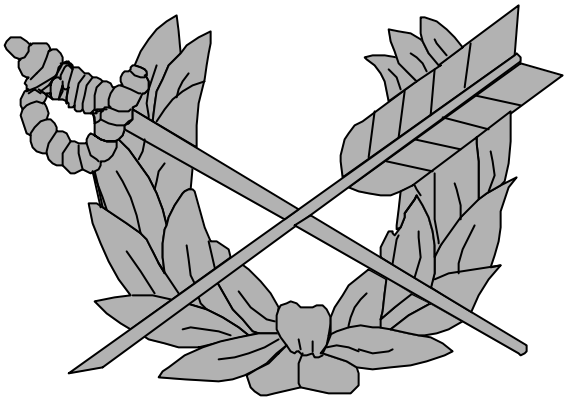
# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

# *BASIC COURSE DESKBOOK*



## Volume I
## Client Services

The Judge Advocate General's School
United States Army

MARCH 2001 JA 280

**ADMINISTRATIVE AND CIVIL LAW DEPARTMENT**
**BASIC COURSE DESKBOOK**

**CLIENT SERVICES**
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## ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## CLIENT SERVICES

The ***Client Services Deskbook*** contains Volume I of the instructional materials for the Administrative and Civil Law Department subjects. Volume II of the materials is in the ***General Administrative Law Deskbook***. Both deskbooks contain Outlines of Instruction that include a table of contents, reference list, an outline of the law applicable to the subject being taught, and, in some cases, appendices that may include additional instructional material, extracts from Army regulations, and illustrative practical exercises.

These materials are general guides for taking notes during class and should serve later as your starting reference for research. The ***Client Services Deskbook*** is divided into three parts. Part I contains information on the Army's Legal Assistance Program and numerous areas of law that will help you provide personal legal advice to service members, civilians, and their families when you get to your assignments. Part II covers the military claims program and contains information you will need to advise both claimants and the command on what compensation the government will pay in case of a loss or damage caused during day-to-day military operations. Part III contains practical exercises, problems, and seminars intended to help illustrate the concepts taught during your core instruction.

## INTRODUCTION TO ARMY LEGAL ASSISTANCE

**THE CONCEPT**. Army Legal Assistance providers worldwide advise soldiers, family members, and other eligible clients on their legal affairs in a timely and professional manner by delivering preventive law information and resolving personal legal problems. Officially, Legal Assistance attorneys have done so continuously since March 1943, annually providing professional advice to tens of thousands of clients on many matters, including family law, landlord/tenant, tax, wills and estates, powers of attorney, and notarial services. Today, there are approximately 250 attorneys, 50 paralegals, and 250 administrative and clerical support personnel working full-time or part-time in over 80 Army Legal Assistance offices to help military personnel assigned all over the world. From 1997 to 1999, these Legal Assistance providers helped between 150,000 and 300,000 eligible legal assistance clients each year. Most of this assistance was in the areas of tax and estate law, family law, consumer law, and military administrative law.

**THE MISSION.** Army Regulation 27-3 states that the mission of the legal assistance program is to assist those eligible for legal assistance with their personal legal affairs in a timely and professional manner by meeting their needs for information on personal legal matters and by resolving their personal legal problems whenever possible.

The legal assistance program is a commander's program. Meeting the personal legal needs of every active duty service member, Reserve Component soldier, and emergency-essential DOD civilian employee helps ensure that they are ready for immediate mobilization and deployment at all times and enhances unit morale and discipline. Although legal assistance is a commander's program, legal assistance providers must remember that the commander and the Army are not the client. Legal Assistance attorneys serve the individual service member, family member, or civilian seeking their help.

## INTRODUCTION TO MILITARY CLAIMS

**THE CONCEPT.** Training missions and overseas deployments by active U.S. Army, Army Reserve, and National Guard personnel performing federal functions may result in claims filed by individuals to recover funds for maneuver damage, certain environmental damage claims, destruction of personal or real property, and physical injury or death. Additionally, soldiers of the Army and other armed services, as well as eligible Department of Defense (DOD) civilian employees who have deployed or changed permanent duty station, submit thousands of claims annually for lost or damaged household goods and other losses sustained incident to service. In sum, the foregoing claims, once evaluated, result in tens of millions of dollars paid each year by the Army Claims System. The U.S. Army Claims Service (USARCS), Office of The Judge Advocate General, has been delegated authority to supervise the processing of all of these claims on behalf of the Secretary of the Army and The Judge Advocate General. AR 27-20, Claims, para 1-8.

**THE MISSION.** The USARCS mission is to supervise, process, investigate, adjudicate, and negotiate the settlement of noncontractual claims worldwide against the Army. It pays claims for lost or damaged property, personal injury, death, medical malpractice, mission maneuver and environmental damage, disasters, and other costs arising from Army operations worldwide. JAGCNET, USARCS webpage, July 2000.

The Army Claims Service through claims personnel in offices all over the world processes three broad categories of claims:

1. **Tort Claims -** Claims against the U.S. for personal injury, death, or property damage caused by the negligence of military personnel acting in the scope of employment or occurring incident to the noncombat operations of the armed services. Noncombat operations include peace-keeping and peace-enforcement missions; humanitarian relief operations in response to hurricanes, floods, earthquakes; and other natural disasters and civil disturbances. USARCS processes these claims under the Military Claims Act, the Federal Tort Claims Act, the National Guard Claims Act, the Foreign Claims Act, and a number of other claims statutes as appropriate.

2. **Personnel Claims** - Claims against the U.S. filed by soldiers, DA civilians, and other military personnel for loss and damage of personal property occurring incident to service. These include claims for damage to household goods during a PCS move.

3. **Affirmative Claims** - Claims on behalf of the U.S. against negligent third parties for damage to military property or injury to military personnel. USARCS, through affirmative claims, is responsible for recovering funds that are owed to the Army, DOD, and the General Treasury by transportation carriers, insurance companies and third parties who injure military personnel or damage military property.

With this brief overview of the Army's Legal Assistance and Claims Programs, welcome to the Client Services portion of your Basic Course Administrative and Civil Law instruction. This is where you, as a judge advocate, will be able to directly help eligible service members, civilian employees, and their family members the most.

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## BIOGRAPHIES

## ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

**LIEUTENANT COLONEL KARL M. GOETZKE**, JA, Professor and Chair, Administrative and Civil Law Department. B.S. (Cum Laude), Trinity University, 1979; J.D., University of Houston, 1982; Field Artillery Officer Basic Course, 1982; 101st Judge Advocate Officer Basic Course, 1983; Combined Arms and Services Staff School, 1989; LL.M., 38th Judge Advocate Officer Graduate Course, 1990; United States Army Command and General Staff Officer Course, 1995. Fire Support Officer, 6/14 Field Artillery, 1st Armored Division, Nürnberg, Germany, 1983; Trial Counsel and Administrative Law Attorney, VII Corps, Augsburg and Stuttgart, Germany, 1983-86; Brigade Judge Advocate, 6th Recruiting Brigade, United States Army Recruiting Command, Fort Baker, California, 1986-89; Administrative Law Attorney, Military Personnel Law Branch, Administrative Law Division, Office of The Judge Advocate General, 1990-94; Deputy Staff Judge Advocate, 1st Armored Division, Bad Kreuznach, Germany, 1995-96; Chief, Criminal Law and Civil-Military Divisions, V Corps, Heidelberg, Germany, 1996-98. Member of the Bars of Texas and the United States Supreme Court.

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**MAJOR HOLLY O. COOK**, JA, Professor, Administrative and Civil Law Department. B.A., St. Joseph's College, 1984; J.D., Union University Albany Law School, 1987; 119th Judge Advocate Officer Basic Course, 1989; Combined Arms and Services Staff School, 1993; LL.M., 44th Judge Advocate Officer Graduate Course, 1996; Command and General Staff College, 1999. Trial Counsel, United States Army Garrison, Fort Huachuca, Arizona, 1989-90; Command Judge Advocate, Eighth Army Special Troops, Korea, 1990; Administrative Law Attorney, Eighth United States Army, Korea, 1990-92; Chief, Criminal Law, Eighth United States Army, Korea, 1992-93; International Law Attorney-Adviser, Department of State, Washington, DC, 1993-95; Chief, Administrative and Civil Law Division, 21st Theater Army Area Command (TAACOM), Kaiserslautern, Germany; 1996-98; Officer-in-Charge (OIC), Kaiserslautern Law Center, 21st TAACOM, Kaiserslautern, Germany, 1997-98; Deputy Staff Judge Advocate, Task Force Eagle, Tuzla, Bosnia and Herzegovina, 1998-99. Member of the Bars of Maryland, United States District Court (District of Maryland), United States Army Court of Criminal Appeals, United States Court of Appeals for the Armed Forces, and the United States Supreme Court.

**MAJOR DANIEL A. CULVER,** JA, USAR. Professor, Administrative and Civil Law Department. B.A., Gonzaga University, 1983; J.D., Gonzaga University School of Law,

1985; 110th Judge Advocate Officer Basic Course, 1986; Judge Advocate Officer Advanced Course, 1994; U.S. Army Command and General Staff College (Nonresident), 1998; LL.M., 48th Judge Advocate Officer Graduate Course, 2000. Legal Assistance Attorney, Trial Counsel, and Chief, Legal Assistance, Fort Bliss, Texas, 1986-89; Post Judge Advocate, Sierra Army Depot, Herlong, California, 1989-92; Chief Depot Counsel, Sierra Army Depot, Herlong, California, 1992-96; Judge Advocate, Nevada Army National Guard, Carson City, Nevada, 1992-96; Judge Advocate (AGR), 81st Regional Support Group, Fort Jackson, South Carolina, 1996-99. Member of the State Bars of Washington and Nevada.

**MAJOR CHERYL K. KELLOGG**, JA, Professor, Legal Assistance Branch, Administrative and Civil Law Department. A.A.S., Danville Community College, 1983; B.S., University of Tampa, 1988; Finance Officer Basic Course, 1988; J.D., College of William and Mary, 1993; Airborne School, 1993; 132d Judge Advocate Officer Basic Course, 1993; Combined Arms and Services Staff School, 1998; LL.M., 48th Judge Advocate Officer Graduate Course, 2000. Utility Equipment Repairman, 4th Infantry Division, Fort Carson, 1985-86; Executive Officer, C Co., 2d Battalion, Troop Brigade, Fort Harrison, Indiana, 1988-90; Legal Assistance Attorney and Trial Counsel, Fort Drum, New York, 1994-96; Defense Counsel, 2d Infantry Division, Camp Casey, Korea, 1995-96; Senior Trial Counsel; Chief, Legal Assistance; and Chief, Claims/Legal Assistance, 3d Infantry Division (Mechanized), Fort Stewart, Georgia, 1996-99. Member of the Bars of Virginia, 4th Circuit Court of Appeals, and the United States Court of Appeals for the Armed Forces.

**MAJOR JONATHAN A. KENT**, JA, Professor, Administrative and Civil Law Department. B.A., University of Vermont, 1985; J.D., Western New England College, School of Law, 1992; Aviation Officer Basic Course and Initial Entry Rotary Wing Aviator Course, 1986; 131st Judge Advocate Officer Basic Course, 1993; Combined Arms and Services Staff School, 1997; LL.M., 48th Judge Advocate Officer Graduate Course, 2000. Aviation Officer, 94th ARCOM, Hanscom AFB, Massachusetts, 1986-87; Platoon Leader, HHC Aviation Detachment, 187th Infantry Brigade (SEP), Fort Devens, Massachusetts, 1987-88; Platoon Leader & Flight Operations Officer, B Co. 4/158 Aviation Regiment, Fort Devens, Massachusetts, 1988-89; Scout Platoon Leader, C Troop, 1/110th Cavalry Regiment, Massachusetts Army National Guard, Westover AFB, Massachusetts, 1989-90; Western Officer in Charge, Operation Stop Crop, Massachusetts Army National Guard, Westover AFB, Massachusetts, 1990; Commander, C Troop 1/10th Cavalry Regiment, Massachusetts Army National Guard, Westover AFB, Massachusetts, 1990-93; Legal Assistance Attorney & Tax Center Officer in Charge, United States Army Garrison and Fort Eustis, Fort Eustis, Virginia, 1993-94; Chief, Legal Assistance, United States Army Garrison and Fort Eustis, Fort Eustis, Virginia, 1993-94; Special Assistant United States Attorney, United States Army Garrison and Fort Eustis, Fort Eustis, Virginia, 1994-95; Command Judge Advocate, 7th Transportation Group, Fort Eustis, Virginia, 1995-96; Officer in Charge, Camp Humphreys Legal Center, Camp Humphreys, Republic of Korea, 1996-97; Chief, Claims Division, United States Army Garrison and Fort Carson, Fort Carson, Colorado, 1997-98;

Deputy Staff Judge Advocate, 7th Infantry Division, Fort Carson, Colorado, 1998-99. Member of the Bars of Rhode Island, the United States District Court (District of Rhode Island), and the United States Supreme Court.

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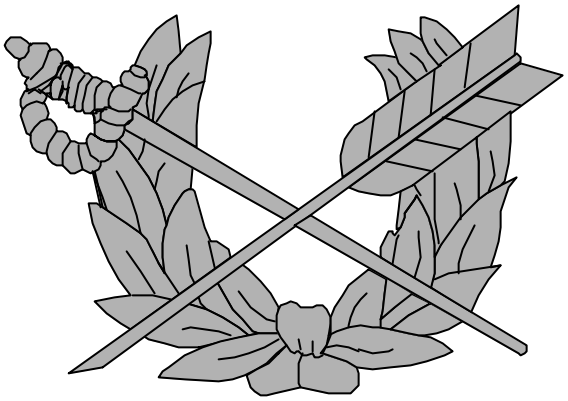

## Part I
## Legal Assistance

The Judge Advocate General's School

United States Army

MARCH 2001 JA 280

# CHAPTER A

# ARMY LEGAL ASSISTANCE PROGRAM AND ADMINISTRATION

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# ARMY LEGAL ASSISTANCE PROGRAM AND ADMINISTRATION

**Outline of Instruction**

## I. REFERENCES.

A. Army Reg. 27-3, Legal Services: The Army Legal Assistance Program (10 September 1995).

B. Arquilla, Webster, Dupuy, "Army Legal Assistance: Update, Initiatives, and Future Challenges," The Army Lawyer, Dec. 1995, at 3.

C. Legal Assistance Practice Notes, The Army Lawyer (monthly).

D. JA 267, Uniformed Services Worldwide Legal Assistance and Reserve Components Office Directory.

E. The Judge Advocate General's School (TJAGSA) Legal Assistance Branch Publications (available on JAGCNET).

F. TJAGSA Videotape Bulletin (available on JAGCNET).

G. 10 U.S.C. § 1044.

H. 10 U.S.C. § 1054.

I. 10 U.S.C. § 3013g.

## II. INTRODUCTION.

## III. ARMY LEGAL ASSISTANCE PROGRAM (ALAP).

A. Army Regulation AR 27-3 (10 September 1995).

1. Prescribes policies, responsibilities, and procedures for the Army Legal Assistance Program. Implements:

a. 10 U.S.C. § 1044. Authority to provide legal assistance to active and retired service members and their dependents.

b. 10 U.S.C.§ 3013g. Authority to provide legal assistance to other eligible clients.

2. AR 27-3 does not create any right or benefit enforceable at law or equity, by a party against the United States, its agencies, its officers, or any other person. (para. 1-1a).

B. Policy. (AR 27-3, para. 2-1).

1. Mission. The mission of ALAP is to assist those eligible for legal assistance with their personal legal affairs in a timely and professional manner by:

a. Meeting their needs for help and information on legal matters, and

b. Resolving their personal legal problems whenever possible.

2. ALAP directly supports the military mission. Legal services must be continuous during both peace and war, and must provide more than just referral assistance.

a. Readiness.

b. Morale.

c. Discipline.

d. Quality Force.

C. Responsibility.

1. Commanders are responsible for providing ALAP services on installations (resources permitting), to include office space, facilities, resources, and CLE funding for attorneys.

2. Staff Judge Advocates (SJAs), or other supervising attorneys, are responsible for operation of ALAP, to include determining scope of assistance provided. SJA must publish policy letter implementing AR 27-3.

3. The Chief, Legal Assistance Division, OTJAG, "is responsible for the overall supervision and administration of the legal assistance program," and for promulgating legal assistance polices and procedures.

   a. Has limited authority to grant exceptions on a case-by-case basis to the provisions of AR 27-3 that governs who is authorized to provide and receive legal assistance.

   b. May grant exceptions as to the nature of the legal assistance that may be provided.

   c. Also is the "sole authority" for authorizing RC judge advocates to earn retirement points for legal assistance work performed when not on active duty.

   d. Also serves as the "supervising attorney" for RC judge advocates not assigned to a TPU or the ARNG "when they are performing legal assistance work for retirement points."

## IV. PERSONS AUTHORIZED TO PROVIDE LEGAL ASSISTANCE (AR 27-3, PARA. 2-2).

A. Active Duty (AD) judge advocates.

*Note: This means that all active duty judge advocates may provide legal assistance if not inconsistent with their assigned duties.

B. Judge advocates on active duty regardless of component.

C. Army National Guard (ARNG) judge advocates assigned to judge advocate positions, even while in civilian status when providing legal assistance pursuant to AR 27-3.

D. US Army Reserve (USAR) judge advocates assigned to judge advocate positions in troop units (TPUs), even while in civilian status when providing legal assistance pursuant to AR 27-3.

E. Other judge advocates authorized to provide legal assistance by the Chief, Army Legal Assistance Division.

F. Department of Army (DA) civilian attorneys.

G. Foreign licensed attorneys employed by DA who work under direction of supervising attorney while providing legal assistance on foreign law matters.

H. Reserve Component (RC) attorneys while not in IDT, AT, or ADT status may earn retirement points for certain pre-approved legal assistance work. (See AR 27-3, para. 2-2b). See JA 267, Uniformed Services Worldwide Legal Assistance and Reserve Component Offices Directory.

## V. PERSONS ELIGIBLE TO RECEIVE LEGAL ASSISTANCE (AR 27-3, PARA. 2-5).

A. AC service members and their family members.

B. RC service members who:

1. Are serving on active duty pursuant to orders for more than 29 days (and their family members), or

2. Are serving on active duty pursuant to orders for 29 days or less (and their family members). Supervising attorneys may limit legal assistance to emergencies or certain categories of cases based on resources.

3. Are undergoing Premobilization Legal Preparation (PLP).

C. RC service members, other than those above, on military administrative matters, personal legal problems that may adversely affect readiness or that arose or were aggravated by military service - except for premobilization legal preparation (PLP), legal assistance will generally be limited to that provided by RC judge advocates to RC members.

D. AC and RC service members receiving retirement or disability pay (and their families).

E. Surviving family members of AC, RC, and retired service members who would have been eligible for legal assistance had they lived.

F. DOD civilian employees (includes DA employees).

1. Against whom pecuniary liability recommended under AR 735-5 with regard to presenting matters in rebuttal to, or an appeal from, such charges, and/or

2. Who are serving with the military in a foreign country (and their accompanying family members).

G. DA civilian employees.

1. Who are employed overseas by U.S. government (services are limited).

2. Who are stateside, classified as "mission essential" or "emergency-essential", and are being deployed (services are limited).

H. DOD contract employees overseas when contractually obligated to provide assistance.

I. PNOK, executors, personal representatives, administrators, and estate representatives for matters relating to settling estates of:

1. AC or RC soldiers who die in a military duty status.

2. U.S. citizens and nationals employed by DOD and serving with or accompanying US forces outside U.S. at time of death.

J. Fiduciaries of:

1. AC or RC soldiers serving in combat zone.

2. U.S. citizens and nationals employed by DOD and serving with or accompanying U.S. forces in combat zone.

K. Members of other military forces while serving in U.S. (and their accompanying family members).

L. Prisoners confined at U.S. military facilities, even though discharged.

## VI. DENIAL OF LEGAL ASSISTANCE SERVICES (AR 27-3, PARA. 2-6).

A. Except for active duty soldiers and RC soldiers on ADT for 30 days or longer, AC commanders may deny services to certain categories of clients listed in AR 27-3, para. 2-6, based upon the availability of space and facilities and the capabilities of the legal assistance staff. This includes sister-service personnel if their department does not routinely provide such services.

B. Individual clients (for up to 1 year) due to abuse of legal assistance services, including:

1. Missing two or more appointments without good cause or prior notification.

2. Misconduct, dishonesty, or other unbecoming conduct during course of seeking, receiving, or using legal assistance.

3. Knowingly using legal assistance services for a purpose prohibited by law or regulation.

## VII. LEGAL ASSISTANCE SERVICES.

A. No distinction made between type of legal assistance rendered to individual office clients and that provided to soldiers preparing to deploy.

B. Legal assistance services provided:

1. During combat readiness exercises such as

a. emergency deployment readiness exercise (EDRE) or

b. an ARNG readiness for mobilization exercise (REMOBE) or

c. mobilization deployment readiness exercise (MODRE).

2. During a RC Premobilization Legal Preparation (PLP).

3. During soldier readiness program (SRP) processing.

4. During a demobilization briefing.

5. During a scheduled or unscheduled client interview.

6. During an informal conversation, in response to a question or request for assistance.

7. In preparing and filing tax returns.

8. By giving classes and briefings and by writing and publishing articles on preventive law subjects.

C. Types of cases given legal assistance (AR 27-3, para. 3-6).

Consistent with available resources and expertise, certain minimum legal services should be provided to each client seen.

1. Family Law.

a. Cases which must be given assistance:

(1) Marriage.

(2) Annulment.

(3) Paternity.

(4) Child custody.

(5) Financial nonsupport.

(6) Legal separation.

(7) Divorce.

b. Cases which may be given assistance depending on available resources and expertise:

(1) Adoption.

(2) Other family law cases.

2. Estates.

a. Cases which must be given assistance;

(1) Wills.

(2) In conjunction with will preparation, discuss SGLI designation and advise on effect of "by law" designation". [Army prohibits "by law" designation].

(3) Attorney who prepares will shall insert his or her name on the will as the drafter and shall include state of bar membership.

(4) An attorney must review the will prior to and after execution and must be present to supervise the execution of the will

(5) May use statutory short form wills.

(6) See AR 27-3, para. 3-6b for further guidance on will drafting, estate planning, and assisting next-of-kin.

(7) Testamentary trusts for minors.

(8) Guardianships.

(9) Preparing health care directives, including:

(a) Living wills,

(b) Powers of attorney for health care, and

(c) Anatomical gift designations.

b. Other aspects of estate planning may be given assistance depending on available resources and expertise.

3. Real Property.

a. Cases which must be given assistance: Landlord/tenant.

b. Cases which may be given assistance depending on available resources and expertise:

(1) Matters relating to purchase, sale, and rental of client's principal residence. (But see AR 27-3, para. 3-8a(2) - may not represent client in private business activities).

(2) Assistance may include drafting documents for above.

4. Personal Property.

a. Cases which must be given assistance: Purchases of personal property, to include contracts, mortgages, security agreements, warranties, cancellations, and other consumer affairs matters.

b. Cases which may be given assistance depending on available resources and expertise: Selling or leasing personal property (But see, AR 27-3, para. 3-8a.(2), on prohibition against helping clients on private business activities).

5. Economic.

a. Cases which must be given assistance:

(1) Debtors in disputes over lending agreements.

(2) Debtors requiring help on bankruptcy, debt, banking, credit card, property insurance problems, and claims.

(3) SSCRA interest limitations.

(4) Veterans' reemployment rights (But see cautionary note and limitations in AR 27-3, para. 3-6e(2).

b. Cases which may be given assistance depending on available resources and expertise: Creditors in disputes over lending agreements.

6. Civilian Administrative.

a. Cases which must be given assistance: Notarizations (AR 27-55).

b. Cases which may be given assistance depending on available resources and expertise:

(1) Name changes.

(2) Immigration.

(3) Naturalization.

(4) Welfare assistance.

(5) Other cases.

7. Military Administrative.

a. Cases which must be given assistance:

(1) As required by law or regulation.

(2) Line of Duty (LOD) investigations, reports of survey, NCOERs, relief for cause reviews, memoranda of reprimand, Art. 138 complaints, Inspector General (IG) investigations, hardship discharges, compassionate reassignments, officer unqualified resignations, correction of military records.

b. Cases which may be given assistance depending on available resources and expertise: Bars to reenlistment, waivers to allow reenlistment, security clearance revocations, suspension of favorable personnel actions, expungement of military records, physical evaluation boards, flying evaluation boards, quality accreditation for doctors, qualitative management, driving privileges.

8. Torts.

a. Cases which must be given assistance: Those involving invocation of Soldier's and Sailor's Civil Relief Act protections.

b. Cases which may be given assistance depending on available resources and expertise: Assistance limited to counseling and assistance in retaining civilian counsel.

c. Be alert to cases where client faces civil lawsuit as result of actions taken within scope of his/her official duties. Refer to claims JA or Army Litigation Center. (See 27-3, para. 3-6h(2)).

9. Taxes.

a. Cases which must be given assistance:

(1) Real and personal property tax issues

(2) Income tax return preparation. (See AR 27-3, para. 3-6i).

b. Cases which may be given assistance depending on available resources and expertise:

(1) Electronic filing.

(2) Estate, inheritance, and gift taxes.

(3) Appealing tax rulings or findings.

(4) Non-business income producing activities

10. Civilian Criminal Matters.

a. Assistance may be provided based on expertise and resources.

b. In-court representation is prohibited, except for cases pending before U.S. Magistrate on a military installation.

*Note: In-court representation before a United States magistrate should be the exception, rather than the norm, and supervising attorneys should carefully review requests for in-court representation on a case-by-case basis.

D. Types of Services Provided.

1. Ministerial (i.e. notary services, witnessing signatures).

2. Legal counseling.

3. Legal correspondence.

a. Should include: "I represent (named client)" or "I write on behalf of my client (name)..."

b. Do not state: "This office represents (named client)..."

c. Do not include disclaimer: "This letter represents my own opinion as a legal assistance attorney and not the position of the US Army."

4. Legal negotiations.

5. Legal document preparation.

6. Document filing.

a. Only supervising attorney may authorize pro se assistance (this does not mean in court representation).

b. Unless on active duty, USAR and ARNG also must have approval of Chief, Army Legal Assistance.

7. In-court representation (civil matters).

a. Only supervising attorney may authorize.

b. Unless on active duty, USAR and ARNG also must have approval of Chief, Army Legal Assistance.

c. Authorization may be made on case-by-case basis (i.e. to allow attorney additional experience; to advance certain command objectives (protect soldiers from unfair business practices)).

d. Prohibited representation.

(1) Military justice proceedings (USATDS handles).

(2) Civilian criminal proceedings (except if before U.S. Magistrate on installation).

e. Persons eligible for representation.

(1) Active duty or reserve on active duty over 29 days (less than 29 days if emergency), and

(2) For whom hiring civilian lawyer would entail substantial financial hardship to themselves or their family.

(a) Supervising attorneys will determine if a client satisfies the substantial hardship test on a case by case basis.

(b) The following guidance will be applied in making these determinations:

(i) Soldiers in pay grade E-4 and below qualify if have no other significant income (rank and/or income of spouse will be considered if spouse is named party and interests are not adverse to soldier).

(ii) Soldiers above pay grade E-4 must provide financial information supporting substantial financial hardship.

f. Representation may occur if:

(1) There is state-approved program (written agreement with state bar or motion granted from appropriate court), and

(2) Attorney has requisite bar membership.

8. Legal referrals.

a. AR 27-3 directs that legal assistance attorneys consider the following before referring a client to a military attorney or to a civilian lawyer, or providing a client a list of civilian lawyers:

(1) Their own workloads.

(2) Their areas of expertise compared to the expertise of the attorney receiving the referral.

(3) The goals or interests of the client.

(4) The convenience to the client.

(5) The cost to the client.

b. AR 27-3 also indicates the following order of preference on making referrals to military attorneys and civilian lawyers:

(1) An attorney in the same Army legal office.

(2) An attorney in another Army legal office, such as a USATDS branch office.

(3) An attorney in another Army or military legal office of the same or different component.

(4) A civilian lawyer on a no-fee basis.

(5) A civilian lawyer on a reduced-fee basis.

(6) A civilian attorney whose fees are reasonable in the locale in which assistance is required.

c. First discuss with lawyer to whom case will be referred.

d. Avoid appearance of favoritism.

e. May provide list of attorneys; copies of JAGC Reserve Officer Legal Assistance Directory will not be given out to clients.

9. Mediation.

a. Mediation services may be provided as part of a formal program authorized by the commander responsible for the legal assistance program.

b. Attorneys providing mediation services must comply with the applicable ethical standards of AR 27-26, and may mediate any dispute involving one or more eligible legal assistance clients.

E. Limitations on Services (AR 27-3, para. 3-8).

1. The following are not considered or counted as legal assistance cases and no legal advice or assistance, other than referral to civilian lawyers or providing lists of lawyers, may be provided:

   a. Military justice matters.

   b. Private business activities.

   c. Civil litigation against the United States (action has commenced).

2. The following are considered as legal assistance cases and attorney-client relationships may be formed, when appropriate, but legal assistance is limited, as specified, to certain legal advice and guidance, and to referral to civilian lawyers or providing lists of lawyers:

   a. Claims or civil lawsuits against the United States. Legal assistance is limited to general guidance on administrative or legal procedures and filing requirements.

   b. Contingent legal fee cases. Legal assistance is limited to general advice on these lawsuits, court procedures, filing requirements, and the potential merits of these cases.

   c. Prepaid legal representation cases. Legal assistance is limited to general advice on these lawsuits, court procedures, filing requirements, the potential merits of these cases, and on the client's need to contact the insurance company or other organization that will pursue or defend a potential lawsuit.

   d. Standards of conduct issues. Legal assistance may be provided on standard of conduct issues, but legal assistance attorneys will refer clients to the Ethics Counselor for the "agency position concerning post-employment, honoraria, procurement integrity, and similar standard of conduct issues." Clients will be informed that "there is no attorney-client privilege or confidentiality between them and their Ethics Counselor" regarding standards of conduct matters.

## VIII. PROFESSIONAL CONDUCT.

A. Those providing legal assistance will not make statements or send correspondence purporting to be on behalf of U.S., the Army, or the command or legal office (AR 27-3, para. 4-6).

B. Those seeking official interpretation or position of government are referred to person responsible for such matters (i.e. an official legal opinion on interpretation of Army regulation).

C. Ethical standards (AR 27-3, para. 4-7).

1. AR 27-26 - rules of professional conduct for those providing legal assistance in Army.

2. Refer to another attorney when client's needs exceed legal assistance attorney's competence or authority to render assistance.

3. Must properly terminate attorney-client relationship.

4. May not request or accept benefit or gratuity from any source as payment.

5. May not request or accept compensation or benefit for referring to lawyer in private practice matter in which the lawyer was involved in military legal assistance capacity.

6. (RC) May not refer client to self or own firm for same general matter client sought legal assistance except on no-fee basis, but may represent client on new matters for fee.

## IX. ATTORNEY-CLIENT CONFIDENTIALITY (AR 27-3, PARA. 4-8).

A. Communications between attorney and client are confidential (see AR 27-26).

B. If client authorizes disclosure, get his/her written authorization to disclose.

C. Same standards of confidentiality apply to office staff and supervising attorneys.

D. Client files are confidential and must be safeguarded.

## X. CONFLICTS OF INTEREST (AR 27-3, PARA. 4-9).

A. See AR 27-26, Rules of Professional Conduct, 1.7 through 1.10 regarding conflict of interest and imputed disqualification.

B. Supervising attorneys must establish procedures to ensure that:

1. All clients are screened to avoid inadvertent conflicts.

2. Full explanations given to each client not assisted because of a conflict.

3. Confidentiality of attorney-client communications is protected.

C. Army policy discourages attorneys from same office from providing legal assistance services to both spouses in domestic dispute.

1. Exceptions may be granted by supervising attorney with informed consent of both parties.

2. Maintain confidentiality of both parties.

3. Resolve conflicts before representation in estate planning cases involving both spouses and/or involve requests for legal assistance on behalf of third party (i.e. younger person accompanying elder person).

## XI. LIABILITY (AR 27-3, PARA. 4-3).

A. Legal Assistance attorneys acting pursuant to AR 27-3 are performing an official function of the U.S. Army.

1. 10 U.S.C. § 1054 - exclusive remedy for injury or loss of property caused by negligent or wrongful act or omission of any attorney, paralegal, or other member of the Army legal office is a civil lawsuit against the U.S. under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b); 2671-2680).

2. See 28 C.F.R. § 50.15 regarding representation by Dept. of Justice.

3. If Attorney General of U.S. certifies the attorney or other person was acting within scope of office or employment, U.S. will be substituted as defendant.

B. See AR 27-3, para. 4-3d,e concerning liability of unit tax advisors and volunteers.

## XII. REPORTING REQUIREMENTS (AR 27-3, PARA. 5-2).

A. Fiscal Year Legal Assistance Report - 15 October.

B. Income Tax Report - 1 June CONUS; I July OCONUS

## XIII. CONCLUSION.

# APPENDIX A

## CHECKLIST FOR NEW LEGAL ASSISTANCE ATTORNEYS

This checklist should assist the new legal assistance attorney in becoming familiar with legal assistance office procedures and services. By following this suggested sequence, your familiarization should be completed as quickly as possible.

1. Read All Pertinent Publications. Carefully read AR 27-3, Legal Assistance; AR 27-26, Rules of Professional Conduct for Lawyers; AR 25-50, Preparing Correspondence; and the LAAWS Legal Assistance Module Deskbook. Understanding the contents of these publications is crucial to the successful discharge of legal assistance duties.

2. Read the SOP. The standard operating procedure explains most basic information that the new LAA needs to know right away about the office (e.g., organization, hours, duties, and resources).

3. Read the Office Handbook. The new LAA should read the locally published handbook on local law or procedures to learn any peculiar local law.

4. Consult the LAO NCOIC and/or Civilian Paralegal. The NCOIC should brief the new LAA on enlisted personnel and responsibilities. The NCOIC also can provide samples of standard correspondence and forms used in the office. Those LAOs with civilian paralegals and attorneys generally have an excellent institutional memory and can quicken the new LAA's transition. Usually, civilians will have been in the office for several years and will be familiar with common issues and problems, as well as many practical solutions and permissible shortcuts.

5. Legal Assistance Office Reading Files. Obtain several weeks or months of recent LAO reading files that have had personal identifying information (e.g., name, social security number) redacted. By reviewing these files, LAAs can identify the matters frequently handled by the LAO and can become familiar with appropriate formats, phraseology, and the correspondence errors the office strives to avoid.

6. Observe Client Interviews. Any good training program capitalizes on the experience of others. Seasoned LAAs should encourage the new LAA to observe several client interviews. Following the interview, the experienced LAA should answer any questions the new LAA may have on the interview or the legal advice rendered. After several interviews, the new LAA should conduct client interviews and consultations in the presence of the more experienced LAA. Thereafter, the two LAAs should discuss the interview process for the benefit of the new LAA.

7. Question Colleagues. Remembering the limits of confidentiality, the new LAA should nevertheless question colleagues regarding any matter about which the new LAA has a question. Asking questions is one of the best ways to narrow research and focus on the needs of specific clients.

# APPENDIX B: LEGAL ASSISTANCE CASES AND SERVICES

| CASE CATEGORY | REQUIRED SERVICES | OPTIONAL SERVICES | OUTSIDE THE SCOPE OF LEGAL ASSISTANCE |
|---|---|---|---|
| Family law | Marriage<br>Adoption<br>Legal Separation<br>Annulment<br>Divorce<br>Financial nonsupport<br>Paternity<br>Child custody | Adoption | |
| Estates | Wills<br>Testamentary Trusts for minors<br>Guardianships<br>Designations of Life Insurance Beneficiaries and SGLI Beneficiaries<br>Living Wills<br>Powers of Attorney<br>Anatomical Gift designations | Inter Vivos Trusts | |
| Real property | Lease Issues and disputes on principal residence | Purchase and Sale of Principal Residences | Private business activities |
| Personal Property | All consumer affairs issues | Sale or leasing of client's property | |
| Economic | Bankruptcy<br>Debtors on loans<br>Banking Problems<br>Credit Cards<br>Insurance<br>SSCRA<br>USERRA | Creditors on Loans | Government and Civilian employment<br>-Hiring<br>-Adverse Personnel actions<br>-Unemployment Benefits<br>-Worker's Compensation |
| Civilian Administrative | Notarizations | Name Changes<br>Immigration<br>Naturalization<br>Welfare assistance<br>Civilian Driving Priv. | |

| CASE CATEGORY | REQUIRED SERVICES | OPTIONAL SERVICES | OUTSIDE THE SCOPE OF LEGAL ASSISTANCE |
|---|---|---|---|
| Military Administrative | Line of Duty<br>Reports of Survey<br>OER/NCOER<br>Relief for Cause<br>Memoranda of Reprimand<br>Article 138 complaints<br>IG and other investigations<br>Hardship Discharges<br>Compassionate reassignment<br>Correction of Military Records | Bars to Reenlistment<br>Waiver to allow reenlistment<br>Security Clearance revocations on military personnel<br>Suspension or favorable personnel actions<br>Expungement of military records<br>Physical Evaluation Boards<br>Flying Qualification Boards<br>Quality accreditation for doctors<br>Medical Evaluation Boards<br>Qualitative Management Program<br>Military Driving Privileges | USATDS Cases<br>Officer eliminations<br>Enlisted separations<br>Reductions in grade<br>Recruiter misconduct |
| Torts | Invoking SSCRA Protection | | Contingent fee cases<br>Litigation vs. the US |
| Taxes | Real Estate<br>Personal Property<br>Federal Income<br>State Income | Electronic Filing of income tax returns<br>Inheritance taxes<br>Estate Taxes<br>Gift Taxes<br>Appealing tax rulings | Private Business Activities |
| Civilian Criminal Matters | Not required | In-court representation before US Mag. court | All other in-court representation |
| Ministerial Services | Witnessing Signatures<br>Notarizations | | |
| Legal Counseling | Whenever Necessary in required cases | | |
| Legal Correspondence | Whenever Necessary in required Cases | | |

| CASE CATEGORY | REQUIRED SERVICES | OPTIONAL SERVICES | OUTSIDE THE SCOPE OF LEGAL ASSISTANCE |
|---|---|---|---|
| Legal Negotiation | Whenever Necessary in required Cases | | |
| Legal document preparation | Whenever Necessary in required Cases | Prenuptial agreements<br>Separation agreements<br>Inter Vivos Trusts | |
| Legal Document Filing | No requirements | Electronic Filing of income tax returns<br>Pro Se Assistance | Pro se Assistance not authorized by supervising attorney |
| In-court representation | No requirements | | In-court representation not authorized by supervising attorney |
| Legal Referral | Whenever necessary or appropriate in required or optional cases | | |
| Providing List of Lawyers | As a secondary alternative to referral whenever necessary or appropriate in required or optional cases | | |
| Mediation | No requirements | | Mediation not authorized by a supervising attorney |

# CHAPTER B

# LEGAL ASSISTANCE

# CLIENT INTERVIEWING AND COUNSELING

**AND**

**LAW OFFICE MANAGEMENT**

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# OUTLINE OF INSTRUCTION

## I. REFERENCES.

A. Army Regulation 27-3, The Army Legal Assistance Program (10 September 1995).

B. AR 27-26, Rules of Professional Conduct For Lawyers (1 May 1992).[hereinafter Army Rules].

C. TJAGSA Publication, JA 271, Legal Assistance Office Administration Guide (May 1994).

D. DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

## II. INTRODUCTION.

A. Interviewing... refers to lawyer interaction with a client for the purpose of identifying the client's problem and ...gathering information on which a solution to that problem can be based....

B. Counseling... refers to a process in which lawyers help clients reach decisions....a process in which potential solutions with their probable positive and negative consequences are identified and then weighed in order to decide which alternative is most appropriate. Binder and Price, Legal Interviewing and Counseling: A Client-Centered Approach, West Publ. Co. (1977) at 5.

## III. THE INITIATION (OR PREPARATORY ) STAGE.

A. Put the client at ease.

1. Greet the client.

2. Escort the client to your office.

B. Office appearance:

1. Desk appearance.

2. Personal Appearance.

3. Office Appearance.

C. Initiate conversation.

1. Role of Legal Assistance Attorney.

2. Briefly discussing attorney-client confidentiality will put them at ease.

a. Our Rules of Professional Conduct provide that when representing a legal assistance client, you represent that client not the Army. Army Rule 1.13(b).

b. What they tell you is confidential and should not be told to others unless it fits within the Rules exceptions or you have the client's permission. Army Rule 1.6.

c. You may want to get the client's permission to discuss a difficult case with your boss and/or fellow attorneys. Army Rule 1.6 grants you implied authority to release confidences required to further the representation. It may be advisable, however, to consult with the client and ask permission to discuss the case with other attorneys.

3. If at all possible exclude third parties from the interview. Make it possible!

4. Avoid interruptions.

a. Phone policy.

b. Visitor policy.

D. Time Management during interview.

1. Inform client of time constraint up front?

2. Focus the interview.

E. At the beginning of the interview, determine whether client has seen another attorney and if so, whether the client or a potential adversary (or opposing party) is already represented.

1. Get the other attorney's view.

2. Also, hearing what the other lawyer advised can help you focus rapidly on the issues or spot ones not addressed.

3. Ensure there is no conflict.

F. Agenda?

1. Gathering facts.

2. Time for case development.

3. Inform client of agenda?

4. Explain interview process?

G. Identify the reason for the client's visit.

1. Determine the problem. "How may I help you today?"

2. What is the nature of relief sought?

a. Make sure you understand not only the problem but also what resolution the client seeks. Just because client X comes in with a marital problem, does not mean he or she wants a divorce. There may be underlying problems that can be cured through other means such as financial counseling.

b. A Missouri Bar study indicated that there was only a 20% correlation between what a client wanted and what the attorney *thought* the problem was.

## IV. DEVELOPMENT STAGE OF THE INTERVIEWING PROCESS.

A. Goal: To learn as much as we can about the facts of the case and the client's objectives in the limited time available.

B. Inhibitors:

1. Ego threats. People withhold information that is threatening to their self-esteem; for example, a Colonel is taken by a Florida land swindle and he is ashamed to admit all the facts (particularly to you - a junior officer).

2. Case threats. Clients will withhold information they feel may damage the case; for example, client husband thinks his drinking or abuse of the children will hurt his chances for custody , so he "neglects" to mention these facts.

3. Role expectations. Clients come into an interview with certain preconceived notions of what is proper client behavior. In the military, clients often expect to be in the subordinate or passive position and they see the lawyer as occupying the superior role. In such situations the client may be reluctant to openly communicate. The military rank structure may make this worse because of rank role perceptions, expectations and sometimes outright hostility.

4. Etiquette barriers. Some people will provide certain information only to certain people and not to others. For example, a man may feel comfortable only discussing problems with a woman and not another man who might threaten his self-image.

5. Trauma. Clients may be reluctant to relate unpleasant experiences. A wife might not relate spouse abuse.

6. Perceived irrelevancy. A client may think that a fact is not significant to the case, when in fact it is.

7. Greater need. A client may have different priorities of needs than the attorney perceives. For instance, a client may want to find another apartment after eviction, whereas the attorney is primarily concerned about a habitability defense for the client.

C. Facilitators:

1. Empathetic understanding. Try to listen, understand, and avoid judging the client. Try to see the case from the client's perspective.

2. Fulfilling expectations. On sensing reluctance from the client, the attorney can convey a strong expectation that the sought after information should be revealed. For example, the client is reluctant to talk about the unhappy marriage, the attorney acknowledges how difficult it is to talk about, but lets the client know that the information is important and that the attorney expects to hear the relevant information.

3. Altruistic appeals. Humans generally respond to higher values, above their own self-interest. This can be effective in persuading a spouse to reveal the other spouse's child abuse so the child can get help.

4. Extrinsic rewards. Show the client that providing the information will be in his or her best interest - it will help the case.

5. Recognition. You may have to resort to praising the client for giving the information by telling him or her how helpful they are being.

D. Techniques for Developing Facts.

1. Avoid early conclusions.

a. Let the facts come out first.

b. Adopt an empathic approach.

2. Use questions effectively.

a. Open ended questions.

(1) "How did you feel after the collision?"

(2) "Tell me what happened."

b. Closed ended questions - questions that actually suggest an answer. Be careful, however - remember that the client establishes the goals of the representation. Examples:

(1) "You feel terrible about this, don't you?"

(2) "You would be better off with a divorce, wouldn't you?"

c. Combinations of the two are often used in interviewing and some call this the T funnel approach. You use open-ended to get a general picture of the problem, then closed questions to focus.

d. Avoid confusing your client by asking double questions. Keep it simple.

3. Also avoid bombarding the client, let the client talk without having to respond to you all the time.

4. Try not to ask the "Why" question.

5. Use responses to show client you are actively listening.

a. Restatement - This shows the client you listened and understood what he or she said. Just rephrase what they said.

b. Reflection - This shows the client you are empathetic and relate to his or her feelings about the case.

c. Explanation - This is a descriptive statement used to orient a client in a particular way. "I need to understand this about the case because..."

d. Encouragement - This is merely supporting and strengthening the client feelings toward the case.

e. Assurance and reassurance - This is used to indicate that we believe the client can face up to his or her situation.

f. Suggestion - This is a mild form of advice, but leaves leeway for the client to make the decision.

E. Other techniques.

1. Wait out silences. Learn when to keep quiet.

2. Don't be afraid to probe deeper if gaps or inconsistencies develop.

a. Probing is a necessary part of your job.

b. If the client becomes upset, reeducate him or her about your role and the confidentiality of the interview.

3. Spot tension and emotional issues and develop. Try to help the client through these.

F. Be sure to ask client if there is anything else you should know ... if anything important has been left out.

1. This puts the responsibility back on the client for the extent of your knowledge of the case.

2. If you don't ask it, he or she can later claim they didn't provide this information because you didn't ask.

G. Problem areas during the development stage.

1. The rambling client.

2. The deceptive client.

   a. Be careful in domestic situations especially. Seldom will one party give the whole story and often it is shaded in their favor.

   b. Tell the client if you find out inconsistent information, this often prompts them to be more truthful.

H. Taking notes. If you take notes during the interview, wait to do it after the client talks a while and you explain to him or her that it is important for you to jot down some facts. Extensive note taking can be very distracting to a client and inhibit their conversation with you. You can always take more notes after they leave the office.

Be sure to make notes of their name, phone number and address, and military unit; this should be on the client cards that your receptionist prepares; if it is, check it for accuracy.

## V. THE COLLABORATION AND COUNSELING STAGE.

A. Solving the problem.

1. Apply the facts to the law (or the law to the facts).

   a. Consider the full range of alternatives and analyze probable outcomes.

   b. You must also consider (and **may** advise on) the impact of non-legal factors. Army Rule 2.1: provides that ". . . in rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant . . .".

      (1) Telling a client he or she can sue for child custody without talking about the high costs involved in the suit would do an injustice to your client;

(2) Likewise if you believe after hearing all of the facts, that the children would be better off with the other spouse, you should advise the client how a judge or jury would look at those same facts. You should be familiar with how judges are treating certain types of cases within your jurisdiction.

c. Consultation.

B. Teach the client about compromise.

1. Not always should a case go to court or even resolve solely in favor of one party.

2. Many problems can be solved with common sense and compromise.

3. Don't rush into a battle when there doesn't need to be one. One of the lawyers greatest tools is the ability to negotiate for clients.

C. You need to completely and competently advise the client of the law and the risks. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (Rule of Professional Conduct For Lawyers, Rule 1.4)

D. Know your capabilities and limitations. Remember Army Rule 1.1 - Competence.

E. Don't ever - ever - ever ***guess*** at the law.

F. Be honest with the client. If they have a loser of a case, tell them. Conversely, don't make promises that they will win. In some ways it is just like a doctor. If the patient is terminal, is the physician being honest by telling the patient that "it's not too bad." When a physician must tell a family that a patient has died, he or she cannot say that the patient is in a very serious but stable condition! Packaging the negative information is necessary, deception, however, is unacceptable and unethical!

G. Allow the client to make the final determination. (Army Rule 1.2)

H. Be aware that some clients make very poor decisions in certain circumstances. For example, a mother may not ask for child support thinking she can manage all by herself. You need to advise her that the children are entitled to support by both parents.

I. Problems in Counseling.

1. Negative attitude towards attorney.

2. Legalese.

3. Negative reaction to advice. ("Shooting the messenger").

a. You can only do so much for a client. Just be sure to keep very good records of what you discussed and the advice you offered.

b. Some clients are happy to blame you after the fact.

## VI. THE TERMINATION STAGE.

A. How do you end an interview? By all means, end the interview session on time. Don't forget that if you run overtime, you are into the client's time and your next client's time. If you must run over - get this client's consent and have someone let the next client know there will be a delay.

B. Perhaps the most important thing is to ask client if they have any questions before you let them leave the office.

1. "Do you have any questions?"

2. **"Is there anything else I can do for you today?"**

C. Make sure the client understands the nature of problem. Restate what you think the problem is i.e. "Client X, I think you have a financial problem, that if solved, could take the stress off of your marriage.

D. Ensure client understands what will be done about the problem. For example:

1. Tell the client that you will write a letter to the creditor outlining your agreed upon position;

2. That you will call her spouse's divorce lawyer and see if a settlement can be reached on property division without going to court.

E. Also, tell the client what you expect him or her to do. For example:

1. Get more paperwork and bring it back the next day or

2. Go to financial counseling services on base and work up a budget for the family.

3. Some clients you talk to will not need legal services or need greater expertise than you have. Refer them to appropriate agencies or other attorneys.

F. Give the client a timetable for achieving results. For example: "Let me know by next week if you hear from the car dealer." Then, call the client, if they don't call you.

1. Keep the client informed and conduct all necessary follow-up actions. (Rule of Professional Conduct For Lawyers, Rule 1.4)

2. Show client to the door.

3. Terminating the relationship.

## VII. HOW WELL DID YOU DO YOUR JOB? ASK THE CLIENT.

A. "Quality service is not limited to good work...[it includes] responsiveness, timeliness, accessibility, and even prompt return of telephone calls...." Schmidt The Client Service Edge - The Key to Your Firm's Future, 16 No. 3 Law Prac. Mgmt 18 (April 1990) (American Bar Journal).

B. Client surveys can provide the legal assistance office with valuable feedback on the quality of services provided. (The following was taken from Coburn and Ginsburg, How to Design An Effective Client Survey, Vol. 13, No. 41 Nat'l. L. J. 26 (June 17, 1991):

1. Good surveys lose their value if worded ambiguously or arranged in a confusing manner.

2. Good surveys positively reflect on the office; poor ones do the opposite. Make the survey professional looking.

3. Surveys should be geared toward the needs and interests of the office.

4. Anonymous survey results provoke more candid responses.

C. Both open-ended and closed-ended questions are valuable. A good approach is to use combination of both. Closed-ended questions are easy, quick for clients to complete, and objective. Open-ended questions complement the objectivity of the closed-ended question and allow the client to elaborate on his or her answers.

1. A good approach is to focus the survey around close-ended questions and include a limited number of open-ended questions to allow the client to explain those questions calling for elaboration.

2. An example of combining these types of questions would be to ask "To what extent were you satisfied with the service you received at this office?" and provide five possible choices, ranging from "completely satisfied" to "very dissatisfied." Follow this question with a space for the client's comments or a follow-on question such as "What would you change about our office?"

D. **Don't ask the question if you don't want to hear the answer**. It is pointless to conduct surveys if nothing will be done with the results.

1. Involving the legal assistance staff in analyzing the results is useful and encourages total commitment to the goal of improving services.

2. Extend the "useful" suggestions you receive into an action plan that contains concrete proposals and assignments of responsibility.

3. "Get mad, then get over it" (particularly if they unload on you).

E. People evaluate five dimensions when judging the quality of a service (in order of importance) (the following was taken from Schmidt, The Client Service Edge - The Key to Your Firm's Future):

1. Reliability (the ability to provide what was promised, dependably and accurately);

2. Responsiveness (the willingness to help customers and provide prompt service);

3. Assurance (the knowledge and courtesy of employees, and their ability to convey trust and confidence);

4. Empathy (the degree of caring and individual attention provided to customers); and

5. Tangibles (the physical facilities and equipment, and the appearance of personnel).

6. "Most lawyers are technicians - researchers, writers, drafters. Because of the intensive training on the "work product" side (and lack of appreciation for or training on the "service side"), some lawyers even see clients as intrusions...."

F. A survey of legal client satisfaction taken by the Missouri Bar and Prentice-Hall indicated the following:

1. Why would the client hire that attorney again? Because he or she

a. Was friendly,

b. Was prompt and business-like,

c. Was courteous,

d. Was not condescending, and

e. He/she kept me (the client) informed.

2. Why would the client **not** hire that attorney again? Because he or she

a. Had a superior attitude (said I couldn't understand because I wasn't a lawyer),

b. Was bored or indifferent (couldn't find my file in the pile on his desk),

c. Was impersonal (didn't know who I was),

d. Failed to keep me informed (I never knew what was going on), and

e. Was rude and brusque (he never came out to the waiting room; he didn't rise when I came in the room).

G. What does it take to make a legal assistance office "client oriented?"

1. Commitment from the leadership.

2. Service training.

3. Recognition of the factors clients use to judge quality of service.

## VIII. CONCLUSION.

# CHAPTER C

# OFFICER AND NONCOMMISSIONED OFFICER EVALUATIONS


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# OUTLINE OF INSTRUCTION

## I. REFERENCES.

A. AR 623-1, Academic Evaluation Reporting System, 31 Mar 92.

B. AR 623-105, Officer Evaluation Reporting System, 31 Mar 92.

C. AR 623-105, Officer Evaluation Reporting System, 1 Oct 97 w/Change 1, 1 April 1998. Paragraph references to this regulation throughout this outline will be made to "NEW 623-105." The change referenced here contained no substantive changes. It merely clarified the "phased" applicability of the new OER system for Reserve Components.

**Remember that the applicable regulation for reports and appeals of those reports is the regulation in effect *at the time the report is issued*. Thus, you must be familiar with BOTH the old and new systems and maintain copies of the old regulation.**

D. AR 623-205, Noncommissioned Officer Evaluation Reporting, 31 Mar 92.

E. Internet Resources:

1. PERSCOM On-line: http://www-perscom.army.mil

2. DA Publications Home Page: http://www-usappc.hoffman.army.mil

## II. INTRODUCTION.

## III. OFFICERS (Commissioned & Noncommissioned): MANAGERS, MENTORS, & LEADERS

A. Why Have Evaluations?

1. The Officer Evaluation System (OES) identifies those who are best qualified for promotion and assignment to higher responsibility. (AR 623-105, para. 1-5a.; NEW AR 623-105, para. 1-8a.(1)).

2. The Noncommissioned Officer Evaluation Reporting System (NCOERS) ensures "the selection of the best qualified noncommissioned officers to serve in positions of increased responsibility . . ." (AR 623-205, para. 1-5a.(2)).

3. Three types of evaluations (AR 623-105, para. 1-5b.; NEW AR 623-105, para. 1-8a.(2)).[1]

   a. **Duty** Evaluations: The Officer Evaluation Report (OER) and Noncommissioned Officer Evaluation Report (NCO-ER) are used for these evaluations. The evaluation covers a specific period of time and covers performance and potential in a particular duty assignment during that time.

   b. **School** Evaluations: The Academic Evaluation Report (AER) is used. The evaluation covers a specific period of time during which the officer attended a training school. The evaluation rates performance and potential in the school environment.

   c. **Department of the Army** (DA) Evaluations: These are selection boards and personnel management decisions. They do not focus on any one period, but look at the officer's or NCO's entire career. These evaluations are critical and focus on potential. Three factors are considered:

      (1) Army Requirements: The number of officers needed in each specialty and grade. (AR 623-105, para. 1-5c.(1); NEW AR 623-105, para. 1-8a.(3)(a); AR 623-205, para. 1-5a.(2)).

      (2) Officer or NCO Qualifications: Consideration of the different skills, experience, background, and training needed for each specialty. (AR 623-105, para. 1-5c.(3); NEW AR 623-105, para. 1-8a.(3)(c); AR 623-205, para. 1-5a.(2)).

      (3) Duty Performance: The most important factor in determining potential. This is "judged by how well an officer performs his or her tasks and how well he or she meets officer corps professional values." (AR 623-105, para 1-5c.(2); NEW AR 623-105, para. 1-8a.(3)(b)). For NCOs, the NCO-ER provides "recognition for performance of duty [and] measurement of professional values and personal traits, . . ." (AR 623-205, para. 1-5a.(3)).

[1] The NCOERS does not expressly list each of these types. NCOs, however, do receive each of these types of evaluations during the course of their careers.

4. Evaluations make possible the judgments needed to efficiently manage the officer corps. Particularly, the evaluation reports provide the information for DA to judge duty performance.

B. Professional Values

1. Timeless Values of Military Service

### *Selfless Service -- Duty, Honor, Country*

Duty -- Honor -- Country. Those three hallowed words reverently dictate what you ought to be, what you can be, what you will be. They are your rallying points: to build courage when courage seems to fail; to regain faith when there seems to be little cause for faith; to create hope when hope becomes forlorn. Unhappily, I possess neither that eloquence of diction, that poetry of imagination, nor that brilliance of metaphor to tell you all that they mean. . . . But these are some of the things they do. They build your basic character, they mold you for your future roles as the custodians of the nation's defense, they make you strong enough to know when you are weak, and brave enough to face yourself when you are afraid. They teach you to be proud and unbending in honest failure, but humble and gentle in success; not to substitute words for actions, not to seek the path of comfort, but to face the stress and spur of difficulty and challenge; to learn to stand up in the storm but to have compassion on those who fail; to master yourself before you seek to master others; to have a heart that is clean, a goal that is high; to learn to laugh yet never forget how to weep; to reach into the future yet never neglect the past; to be serious yet never to take yourself too seriously; to be modest so that you will remember the simplicity of true greatness, the open mind of true wisdom, the meekness of true strength. They will give you a temper of the will, a quality of the imagination, a vigor of the emotions, a freshness of the deep springs of life, a temperamental predominance of courage over timidity, an appetite for adventure over love of ease. They create in your heart the sense of wonder, the unfailing hope of what next, and the joy and inspiration of life. They teach you in this way to be an officer and a gentleman.

*--General of the Army Douglas MacArthur*

### *Impartiality - Worth's Battalion Orders*

But an officer on duty knows no one -- to be partial is to dishonor both himself and the object of his ill-advised favor. What will be thought of him who exacts of his friends that which disgraces him? Look at him who winks at and overlooks offenses in one, which he causes to be punished in another, and contrast him with the inflexible soldier who does his duty faithfully, notwithstanding it occasionally wars with his private feelings. The conduct of one will be venerated and emulated, the other detested as a satire upon soldiership and honor.

*-- Brevet Major William Jenkins Worth*

### *Leadership - Schofield's Definition of Discipline*

The discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh or tyrannical treatment. On the contrary, such

> treatment is far more likely to destroy than to make an army. It is possible to impart instruction and to give commands in such a manner and such a tone of voice to inspire in the soldier no feeling but an intense desire to obey, while the opposite manner and tone of voice cannot fail to excite strong resentment and a desire to disobey. The one mode or the other of dealing with subordinates springs from a corresponding spirit in the breast of the commander. He who feels the respect which is due to others cannot fail to inspire in them regard for himself, while he who feels, and hence manifests, disrespect toward others, especially his inferiors, cannot fail to inspire hatred against himself.
>
> *-- Major General John M. Schofield*

2. The Army Ethic - The Character of a Leader. *See* General Dennis J. Reimer, *Leadership For The 21st Century: Empowerment, Environment And The Golden Rule*, Mil. Rev. (1996).

   a. **"Courage.** General George C. Marshall, echoing Ridgway's sentiment, described the need for leaders with the moral courage to tell their superiors when they are wrong. 'It is hard to get men to do this, for this is when you lay your career, perhaps your commission, on the line.'"

   b. **"Candor**. Another character trait closely associated with courage is candor. Candor is a two-way street. Honesty is as important to a subordinate as it is to a superior. Mentoring and coaching are the best ways I know of to stamp out the zero defects mentality. . . . We must coach and mentor our young officers and NCOs and spend time with subordinates, talking with them face-to-face about their performance. Everyone wants feedback. We need to tell soldiers when they make mistakes and then coach them to succeed. Nothing is more important than taking the time to mentor subordinates. General William Creech, a great Air Force innovator and leader, said it best: 'The first duty of any leader is to create more leaders.' Part of mentoring is listening to soldiers. You can always learn from them."

   c. **"Competence.** A third character trait of good leaders is competence. As General Douglas MacArthur said, 'There is no substitute for victory.' The public trusts us with their most precious asset-their sons and daughters. They do not question what we do with them. They trust us to train them to survive on the battlefield. This is a tremendous responsibility and we, as leaders, must continue to earn that trust by our professionalism and competence. I count on leaders to not only know their jobs, but to strive to be the best in their respective fields."

d. **"Commitment.** The final character trait of a good leader is commitment. MacArthur had the best definition of commitment- 'Duty, honor, country. These three hallowed words reverently dictate what you ought to be, what you can be, what you will be.' Leaders today should be devoted to selfless service. Marshall said, 'It is amazing what gets done when nobody worries about who gets the credit.'"

3. Army Values – L-D-R-S-H-I-P. *"Values are at the core of everything our Army is and does. Your commitment to living and teaching the Army's core values is critical to our success today and tomorrow."* GEN Dennis J. Reimer.

a. ***Loyalty***: Bear true faith and allegiance to the U.S. Constitution, the Army, your unit, and other soldiers.

b. ***Duty***: Fulfill your obligations.

c. ***Respect***: Treat people as they should be treated.

d. ***Selfless-Service***: Put the welfare of the nation, the Army, and your subordinates before your own.

e. ***Honor***: Live up to all the Army values.

f. ***Integrity***: Do what's right, legally and morally.

g. ***Personal Courage***: Face fear, danger, or adversity (Physical or Moral).

## IV. THE OFFICER EVALUATION REPORTING SYSTEM.

A. Evolutionary change to new system

1. Erosion of senior rater profiles

2. OLD system lasted 18 years.

3. Masking LT reports when you make MAJ.

B. Overview of the System

1. Functions of the System. (AR 623-105, para. 1-6c. & d.; NEW AR 623-105, para. 1-8b.(3) & (4)).

a. PRIMARY: Provide information to career managers for use in making personnel management decisions to include promotion, retention on active duty, elimination, reduction in force (RIF), command selection, and specialty designations.

b. SECONDARY: Encourage office professional development and enhance mission accomplishment.

2. Critical Aspects of the System. (AR 623-105, para. 1-6d.; NEW AR 623-105, para. 1-8b.(4)).

a. Stresses the importance of sound senior/subordinate relationships.

b. Stresses the importance of setting standards and giving direction for the performance of subordinates.

c. The key is effective communication.

C. The Players in the System - "The Rating Chain." (AR 623-105, Chapter 3; NEW AR 623-105, Chapter 2).

| **Rules for Establishing Rating Chains** | | | | |
|---|---|---|---|---|
| General Rules: | ✓ Commanders are responsible for establishing rating chains for the organization.<br>✓ Commanders will normally rate commanders. | | | |
| **Rating Official** | **Requirements** | | | |
| Rater | ✓ Normally the immediate supervisor of the rated officer.<br>✓ Officer of US or Allied Forces or US Government Employee.<br>✓ Senior in rank (or date of rank) to the rated officer. | | | |
| Intermediate Rater | ✓ Officer of US or Allied Forces or US Government Employee.<br>✓ Must be senior to the rated officer.<br>✓ Normally included when there is a level of supervision between the rater and the senior rater. | | | |
| Senior Rater | ✓ Officer of US or Allied Forces or US Government Employee.<br>✓ Normally the supervisor of the rater and intermediate rater.<br>✓ Minimum grade as indicated below<br>✓ Must be senior in grade or date of rank to the rated officer, the rater, and the intermediate rater[2] | | | |
| When the Rated Officer is a: | The minimum grade of the senior rater must be: | | | |
| | Military Senior Rater | Civilian performing the senior rater function[3] | | |
| | | GD Merit or General Schedule | Non-Appropriated Fund | Senior Executive Service |
| Warrant Officer<br>2d Lieutenant<br>1st Lieutenant (1LT) | Major or Captain(P)[4] | GM/GS13 | UA-13 | An SES may senior rate all officers if he is in the chain of |

[2] The senior rater need not be senior in date of rank to the other rating officials if he/she is authorized to rate those officials. Additionally, under the ***new*** OER system, a senior rater need not be senior in grade or date of rank to an intermediate rater from a non-parent unit where a dual supervision situation exists.

[3] Supplementary review is required for some situations where the senior rater is a civilian. See para. 2-19, NEW AR 623-105; para. 3-13, AR 623-105.

[4] For a promotable officer to be qualified, they must be serving in a position authorized the higher grade. For example, a promotable captain must be serving in a Major's position to meet the minimum grade requirement. See para. 2-6, NEW AR 623-105; para. 3-11, AR 623-105.

| | | | | |
|---|---|---|---|---|
| 1LT(P)[5]<br>Captain (CPT) | Lieutenant Colonel or Major (P)[3] | GM/GS13 | UA-13 | supervision and is at least one level above the immediate supervisor. |
| CPT(P)[4]<br>Major (MAJ) | Colonel or Lieutenant Colonel (P)[3] | GM/GS15 | UA-15 | |
| MAJ(P)[4]<br>Lieutenant Colonel (LTC) | Colonel or Lieutenant Colonel (P)[3] | GM/GS15 | UA-15 | |
| LTC(P)[4]<br>Colonel (COL) | Brigadier General or Colonel (P)[3] | GM/GS16 | UA-16 | |
| COL(P)<br>Brigadier General<br>Major General | Senior to the rater and intermediate rater. | | | |

D. The Flow of the System

1. STEP 1: The support form is completed.

a. Forms

(1) OLD: DA From 67-8-1

(2) NEW: DA Form 67-9-1

b. Responsibility of the **rated officer**!

c. Must have a face-to-face discussion with rater within 30 days of the start of the rating period. Initials on the support form verify this discussion.

d. Make the duty description concise, but comprehensive. Explain legal duties in plain English for non-legal readers. Try to make objectives measurable. The regulations lists areas to consider when drafting objectives and duties. (AR 623-105, para. 4-5c.; NEW AR 623-105, para. 3-5c.).

[5] The promotable rated officer must be on a promotion list and be in a position authorized an officer of the next higher grade. For example, a promotable first lieutenant must be in a position authorized a captain for an O-5 senior rater to be required. See para. 3-16, NEW AR 623-105; para. 3-2, AR 623-105.

e. Changes with the new system

(1) Rated Officer provided copies of rater & senior rater support forms. (NEW AR 623-105, para. 3-6a.). The rated officer's support form should be prepared considering these support forms.

(2) The Senior Rater reviews and initials the form after initial and follow-up counseling. (NEW AR 623-105, paras. 3-7f.(2) & 3-9).

(3) Follow-up Counseling.

(a) Must Counsel – Recorded on DA Form 67-9-1.

(b) Timing Goals (NEW DA PAM 623-105 at 4).

(i) Quarterly for LTs & WO1's

(ii) Mid rating period (3-6 months) for CPTs & CW2s

(iii) Field Grade - As needed.

(4) Junior Officer Developmental Support Form (DA Form 67-9-1a). (NEW AR 623-105, paras. 3-10 – 3-14).

(a) Purpose: To build a developmental plan based on tasks that target the major performance objectives listed on the support form.

(b) Record at least one task for each doctrinal skill listed on form.

(c) Rater with rated officer's active participation directs process.

(d) Senior rater approves plan. The plan is put into effect only after senior rater approves.

(e) Plan is evaluated at mandatory quarterly counseling.

2. STEP 2: Assess objectives during the rating period. (AR 623-105, para. 4-4c.; NEW AR 623-105, para. 3-4c.(2)).

a. The rated officer is responsible to periodically review the support form to ensure it properly reflects duties.

b. Make pen and ink changes on the working copy of the support form during the rating period after coordination with the rater.

3. STEP 3: Event requiring report to be generated occurs.

a. Mandatory Reports - Officer's "Rated Period" must be at least 90 days in the same position, under the SAME RATER, during the same rating period. Reports are required under whichever event occurs first. (AR 623-105, paras. 5-2 - 5-11; NEW AR 623-105, paras. 3-39 - 3-45).

(1) Annual Report - Required upon completion of 1 calendar year from the "Thru" date on the previous report.

(2) Change of Rater Report - Required when the rated officer ceases to work under the immediate supervision of the rater.

(3) Change of Duty Report - Required when the rated officer has a change of principal duty, even if the rater remains the same.

b. Mandatory Reports that DO NOT require the 90 day minimum time period. (AR 623-105, paras. 5-13 - 5-19; NEW AR 623-105, paras. 3-46 - 3-51).

(1) Initial tour on active duty report.

(a) Chaplain, AMEDD, and JAGC only. **Change under the new reg:** Chaplains do NOT get an initial tour report.

(b) Period covered begins with date of entry on active duty OR the day after the through date on the last academic report and ends upon completion of **120 calendar days** (excluding non-rated periods) in the same principal duty assignment under the same rater.

(c) Rating chain qualification time limits DO apply.

(2) Officers participating in FLEP.

(3) Relief for cause report.

(a) Relief for cause is an early release of an officer from a specific duty or assignment directed by superior authority and based on a decision that the officer has failed in his or her performance of duty.

(b) Note that duty performance consists of not only completing assigned tasks in a competent manner, but also complying with professional standards (Part IV of DA Form 67-8 or 67-9) BOTH on and off duty.

(c) Report is required REGARDLESS of the rated period.

(d) The report is rendered by the published rating chain at the time of the relief, regardless of time qualifications.

c. Optional Reports. Reports submitted at the option of rating officials. (AR 623-105, paras. 5-20 - 5-27; NEW AR 623-105, paras. 3-52 - 3-56).

(1) Complete the Record report.

(a) Submitted at the RATER's option.

(b) OLD System: The following conditions MUST BE met:

(i) Rated officer is about to be considered by a DA selection board for promotion, schooling, or command;

(ii) Rated officer has not been rated in the current position *(May be WAIVED by senior rater if performance has changed "markedly" since the previous report)*; and

(iii) Rated officer has served in the position at least 180 calendar days (excluding non-rated periods) in the same position under the same rater as of the date set by DA in the message announcing the board.

(c) NEW System:

(i) Rated officer is about to be considered by a DA selection board for promotion, schooling, or command; and

(ii) Rated officer has served in the position at least 90 calendar days (excluding non-rated periods) in the same position under the same rater as of the date set by DA in the message announcing the board.

(d) Normal rating chain qualifications apply.

(2) Senior Rater option.

(a) Issued at the outgoing SENIOR RATER's option when a change in senior rater occurs. This type of report SHOULD be rendered when a routine report would be due within the 60 days following the change of senior rater. Otherwise, the routine report would have to be submitted without a senior rater portion.

(b) The following conditions must be met:

(i) Senior rater has served in that position for at least 60 calendar days;

(ii) The rater meets the minimum requirements to render a report; and

(iii) The rated officer has not received a report in the preceding 90 calendar days.

(3) Rater option.

(a) Submitted at the rater's option.

(b) Applies when the rated period is less than 90 calendar days, but one of the events in paragraph a. (mandatory reports with 90-day minimum) occurs.

(c) Rater may issue report IF the rated officer has served CONTINUOUSLY under the same rater in the same position for 90 days, including time from the preceding rating period. EXAMPLE: Officer receives annual report on 1 May. On 31 May, she PCSs to a new post (Change of Rater). The current rating period would be 30 days. If the rated officer worked for the same rater who issued the annual report, in the same position for which she received the annual report, the rater may at his option issue a report.

(4) Sixty-day option.

(a) Applies only to officers serving in overseas short tours of 14 months or less.

(b) Rated period is less than the 90 days, but more than 59 days (excluding non-rated periods), and one of the events in paragraph a. above occurs (mandatory reports with 90-day minimum).

(c) Senior rater meets the minimum time requirement (60 days) and the senior rater approves.

4. STEP 4: Complete accomplishments on support form at the end of the rating period.

a. Rated officer completes this portion of support form at the end of the rating period. Tie the accomplishments to your objectives!

b. Don't be bashful, but don't be boastful.

c. Make sure numbers are absolutely accurate and consistent!!!!!

5. STEP 5: A "Shell" of the report with the administrative data filled in is prepared.

a. The Rated Period.

(1) Period Covered - Non-rated Time = The Rated Period.

(2) Period Covered: The time (in months, days, and years) that the report covers. (AR 623-105, para. 4-10c.(1); NEW AR 623-105, para. 3-16c.(1); & Glossary).

(a) Begins on the day AFTER the completion of the most recent evaluation report (AER or OER).

(b) Ends on the day the event causing the report to be generated occurs.

(3) Non-rated Time. (AR 623-105, para. 4-10c.(2); NEW AR 623-105, para. 3-16c.(2)).

(a) Period between leaving one duty position and beginning another, regardless of the number of days.

(b) Period(s) spent performing duties (or training) for which the officer does not meet minimum time requirements for a report.

(c) Period(s) of 30 or more CONSECUTIVE days where the officer is:

(i) On leave;

(ii) Absent Without Leave (AWOL);

(iii) In the hospital;

(iv) In confinement;

(v) Under arrest;

(vi) On permissive temporary duty (TDY);

(vii) On TDY or Special Duty (SD) serving as a member of a DA selection board or a court-martial.

(viii) On TDY or SD attending instruction scheduled for less than 60 days; or

(ix) Attending CAS[3].

(4) The "Rated Period" determines whether an officer meets the time requirements for a particular type of report.

b. Signature of Rated Officer

(1) Under the OLD system, the rated officer would verify the administrative data, fill in his most recent APFT and Ht/Wt and sign the form BEFORE sending it to the rater. (AR 623-105, para. 4-11b.(3). The rated officer's signature verified the accuracy of the data in Part I, the names of the rating officials, and the APFT & Ht/Wt data.

(2) Under the NEW system:

(a) The rated officer MUST be the last person to sign the OER form. (NEW AR 623-105, paras. 3-17c.(3) & c.(7))

(b) The RATER enters the APFT and Ht/Wt data. (NEW AR 623-105, paras. 3-17c.(3) & 3-19.1)

6. STEP 6: Evaluations are completed in sequence

a. Rater begins sequence. Completes through Part V of DA Form 67-8 or 67-9.

(1) Part III: Duty Description. Based on the entries in the support form (if appropriate). (AR 623-105, para. 4-12a.; NEW AR 623-105, para. 3-18a.)

(2) Part IV: Professionalism

(a) OLD System: (AR 623-105, para. 4-13)

(i) Designated attributes rated on a 1-5 scale (1 being high).

(ii) As a practical matter, anything other than a 1 was a negative rating.

(b) NEW System: (NEW AR 623-105, para. 3-19).

(i) The section is divided into two parts -- Army Values and Leadership attributes/skills/actions.

(ii) Rater checks "yes" or "no" for all values and leadership items. Any "no" entries MUST be explained in the rater's narrative (Part Vb).

(iii) For the leadership items, the rater must create a "leader word picture" by selecting 1 attribute, 2 skills, and 3 actions that best describe the rated officer's strengths during the rating period.

(3) Part IVc: APFT & Ht/Wt (AR 623-105, para. 4-13.1; NEW AR 623-105, para. 3-18.1)

(a) Under the old system, if a soldier met the body fat standards of AR 600-9, but exceeded the screening table weight, the rater was required to comment as follows: "Meets body fat standard of AR 600-9."

(b) Under NEW system, that comment is no longer required.

(4) Under the NEW system, raters must indicate compliance with the JODSF in Part IV as well. (NEW AR 623-105, para. 3-19.2)

(5) Part V, Performance and Potential. (AR 623-105, para. 4-14; NEW AR 623-105, para. 3-20).

(a) Under BOTH systems, the rater will check a block rating the officer's potential for promotion compared with her contemporaries; give narrative comments on performance during the rating period; and give narrative comments regarding potential.

(b) Under the NEW system, raters must also include unique skills in the potential block, and must indicate a recommended Career Field for competitive category officers in the grades of O-3 through O-5.

b. Intermediate Rater (if any) completes their portion.

c. Senior Rater. (AR 623-105, para. 4-16; NEW AR 623-105, para. 3-22)

(1) Provides an independent evaluation of officer's potential, comparing that officer to all other officers of the same rank, army-wide.

(2) Provides the final chain of command review of the report to ensure it is correct and accurate.

(3) Makes MANDATORY comments.

(4) OLD System:

(a) Checks appropriate block on the pyramid.

(b) Block check is compared to the "senior rater profile" added by DA when report is processed.

(c) Must use a DA Form 67-8-1 when preparing evaluation. If they do not, they MUST explain in the comments.

(5) NEW System:

(a) The senior rater first rates the officer's potential for promotion to the next higher grade compared to all officers in the same grade as the rated officer. The senior checks "best qualified," "fully qualified," or "do not promote."

(b) The senior rater then checks one of four blocks. "Above Center of Mass," "Center of Mass, "Below Center of Mass-Promote," or "Below Center of Mass-Do Not Promote." Senior raters must have less than 50% of the officers they rate at that grade in the "Above Center of Mass" block. DA enforces this requirement through a labeling process described below.

(c) Finally, the senior rater makes narrative comments and lists three future assignments for the officer and, like the rater, lists a career field for competitive category officers, O3 - O5.

7. STEP 7: The report is processed through HQDA.

a. The report is processed through the local personnel services company to the officer's branch at HQDA.

b. Batch processing: OERs are batch processed and incremented against the senior rater profile on the day they are received at DA. (NEW AR 623-105, para. 3-23d.) This is critical under the NEW system since less than 50% of rated officers can be in the "Above Center of Mass" block.

c. OLD System: The branch recalculates the senior raters profile and places that on the report.

d. NEW System: The HQDA Electronically Generated Label. (NEW AR 623-105, para. 3-23)

(1) Part VIIb. (Senior Rater potential block check) is replaced on the final report with an electronically generated label.

(2) The label contains a statement reflecting the block checked by the senior rater. ("Center of Mass," etc.)

(3) If the senior rater's profile has 50% or more of officers in that grade in the "Above Center of Mass Block," the label will say "Center of Mass" even though the senior rater checked the "Above Center of Mass" block. Because the label overlays the original portion, there will be NO indication of the senior rater's original block check.

(4) To avoid problems, the regulation recommends that senior rater's maintain a "cushion" in their top block by rating only 1/3 of their officers in each grade in that block. (NEW AR 623-105, para. 3-22c.(2)(c)).

(5) Senior raters are PROHIBITED from mentioning their actual block check in their narrative comments! (NEW AR 623-105, para. 3-22c.(3)).

e. The report is finally reviewed for administrative accuracy and then placed on the officer's OMPF.

## V. THE NONCOMMISSIONED OFFICER EVALUATION SYSTEM.

A. Purpose. Similar to officer system.

1. Strengthen the NCO Corps through the inculcation of Army values and basic NCO responsibilities.

2. Ensure the selection of the best qualified NCOs for promotion and increased responsibility.

3. Improve performance Army-wide through an emphasis on performance counseling.

B. Rating Chain.

1. Rated NCO. The subject of the report.

2. Rater.

a. Immediate supervisor of the rated NCO

b. Must be designated for a minimum of 90 days.

c. Must be a Sergeant or higher and senior to the rated NCO. U.S. Civilians may rate NCOs. They must be in the grade of GS-6 or above. Members of allied forces may NOT rate NCOs.

3. Senior rater.

a. A person in the direct line of supervision of the rated NCO who is senior to the rater.

b. Must serve for a minimum of two months.

c. Military need only be senior to the rater. Civilians must be at least a GS-6 and be senior to the rater. Members of Allied Forces may NOT serve as Senior Raters.

4. Reviewer.

a. A commissioned/warrant officer or sergeant major or higher in the direct line of supervision of the rated NCO.

b. No minimum time requirement.

c. Civilians must be GS-9 or higher. Civilians may only serve if either the rater or senior rater is a uniformed official. Allied forces may NOT serve as reviewer.

d. Rating overwatch role. No comments unless they disagree with the rater and/or senior rater.

C. Forms.

1. DA Form 2166-7-1 (NCO Counseling Checklist/Record).

a. Used as guide to prepare, conduct, and record counseling sessions with the rated NCO.

b. Use is mandatory.

c. Initial counseling must occur within first 30 days of rating period.

d. Thereafter, counseling sessions will be conducted on at least a quarterly basis.

2. DA Form 2166-7 (NCOER).

a. Five part form.

b. Bullet comments.

(1) Short concise statements no longer than two lines; preferably one.

(2) Starts with action verbs or possessive pronouns (his/her)

(3) Must be double space between bullets.

(4) Begin with small letter "o" to designate start of comment.

(5) Specific bullet comments are mandatory for "excellence" or "needs improvement" ratings.

c. No numerical scores.

# VI. CONCLUSION

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# CHAPTER D

# ARMY OFFICER AND

# NONCOMMISSIONED OFFICER EVALUATION

# REPORT APPEALS


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**APPENDIX A. Guide for Preparation of Evaluation Report Appeals**

# OUTLINE OF INSTRUCTION

## I. REFERENCES.

A. AR 623-1, Academic Evaluation Reporting System, 31 Mar 92.

B. AR 623-105, Officer Evaluation Reporting System, 31 Mar 92.

C. AR 623-105, Officer Evaluation Reporting System, 1 Oct 97. w/Change 1, 1 April 1998. Paragraph references to this regulation throughout this outline will be made to "NEW 623-105." The change referenced here contained no substantive changes. It merely clarified the "phased" applicability of the new OER system for Reserve Components.

**Remember that the applicable regulation for reports and appeals of those reports is the regulation in effect *at the time the report is issued*. Thus, you must be familiar with BOTH the old and new systems and maintain copies of the old regulation.**

D. AR 623-205, Noncommissioned Officer Evaluation Reporting 31 Mar 92.

E. Internet Resources:

1. PERSCOM On-line: http://www-perscom.army.mil

2. DA Publications Home Page: http://www-usappc.hoffman.army.mil

## II. INTRODUCTION.

## III. PURPOSE OF THE APPEAL PROCESS. (AR 623-105, Para. 9-1; NEW 623-105, para. 6-2; AR 623-205, Para. 4-1.)

A. Protects Army's interest.

B. Ensures fairness to the rated soldier.

C. Ensures fairness to rating official.

# IV. EXCEPTIONAL PROCESSING PROCEDURES.

A. Referred reports (officers only) (AR 623-105, para. 4-27; NEW 623-105, paras. 3-32 & 3-33).

1. Reports containing negative comments or ratings must be referred to rated officer for acknowledgment and comment.

2. Rated officer's comments are attached to the report but do not constitute an appeal.

3. NEW AR 623-105 has some fairly specific criteria for referral in para. 3-32.

B. Relief for cause reports. (AR 623-105, para. 5-18; NEW 623-105, para. 3-50; AR 623-205, para. 2-10.)

C. Commander's inquiry. (AR 623-105, paras. 3-15 and 5-30; NEW 623-105, paras. 6-3 & 6-4; AR 623-205, para. 2-15.)

1. Commanders are required to look into alleged errors, injustices, and illegalities.

2. Not a prerequisite for appeal.

3. Informal procedures are used.

4. Results can be forwarded to HQDA and may become part of the OMPF.

D. Modifications to Submitted Reports. (AR 623-105, Chapter 5, Section V; NEW 623-105, Chapter 3, Section X.)

1. Basic rule - OERs and NCO-ERs received by HQDA are presumed complete and accurate.

2. Requests to withdraw or modify report will not be granted unless new or unverified information would change rating.

a. If new information is favorable, follow regular appeal procedures.

b. If new information is derogatory, prepare an addendum, refer to rated officer, and submit.

## V. EVALUATION REPORT APPEALS (AR 623-105, Chapter 9; NEW 623-105, Chapter 6; AR 623-205, Chapter 4.)

A. Types of Appeals.

1. Administrative (AR 623-105, para. 9-2h.; NEW 623-105, paras. 6-6h.; AR 623-205, para. 4-2h.)

a. Errors in parts I, II, IIIb, and Va of DA Form 67-8 (OER); parts I, II, IIIb, c, d, and IVc of DA Form 67-9 (NEW OER); parts I and II of DA Form 2166-7 (NCOER); or similar items on other forms.

b. Includes such things as deviation from the established rating chain, insufficient period of observation by the rating officials, and errors in the period covered.

2. Substantive (AR 623-105, para. 9-2i.; AR 623-205, para. 4-2i.)

a. Bias or prejudice

b. Inaccurate or Unjust Ratings

c. Any other matter that is not administrative.

d. NOTE: APFT Score & Height weight data are SUBSTANTIVE for NCOERs!

3. Combined Administrative & Substantive

B. Potential Bases for the Appeal.

1. Deviation from regulation.

   a. Report refers to conduct outside rating period. (AR 623-105, para. 4-17; NEW 623-105, paras. 3-24; AR 623-205, para. 6-4)

   b. Comments are not limited to the forms. Report cannot contain continuation sheets. (AR 623-105, para. 4-18; NEW 623-105, paras. 3-25; *see* AR 623-205, para. 6-8)

   c. Narrative gimmicks are contained in the report. (AR 623-105, para. 4-19; NEW 623-105, paras. 3-26; AR 623-205, para. 6-7d.)

   d. Reference is made to unproven derogatory information. (AR 623-105, para. 4-21; AR 623-205, para. 6-5)

   e. A rating official has been required to change a report. (AR 623-105, para. 4-20; NEW 623-105, paras. 3-27; AR 623-205, *see* para. 3-10c.(1)(c))

   f. Inappropriate comments have been included. (AR 623-105, paras. 4-21.1 & 4-21.2; NEW 623-105, paras. 3-28 – 3-31; AR 623-205, para. 2-17, 6-6, 6-13, 6-14)

   g. Adverse report not referred to officer for comment. (officers only) (AR 623-105, para. 4-27; NEW 623-105, paras. 3-32).

2. Error in the senior rater profile. (*See* AR 623-105, para. 4-16; NEW 623-105, para 3-22.)

3. Failure to counsel or to comply with support form procedures. (*See* AR 623-105, paras. 4-4 - 4-8.1; NEW 623-105, Chapter 3, Sections II & III; AR 623-205, para. 6-2)

4. Mistake made in preparing or typing the report.

5. Bias or prejudice on the part of a rating official.

C. Who may File the Appeal? (AR 623-105, para. 9-2,; NEW 623-105, para. 6-6c.; AR 623-205, para. 4-2.)

1. The rated officer;

2. Other interested parties in certain offices and agencies (e.g., Personnel Command (PERSCOM), Office of Deputy Chief of Staff for Personnel (ODCSPER), or TJAG).

3. Other interested individuals must contact one of the above.

D. Standard of Evidence and Burden of Proof. (AR 623-105, para. 9-7; NEW 623-105, para. 6-10; AR 623-205, para. 4-7.)

1. OER/NCO-ERs received at HQDA are presumed administratively correct, prepared by proper officials, and accurate.

2. Appellants have the burden of proving by clear and convincing evidence that:

a. Presumption of regularity should not apply.

b. Action is warranted to correct a material error, inaccuracy, or injustice.

3. Evidence must be competent, material, and relevant to the claim.

4. Examples of insufficient evidence: (Not in NEW 623-105).

a. Rated officer's statement.

b. Statement from rater alleging error in judgment, administrative oversight, or typographical error.

c. Statements or documents showing outstanding performance during unrelated periods.

5. NEW 623-105 prohibits appeals based on improper sequencing of OERs for new senior rater profiling. (NEW 623-105, para. 6-10f.)

E. When Must the Appeal be Filed? (AR 623-105, para. 9-3; NEW 623-105, para. 6-7; AR 623-205, para. 4-3)

1. Administrative appeals: No prescribed time limit.

2. Substantive appeals:

a. DA Form 67-8: Must be filed within 5 years of the completion date of the report absent exceptional circumstances.

b. DA Form 67-9: Must be filed within 3 years of the completion date of the report absent exceptional circumstances.

F. Preparing the Appeal.

1. Military memorandum format. (AR 623-105, Appendix N; NEW 623-105, Appendix F & Figures in Chapter 6; AR 623-205, Appendix F.)

a. Include name, rank, branch, SSN, period of report, and priority of the appeal.

b. Prepare a concise explanation of defect and requested corrective action. (Attach supplemental statement if lengthy).

2. Attach supporting documentation, statements, and the contested OER/NCO-ER.

a. Statements must be the originals.

b. Other documents must be certified copies.

3. JAG offices will assist soldiers who request advice about preparing and submitting appeals. (TJAG Policy Letter 84-2 and AR 27-3).

4. Practical advice. (AR 623-105, Appendix N; NEW 623-105, para. 6-12 & Appendix F; AR 623-205, Appendix F.)

G. Processing the Appeal.

1. Appeals based on administrative error.

a. Adjudicated by Appeals and Corrections Branch, Personnel Command (PERSCOM) for OERs (AR 623-105, para. 9-2; NEW 623-105, para. 6-6h.) and by NCO Evaluation Report Appeals Section (Active Army), U.S. Army Records and Evaluation Center (USAREC) for NCO-ERs (AR 623-205, para. 4-2).

b. Errors in parts verified by rated officer accepted only under unusual circumstances.

c. Correction of minor errors will not invalidate an entire OER or NCO-ER.

d. Prove errors with certified copies of appropriate documents.

2. Appeals based on substantive error (AR 623-105, para. 9-5; NEW 623-105, paras. 6-6i. & 6-11; AR 623-205, para. 4-9).

a. Screened by PERSCOM (OERs) or USAREC (NCO-ERs).

b. OERs adjudicated by DCSPER Officer Special Review Board (OSRB) (AR 623-105, para. 9-2; NEW 623-105, para. 6-11). NCO-ERs adjudicated by DCSPER Enlisted Special Review Board (ESRB) (AR 623-205, para. 4-2).

(1) Composed of at least three senior officers for OER appeals and three senior noncommissioned officers for NCO-ER appeals.

(2) Senior to the appellant and one with similar background if possible.

(3) Board recommendation based on majority vote.

c. DCSPER board procedures. (AR 623-105, para. 9-8; NEW 623-105, para. 6-11b.; AR 623-205, para. 4-8.)

(1) Administrative, nonadversarial.

(2) Not bound by rules of evidence.

(3) No right to appear in person.

(4) May contact interested parties directly.

d. Evidence required to support substantive error.

(1) Original typed statements from third parties, rating officials, and knowledgeable observers.

(2) Other documents from official sources.

H. Resolution of the Appeal. (AR 623-105, para. 9-5; NEW 623-105, para. 6-8; AR 623-205, para. 4-5.)

1. Priority system for resolving appeals. (AR 623-105, para 9-6; NEW 623-105, para. 6-9; AR 623-205, para. 4-6.)

a. First Priority.

(1) Officers and NCOs twice nonselected for promotion with mandatory release date within six months.

(2) Certain officers and NCOs selected for involuntary discharge within six months.

(3) Officers identified for referral within six months by a DA Active Duty Board or a AGR continuation board.

(4) Officers recommended for elimination board including officers denied Voluntary Indefinite (VI) status.

b. Second Priority.

(1) Officers and NCOs once nonselected for promotion.

(2) Officers pending promotion list removal

c. Third Priority: all others.

2. An appeal may be approved in whole or in part.

a. The relief may be different than that requested.

b. Board will not usually worsen appellant's position.

3. If the appeal is approved:

a. Document is either corrected or deleted.

b. Memo is placed in OMPF performance fiche.

c. If appellant is a promotion passover, OSRB/ESRB determines whether to grant a relook board.

4. If the appeal is denied:

a. Notification letter is sent to the appellant.

b. Copy of letter is placed in OMPF performance fiche.

c. Appeal correspondence placed in restricted OMPF.

5. A case summary of board's consideration is available to the appellant.

I. Reconsideration of Appeals.

1. No provisions for requesting reconsideration for OER appeals.

2. Appellants may submit a new appeal to the OSRB/ESRB based on new information or additional evidence. (AR 623-105, para. 9-5; NEW 623-105, para. 6-8f; AR 623-205, para. 4-5.

3. Appellants may appeal Board's decision to the Army Board for Correction of Military Records (ABCMR).

## VI. OTHER REMEDIES (IF THE APPEAL FAILS)

A. The Army Board For Correction Of Military Records (ABCMR).

1. ABCMR may correct any military record when necessary to correct an error or remove an injustice. (10 U.S.C. § 1552; AR 15-185).

2. Consult AR 15-185 for procedures.

3. ABCMR has broad power to recommend corrective action and fashion an appropriate remedy.

a. Claimants must specifically request monetary settlements.

b. The Secretary of the Army approves ABCMR recommendations on OER/NCO-ER appeals.

B. Judicial Review.

1. Jurisdiction over OER/NCO-ER Appeals.

a. U.S. Court of Federal Claims has jurisdiction over money claims founded upon the Constitution, any Act of Congress, or any regulation of an Executive Department. (28 U.S.C. § 1491).

b. U.S. District Courts have concurrent jurisdiction of money claims under $10,000. (28 U.S.C. §1346).

2. Exhaustion of administrative remedies.

a. General Rule: "'A party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.'" Howell v. Immigration & Naturalization Service, 72 F.3d 288, 291 (2d Cir. 1995) (Howell contains a good summary of the exhaustion requirement.)

b. Supreme Court Limitation on Exhaustion: Federal courts may not require exhaustion of available administrative remedies under the APA before judicial review of agency action where exhaustion not expressly required by statute, Darby v. Cisneros, 113 S.Ct. 2539 (1993). Note that this is an exception for the APA, NOT a blanket reversal of the exhaustion doctrine. *See* Howell above.

c. ABCMR specifically:

(1) Majority view - appellant must exhaust ABCMR remedies. Exhaustion applied strictly in military cases. Guitard v. Sec'y of the Navy, 967 F.2d 737 (2d Cir. 1992); *see also* Horn v. Schlesinger, 384 F.Supp. 506 (E.D. Mo. 1974), aff'd 514 F.2d 549 (8th Cir. 1985).

(2) Minority view - exhaustion of ABCMR remedy is permissive only. Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982). But note that the Federal Circuit is in accord with the minority view, Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986), Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983).

3. Laches.

a. An OER must be challenged within a reasonable time after it is issued. Adkins v. United States, 328 Ct. Cl. 909 (1981).

b. Government is entitled to dismissal of an OER appeal if it can show inexcusable delay and prejudice. Pepper v. United States, 794 F.2d 1571 (F. Cir. 1986).

4. Standard of Review.

a. Decisions of the ABCMR are reviewable in federal court. Jamison v. Stetson, 471 F. Supp. 48 (D.C. N.Y. 1978). *See also*, Randall v. United States, 95 F.3d 339, 348 (4th Cir. 1996).

b. Decisions by Service Secretaries to follow/not follow ABCMR advice may be reviewable as well. Adkins v. United States, 68 F.3d 1317, 1322-23 (Fed. Cir. 1995).

c. A party is bound by the ABCMR decision unless the decision is unsupported by substantial evidence or is arbitrary, capricious, or contrary to law. Randall, *supra*, at 348, *citing* Chappell v. Wallace, 462 U.S. 296, 303 (1983); Robbins v. U.S., 29 Fed. Cl. 717, 725 (1993).

d. Courts apply a strong but rebuttable presumption that officers have discharged duties correctly, lawfully, and in good faith. Guy v. United States, 608 F.2d 867 (Ct. Cl. 1979).

e. Courts will not interfere with rating process unless there is clear and convincing evidence of factors affecting ratings which had no place in the rating process. Savio v. United States, 213 Ct. Cl. 737 (1977).

5. Examples of Successful Appeals.

a. Labeling an OER as an "Adverse Efficiency Report" by mistake. Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982).

b. OER downgraded on mistaken belief superiors would not approve a high rating. Skinner v. United States, supra.

c. Signing blank OER, rating downgraded by another. Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980).

d. Violation of regulation. Riley v. United States, 608 F.2d 441 (Ct. Cl. 1979).

6. Examples of Unsuccessful Appeals.

a. Plaintiff did not show that ABCMR acted arbitrarrily or capriciously in denying challenge based on racial discrimination. Randall, *supra*.

b. Intentional downgrade in rating to show future job progression. Stewart v. United States, 611 F.2d 1356 (Ct. Cl. 1979).

c. Using words and phrases from previous OERs and endorser's instructions to rater to downgrade rating. Gruendyke v. United States, 639 F.2d 745 (Ct. Cl. 1981).

d. Rater claiming he rated appellant too low. Tanaka v. United States, 538 F.2d 348 (Ct. Cl. 1976). See also Savio v. United States, supra.

e. Contested OER inconsistent with prior and subsequent OERs. Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981).

7. Judicial Remedies.

a. Courts may award backpay to successful appellant. Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).

(1) Award is offset by civilian pay earned.

(2) Award cannot be based on an anticipated promotion.

b. Courts may order removal of an OER/NCO-ER. Skinner v. United States, supra.

c. Appellants can be reinstated in the service with their consent. Yee v. United States, 512 F.2d 1383 (Ct. Cl. 1975).

d. Courts may order that a nonprejudicial statement be placed in appellant's file. Sanders v. United States, supra; Yee v. United States, supra.

e. Under limited circumstances, courts may void promotion passovers and order relook boards.

(1) Harmless error standard applied. Riley v. United States, supra.

(2) Appellants must show a nexus between the board's action and the defective OER/NCO-ER. Harry v. United States, supra; Sanders v. United States, supra.

f. Courts will not:

(1) Order promotions be made. Yee v. United States, supra; Skinner v. United States, supra.

(2) Reconstruct a report or order the Army to prepare a favorable OER to replace a defective OER. Turner v. Dept. of Army, 447 F. Supp. 1207 (D.D.C. 1978).

## VII. CONCLUSION

# CHAPTER E

# INTRODUCTION TO FAMILY LAW

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*Outline of Instruction*

## I. INTRODUCTION.

## II. MARRIAGE.

A. Historical Perspective.

1. Purposes.

a. Economic/political alliance.

b. Romantic alliance.

2. Types.

a. Ceremonial.

b. Common Law.

B. Requirements for a Valid Ceremonial Marriage.

1. License--required by all states.

2. Physical exam--not required in every state.

3. Capacity to marry.

   a. Age -- varies state to state. (e.g. Alabama and South Carolina allow females to marry at age 12 with consent of a parent. Majority of states allow marriage at age 18, 16 with consent of a parent.)

   b. Mental capacity to contract.

4. No living spouse.

   a. Void as a matter of law in several states.

   b. Voidable in other states.

5. Parties are unrelated by blood or marriage.

   a. Universal ban--members of nuclear families and grandparents/grandchildren.

   b. Jurisdictional variances.

      (1) First cousins.

      (2) Aunt/nephew and uncle/niece.

      (3) Adopted children and step-relatives.

6. No legal incapacity to marry.

7. Intent to marry.

8. Solemnization by authorized official.

9. Consummation is not a prerequisite for a valid marriage.

C. Effects of Noncompliance with Statutory Requirements.

1. Failure to obtain a license.

a. A few states declare such marriages void.

b. Majority view--marriage is valid.

(1) *Yun v. Yun,* 908 S.W.2d 787 (Mo. Ct. App. 1995). The Yuns lived in Missouri but married in a church in Kansas in November 1986. No evidence of a license. In February 1990, Mr. Yun obtained a Kansas marriage license and filed it 26 June 1990 alleging marriage date of 3 June 1990. Mrs. Yun filed for divorce in 1993; Mr. Yun sought to avoid dissolution, property settlement and child support by alleging there was never a marriage. Court recognized the marriage.

(2) *Lambertini v. Lambertini,* 655 So.2d 142 (Dist. Ct. of App. FL 1995). Parties obtained a Mexican divorce for Mrs. Lambertini from her first husband and a Mexican marriage license--30 years later Mrs. Lambertini files for divorce and Mr. Lambertini asserts no marriage (and therefore no alimony or property division) because the license was not valid and therefore the marriage was void ab initio. The court recognized the marriage.

2. Defective, invalid, or spuriously obtained license--marriage is valid

3. Failure to obtain a physical--marriage is valid.

4. Unauthorized solemnizing official--marriage is valid unless the parties knew of the problem.

D. Conflicts of Law.

1. General rule: a marriage valid under the law of the jurisdiction where celebrated is valid everywhere.

2. Neither party need be a domiciliary of the jurisdiction where the marriage is performed.

3. General Overview:

a. Void = polygamy or marriages between persons who are too closely related.

b. Voidable = insufficient age, fraud, duress, sham, physical disability (disease or incurable impotence), mental disability.

E. Common Law Marriages.

1. Two types.

a. "Traditional" common law marriage entered into without formalities.

b. Valid marriage arising from invalid marriage after impediment is removed.

(1) For example, despite a party's underage status at the time of marriage, continued cohabitation as husband and wife after reaching majority results in the marriage ripening into validity.

(2) Note that courts may be reluctant to find a valid marriage when the parties entered into a relationship knowing it to be polygamous, even after the impediment to marriage has been terminated.

2. States recognizing formation of "traditional" common law marriages: AL, CO, DC, GA (only if before 1 Jan 97), ID (only if before 1 Jan 96), IA, KS, MT, OH (only if before 10 Oct 91), OK, PA, RI, SC, & TX.

3. Requirements for formation.

   a. Express mutual consent and intent to be married.

   b. Parties "must hold themselves out to the world as being married," or "must openly and professedly live as husband and wife" in most states.

4. Conflict of laws.

   a. Most jurisdictions recognize common law marriages as valid if the marriage was formed in a state that allows their formation.

      (1) *White v. State Farm Mutual Automobile Insurance Company*, 907 F. Supp. 1012 (E.D. Tx 1995).

   b. Most jurisdictions recognize a common law marriage if the parties at some time during their coverture lived in a state that allows the formation of common law marriages.

      (1) The marriage becomes valid if the parties move to a state that allows common law marriages, even at some time after they begin living together in a state that does not allow the formation of such marriages.

      (2) In such cases courts generally overlook the requirement of an express intent to marry.

   c. Temporary visits to a state that allows formation of a common law marriage while the parties remain domiciled in a state that does not recognize common law marriage usually will not result in a valid marriage.

(1) *Kelderhaus v. Kelderhaus*, 467 S.E.2d 303 (Ct. of App. Va 1996). Mrs. Kelderhaus filed for divorce and spousal support. Married in California in 1992 with a license (he was not legally divorced yet) moved to Arizona and got divorce from his first wife in Aug 1993. Immediately moved to Virginia and in 1994 filed for divorce in Virginia. Wife claims common-law marriage formed on way to Virginia in Oklahoma or Texas. Court finds no marriage and dismissed the case.

## III. MARRIAGE OF MILITARY MEMBERS.

A. Marriage in the U.S.

1. Counseling services available.

2. Legal advice.

a. Capacity to marry.

b. Antenuptial agreements.

3. Primary military interest: the validity of the marriage.

B. Marriage Overseas.

1. Military interests.

a. Logistical burdens.

b. Immigration problems.

c. Welfare of the unsophisticated soldier.

2. DOD policy: military regulations no longer require personnel desiring to marry overseas to apply for authorization from the chain of command.

a. Although rescinded as a requirement, the goals of AR 608-61 are still relevant.

b. Goals.

(1) Ensure the soldier understands the consequences and potential problems.

(2) Assist the soldier in obtaining a valid marriage under local law.

c. Procedures required under old regulations should still be available.

(1) Premarital counseling.

(a) By commander.

(b) By chaplain if desired.

(c) By JAG.

(i) Capacity to marry.

(ii) Immigration issues - admission to the U.S. is not automatic for an alien marrying a soldier.

(2) Physical exams.

(3) Local background check of proposed alien spouse to identify potential immigration problems.

(4) Documents for marriage must be gathered.

# IV. DIVORCE.

A. Jurisdiction.

1. Basic principle: court must have due process minimum contacts with one of the parties to exercise jurisdiction over the marriage.

2. Exercise of jurisdiction is based on specific statutory language, which addresses domicile or residency within the state for specified periods of time.

3. Most states have specific provisions allowing military personnel assigned within the state to maintain a divorce action if they meet period of residency requirements, regardless of domicile.

4. In personam jurisdiction over the "defendant" is not required to terminate the marriage, but such jurisdiction is necessary in matters of property division and spousal support.

B. Traditional Grounds for Marital Termination.

1. Fault Grounds.

a. Adultery.

b. Habitual drunkenness or drug addiction.

c. Abandonment or willful desertion.

d. Cruel or inhuman treatment or infliction of indignities.

e. Lengthy imprisonment or conviction of a felony.

f. Crimes against nature.

g. Commitment to a mental hospital.

C. "No-Fault" Revolution.

1. All states now have some type of no-fault termination.

a. Pure No-Fault---only 17 states. AZ, CA, CO, DE, D.C., FL, HI, IA, KY, MI, MN, MT, NB, OR, WA, WI, WY.

b. Hybrid No-Fault ---most states added a no fault provision to their statutes.

2. General requirements to establish a No-fault cause of action.

a. Minimum--one party asks for a divorce.

b. Most states add a condition that the parties live separate and apart for a period of time, varying from 6 months to 2 years.

Some states also require that the parties enter into a separation agreement in order to proceed on a no-fault basis.

## V. ANNULMENTS.

A. Annulment vs. Divorce.

1. Annulment--the marriage never existed, so marital property and marital obligations (such as alimony) do not exist.

2. Divorce--termination of a marriage, but the parties may have continuing obligations to each other.

B. Grounds for Annulment.

1. The grounds for annulment must have existed at the time of the marriage.

2. Polygamy: formal annulment usually not necessary since this defect usually renders the marriage void.

3. Incestuous marriage: again, in most jurisdictions this renders the marriage void.

4. Age: an underage party to a marriage can have the marriage annulled, at least until reaching majority, and the defect in some jurisdictions can result in a void marriage.

5. Impotence: usually must render the party physically incapable of normal sexual relations and must be incurable.

6. Disease: usually venereal disease.

7. Duress: must be sufficient to overcome the contractual notion of consent--usually must amount to violence or threats of violence that led to consent to marriage.

8. Mental incapacity: e.g., feeblemindedness, insanity, lunacy, idiocy, or mental weakness creating an incapacity to contract.

9. Fraud.

    a. Generally must relate to some aspect of the marital relationship and must be material. If the marriage has been consummated, a higher standard may be applied.

    b. Concealment of pregnancy by another man is sufficient.

    c. Misrepresentation that the husband is the father of the unborn child is usually enough.

    d. False assertion of pregnancy is not a ground for annulment.

10. Marriage for limited purposes: may result in a voidable marriage.

11. Refusal to conceive children.

a. Implied purpose of marriage is to procreate, absent agreement otherwise.

b. If a party never intended to have children (and if this can be proven), this constitutes fraud sufficient to justify annulment.

c. However, the "victim" spouse may be held to have waived the issue by continued cohabitation.

12. Denial of conjugal rights--not a ground for annulment in itself, but may constitute fraud if the party never intended to have sex after marriage.

## VI. SERVICE OF PROCESS.

A. CONUS.

1. AR 27-40, Litigation.

2. Military Role.

3. What is the jurisdiction of the installation?

a. Exclusive federal jurisdiction.

b. Concurrent.

c. Proprietary.

B. OCONUS.

1. The Hague Service Convention.

a. Purpose. Provide a mechanism to help plaintiff authorized to serve documents under the laws of its country effect service that gives appropriate notice to the party being served and is not objectionable to the country in which that party is served. See Comm. on Fed. Courts of the N.Y. State Bar Ass'n, Service of Process Abroad: A Nuts and Bolts Guide, 122 F.R.F. 63, 70 (1989). See Dept. of Justice, U.S. Marshals Service, Policy & Procedures, Vol.III, Process, pgs. 7-43, 48,57 (Nov. 1994).

b. Central Authority. Each nation / party to the treaty must establish one to process letters of request for service. These letters must comply with the provisions of the convention. Arts. 2-7, 13.

c. Direct, Noncompulsory Service Through Diplomatic Agents. Permitted in every case with respect to U.S. nationals. With respect to others, permitted unless the foreign country has objected to such method. Art. 8.

d. Mail. A person may "send" judicial documents by mail directly to persons abroad, unless the country of destination has objected to direct mailing. Art. 10(a). See, e.g., Rivers v. Stihl, Inc., 434 So. 2d 766 (Ala. 1983) (holding that service by mail in Germany is ineffective because of Germany's objection).

e. Delivery of a Translated Document by Central Authority. Generally a safe (albeit expensive) method. Unless the plaintiff applying for service within a foreign country specifically requests some other method, "the document may always be served by delivery to an addressee who accepts it voluntarily." Art. 5. "The Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed."

f. Mandatory Use of the Convention. Compliance with the Convention is mandatory in all cases in which it applies. Volksvagenwerk A.G. v. Schlunk, 486 U.S. 94 (1988). Yet ultimately the question whether service abroad is adequate must be determined by reference to the law of the forum state. See, e.g., Vause v. Vause, 140 Wis. 2d 157 (1987) (rejecting mother's claim that service of process by Airman-father in custody case was required to be in manner prescribed by the Convention).

g. Bilateral Agreements. Richmark Corp. V. Timber Falling Consultants, Inc., 937 F.2d 1444, certiorari denied, 506 U.S. 903 (1992).

2. Service in Non-Convention Countries.

a. Action Brought in U.S. Federal Court. Governed by Fed. R.Civ.P. 4(e) and 4(i). Majority view among American courts? Federal and state procedures are the sole requirements that extraterritorial U.S. service must satisfy. Defective service under foreign law usually will not invalidate service for purposes of U.S. law.

b. Action Brought in State Court. Governed by state rules for service of process.

c. Caveat. Usually, plaintiff should make every effort to comply with the internal law of the foreign country. See, e.g., R.M.B. Electrostat, Inc. v. Lectra Trading, A.G., No. 82-1844 (E.D.Pa., Jan. 17, 1983) (dismissing plaintiff's complaint where service had been by mail upon defendant's office in Switzerland and where the federal law itself required service of translated summons and complaint by letters rogatory).

d. Letters Rogatory. A request for assistance from the court of one country to the court of another country. Courts honor such requests as a matter of comity. Fed.Rule of Civil Proc.4(i)(1)(B) and some state statutes make specific provisions for use of letters rogatory. 1 B. Ristau, INTERNATIONAL JUDICIAL ASSISTANCE ~~3-1 to 3-47 (1984 & Supp.1986).

3. Bilateral Agreements. Service by receiving state courts of foreign documents on sending state personnel may be achievable through a sending state liaison office pursuant to a status of forces agreement. See, e.g., Supplementary Agreement to the NATO Status of Forces Agreement With Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, U.S.-F.R.G., art. 32, 1 U.S.T. 531 [hereinafter NATO Supp. Agreement] (entered into force for United States on Jul. 1, 1963).

# VII. CONCLUSION

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# FAMILY LAW


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# FAMILY LAW

Outline of Instruction

## I. REFERENCES.

A. Dept. of Defense Financial Management Regulation, Volume 7, Part A (DODFMR, Vol. 7A), Basic Allowance for Quarters (BAQ).

B. AR 608-99, Family Support, Child Custody, and Paternity (1 Nov 1994)

C. JA 263, Family Law Guide, May 1998.

## II. OTHER SERVICE'S SUPPORT REQUIREMENTS.

A. DOD-Wide Policy: Military service will not be used to evade family support obligations.

B. Air Force Implementation of DOD policy.

1. Reference: AFI 36-2906 (1 OCT 95); 32 C.F.R. Part 818.

2. "The Air Force expects its members to provide regular and adequate support, either direct or in kind, based on the needs of the dependents and the ability of the member to provide."

3. No authority to order a specific dollar amount of support.

4. BAQ at the with-dependents rate will be terminated if the member refuses to use the money to support family members.

5. Paternity? An issue for civil court.

C. Marine Corps Implementation of DOD policy.

1. Reference: Chapter 8, Legal Admin Manual, effective 1 April 1998.

2. Guideline--§8002

a. GENERAL RULE: The greater of $200.00 per supported family member, or BAH (if entitled) up to 1/3 of gross pay.

b. **GROSS PAY** is defined as basic pay, basic allowance for housing.

c. Rules for Single Family Units.

(1) SINGLE FAMILY IN GOVERNMENT HOUSING: Support will be $200.00 per supported person up to 1/3 of gross pay.

(2) SINGLE FAMILY NOT IN GOVERNMENT HOUSING: Support will comply with the general rule.

d. Rules for Multiple Family Units.

(1) Do not include spouse if spouse is a member any U.S. Armed Force.

(2) Support will comply with the general rule.

e. Military Couples.

(1) NO CHILDREN OF THE MARRIAGE: There is no support obligation regardless of disparity in pay-grade.

(2) ALL CHILDREN OF THE MARRIAGE IN CUSTODY OF ONE SPOUSE: General rule applies.

(3) SPLIT CUSTODY: General rule applies.

3. Punitive Regulation.

a. §8001 makes violating the guidelines a violation of Article 92, UCMJ.

b. Duration of support: Support amounts paid under the interim support requirements apply until a court order or written agreement is obtained.

4. In-kind Payments.

a. In-kind payment is authorized.

b. Not limited to non-governmental housing costs. Can also be for charge accounts, car payments, etc.

c. Commander must authorize the in-kind payment as complying with the regulation requirements.

5. Release from Obligation.

a. Commander can release a Marine from the interim support obligations established by the regulation.

b. §8003.5 specifies 4 reasons for release:

(1) Marine cannot determine the whereabouts and welfare of the child concerned.

(2) Person requesting support for the child does not have physical custody of the child.

(3) Marine is the victim of a substantiated physical abuse by the spouse requesting support.

(4) The dependent is in jail.

c. §8004.4 provides another reason for release:

(1) Spousal Misconduct. A Marine alleging marital desertion or adultery by the spouse can be released from the spousal portion of support.

(2) The request for release goes to the Marine's Commanding Officer who forwards it to the General Court Marital authority for approval of the waiver.

6. Paternity.

a. Civil Matter. Marine commanders do not make paternity determinations unless the Marine acknowledges it or there is a court order of paternity.

b. If a Marine acknowledges paternity or a court adjudicates him the father of an illegitimate child, the Marine owes an obligation of support under the regulation.

D. Navy Implementation of DOD policy.

1. Reference: 32 C.F.R. Part 733.

2. Support amounts in the absence of an agreement or a court order:

a. Spouse only: 1/3 of gross pay.

b. Spouse and one child: 1/2 of gross pay.

c. Spouse and two or more children: 3/5 of gross pay.

d. One child (no spousal support): 1/6 of gross pay.

e. Two children (no spousal support): 1/4 of gross pay.

f. Three or more children (no spousal support): 1/3 of gross pay.

3. "Gross pay" means basic pay, BAQ and VHA but not BAS or other pay entitlements.

4. These are only guidelines, and a commander can require a member to pay more or less, based on the facts of the case.

5. The spousal support obligation (not the child support obligation) may be waived by the Director, DFAS – Cleveland, based on the spouse's desertion without cause, physical abuse or infidelity. The commander has discretion to withhold administrative or disciplinary action when the whereabouts and welfare of the child cannot be determined or where the person seeking payment does not have physical custody of the child.

6. Paternity.

a. Disputes must be resolved by a civil court.

b. Support must be paid according to any applicable court order, agreement between the parties, or the above guidelines.

E. Coast Guard Implementation of DOD policy.

1. Reference: Personnel Manual, Chapter 8 -- Support of Dependents.

2. Members are expected to "provide continuous and adequate for lawful dependents."

a. If, after counseling, the member demonstrates a pattern of non-support and/or failure to obey civil court support orders, the member is subject to administrative discharge for unfitness.

b. Non-support that is "notorious" and discrediting to the Coast Guard can result in courts-martial or other disciplinary proceedings.

3. Court orders for support are normally binding on members. If, however, a "member acting on good faith and on the express advice of qualified legal counsel disputes such a claim, the commanding officer may withhold disciplinary /administrative action against the member for a reasonable length of time . . . ." (emphasis in original).

4. Where there is no court order or agreed to level of support, the following scale is used:

a. Spouse only -- BAQ and VHA, plus 20% of basic pay.

b. Spouse and 1 minor child -- BAQ and VHA, plus 25% of basic pay.

c. Spouse and 2 or more minor children -- BAQ and VHA, plus 30% of basic pay.

d. One minor child -- 1/6 of basic pay.

e. Two minor children -- 1/4 of basic pay.

f. Three of more minor children -- 1/3 of basic pay.

5. Defenses to non-support (in accordance with Coast Guard guidelines):

a. Spousal non-support -- infidelity or desertion.

b. Child non-support:

(1) Member cannot ascertain the whereabouts and welfare of the child.

(2) Person seeking payment does not have physical custody of the child.

6. Paternity ? A civil matter.

## III. ARMY SUPPORT REQUIREMENTS.

A. AR 608-99 (1 NOV 94). Six Key Points.

1. Army support requirement applies only to "family members."

2. The regulation's definition of "family members" may differ from other definitions of "dependents" or "family members" used for benefits such as identification cards and BAH entitlement.

3. The regulation creates an "interim support requirement" that applies **ONLY** when there is no agreement between the parties or no court order. [This interim amount is not intended to provide adequate support in all cases and should not be used as a guideline for civilian agencies or courts in establishing support requirements.]

4. The regulation does not allow the Army to take money from a soldier and pay it to family members. Instead, it creates a military obligation to pay support, and the Army can punish a soldier for failing to comply. All of the services will comply with valid civilian garnishment or wage assignment orders.

5. Enforcement authority is the military commander.

6. The Army uses Basic Allowance for Quarters (BAQ) as a **yardstick** for determining the interim support obligation.

a. Actually receiving BAQ is **not** a prerequisite to the requirement of paying support to family members.

b. BAQ-WITH is **not** a cap on support obligation of a soldier.

7. Basic Allowance for Housing (BAH) is a combination of BAQ and VHA (Variable Housing Allowance). As of **1 January 1998** soldiers LESs show a BAH amount and not the BAQ amount.

a. BAQ-WITH and BAQ-DIFF remain the standard of AR 608-99. The difficulty is identifying the amounts of BAQ-WITH and BAQ-DIFF.

b. Use the 2000 BAH Table II to get these amounts. Full = BAQ-WITH and Differential = BAQ-DIFF for the respective rank of the soldier. SEE APPENDIX A.

c. The BAH Table II amounts must be adjusted every year if Congress approves an increase (usually those take effect on 1 January).

B. The Support Obligation--Who is Covered? -- **Family Members!**

1. Current spouse.

2. Minor children (under 18) of the current marriage and of past marriages (including children adopted by the soldier).

3. Minor children born out of wedlock to--

a. a female soldier.

b. a male soldier IF paternity is established by court order and a support obligation is judicially established.

4. Any other person the soldier is obligated to support by applicable state law.

a. Stepchildren: not considered family members unless state law requires soldier to support them.

b. Parents: same rule as stepchildren.

C. The Support Obligation--How Much?

1. Soldiers must comply with any support order.

2. Absent a support order, soldier pays according to any written support agreement.

3. If there is no support order or written agreement, the soldier pays according to the Army's interim support requirement.

D. Foreign Court Orders. AR 608-99, para. 2-4 b.

1. Soldiers cannot be ordered to comply with a foreign court order of support **UNLESS**:

a. the foreign court order is domesticated by a U.S. state court, OR

b. a treaty or international agreement exists between the U.S. and the foreign country to honor court orders. The U.S. has such an agreement with Germany ONLY WHILE THE SOLDIER IS STATIONED IN GERMANY.

2. This lack of authority to require soldiers to comply once they leave the foreign country does not necessarily relieve them of the obligation. Should the soldier ever return to the foreign country or if the foreign court order is later domesticated in the U.S, the obligation will be enforced.

3. Even if the foreign court order cannot be enforced, soldiers must still comply with the interim support requirements of AR 608-99.

E. The Interim Support Requirement. AR 608-99, para. 2-6.

1. Purpose: provide some family support while the parties seek to reach an agreement or initiate litigation.

a. BAQ-WITH - The full basic allowance for quarters with dependent rate for the service member's pay grade.

b. BAQ-DIFF - The difference between basic allowance for quarters with dependents and the basic allowance for quarters without dependents for the service member's pay grade.

c. Pro-rata Share - Basic allowance for quarters with dependents rate for the service member's pay grade divided by the total number of family members.

2. Single Family Situations.

a. Family **living in government quarters**--BAQ-DIFF.

b. Family **living off-post**--full BAQ-WITH

c. Family members residing in **different locations**--pro-rata share to those not in government quarters and BAQ-DIFF for members residing in government quarters.

3. Military Couple Situations.

a. If there are no children, neither spouse has to provide support for the other.

b. If there are children and all are in the custody of one of the spouses, the non-custodial spouse pays support equal to BAQ-DIFF.

c. If there is a split of custody regarding two or more children, neither spouse pays any support to the other.

4. Multiple Family Situations.

a. "Multiple family situations"--family members from different relationships (possibly living at varying locations).

b. Generally, each supported family member gets a pro-rata share of BAQ-WITH.

(1) REMEMBER: Soldiers must comply with all support orders.

(2) REMEMBER: Location of family members determines how much support they receive.

c. Examples:

(1) Soldier has two children by a previous marriage with no court order for support, and just separated from his current family of a wife and one child. Total family members: 4. Each gets 25% of an amount equal to the soldier's BAQ at the with-dependent rate. If the BAQ rate is $300, the current family gets $150 (25% x 2 people x $300).

(2) Same as above except the two children live with their mother and stepfather, who is also in the Army, in government quarters. The support owed them is the difference between BAQ "with" and "without." The current spouse and child together still get 50% of the BAQ "with" rate.

(3) Same as above except there is a court order requiring payment of $150 per month per child for each of the two children of the previous marriage. The "interim standards" are not applicable to them, and the regulation requires that the soldier pay in accordance with the order. The current spouse and child still each receive a pro rata share of the BAQ-WITH amount.

5. When the Interim Requirement Is Not Acceptable.

a. Soldiers and supported family members who believe the interim requirement is not enough or excessive must obtain a court order or enter an agreement to change the support obligation of the soldier.

b. Commander has **NO** authority to order support less than or in excess of the interim requirement amount found in AR 608-99.

F. Payment of Support. AR 608-99, para. 2-7.

1. Cash

a. Personally delivered to an adult.

b. Receipt.

2. Check

3. Money Order

4. Voluntary Allotment

5. All payments are due first day of the month following the month to which the support payment pertains. (Payments for April due 1 May).

G. Payment In Kind. AR 608-99, para. 2-7d & e.

1. Allowed in certain cases of interim support unless the court order or written agreement allows for payment in kind.

2. Limited to non-government housing expenses for a dwelling where the supported family members live. Examples:

a. Rent.

b. Real property taxes and property insurance, mortgages

c. DOES NOT include utilities, cable T.V.

3. Soldier must make up any shortfall between payment in kind and actual support obligation.

4. Supported family member must give written consent to any other support in kind such as car payments, insurance and credit card obligations.

5. Release From Support Requirements. AR 608-99, para. 2-11.

6. Only battalion commanders and above can release a soldier from support obligations. SJA must be consulted before releasing the soldier. (AR 608-99, para. 2-10b (2)c)

7. *Order issued by a court without jurisdiction*. Release from the requirement to support in accordance with the terms of a court order is only appropriate when jurisdiction is clearly lacking and the soldier has continuously provided support in accordance with a written agreement or the interim requirements of AR 608-99.

8. *A court order does not contain a financial support provision*. There is a judicial proceeding underway and at least one court order issued but there is NO language of support addressed in the order(s). Release under this authority is limited and should be discussed with the servicing SJA office.

9. *The income of the spouse exceeds the military pay of the soldier*. Release from **spousal support**, not child support, and only applies in the absence of a court order or written separation agreement. The soldier must show the spouse makes more than the soldier's military pay (defined as military base pay only).

10. *The soldier has been the victim of a substantiated case of physical abuse*. The abuse must be documented by a court or a Family Advocacy Case Management Team (FACMT) and not involve a mutual affray or abuse of the spouse by the soldier. This exception authorizes release from regulatory requirements of **spousal support**, not child support.

11. *The supported family member is in jail*. This exception applies to any penal institution, regardless of the reason for incarceration.

12. *The supported child is in the custody of another who is not the lawful custodian*. This limited exception applies only when the soldier is the lawful custodian and is diligently pursuing physical custody.

H. Raising the Issue of Non-Support.

1. Communicating with the non-supporting soldier is the initial option. If it is obvious that the nonpayment of support is intentional, or if there is no satisfactory response from the soldier, write to the soldier's immediate (i.e., unit) commander.

2. The commander is required to counsel the soldier, ascertain his/her intentions re: support, and respond to the writer. The commander may also impose sanctions for non-support.

I. Sanctions for Non-Compliance.

1. AR 608-99 is punitive regarding paragraphs 2-6 and 2-9.

2. Administrative:

a. Reprimand,

b. Adverse information in official file,

c. Bar to Reenlistment,

d. Administrative Elimination.

3. Punitive:

a. Article 15

b. Courts-Martial.

4. The decision to impose sanctions is entirely within the commander's discretion.

J. BAQ Entitlement. DOD Financial Management Regulation. Generally, allowances received by soldier based on the existence of dependents must be paid for their support. Failure to pay such amounts in support can lead to recoupment and criminal charges based on fraud.

## IV. PATERNITY.

A. Support Obligations.

1. Soldier mothers of illegitimate children are expected to provide support in accordance with court decrees or the interim support requirements.

2. A soldier father of an illegitimate child is not required to pay support unless there is a judicial determination of paternity and an order for support.

a. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [P.L. 104-193](Welfare Reform Act) provides that an acknowledgment of paternity done under an in-hospital program of paternity acknowledgment has the force of a court order after 60 days with no further court action required.

b. Welfare Reform Act authorizes expedited paternity and support hearings by administrative means with the full force of court order. SSCRA protections are not available in administrative hearings.

3. Can a soldier draw BAQ to support an illegitimate child? See Financial Management Regulation Vol. 7A, para. 30238.

a. Yes. A soldier, otherwise not entitled to BAQ, can receive BAQ-DIFF if he contributes the full sum to support his illegitimate child. The amount of entitlement is limited by law to BAQ-DIFF, regardless of the actual support ordered or paid. In order to draw even the BAQ-DIFF amount the soldier must be ordered to pay support in an amount equal to at least the soldier's BAQ-DIFF.

b. Yes. A soldier who draws BAQ-WITHOUT, based on his own off post residence, can also receive the amount equal to the soldier's BAQ-DIFF for the support of the child.

B. The Role of the Command in Establishing Paternity.

1. Paternity is a civil matter.

2. Allegations of paternity may be lodged with the soldier's immediate commander, to be processed IAW Chapter 3, para. 3-7, AR 608-99. The commander will:

a. Advise the soldier of the allegation.

b. Provide an opportunity for the soldier to consult with an attorney.

c. Provide the soldier the opportunity to acknowledge or deny paternity.

d. Assist the soldier if paternity is admitted.

e. Advise the other party to pursue legal remedies if the soldier denies paternity or declines to comment.

## V. PARENTAL KIDNAPPING.

A. Army Policy.

1. Soldiers will comply with court orders regarding child custody.

2. The Army will assist the custodial parent regain custody.

a. Provide information regarding the soldier's current and future duty assignment.

b. Take appropriate disciplinary action against soldiers who violate custody decrees.

B. Legal Obligations. AR 608-99, para. 2-9.

1. Soldiers will not knowingly abduct, entice, or take a child from a lawful custodian.

2. Soldiers will not knowingly withhold, detain, or conceal a child from a lawful custodian.

3. "Child" = a relative of the soldier who is unmarried and under 14.

4. "Lawful custodian" = a person granted custody of a child by a court order.

5. The existence of a valid court order authorizing physical custody by the soldier to the exclusion of all others is a defense to this provision.

## VI. REQUESTS FOR ASSISTANCE FROM GOVERNMENT OFFICIALS BASED ON COURT ORDERS.

A. DOD Directive 5525.9 implementation.

1. AR 608-99, Chapter 4.

B. Application.

1. Applies to soldiers, family members residing outside the U.S.

2. Does not apply to DOD or DA civilian employees who are not also family members.

3. Applies to requests for assistance by U.S. Federal, State or local government officials based on court orders regarding financial support, child custody, visitation, paternity and related cases.

C. Procedure to Request Assistance.

1. Federal, State or local government official sends a letter requesting assistance by the Army regarding a soldier or family member residing outside the U.S.

2. Basis for the request.

a. Charged or convicted of a felony arising from financial support, child custody, visitation, paternity or a related case. OR

b. Been held in contempt by a court for failing to obey an order or been ordered to show cause why he should not be held in contempt arising from a case of financial support, child custody, visitation, paternity or a related case.

3. Assistance Requested.

a. The letter requesting must ask for some sort of assistance by the Army regarding the soldier or family member.

b. The assistance requested need not be realistic, warranted or possible to trigger some response under Chapter 4 of AR 608-99.

4. Response Required.

a. Commanders with "close consultation with their servicing SJA" will allow the subject of the request an opportunity to show legitimate cause for noncompliance with the order.

b. Commanders will attempt to resolve the matter without the return of the soldier or family member.

c. If the Commander and court cannot resolve the issue without the return of the soldier or family member the following will occur **if subject of the request is a soldier**:

(1) Underlying charge, conviction, contempt or order to show cause involves removal of a child from the jurisdiction of a court or the custody of the lawful custodian: Company Commander will order the soldier to return to an appropriate port of entry at Government expense, contingent on the party requesting assistance providing transportation (and escort if desired) of the soldier to the jurisdiction of the court.

(a) Ordinarily the commander will give 10 days notice to the requesting government official.

(b) Military escort to the port of debarkation is appropriate if escort to the jurisdiction is provided by the requesting official.

(c) Company Commander must promptly report action under this regulation through command channels to the GCMCA.

(2) Underlying charge, conviction, contempt or order to show cause does not involve removal of a child from jurisdiction or custody of lawful custodian then the Company Commander will forward the matter with recommendations to the GCMCA for action.

(a) The GCMCA may, if appropriate, order the soldier to return at Government expense to the nearest port of entry to the jurisdiction.

d. If the charge, conviction, contempt or order to show cause involves **a family member** the following guidance applies:

(1) The Company Commander of the soldier will forward the request with recommendations to the GCMCA for action.

(2) The GCMCA (or an officer acting on his behalf) will strongly encourage the family member to comply with the court order.

(3) If the family member fails to comply the GCMCA may take appropriate action including:

(a) Withdrawal of command sponsorship.

(b) Adverse action, up to and including removal from the Federal service by a supervisor, if the family member is a DA civilian employee.

(c) Curtailment of the soldier's military assignment outside of the U.S. or denial of a request to extend beyond normal tour length.

(d) Cancellation of orders to another OCONUS assignment.

5. Requesting a Delay or Exception.

(a) The GCMCA may request a delay in taking action under this regulation up to 90 days in order to afford the subject of the request a reasonable opportunity to provide evidence of legal efforts to resist the order or to otherwise show legitimate cause for non-compliance.

(b) The GCMCA must request delay within 30 days of the date the request for assistance is first received in the command.

(c) The request for delay must be forwarded through the Legal Assistance Policy Division in the Pentagon to the Assistant Secretary of Army for Manpower and Reserve Affairs. The Assistant Secretary of Army for Manpower and Reserve Affairs is the approval authority of the delay.

## VII. SUPPORT ENFORCEMENT THROUGH GARNISHMENT.

A. Statutory Basis For Garnishment of Federal Pay: 42 U.S.C. § 659-662; 5 C.F.R. Part 581.

B. What Can Be Garnished?

1. A portion of military compensation.

2. Federal civilian employee compensation.

3. Military and civilian retiree pay.

4. Other forms of "remuneration for employment." See 42 U.S.C. § 662(f).

C. Garnishment of Military Compensation: "Disposable Pay." 5 C.F.R. §§ 581.103 and 581.104.

1. "Disposable pay:" applicable gross pay minus sums owed to the U.S., tax withholdings, fines & forfeitures, government life insurance premiums, and other deductions required by law. 5 C.F.R. § 581.105.

2. Active duty--basic pay and special pay and bonus pay, but not BAQ, BAS, Family Separation Allowance, or Variable Housing Allowance (VHA).

3. Retired or retainer pay (including disability pay received in lieu of longevity retired pay. See 42 U.S.C. § 662(f)(2)).

D. Garnishment For What Purposes?

1. Child support.

2. Alimony (separate maintenance, alimony pendente lite, spousal support; see 42 U.S.C. § 662(c)).

3. Attorney's fees and court costs, IF defined by state law as a component of support AND expressly made a part of the recovery in the garnishment order.

4. Arrearages IF payment is called for by the garnishment order.

E. Procedure.

1. Obtain a garnishment order issued by a state federal court with jurisdiction over the support debtor. The government entity which employs the obligor must be named as the garnishee. 5 C.F.R. § 581.202(a).

2. Serve the garnishment order on the appropriate designated official by certified or registered mail, return receipt requested, together with --

   a. A copy of the underlying support order or the evidence that the garnishment is to enforce a support obligation (5 C.F.R. § 81.202), and

   b. Identifying information regarding the support obligor (5 C.F.R. § 581.203).

3. The Defense Finance and Accounting Service (DFAS) is the "Designated agent" for service of process: The address for all services is:

   Defense Finance & Accounting Service
   Cleveland Center
   P.O. Box 998002
   1240 E. 9th Street
   Cleveland, OH 44199-8002
   (216) 522-5301

[For other federal agencies: see Appendix A of 5 C.F.R. Part 581.]

4. Finance officer sends notice of the garnishment to the debtor not later than 15 days after receipt of the garnishment order.

5. If the garnishment order is "valid on its face" it will be honored by the military finance offices (5 C.F.R. § 581.305; United States v. Morton, 467 U.S. 822, 104 S.Ct. 2769 (1983), rehearing denied 468 U.S. 1226, 105 S.Ct. 27 (1984)) UNLESS...

   a. It is for an impermissible purpose; or

   b. It fails to comply with 5 C.F.R. Part 581; or

   c. The government has been served with an order enjoining or suspending the garnishment order; or

   d. The government has received notice that the obligor is appealing the underlying support obligation and state law calls for suspension of garnishment during appeal.

F. Limitations on Amount to be Garnished.

1. The lesser amount called for by state or federal law.

2. Federal limits: Consumer Credit Protection Act (15 U.S.C. § 1673).

   a. 50% of disposable pay if soldier is supporting family other than those whom the garnishment order pertains to.

   b. 60% of disposable pay if the soldier is not supporting other family members.

   c. Plus additional 5% added to 50% or 60% if the arrearage is for 12 or more weeks.

## VIII. SUPPORT ENFORCEMENT THROUGH STATE WAGE ASSIGNMENT ORDERS.

A. DFAS View

1. Treat like garnishment

2. Same rules as above apply

B. State Court Use

1. Some states require 30 day arrears

2. Some issue automatically upon ordering support

## IX. SUPPORT ENFORCEMENT THROUGH INVOLUNTARY ALLOTMENTS.

A. Background Information.

1. Statutory provision: 42 U.S.C. § 665; regulatory provisions: 32 C.F.R. Part 54.

2. Essentially, a federal wage assignment statute **applicable only to active duty military pay.**

B. Threshold Requirements.

1. An underlying court or administrative order which establishes a support obligation (a "support order");

2. of child support (or spousal support AND child support); AND

3. an arrearage equal to two months' support obligation.

C. Procedures.

1. Notice is sent by an "authorized person" to the military finance center notifying the agency of the arrearage and requesting the initiation of an involuntary allotment.

a. "Authorized person:" any agent or attorney of a state having an approved IV-D plan who has authority to seek recovery of child or child and spousal support; OR any court (or agent of the court) that has authority to issue a child support order against a member. 32 C.F.R. § 54.3(a).

(1) Private attorneys and legal assistance attorneys are **not** "authorized persons."

(2) Legal assistance attorneys may be able to arrange mutual cooperation with state child support enforcement agents.

b. "Notice": need not be a court order. It can simply be a letter sent by an authorized person stating that a support obligation exists and that an arrearage of at least 2 months' support obligation has accrued. The initiation of an allotment is requested, and the writer certifies that he or she is an authorized person as defined by 42 U.S.C. § 665(b).

c. The notice must include specific information identifying the member and a certified (not merely notarized) copy of the underlying support order. See 32 C.F.R. § 54.6(a) (iii) & (v).

d. The notice should state when the allotment should stop (e.g., the date the support obligation stops under state law due to the child's age).

e. If the obligor is more than 12 weeks in arrears, the notice should state this fact. This allows DFAS to withhold more money from the soldier pursuant to the provisions of the CCPA.

f. "Serve" the notice on the same officials as for garnishments. (DFAS Cleveland)

2. Finance center sends notice to the soldier (with copies of materials received from the state) and to the soldier's commander.

3. Commander has the responsibility to get the soldier to a legal assistance attorney for consultation.

4. Commander notifies finance center that soldier has been counseled.

5. Allotment goes into effect--

a. After finance center receives notice that the soldier has consulted with a legal assistance attorney, OR

b. In the next pay period after 30 days elapse from the date of sending notice to soldier, whichever occurs first.

c. Stays in effect until the state says to terminate it; the soldier cannot stop an involuntary allotment.

6. Allotment is payable to the "authorized person" (or agency) or directly to the support obligee, as requested in the notice.

7. Amount of the allotment.

a. The amount of the monthly obligation, plus arrearages IF an order specifically calls for the payment of arrearages through the allotment.

b. Same percentage limitations apply as with garnishment (CCPA limits).

c. Disposable Pay for Involuntary Allotments (32 C.F.R. §54.6(b).

(1) Basic pay, some special pay and bonuses AND

(2) BAQ for all members with dependents, and for members without dependents in the grade of E-7 and above; and

(3) BAS for all officers and warrant officers.

D. Defenses to Involuntary Allotments.

1. Finance Center **may** decline to honor a request if the member provides an affidavit and supporting documentation, within 30 days of notice, showing substantial proof of error, such as

a. The support payments are not delinquent, or

b. The underlying support order has been modified, superseded, or set aside. 32 C.F.R. § 54.6(d)(5).

2. Request for involuntary allotment **may** be returned by the finance center without action if the notice fails to comply with procedures established by 32 C.F.R. § 54.6(a) or if the obligor cannot be identified.

E. Involuntary Allotments and State Wage Assignment Actions Compared.

1. Triggering requirements.

a. Wage assignments: not more than 30 days' arrearage.

b. Involuntary allotments: at least 2 months' support arrearage.

2. Money available.

a. Wage assignments: same as for garnishments.

b. Involuntary allotments: more money may be available because BAQ and BAS entitlements may increase the disposable pay subject to process.

3. Involuntary allotment provision preceded state wage assignments; it is not intended to limit applicability of state wage assignments.

4. Use of the involuntary allotment procedure may still be more advantageous than wage assignments in some cases.

a. Large arrearages: more money is available.

b. Wage assignment may not be available under state law because the original support order was issued before the state wage assignment statute became effective.

## X. SUPPORT ENFORCEMENT THROUGH THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT.

A. Authorizes "division" of disposable retired pay for purposes of child support and/or alimony payments; essential, "wage assignment" of retired pay for support purposes.

B. Requirements for direct payment of child support or alimony.

1. Service on the military finance center (see Garnishment section for addresses)...

2. A final court decree of divorce, dissolution, or legal separation (10 U.S.C. § 1408(a)(2))...

3. Issued by a court of competent jurisdiction (10 U.S.C. § 1408(a)(1))...

4. Which calls for child support or alimony.

C. No arrearage need be established.

D. Limitation on Amount: The total of all "direct payments" under the USFSPA cannot exceed 50% of disposable retired pay.

E. See 32 C.F.R. Part 63 for further guidance on requesting direct payments.

## XI. GARNISHMENT, INVOLUNTARY ALLOTMENTS, AND USFSPA COMPARED.

A. Pay Subject to Process.

1. Garnishment: active duty basic pay plus some bonus pay entitlements; retired pay.

2. Involuntary allotment (IA): active duty basic pay, plus BAQ and BAS in some cases, and most bonus pay entitlements.

3. USFSPA: retired pay, including a portion of disability retired pay. Cf. 10 U.S.C. §§ 1408(a)(4) and 1408(d).

B. Obligation Enforced.

1. Garnishment: Child support and/or spousal support; arrearages; attorneys fees.

2. IA: Child support or child support plus spousal support; arrearages.

3. USFSPA: Child support and/or spousal support.

C. Triggering Events.

1. Garnishment: a garnishment order issued by a state court, in accordance with state law.

2. IA: a letter or court order issued by an "authorized person," plus an underlying support obligation created by an administrative order or court order; plus arrearages equal to 2 months' support obligation.

3. USFSPA: a final decree of divorce, dissolution, or legal separation.

D. Amount Subject to Process.

1. Garnishment: 50% - 65% of applicable pay.

2. IA: 50% - 65% of applicable pay.

3. USFSPA: 50% of disposable retired pay.

## XII. WELFARE REFORM ACT.

A. President Clinton signed the Welfare Reform Act 22 August 1996.

B. MAJOR changes in child support enforcement under Title III of the Act.

1. Establishing Paternity.

a. Voluntary acknowledgments.

(1) Offered in all hospital births.

(2) A signed voluntary acknowledgment of paternity is a legal judgment 60 days later--subject to challenge only for fraud, duress or material mistake of fact.

(3) Health & Human Services will specify minimum requirements for an affidavit of voluntary establishment of paternity.

b. Coordination of acknowledgments with birth records.

(1) A father must establish paternity either voluntarily acknowledging or in a legal process to include his name on the birth certificate.

(2) Birth record agencies must offer voluntary paternity establishment services as well as hospitals.

c. Streamlined legal processes.

(1) Requires a party seeking or opposing paternity to set forth in a sworn statement reasonable facts supporting the existence or nonexistence of requisite sexual contact before genetic testing.

(2) States must pay costs of genetic testing ordered by a State agency with possibility of recoupment.

(3) Directs states to reform evidentiary rules making genetic tests and voluntary acknowledgments of paternity more easily admissible.

(4) Prohibits right to jury trial in paternity cases.

d. Cooperation determinations.

2. Child Support Provisions.

a. General Enforcement Provisions.

(1) License and passport revocation laws.

(2) Denial of other federal benefits to delinquent non-custodial parents.

b. Automation and Location of Delinquent Parents.

(1) Expands the Federal Parent Locator Service.

(a) Federal Case Registry of Child Support Orders.

(b) National Directory of New Hires.

(2) State Registries.

(a) Each state must establish a central state case registry of support orders or modifications.

(b) State Directory of New Hires.

(3) Centralized State Disbursement Units.

c. Uniform Laws.

(1) Adoption of Uniform Interstate Family Support Act.

(2) Full Faith and Credit for Child Support Orders Act strengthened.

(3) Uniform forms developed by Health and Human Services.

C. Enforcement of Support Obligations Directed at Military Members.

a. DOD locator system.

b. New hire registry.

c. Regulations facilitating the granting of leave for support hearings. No SSCRA protection for administrative hearings.

## XIII. CONCLUSION.

# BASIC HOUSING ALLOWANCE II (BAH-II) 2001

| The only rates considered official are in the DFAS computer database and are the ones used for all pay calculations. | | |
|---|---|---|
| **Pay Grade:** | **With Dependent** | **Without Dependent** |
| **O-10** | 1152.60 | 936.60 |
| **O-9** | 1152.60 | 936.60 |
| **O-8** | 1152.60 | 936.60 |
| **O-7** | 1152.60 | 936.60 |
| **O-6** | 1037.70 | 859.20 |
| **O-5** | 1000.50 | 827.40 |
| **O-4** | 881.70 | 766.50 |
| **O-3** | 729.30 | 614.70 |
| **O-2** | 622.80 | 487.50 |
| **O-1** | 557.10 | 410.70 |
| **O-3E** | 783.90 | 663.60 |
| **O-2E** | 707.40 | 564.00 |
| **O-1E** | 653.70 | 485.40 |
| **W-5** | 851.10 | 779.10 |
| **W-4** | 780.30 | 691.80 |
| **W-3** | 715.20 | 581.70 |
| **W-2** | 657.60 | 516.00 |
| **W-1** | 568.80 | 432.60 |
| **E-9** | 748.80 | 568.20 |
| **E-8** | 690.60 | 521.70 |
| **E-7** | 641.10 | 445.50 |
| **E-6** | 592.50 | 403.20 |
| **PAY GRADE:** | WITH DEPENDENT | WITHOUT DEPENDENT |
| **E-5** | 532.80 | 372.00 |
| **E-4** | 462.90 | 323.40 |
| **E-3** | 431.10 | 317.40 |
| **E-2** | 410.70 | 257.70 |
| **E-1** | 410.70 | 230.10 |

# CHAPTER G

# UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA)


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## I. INTRODUCTION.

A. History.

B. Goals.

1. True uniformity in the child support arena.

2. Efficiency in processing and collecting support payments.

## II. SIGNIFICANCE OF UIFSA.

A. Replaced Uniform Reciprocal Enforcement of Support Act (URESA).

1. As of 1 January 1998, all states enacted UIFSA (except New Jersey and Kentucky). However, NJ and KY also apply the UIFSA principles due to Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).

2. URESA v. UIFSA. While repealing URESA and enacting UIFSA, many states still have cases in the system begun under URESA. What statute applies to the particular case depends on state implementation of UIFSA; however, most states determine that the statute in effect at the time of filing the action controls, not the statute in effect upon determination of the case. See: DelToro v. McMullen, 471 S.E. 2d 742 (S.C. 1996) rehearing denied, June 1996.

B. Welfare Reform Act of 1996.

1. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193, 110 Stat. 2105) signed by President Clinton on 22 August 1996 amended the Social Security Act to include a provision requiring states to adopt UIFSA by 1 January 1998. (42 U.S.C. §666 (f)).

2. This provision, along with the Federal Full Faith and Credit for Child Support Orders Act (28 U.S.C. §1738B), guaranteed the demise of URESA as a vehicle for interstate family support enforcement.

## III. KEY DEFINITIONS.

A. **Continuing Exclusive Jurisdiction (CEJ):** A state that has issued a support order and remains the residence of the obligor, individual obligee or child, unless the parties agree in writing for another state to exercise jurisdiction. §205 UIFSA.

B. **State:** Any state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. It includes Indian tribes and foreign jurisdictions that have enacted a law or established similar procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act. §101(19) UIFSA.

C. **Tribunal:** A court, administrative agency, or quasi-judicial entity authorized to establish, enforce or modify support or to determine parentage. §101(22) UIFSA.

D. **Home State:** The state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period. §101(4) UIFSA.

## IV. JURISDICTION.

A. Personal Jurisdiction.

1. Broad long-arm statute.

a. Gives a tribunal personal jurisdiction over non-residents.

b. Applies to proceedings to establish, enforce, or modify a support order or to determine parentage.

2. Long-arm provisions of UIFSA:

a. individual is personally served within the state;

b. consent;

c. individual resided with the child in the state;

d. individual resided in the state and provided prenatal expenses or support for the child;

e. the child resides in the state as a result of the acts or directives of the individual;

f. individual engaged in sexual intercourse in the state and the child may have been conceived by that act;

g. individual asserted parentage in the putative father registry maintained by the state; OR

h. there is any other basis consistent with the constitution of the state and the U.S. to assert personal jurisdiction.

3. Affect: Results in a one-state proceeding even though parties are living in different states.

a. The substantive and procedural rules of the forum state apply.

b. Allows for more complete participation by the nonresident party by allowing for §§316 and 318 of UIFSA to apply. These provisions are special rules of evidence and discovery.

B. Simultaneous Proceedings.

1. One state can only exercise jurisdiction to establish a support order when a proceeding is filed in another state IF:

a. the pleading is filed before expiration of the time allowed to respond in the other state;

b. the contesting party challenges in a timely manner jurisdiction in the other state; AND

c. if relevant, this is the home state of the child.

2. Priority for home state of the child--if no home state then the first to file prevails.

## V. ENFORCEMENT OF SUPPORT.

A. In Rem Jurisdiction.

1. UIFSA does not change where a petitioner can seek **enforcement**.

2. Petitioner can seek enforcement in any state where the obligor derives income or owns property/assets.

3. UIFSA action is limited to the establishment, enforcement or modification of child support. A tribunal acting on a UIFSA action cannot determine collateral matters such as visitation. Chaisson v. Ragsdale, 914 S.W.2d 739 (Arkansas Sup. Ct. 1996): "UIFSA actions are not intended to open for the renewed scrutiny all issues arising out of a foreign divorce. The purpose of UIFSA is support of the child and enforcement of the same."

B. Controlling Order. §207 UIFSA.

1. One support order.

2. Multiple support orders.

a. If 2 or more support orders but only one CEJ, then the CEJ order controls.

b. If 2 or more orders and more than 1 CEJ then the order issued by the child's home state controls.

c. If 2 or more orders and more than 1 CEJ but there is no home state then the most recent order controls.

d. If 2 or more orders, no CEJ then the responding tribunal must issue a new support order (assuming personal jurisdiction over the obligor) then this new order controls.

3. The dollar amount of support contained in a support order has **NO** bearing on the controlling order determination.

C. Controlling Order Determinations.

1. An amendment to §207 of UIFSA allows for a proceeding where a tribunal enters a finding of which of the multiple orders is controlling.

2. Requirements to request such a proceeding:

a. An individual party must reside in the forum state;

b. The party requesting the determination must accompany the written request with a certified copy of every support order in effect.

c. Every party whose rights may be affected by a determination of the controlling order must be given notice of the request.

3. Notice.

a. The determination by a tribunal of a controlling order requires notice to every tribunal that issued or registered an earlier order of child support.

b. Must file certified copy.

c. Must file within 30 days of the determination of a controlling order.

D. Enforcement of Arrears.

1. UIFSA does not affect the calculation of arrears under existing orders.

2. Arrears in child support are judgments entitled to full faith and credit [See Bradley Amendment to Social Security Act 42 U.S.C. §666 a(9)].

## VI. MODIFICATION OF EXISTING SUPPORT ORDERS.

1. Jurisdiction Rules.

a. Only the tribunal with CEJ can modify a support order.

b. Two ways to "take over" jurisdiction to modify:

**EITHER**

(1) No one resides in the issuing state,

(2) A petitioner who is a nonresident of the responding state seeks modification and

(3) The responding state has personal jurisdiction over the respondent.

**OR**

(4) Some person (obligor, obligee, or child) is subject to personal jurisdiction in the responding state, and

(5) All individual parties (obligor and obligee) have filed a written consent in the issuing state for the responding state to modify the order and become the tribunal of CEJ.

2. Modifying the order gives the new state CEJ and thus jurisdiction over future modifications.

3. Applicable Guidelines. New support amount is governed by the law of the registering state.

4. Non-modifiable aspects: Duration of the support.

5. One state modification: If all parties leave the issuing state and reside in the same state now UIFSA §613 empowers the tribunal where both reside to modify the order.

## VII. ENFORCEMENT OPTIONS.

A. Registration.

1. Can use registration for both enforcement and modification.

2. Registration is the primary method of enforcement under UIFSA.

3. Procedure. §602 UIFSA requires that the following be sent to the responding state tribunal to register an order for enforcement:

a. A letter of transmittal requesting registration and enforcement;

b. 2 copies (1 certified) of all orders to be registered;

c. A sworn statement by the party seeking registration showing any arrearages;

d. Name of the obligor and if known:

(1) Address

(2) Social Security Number

(3) Name and address of employer

(4) Description of any property

e. Name and address of obligee and if applicable the agency or person to whom payment will be sent.

4. Choice of Law.

a. The law of the issuing state governs the nature, extent, amount and duration of current payments and arrearages under the order.

b. For arrearages, the longer of the statute of limitations of the issuing or responding state applies.

5. Notice to Obligor. The tribunal must notify the obligor of the enforcement action using the following procedures.

a. Notice by certified or registered mail, or personal service.

b. Provide a copy of the registered order and supporting documents.

c. Give notice of the following effects of registration:

(1) Registered order is enforceable as of the date of registration.

(2) 20 days to contest the validity or enforcement of the order.

(3) Failure to contest is waiver.

(4) Notice of alleged amount of any arrears.

B. Administrative Enforcement. §507 UIFSA.

1. This is an alternative to registering the support order.

2. Procedure: The issuing state or a party or agency sends the documents to the responding state tribunal for registration. Before registering the responding state:

a. Can attempt any authorized administrative procedure to enforce the order.

b. If the obligor contests the order the Child Support Enforcement (CSE) agency of the responding state will register the order pursuant to §609.

C. Automatic Income Withholding. §501 - §506 UIFSA.

1. This provision allows for direct contact with an employer of an obligor without filing a petition or pleading or even registering the order.

2. If an employer receives an out-of-state income withholding order that appears valid on its face, the employer **MUST** honor it subject to the obligor's opportunity to contest the order.

3. Rules on what to withhold: The law of the issuing state controls what and how much the employer must withhold. The law of the state where the employee's principle place of employment controls when withholding occurs (weekly, monthly) and the maximum allowed to be withheld. It also controls what fees the employer can charge to process the withholding.

## VIII. PATERNITY AND UIFSA.

A. §701 of UIFSA allows a tribunal to serve as an initiating or responding tribunal in a proceeding under UIFSA or a similar act, like URESA, to determine paternity.

B. A pure parentage action in the interstate context is allowed under this provision.

C. Although a pure paternity action is allowed, it will more commonly be associated with a §401 petition to establish support also.

## IX. FEDERAL FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT (FFCCSOA).

A. History.

1. 28 U.S.C. §1738B

2. Signed and effective October 20, 1994.

3. Welfare Reform Act of 1996 amends it slightly to make it consistent with UIFSA.

B. Purpose.

1. Requires states to recognize and enforce valid ongoing child support orders.

2. Restricts a state's ability to modify another state's order.

3. Jurisdictional rules consistent with UIFSA.

C. Impact on URESA states.

1. Federal supremacy, it supersedes any state law to the contrary.

2. Practically, however, it depends on which avenue of enforcement the URESA action takes.

3. Impact if use filing a petition route of URESA.

    a. Under this URESA action, the obligee files a petition in their state seeking enforcement of an existing order. This petition is forwarded to the responding state, which usually treats URESA proceedings as de novo hearings. Therefore, the responding state will apply its guidelines and issue a new support order. This leads to two competing orders!

    b. Outcome is unclear--some courts find that the URESA order does not nullify or replace the original order and is therefore not a modification under FFCCSOA.

    c. Most commentators and courts say this is exactly what the FFCCSOA and UIFSA seek to avoid because the reality is the original order will not in most cases ever be enforced by the responding state, only the order issued by the responding state will be enforced.

4. Impact if use the registration route of URESA.

    a. Under this URESA action, the obligee registers the existing order in the responding state and the responding state files the order in a registry of foreign support orders. If there is no objection after notice to the obligor, the order is domesticated and enforced like a local order.

b. Most URESA states allow for these domesticated orders to be modified just like a local order. Under this URESA action, the FFCCSOA would prevent modification absent the special rules set out for modification. Except that some states treat registered URESA orders as domestic orders and say they lose their foreign identity and therefore modification is of a domestic order.

D. Written agreement to give jurisdiction to modify.

1. The FFCCSOA and UIFSA allow the parties to shift jurisdiction from the CEJ upon written agreement.

2. Consent clause is to be read strictly, and clear, written consent to jurisdiction is required. Bednarsh v. Bednarsh, 660 A.2d 575 (N.J. 1995); OCS ex rel Michele Degolier v. Crone, 21 Fam. L. Rptr. 1422 (Vt. 1995).

## X. CONCLUSION.

# CHAPTER H
# DIVORCE TAXATION

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# DIVORCE TAXATION

**Outline of Instruction**

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## II. INTRODUCTION.

## III. FILING STATUS.

A. Single Taxpayers.

1. Defined.

a. Anyone who is not married.

b. Taxpayers are considered unmarried for the whole tax year if either of the following applies: I.R.C. § 7703.

(1) There is a final decree of divorce or separate maintenance by the last day of the tax year. State law will control to determine whether a taxpayer is divorced or legally separated.

(2) There is a decree of annulment, which holds that no valid marriage ever existed.

c. Anyone who is married, but is separated pursuant to a decree of separate maintenance. Taxpayer is considered married for the whole tax year if there is no final decree of divorce or separate maintenance by the last day of the tax year. An interlocutory decree is not a final decree.

(1) According to the Tax Court, an individual is considered legally separated under a decree if the decree "expressly and affirmatively provides that the parties live apart in the future. Capodanno v. Commissioner, 69 T.C. 638 (1978), aff'd, 602 F.2d 64 (3rd Cir. 1978).

(2) A voluntary separation under a voluntary separation agreement does not constitute legal separation for purposes of I.R.C. § 7703(a)(2). See, e.g., Kellner v. Commissioner, 468 F.2d 627 (2d Cir. 1972), aff'g per curiam T.C. Memo 1971-103; Johnson v. Commissioner, T.C. Memo 1980-9.

d. The "Abandoned Spouse Rule." I.R.C. § 7703b. A married but separated spouse who is not "legally separated" within the meaning of I.R.C. § 7703(a)(2) may nevertheless be treated as unmarried under the "abandoned spouse rule." A married individual shall not be treated as married if the taxpayer:

(1) files a separate return from the spouse;

(2) maintains a home that is the principal place of abode of a "qualifying person" (defined later);

(a) A taxpayer maintains a home or household if he or she actually occupies it and it is the principal residence of the "qualifying person" for the period he or she actually lives there. Treas. Reg. § 1.143-1(b)(3); Treas. Reg. § 1.2-2(c)(1).

(b) Temporary absences from the household by the "qualifying person" due to illness, education, business, vacation, military service and visitation with the noncustodial parent will not interrupt the period of occupancy if under circumstances it is reasonable to assume the child will return to the household. Treas. Reg. § 1.2-1(c)(1); Treas. Reg. § 1.143-1(b)(3); Blair v. Commissioner, 63 T.C. 214 (1974).

(3) furnishes over one-half of the cost of maintaining such household during the tax year; **and**

(a) Qualifying "costs of maintaining a household" are expenses incurred for "the mutual benefit of the occupants thereof by reason of its operation as the principal abode of such occupants." Treas. Reg. § 1.2-2(d); Treas. Reg. § 1.143-1(b)(4).

(b) Such expenses include property taxes, mortgage interest, rent, utilities, maintenance and repair expenses, casualty insurance, and food consumed on the premises.

(c) The following expenditures do not constitute the costs of maintaining a household: clothing, education, health, vacations and support costs.

(4) such taxpayer's spouse is not a member of such household during the last six months of the year.

(a) "Not a member of the same household" requires living in separate residences for the last six months of the year of the tax year.

(b) The spouse is considered to live with the taxpayer if he or she was temporarily absent due to special circumstances such as illness, education, business, vacation, and military service.

(c) The Tax Court denied a head of household status to a wife who had moved out of the marital home in August after she was unable to evict her husband. The couple decided to terminate their marriage in June, but because the husband had been unable to find housing, he sometimes slept in her living room. The Tax Court stated that "living apart" requires geographical separation and means living in separate residences. Hopkins v. Commissioner, T.C. Memo 1992-326.

(d) It made no difference where the stay beyond the sixth month period was outside the taxpayer's control. Nemeth v. Commissioner, T.C. Memo. 1982-646.

(e) The taxpayer did not satisfy this requirement where the spouses maintained separate bedrooms and bathrooms. Lyddan v. Commissioner, 721 F.2d 873 (1983).

(f) Taxpayer unsuccessfully argued that he did not live with his wife, even though they resided in the same home, because they were emotionally estranged and did not share the same bedroom. The Tax Court concluded that the notion of "living apart" means "living in separate residences" and requires "geographic separation." Chiosie v. Commissioner, T.C. Memo. 2000-117.

2. Single return (Form 1040, Line 1).

3. Head of Household (Form 1040, Line 4; I.R.C. § 2(b)).

a. Advantages of Head of Household Status:

(1) Tax rates lower for head of household than those filing single.

(2) Standard deduction is higher than is allowed on a single or married filing separate return.

(3) For a married person who lived apart from his or her spouse during the last half of the tax year, qualifying as a head of household allows the use of tax rates that are more favorable than those for married persons filing separately.

(4) May be able to claim credits, such as child care credit (I.R.C. § 21(e)(2))and earned income credit, the taxpayer could not claim on a married filing separate return.

b. To qualify as a head of household, the taxpayer must:

(1) Be a U.S. citizen or resident throughout the year, and

(2) Unmarried or considered unmarried at the close of the year ("Abandoned Spouse Rule"), and

(3) Paid more than half the cost of keeping up (maintaining) a home for the year, and

(4) A qualifying person must have lived with the taxpayer for more than half the year.

(a) The taxpayer must be able to claim an exemption for the qualifying person. However, this test can still be meet if the taxpayer does not claim the exemption only because the noncustodial parent is allowed to claim the exemption for the child (discussed later).

(b) Qualifying person is:

(i) an unmarried child, grandchild, foster child, or adopted child. The child does not have to be the taxpayers dependent.

(ii) any other relative whom the taxpayer can claim as a dependent. A dependent parent does not have to live with the taxpayer.

(c) A parent does not have to have custody of a child to be eligible for head of household filing status. However, the actual time a child spends at a parent's home is used to determine whether the residence constitutes the child's principal residence for over half the tax year.

B. Married Taxpayers.

1. Taxpayer is considered married for tax purposes if married on 31 December. (Unless he qualifies to be treated as "unmarried" –see "Abandoned Spouse" rule).

2. If the taxpayer lives together in a common law marriage that is recognized by the law of the state in which the taxpayer lives, or the state where the marriage began, the taxpayer will be treated as married.

3. If a spouse dies during the tax year, the surviving spouse is treated as married for that entire year and may file a joint return.

4. Filing choices for married taxpayers.

   a. Joint return (Form 1040, Line 2; I.R.C. § 6013).

   b. Married filing separately (Form 1040, Line 3; I.R.C. § 6012).

5. Nonresident alien spouse election. A taxpayer who is a U.S. resident or citizen may file a joint return with a nonresident alien spouse if both agree to be taxed on their world-wide income (see IRS Pub 519).

6. Joint return (I.R.C. § 6013).

   a. The advantage of filing a joint return is that the marginal tax rates applicable are the lowest rates and the standard deduction allowable is the highest.

   b. On a married filing jointly return, both spouses include all income, exemptions, and deductions.

c. Disadvantage to a joint return:

(1) Both spouses are responsible, jointly and individually, for tax and any interest or penalty due on a joint return.

(a) The significance of joint and several liability cannot be overstated. The decision by parties contemplating a divorce to file a joint return must be made in recognition of this fact.

(b) If a deficiency of tax is assessed with respect to a joint return and the taxpayers no longer reside in the same household or are no longer married, upon the written request of either taxpayer, the IRS must disclose whether it has attempted to collect the deficiency from the other taxpayer, the general nature of the collection activities, and the amount collected. I.R.C. § 6013(d)(3).

(2) Exceptions for "Innocent Spouses" I.R.C. § 6015; Injured Spouse, IRC § 6402. See Divorce Taxation Outline.

d. Practical Problems: signing returns and refunds.

7. Not filing a joint return may result in higher taxes.

   a. Married taxpayers cannot claim credit for child and dependent care unless a joint return is filed (I.R.C. § 21(e)(2).

   b. Married taxpayers cannot take earned income credit unless a joint return is filed (I.R.C. § 32(d)).

   c. Married taxpayers cannot claim the Hope Scholarship or the Lifetime Learning credits unless a joint return is filed (I.R.C. § 25A(g)(6)).

   d. Married taxpayers cannot deduct student loan interest unless a joint return is filed (I.R.C. § 221(f)(2)).

   e. Married taxpayers cannot rollover a Traditional IRA to a Roth IRA unless a joint return is filed (IRC § 408A(c)(3)(B)(ii).

   f. Married taxpayers cannot take the credit for adoption expenses in most instances if filing a separate return.

   g. Married taxpayers filing separate returns cannot exclude the interest from qualified savings bonds used for higher education expenses.

   h. Married filing separately will result in the taxpayer being subject to the limit on the child tax credit, itemized deductions, and the phaseout of the deduction for personal exemptions at income levels that are half of those for a joint return.

8. Married filing separately (I.R.C. § 6012).

a. If married individuals do not file a joint return and neither of them qualifies as unmarried under I.R.C. § 7703(b), they must each file a separate return using the married filing separately rates.

b. Each spouse reports own income, exemptions, and credits. Each spouse is responsible only for the tax due on his or her own return.

c. In most instances, filing of separate returns will result in the payment of more combined federal taxes than a joint return because the tax rate is higher for married filing separately.

d. Separate returns may save taxes where filing separately allows the taxpayer to claim more deductions. On separate returns, larger amounts of medical expenses, casualty losses, or miscellaneous deductions may be deductible because lower adjusted gross income floors apply.

e. If one spouse itemizes, both must itemize (not allowed to take the standard deduction if the other spouse itemizes).

(1) A married person filing a separate return cannot claim the standard deduction if their spouse files as head of household and elects to itemize deductions.

(2) However, if a married person filing a separate return itemizes, the other spouse can claim the standard deduction if filing as head of household.

(3) *See*, Significant Service Center Advice, ILM 200030023, Memorandum for Kenneth J. Rubin, Assistant District Counsel Pennsylvania District Counsel, from Lewis J. Fernandez by George Baker, Deputy Assistant Chief Counsel (27 Jun 00). A copy of the memorandum can be found at Tax Notes Today, 2000 TNT 147-42, July 31, 2000.

f. Taxpayers in community property states (i.e., Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, & Wisconsin):

(1) may report one-half of community income on separate returns.

(2) generally report their own income if living apart and file separate returns (I.R.C. § 66a; IRS Pub. 555, Community Property and the Federal Income Tax).

(3) Cannot electronically file a MFS tax return.

C. IRS Individual Income Tax Return Filing Status.

1. Check the appropriate block on Form 1040, Lines 1-5.

2. Married filing separately must specifically list the spouse's name and social security number of the spouse on line 3.

## IV. INNOCENT SPOUSE RELIEF (I.R.C. § 6015)

A. In 1998, new provisions of the Internal Revenue Code were enacted in response to concerns that the former law was not providing proper relief to innocent spouses. Unknowing spouses, often divorced or deserted, found themselves responsible for huge tax deficiencies because of joint and several liability.

B. Expanded innocent spouse relief applies to liabilities for tax arising after 22 July 1998 or before that remains unpaid.

C. In the wake of the 1998 change making it easier to claim innocent spouse relief, the IRS expected 3,000 claims for such status but has actually received more than 79,000 claims (more than 90% from women since the summer of 1998). See *Tax Notes Today*, 2000 TNT 115-4 (Jun. 14, 2000).

1. The majority of innocent spouse claims are filed by unrepresented taxpayers.

2. Currently processing time for the claim is in excess of 300 days.

D. In general, innocent spouse relief is easier to obtain. New provision eliminates all understatement thresholds and requires only that the understatement of tax be attributable to an erroneous item of the other spouse. Previously the understatement of tax had to be more than $500.

E. If innocent spouse relief is granted, the taxpayer can be relieved of responsibility for paying tax, interest, and penalties if the other spouse did something wrong on the tax return. If relieve is granted, the IRS can only collect for those items from the spouse.

F. Three types of relief:

1. Innocent Spouse Relief. I.R.C. § 6015(b).

2. Separation of Liability. I.R.C. § 6015(c).

3. Equitable Relief. I.R.C. § 6015(f).

***G.*** Innocent Spouse Relief (I.R.C. § 6015(b)): In order to qualify for innocent spouse relief, the taxpayer must meet all of the following conditions:

1. The taxpayer filed a joint return which has an understatement of tax due to erroneous items of the spouse.

   a. Erroneous items are either unreported income or incorrect deductions, credits, or property basis.

   b. An understatement of tax is generally the difference between the total amount of tax that should have been shown on your return and the amount of tax that was actually shown on your return.

2. The taxpayer must establish that at the time he/she signed the joint return they did not know, and had no reason to know, that there was an understatement of tax. See, Butler v. Commissioner, 114 T.C. No. 19 (2000).

3. Taking into account all the facts and circumstances, it would be unfair to hold the taxpayer liable for the understatement of tax. A spouse seeking relief is not permitted to "turn a blind eye" to facts that are available to him/her. Charlton v. Commissioner, 114 T.C. 22 (2000). Two indicators the IRS may use to decide that it is unfair to hold a taxpayer responsible for the tax are whether the taxpayer:

   a. Received any significant benefit (directly or indirectly) from the understatement of tax, or

b. Were later divorced from or deserted by the spouse.

H. Relief by Separation of Liability.

1. Provides for a separate liability election for a taxpayer who, at the time of election, is no longer married to, is legally separated from, or has been living apart for at least 12 months from the person with whom the taxpayer filed a joint return. The election limits any deficiency to items allocable to that taxpayer.

2. The taxpayer making the request has the burden of proof in establishing the basis for separating liabilities.

3. Even if the taxpayer meets the requirement for separate liability relief, the request will be considered invalid if:

a. The IRS proves the taxpayer and spouse transferred assets as part of a fraudulent scheme.

b. The IRS proves that at the time the taxpayer signed the joint return they had actual knowledge that any items giving rise to the deficiency and allocable to the spouse were incorrect.

c. There was a transfer of property to the spouse (or former spouse) joint to avoid tax or the payment of tax.

4. Under the relief by separation of liability, the taxpayer allocates (divide) the understatement of tax (plus interest and penalties) on the joint return between the taxpayer and spouse (or former spouse). The understatement of tax allocated to the taxpayer is generally the amount the taxpayer is responsible for.

5. This relief by separation of liability can be requested whether or not the taxpayer requests innocent spouse relief.

I. Equitable Relief: IRS has authority to relieve an individual of liability if relief is not available under the innocent spouse rule or separate liability election, but it would be inequitable to hold the individual liable for any unpaid tax or any deficiency. The IRS can grant equitable relief for responsibility for tax, interest, and penalties. In order to qualify for equitable relief the taxpayer must meet all of the following conditions:

1. Taking into account all the facts and circumstances, it would be unfair to hold the taxpayer liable for the understatement or underpayment of tax.

2. The taxpayer is not eligible for innocent spouse relief.

3. The taxpayer is not eligible for separation of liability.

4. The IRS has issued permanent guidance for individuals seeking equitable innocent spouse relief. Rev. Proc. 2000-15.

5. Tax Court can review the denial of equitable relief. Fernandez v. Commissioner, 114 T.C. 21 (2000); I.R.S. Action on Decision, 2000-06.

J. The IRS is required to inform the other spouse (or former spouse) if a taxpayer request innocent spouse relief or separation of liability, and will allow the spouse (or former spouse) to participate in the determination of the amount of the relief from liability. The "nonelecting spouse" has the right to participate in the administrative and judicial review of a claim for innocent spouse relief. Corson v. Commissioner, 114 T.C. No. 24 (2000).

K. Expanded innocent spouse relief and separate liability election must be elected no later than two years after the date on which the IRS has begun collection activities.

L. Tax Court has jurisdiction with respect to disputes about innocent spouse relief in two situations:

1. If the taxpayer disagrees with the IRS' determination notice telling the taxpayer the extent to which the request for relief has been denied.

2. If the taxpayer does not receive a determination notice from the IRS within six months from the date the Form 8857 was filed.

3. A petition with the U.S. Tax Court in order for it review a request for innocent spouse relief. The petition must be filed no later than 90 days from the date the IRS mails its determination notice to the taxpayer.

M. Innocent spouse relief is requested by filing Form 8857. The IRS will review Form 8857, figure the understatement or underpayment of tax and related interest and penalties, and notify the taxpayer if they qualify for innocent spouse relief.

N. IRS advises taxpayers in abusive situations to note the issue on the top of the Form 8857 by writing "Abused Innocent Spouse" and highlighting it. That will alert the IRS to treat the information on the request for relief as very sensitive. See *Tax Notes Today*, 2000 TNT 115-4 (Jun. 14, 2000).

Table 1. **Three Types of Relief at a Glance**

| Factors | Rules for Innocent Spouse Relief | Rules for Separation of Liability | Rules for Equitable Relief |
|---|---|---|---|
| **Type of Liability** | You must have filed a joint return that has an understatement of tax due to an erroneous item of your spouse. | You must have filed a joint return that has an understatement of tax due, in part, to an item of your spouse. | You must have filed a return that has either an understatement or an underpayment of tax. |
| **Marital Status** | | You must be no longer married, legally separated, or have not lived with your spouse in the same house for an entire year before you file for relief. | |
| **Knowledge** | You must establish that at the time you signed the joint return you did not know, and had no reason to know, that there was an understatement of tax. | If IRS establishes that you actually knew of the item giving rise to the understatement, then you are not entitled to make the election to the extent of the actual knowledge. | |
| **Other Qualifications** | | | You do not qualify for innocent spouse relief or separation of liability. |
| **Unfairness** | It must be unfair to hold you liable for the understatement of tax taking into account all the facts and circumstances. | | It must be unfair to hold you liable for the underpayment or understatement of tax taking into account all the facts and circumstances. |
| **Refunds** | Yes, your request can generate a refund. | No, your request cannot generate a refund. | Yes, for amounts paid between July 22, 1998, and April 15, 1999, and for amounts paid pursuant to an installment agreement after the date the request for relief is made. |

## V. INJURED SPOUSE CLAIM & ALLOCATION

A. In some cases a joint overpayment (refund) is applied to a past-due obligation for child support, spousal support, or a debt owed the federal government (such as student loans). I.R.C. § 6402(c). Also, past due state income tax. I.R.C. § 6402(e)(1).

B. The spouse not liable for the past-due support or nontax debt (the "injured spouse"), can file Form 8379 and the IRS can allocate the refund properly. Treas. Reg. § 301.6402-6(i)(2).

C. A taxpayer can qualify as an "injured spouse" if the following conditions are met:

1. The taxpayer is not required to pay the past-due amount.

2. The taxpayer received and reported income on the joint return (this condition does not apply if main home was in a community property state other than Arizona).

3. The taxpayer made and reported tax payments (such as tax withholding from wages), or claimed the earned income credit or other refundable credit on the joint return.

D. Refunds that involve community property states must be divided according to local law. In community property states in which all community property is subject to the debts of either spouse, the entire refund can be used to pay those debts.

E. The Injured Spouse Claim and Allocation is made on IRS Form 8379.

F. Taxpayers that have not filed a current tax return should attach Form 8379 behind the regular tax return in the order of the attachment sequence and enter "Injured Spouse" in the upper left corner of the return.

G. Taxpayers that have already filed a current year tax return and now wish to file a Form 8379 should mail the Form 8379 by itself to the IRS Center for the place the taxpayer lived when they filed their tax return. The taxpayer needs to include copies of their W-2 forms of both spouses, and any Form 1099-R showing income tax withheld.

H. Part II of the 8379 allows the "injured spouse" to allocate between spouses of items on the joint return. The IRS will compute the amount of any refund due the injured spouse.

*I.* The IRS has made available *Significant Service Center Advice* on how to apply a joint overpayment to separate liabilities. Memorandum, Assistant Chief Counsel (Income Tax and Accounting), Internal Revenue Service, to District Counsel, South Texas District, Austin, subject: Significant Service Center Advice (11 Feb 1998). A copy of the memorandum can be found in WESTLAW, Tax Notes Today, TNT Database, 98 TNT 124-70, June 29, 1998.

## VI. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.

A. General Rule (I.R.C. § 71; Treas. Temp. Reg. § 1.71-1T).

1. Alimony payments are considered gross income to payee.

2. Deductible by the payor as a deduction/adjustment from gross income (I.R.C. § 62(a)(10) and 215(a)). The payor does not have to itemize to be allowed the deduction.

3. Alimony is treated as earned income so the divorced spouse may separately establish an IRA and contribute up to $2,000 per year or amount of alimony if less than $2,000 per year. I.R.C. § 219(b)(4).

B. Requirements for Alimony Tax Treatment (I.R.C. § 71).

1. Payments must be made in cash (I.R.C. §§ 71(b)(1), 215(b)). Debt instruments of the payor or a third party issued to or transferred to the payee are not considered cash payments. Treas. Reg. § 1.71-1T(b), Q&A-5.

2. Payments must be made and received under a qualifying instrument.

a. Includes a decree of divorce or separate maintenance, written separation agreement, or a decree requiring support or maintenance payments to a spouse.

b. The "instrument incident to a decree of divorce" generally describes writings containing marital settlement terms which are referred to but not merged in the divorce decree, including both formal separation agreements and writings which lack characteristics of a contract, such as a letter. In order for an instrument to be considered "incident to divorce," the writing must provide adequate proof of the existence of a contract between the parties and it must memorialize the parties' understanding regarding the payment terms. I.R.C. § 71(b)(2)(A), Brooks v. Commissioner, T.C. Memo. 1983-304.

c. A written separation agreement in divorce practice ordinarily embodies a declaration of separation, the terms of the marital separation, and payment of support and division of marital property.

(1) Neither the Tax Code, nor the Treasury Regulations define "written separation agreement" for alimony purposes. Jacklin v. Commissioner, 79 T.C. 340, 346 (1982); Leventhal v. Commissioner, T.C. Memo. 2000-92; Keegan v. Commissioner, T.C. Memo. 1997-359.

(2) As construed by the IRS and the Tax Court, a separation agreement under I.R.C. § 71(b)(2)(B) need not be legally enforceable so long as it entered "in contemplation of separation status" and entails a meeting of the minds on the payment terms. Bogard v. Commissioner, 59 T.C. 97 (1972); Treas. Reg. § 1.71-1(b)(2)(I); Richardson v. Commissioner, 97-2 U.S.T.C. Para. 50,653 (7th Cir. 1997), (cash payments made pursuant to separation agreement later determined to be unconscionable and therefore unenforceable are taxable alimony to payee spouse regardless of the state court's reason for invalidating the agreement).

d. Payments made merely to comply with a service regulation (e.g., AR 608-99) are not pursuant to a qualifying instrument and are not alimony.

e. If made under a decree of divorce or separate maintenance, the payment must be made after the decree (Treas. Reg. § 1.71-1(b)(1)). If made under a separation agreement, the payment must be made after the execution of that agreement (Treas. Reg. § 1.71-1(b)(2)).

3. The divorce or separation instrument must not designate that the payments will not be includable in the gross income of the recipient (see example provision, Appendix C, clause 2).

a. A taxpayer and spouse may designate that otherwise qualifying payments are not alimony. This is done by including a provision in the divorce or separation instrument that states the payments are not deductible by the taxpayer and are excludable from the spouse's income.

b. However, if a divorce or separation instrument designates a payment that would otherwise qualify as alimony as not to be treated as alimony (e.g., as a property settlement), the payment will not qualify as alimony. I.R.C. § 71(b)(1)(B).

c. A taxpayer was divorced in Virginia and part of the settlement required him to provide his ex-spouse with 37.5% of his military retirement. Both parties were denied spousal support. Husband separated from the U.S. Navy and received a lump sum separation payment in lieu of retirement benefits. The ex-spouse petitioned a court in Illinois, where the husband resided to enforce the Virginia order. The IRS determined the payment was not an alimony payment and the husband could not deduct the payment. Generally, alimony is deductible to the extent the alimony is includable in the former spouse's gross income. However, both the Virginia decree and the Illinois order clearly contemplated that this payment was not to be alimony since neither party was to receive spousal support and the payment was to be a non-taxable event. Maloney v. Commissioner, T.C. Memo 2000-214, 2000 Tax Ct. Memo LEXIS 255.

4. There must be no requirement that payments continue beyond the death of the payee spouse (e.g., to the estate) or that any substitute payment is made after the death of the payee spouse (I.R.C. § 71(b)(1)(D)).

a. Payments must end at death of the payee spouse. This requirement is to discourage classification of large cash settlements in payment for marital property as deductible alimony.

(1) Settlement agreement provided that taxpayer would pay certain sum for 142 payments without regard to death of payee spouse. Court looked to state law which did not help. Liability to make payments must terminate at the death of the payee spouse in order for such payments to be alimony. If a payor spouse continues to be liable to make even one otherwise qualifying payment after the death of the payee spouse, none of the related payments required before the payee spouse's death will be alimony. Cunningham v. Commissioner, T.C. Memo. 1994-474, 68 T.C.M. (CCH) 801 (1994) (Treas. Reg. § 1.71-1T(b), Q & A-13.

(2) Will not be considered alimony if the payments do not meet the requirement of I.R.C. § 71(b)(1)(D), that the payments not extend beyond the death of the payee spouse. Stokes v. Commissioner, T.C. Memo. 1994-456, 68 T.C.M. (CCH) 705 (1994).

b. To make sure of alimony treatment, the divorce or separation instrument should specify that otherwise qualifying payments will cease at the death of the recipient.

c. While alimony payments must terminate at the death of the payee, I.R.C. § 71(b) does not require that payments terminate at the death of the payor. If the payor's estate is required to continue alimony payments after the payor's death, the estate is not entitled to an alimony deduction for the payment. However, under I.R.C. § 682(b), such payments are treated as distributions to an estate beneficiary subject to the normal estate distribution rules. If the estate has distributable net income, the estate can take a deduction for the distribution and the payment is included in the payee's income as a distribution from the estate.

5. Payments must not be made during a tax year for which the payor and payee file a joint return. I.R.C. § 71(e).

6. Payments must not be to a member of the same household after a decree of divorce or separate maintenance has been issued or it will not be treated as alimony (I.R.C. § 71(b)(1)(C)). However, if spouses are not legally separated, a payment under a written separation agreement or temporary support order may be alimony even if they are members of the same household (Treas. Reg. § 1.71-1T(b), Q&A-9); Benham v. Commissioner, T.C. Memo. 2000-165 (May 22, 2000).

a. Spouses will not be treated as members of the same household if one spouse is preparing to leave it, and does leave within one month after the payment.

b. Coltman v. Commissioner, 980 F.2d 1134 (7th Cir. 1992), aff'd 61 T.C.M. 2207 (CCH) (1991), court applied Treas. Reg. § 1.71-1(b)(3)(i) and held that husband who used suburban marital home as part-time way station between his business and his real residence in another city, where he lived with "significant other" for most of the week, was not entitled to "alimony" deduction for payments to the former wife.

C. Payments may be made to a third party if spouse consents or instrument specifically calls for the third-party payment. I.R.C. 71(b)(1)(A). These can include payments for spouse's living expenses, food, clothing, insurance, medical expenses, housing costs, taxes, tuition, vacations, etc. The payments are treated as received by the spouse and then paid to the third party. Temp. Treas. Reg. § 1.71-1T(b); Priv. Ltr. Rul. 87-10-089.

1. Payments to third parties encompass payments to third parties made pursuant to a written request, consent or ratification of the payee. The qualifying instrument or writing must declare the parties' intent that the payment be treated as alimony subject to the rules of I.R.C. § 71 and must be received by the payor spouse prior to the date of filing his or her income tax return for the taxable year in which the payment is made. Treas. Reg. § 1.71-1T(b), Q&A-7.

2. However, payments made to maintain property owned by the payor spouse but used by the payee spouse (including mortgage payments, realty taxes, and insurance premiums) are not payments on behalf of the payee spouse (i.e., not alimony) even if made under the terms of the divorce or separation instrument. Treas. Reg. § 1.71-1T(b).

3. A payor spouse who is required by the divorce or separation instrument to pay the mortgage on a home he owns jointly with the payee spouse may deduct one-half of those payments as alimony, if they otherwise qualify (the rest may be deductible as qualified residence interest if paid on a qualified home).

4. The Tax Court has held that a man may deduct as alimony one-half of the housing payments he made "on behalf of" his wife, finding that letters qualified as a written separation agreement. Leventhal v. Commissioner, T.C. Memo. 2000-92 (2000).

5. Be careful of disguising child support as alimony. Payments which are for specific expenses of children as they arise may be considered child support and not alimony. Preston v. Commissioner, 2000 U.S. App. LEXIS 7190 (April 20, 2000).

D. Premiums a taxpayer must pay under a divorce or separation instrument for life insurance on their life qualify as alimony to the extent the spouse owns the policy. Temp. Treas. Reg. § 1.71-1T(b).

E. Compliance Provisions.

1. Recipient must furnish taxpayer ID number to payor. I.R.C. § 215(c).

2. Payor must include recipient's number on return. I.R.C. § 215(c).

3. Separation agreements should include parties' social security numbers (see sample provision, Appendix C, clause 3).

F. Making Property Settlement Transfers as Alimony.

1. Alimony payments no longer need to be made in satisfaction of an obligation to support. The payments do not have to be periodic, or in discharge of a legal support obligation arising out of the marital or family relationship (Treas. Reg. § 1.71-1T(a)).

2. Rules limiting treatment of property transfers as alimony.

a. Alimony payments must be made in cash.

b. Recapture rules (effective for decrees after 1986) (I.R.C. § 71(f)(2)).

(1) If total alimony payments in year one exceed the average annual payments made in years two and three by more than $15,000, the excess is recaptured in the payor's gross income in the third year.

(2) If payments in the second year exceed payments in the third year by more than $15,000, the excess is recaptured in the payor's gross income in the third year.

(3) The recapture rules do not apply:

(a) if payments in three post-separation years are under $15,000 per year,

(b) if the reason for the reduction is the death or remarriage of the payee spouse, or

(c) if payments change because they are based on a fixed portion of the income from a business or property or from compensation from self-employment (I.R.C. § 71(f)(2)).

(4) Example - see Appendix D.

## VII. CHILD SUPPORT PAYMENTS (I.R.C. § 71(C); TEMP. TREAS. REG. § 1.71-1T).

A. General Rule.

1. Payments specified in a divorce decree or separation agreement as child support are **not** includable in gross income.

2. Child support payments are **not** deductible by payor.

B. Unallocated Family Support.

1. If the amount of child support is not specified in the instrument, the amount to be decreased upon a contingency relating to a child will be treated as child support. Reverses rule of Commissioner v. Lester, 366 U.S. 299 (1961). Contingencies relating to a child include reaching the age of majority, marriage, death, earning specified income level, gaining employment, and leaving the home of custodial parent.

**Example**: Separation agreement provides that H shall pay $500 per month for family support (unallocated). This amount shall be reduced by $50 per week per year when H has uninterrupted visitation with the child. Amount of the reduction ($50 is treated as fixed for child support. Total of $2,600 ($50 X 52 weeks) does not qualify as alimony (Priv. Ltr. Rul. 8746085).

2. Payments to be reduced at a time that can be "closely associated" with such a contingency will also be treated as child support.

   a. Where payments are reduced not more than six months before or after the child is to attain the age of 18, or 21, or the local age of majority.

   b. Where the payments are reduced on two or more occasions before or after a different child attains a certain age between the ages of 18 and 24, inclusive.

**Example**: Divorce decree grants a 30-year-old ex-wife custody of her 10-year-old son. Decree provides for unallocated support in amount of $500 per month to be reduced to $200.00 when ex-wife attains age of 38. A total of $300.00 will be treated as "fixed" child support.

3. Effective for decrees executed after 31 December 1984.

4. Cases.

   a. Preston v. Commissioner, 2000 U.S. App. LEXIS 7190; 13 Fla. Law W. Fed. C 603 (2000)(payments made by taxpayer to his former spouse and others for his children's expenses were not deductible as alimony and these payments were child support and nondeductible).

   b. Bay v. Commissioner, T.C. Memo. 1994-389, 68 T.C.M. (CCH) 396 (1994) (unallocated family support and spousal maintenance payments originally structured (and treated as alimony) were transformed on ex-wife's remarriage into child support payments and were no longer deductible as alimony).

   c. Fosberg v. Commissioner, T.C. Memo. 1992-713, 64 T.C.M. (CCH) 1527 (1992) (payments to a former spouse that were to be discontinued upon the earliest of the taxpayer's death, the taxpayer's remarriage, or the youngest child reaching age 18 were not alimony).

C. Priority Rule (§ 71(c)). If all support payments (alimony and child support) are not made, the payments that were made will be treated as child support first.

## VIII. EXEMPTIONS (FORM 1040, LINES 6a-d; 38).

A. Each personal exemption claimed on the 2000 tax return is the equivalent of a $2,800 deduction.

B. Personal Exemption (See generally IRS Pub. 501, Exemptions, Standard Deduction, and Filing Information).

1. A personal exemption may be claimed only if another taxpayer is not entitled to claim the person (I.R.C. §151(c)(2)).

2. Benefit of personal exemption is phased out for taxpayers with high incomes.

C. Exemption for Spouse (I.R.C. § 151(b)).

1. Automatic on a joint return. These exemptions are allowed whether or not a spouse has gross income or is a dependent of another taxpayer (though the other taxpayer will be denied an exemption) (Treas. Reg. § 1.151-1(b)).

2. On a separate return, the taxpayer may claim an exemption for a spouse only if the spouse has no gross income, and is not the dependent of another (I.R.C. § 151(b)).

3. If the spouse is a nonresident alien, has no income from U.S. sources, and is not a dependent of another person, the taxpayer may claim an exemption for the spouse on a separate return.

D. Exemption(s) for Dependents (I.R.C. § 151(e)).

1. An exemption is allowed for each person who qualifies as a dependent.

2. Children must have social security numbers.

3. Test for determining who is a dependent.

a. Member of household or relationship test (I.R.C. § 152(a)).

(1) Must be a child, stepchild, adopted child, foster child, brother, sister, parent, grandparent, or other qualified relative, or

(2) Must have lived with the taxpayer for entire year (Treas. Reg. § 1.152-1(b)).

b. Citizenship test (I.R.C. § 152(b)(3); Treas. Reg. 1.152-2(a)).

(1) Must be citizen or national of U.S. or

(2) Resident or national of U.S., Canada or Mexico.

(3) A resident alien can claim personal exemptions and dependency exemptions under the same rules as U.S. citizens. But no joint return can be made if either the husband or wife is a nonresident at any time during the tax year, unless the nonresident alien spouse elects to file a joint return and be treated as a resident for tax purposes. (I.R.C. § 6013(g); Treas. Reg. § 1.6013-1(b)).

c. Joint Return Test. Taxpayer may not claim exemption for a dependent who files joint return with another (I.R.C. § 151(e)(2)).

d. Gross income test (I.R.C. § 151(e)(1)).

(1) Dependent must have earned less than personal exemption amount ($2,800 for 2000).

(2) Gross income test **does not apply** to a child of a taxpayer who is either under age 19 or a full-time student and under age 24 (I.R.C. § 151(c)(1)(B)).

(a) To qualify as a student, the child must, during some part of each of at least five calendar months, whether or not consecutive, during the calendar year in which the taxpayer's year begins, be a full-time student enrolled at an educational institution, or must pursue a full-time course of institutional on-farm training (I.R.C. § 151(c)(4); Treas. Reg. § 1.151-3(b)).

(b) An individual was entitled to claim a dependency exemption for his daughter who was a full-time university student. Although the daughter attended classes for only four months of the calendar year at issue, she was registered with the university for five months. The ordinary meaning of enrollment is registered and is not dependent on attendance. The intent of the regulation is that a student will qualify as full-time if registered for a semester in full-time course of study. Priv. Ltr. Rul. 98-38-027 (Sept. 21, 1998).

(c) A child who attends school exclusively at night is not a full-time student (Treas. Reg. § 1.151-3(b)).

e. Support test (I.R.C. § 152(a)).

(1) Taxpayer must have provided over one-half person's support.

(2) Requires taxpayer to determine total amount of support furnished from all sources and the support furnished by the taxpayer.

(3) In order to be entitled to the dependency exemption, the taxpayer must prove he provided over one-half of the child's support. Batson v. Commissioner, T.C. Memo. 2000-172 (2000).

E. Exemptions for Children of Divorced or Separated Taxpayers (IRC § 152(E)).

1. General Rule.

a. The custodial parent is generally entitled to the exemption.

b. Custody is usually determined by the most recent decree of divorce or separate maintenance. If there is no decree, then pursuant to a separation agreement.

c. If neither a decree nor an agreement establishes custody, then the parent who had physical custody of the child for the greater part of the year is considered the custodial parent.

(1) Under this special rule the parent who had custody of the child for the greater part of the year, the "custodial parent," is generally treated as the parent who provided more than half the child's support.

(2) Focus on counting number of days of custody and not on amount of support provided.

d. The identity of the custodial parent is not always clear, particularly where the divorce instrument provides that the divorced parents have shared 50-50 physical custody of the child.

e. Practice Note: If a settlement agreement will provide for 50-50 shared custody and for alternating dependency exemption and dependent care credit between the parents from year to year, the agreement should identify which parent is the custodial parent for tax purposes.

2. Basic Requirements. I.R.C. § 152(e).

a. Child must receive over half total support from both parents.

b. Parents must be divorced or separated pursuant to written agreement or decree or have lived apart for last 6 months of calendar year.

c. Child must be in custody of one of the parents for more than one-half of the year (see Rownd v. Commissioner, T.C.Memo. 1994-465, 68 T.C.M. (CCH) 738 (1994) (After child reaches majority, regular 5-part dependency test "reapplies"--especially where one parent provides college financial support; dependency exemption then goes according to normal rules)).

3. Exceptions to General Rule (IRC § 152(e)(2)).

a. Custodial parent waives right to claim the exemption.

(1) Waiver can be permanent or annual.

(2) Noncustodial parent must attach the waiver to his tax return when claiming the exemption (each year) (IRS Form 8332).

(3) Can an IRS Form 8332 be nullified?

(a) This question is not answered on the form itself, any IRS publications, and the IRS has not published procedures for revoking the release.

(b) The only way a custodial parent can void a Form 8332 and claim the child on his or her return, is to get the noncustodial parent to forego claiming that child as a dependent. If the two former spouses cannot agree and both claim the same child, then the IRS will step in and audit the returns. I.R.S. Legal Memo. 2000-07-031.

(4) The Tax Court upheld the IRS in disallowing a noncustodial parent's claimed dependency exemption where he merely attached to his return a letter signed by his former wife which tracked the language of the divorce decree providing that the husband would be entitled to claim the children as dependents and that the wife would be required to sign any documents necessary to enable the husband to do so. The letter failed to state that the wife would not claim the children as dependents and lacked the other specific items of information required by the Code, Regulations, and Form 8332. White v. Commissioner, T.C. Memo 1996-438.

(5) Under a divorce decree, the wife had sole custody of children, but the husband was provided the children on his tax return as exemptions. The husband claimed the children on his tax return, but did not attach a copy of Form 8332. Instead the husband attached a copy of a portion of the divorce decree to the return. The IRS disallowed the claimed dependency exemption by the husband. The wife did not claim the children on her return, but several years later contended she is entitled to the exemptions. The Tax Court held the husband was not entitled to claim the child as dependency exemptions because he failed to satisfy the requirement that the noncustodial parent attach a declaration signed by the custodial parent confirming that she would not claim the children. The Tax Court held the custodial parent was entitled to the exemptions. Miller v. Commissioner, 114 T.C. 13 (2000).

(6) Practice Note:

(a) The custodial parent should insist on any releases to the exemption being conditional on child support payment being current.

(b) The noncustodial parent should insist on unconditional releases to avoid litigation in the event the custodial parent refuses to sign a release without cause.

(c) The Form 8332 does not contain a cancellation date. The custodial parent need only sign the form once, but the noncustodial parent must attach it to his or her return every year.

b. A multiple support agreement (IRC § 152(c); IRS Form 2120, Multiple Support Declaration).

(1) If two or more people together pay over half of the support of a child or other individual, but no one person alone pays more than half, one of the payors may be treated as having provided over half the support and may claim the supportee as s dependent if:

(a) The taxpayer paid over 10% of the total support;

(b) If not for the support test, the taxpayer could claim the dependency exemption with respect to the supportee; and

(c) The claimant attaches to his or her tax return an IRS Form 2120 signed by every other person who meets the previous two requirements.

(2) Form 2120 states that the person who signs it will not claim the dependency exemption for that year.

c. The noncustodial parent is entitled to claim the child pursuant to a pre-1985 decree or agreement and provides over $600 support for the child.

F. Significance of Claiming Dependency Exemption.

1. Either parent may claim a deduction for medical expenses paid for a child regardless of who claims the child as a dependency exemption (IRC §§ 213(d)(5) and 152(e)(6)).

2. Custodial parent waiving exemption may also claim earned income credit (IRC § 32).

3. Only the custodial parent may claim childcare credit even if the right to claim the child as a dependent is waived (IRC § 21).

   a. The Code section does not allow the custodial parent to release the childcare credit to the noncustodial parent.

   b. Divorced or legally separated parents who seek to claim the childcare credit for an under 13 year-old child must meet the custody test. That is where the child receives more than half of his support during the year from his parents, and is in custody of one or both of the parents for more than half of the calendar year. That parent need not be able to claim the child as a dependent and may even have released the dependency exemption to the other parent. I.R.C. § 21(e)(5).

4. Child tax credit.

   a. Beginning in 1998 there was a child tax credit of $400 and it increased to $500 for 1999 (still $500 in 2000).

b. The parent that is "allowed a deduction" with respect to such child will be entitled to the credit. Must be allowed to claim a dependency exemption for a child in order to take child tax credit (IRC § 24(c)(1)(A))

(1) In order to claim the child tax credit, the parent must claim the child as a dependency exemption. The parent claiming the child tax credit must list the child as a dependency exemption on the tax form and include the qualifying child's name and social security number.

(2) If the custodial parent waives the dependency exemption, the noncustodial parent gets both the exemption and the child tax credit.

5. Hope or Lifetime Learning Scholarship credits (IRC § 25A).

a. Must be allowed to claim a dependency exemption for a child in order to take the Hope or Lifetime Learning Scholarship credits (IRC § 25A(f)(1)(A)(iii)).

b. If a child who is claimed as a dependent by another taxpayer incurs qualified tuition and related expenses, the taxpayer, not the child, is deemed to have paid such expense for purposes of both the Hope and Lifetime Learning Credits.

c. Married taxpayers incurring qualified expenses must file a joint income tax return in order to claim the educational tax credits. No credit under I.R.C. § 25A is allowed for married taxpayers filing separate returns. In order to claim the credit, the taxpayer must include the student's name and social security number on his or her return.

G. Planning Strategy for Dependency Exemption.

1. Which spouse will take the dependency exemption(s) and therefore be allowed the child tax credit and / or educational credits?

2. Analyze the true comparative tax savings of dependency exemptions and the child tax credit **per child** (for 2000):

   a. 15% tax bracket: Federal taxes saved from dependency exemption ($2,800) equals $420 plus the child tax credit of $500 equals total tax savings of $920.

   b. 28% tax bracket: Federal taxes saved from dependency exemption ($2,800) equals $784 plus the child tax credit of $500 equals total tax savings of $1,284.

   c. 31% tax bracket: Federal taxes saved from dependency exemption ($2,800) equals $868 plus the child tax credit of $0 (due to phaseout) equals total tax savings of $868.

3. Many custody arrangements today are for shared or joint custody of the child where each parent has physical custody for 50% of the time. This situation should be addressed in the divorce instrument by stating who is or how the custodial parent will be determined on a year-to-year basis.

4. If the support test in the case of a child of divorced parents applies (I.R.C. § 152(e)), parents can decide between themselves who will take the dependency exemption with respect to their child. While neither the Code nor the Regulations expressly say so, presumably the transfer of the deduction can be made on an ad hoc basis each and every year. Where the custodial and noncustodial parents are in different income tax brackets, the deduction is more valuable tot he higher bracket parent.

5. On a joint return, the married couple can claim exemptions for all persons who are dependents of either or both spouses. On a separate return, a spouse can claim exemptions only for his or her own dependents.

6. If a husband and wife in a community property state file separate returns they can divide the total of their exemptions for dependents between them, but they cannot divide between them any exemption for any one dependent.

H. On a joint return, the married couple can claim exemptions for all persons who are dependents of either or both spouses. On a separate return, a spouse can claim exemptions only for his or her own dependents.

I. If a husband and wife in a community property state file separate returns they can divide the total of their exemptions for dependents between them, but they can not divide between them any exemption for any one dependent.

J. IRS Individual Income Tax Return Exemptions.

1. Check the appropriate block for "Yourself" and "Spouse" if applicable (line 6a and 6b).

2. On line 6c, the taxpayer must specifically list each dependent.

3. Form preparation points to remember:

a. On line 6c the taxpayer must specifically list each dependent to include:

(1) The first and last name.

(2) Each dependents social security number (I.R.C. § 151(e)).

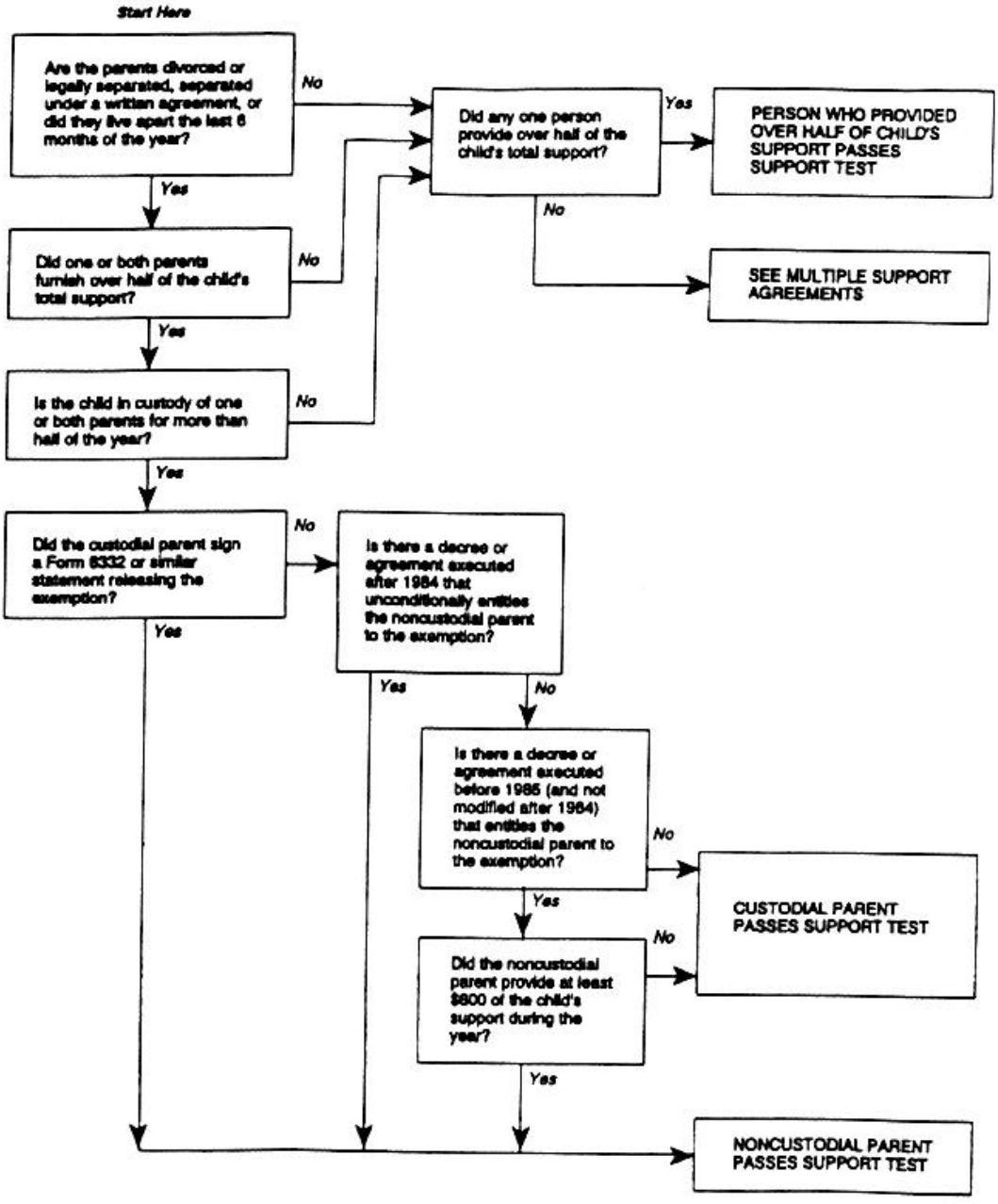
(3) The dependent's relationship to the taxpayer.

(4) A check to indicate if the taxpayer is the child to qualify for the child tax credit.

b. On line 6d add the total number of dependents being claimed (including spouse and self).

4. Multiply the total number of dependents claimed on line 6d times $2,800 and place the total amount on line 38 (back of Form 1040).

## SUPPORT TEST FOR CHILDREN OF DIVORCED OR SEPARATED PARENTS



## IX. AMENDING WITHHOLDING CERTIFICATE.

A. A taxpayer must amend his Form W-4, reducing the number of allowances, within ten days:

1. When the spouse he has been claiming is divorced or legally separated from him, or claims her own allowance on a separate W-4;

2. When he loses the right to an exemption for a claimed dependent;

3. When he loses the right to the number of withholding allowances he has claimed. I.R.C. § 3402(f)(2)(B); Treas. Reg. § 31.3402(f)(2)-1(b).

B. The employer must give effect to an amended W-4 no later than the beginning of the first payroll period ending on or after the 30th day after the day the amended W-4 is furnished. I.R.C. § 3402(f)(3)(B)(i).

## X. PROPERTY TRANSFERS BETWEEN SPOUSES AND FORMER SPOUSES (I.R.C. § 1041; TEMP. TREAS. REG. § 1.1041-1T).

A. General Rule.

1. Transfers of property and payments between divorcing spouses made pursuant to a written settlement agreement in settlement of marital and property rights or for support of issue of the marriage during minority will be deemed made for adequate consideration and therefore not a gift under I.R.C. § 2512(b) if the parties divorce within the three-year period beginning one year before execution of the agreement. I.R.C. § 2516; Treas. Reg. § 25.2516-1; Treas. Reg. § 25.2516-2.

2. Transfers between spouses or between former spouses, if incident to divorce, will be treated as gifts for tax purposes (I.R.C. § 1041).

   a. The transfer is treated as acquiring the property by gift and the transferee's basis in the property received is the adjusted basis that the transferor had in the property. I.R.C. § 1041(b).

   b. This rule applies even where the transaction is a sale between the spouses or where the transferee-spouse pays a sum of money to the transferor-spouse (as required under the divorce settlement) for the transfer of title to the property to the transferee spouse. Treas. Reg. § 1.1041-1T(a), Q&A-2.

   c. The carryover basis rule applies whether the adjusted basis of the transferred property is less than, equal to, or greater than the fair market value at the time of transfer and applies for purposes of determining loss as well as gain, upon later sale by the transferee. Treas. Reg. § 1.1041-1T(d), Q&A-11. However, there are exceptions that apply to certain transfers in trust (where liabilities assumed by the trust exceed the transferor's adjusted basis) and to transfers of installment obligations into a trust. I.R.C. § 1041(e) and § 453B(g).

   d. The transferor must, at the time of the transfer, give the transferee records sufficient to determine the adjusted basis and holding period of the property at the date of the transfer. Treas. Reg. § 1.1041-1T(e), Q&A-14.

3. Result--no tax on transfer because no recognition of gain or loss; transferor's basis carries over to transferee. Under the tax-free exchange rules, recipient spouse may incur tax liability on a later sale because his/her basis in the property is the same as the transferor-spouse's basis.

**Example**: In a property settlement accompanying a divorce, H plans to give W $15,000 worth of stock that H bought for $5,000. If W later sells the stock for more than $5,000, W bears the tax burden for the profit above H's basis. W should bear this in mind in arriving at the settlement.

4. Rule applies not only to transfers for release of marital rights, but also for transfers in exchange for property, liabilities, or other considerations.

**Example**: Godlewski v. Commissioner, 90 T.C. 200 (1988). H and W purchased home jointly for $32,200 in 1973. Property settlement agreement provided that W would convey her interest in home to husband for $18,000. After paying W, H sold home to third party for $64,000 in 1984. IRS used original basis ($32,200) to figure gain. H contended that he was entitled to increase his basis to $50,200 (original $32,200 + $18,000 he paid to buy W out). Tax Court disagreed--I.R.C. § 1041(b)(2) and Temp. Treas. Reg. § 1.1041-1T(d)A-11 preclude transferee spouse from increasing basis even in a bona fide sale when I.R.C. § 1041 applies. H owed tax on entire gain ($64,000 - $32,200).

5. Parties should transfer appropriate records to establish the basis of property involved in marital property transfers (see Appendix F for sample clauses mandating cooperation between the parties on marital property transfers).

B. Qualifying Transfers.

1. All transfers between current spouses.

2. Transfers between former spouses related to the cessation of the marriage.

a. Made pursuant to decree or divorce instrument and within six years of divorce (Temp. Treas. Reg. § 1.1041-1T(b) Q and A7; Priv. Ltr. Rul. 9306015 (Nov 13, 1992) (Transfer by taxpayer's former husband more than six years after end of marriage was not transfer incident to divorce under I.R.C. § 1041)), or

b. Made within one year from date of divorce. I.R.C. § 1041(c)(1).

3. Exception: transfers to a nonresident alien spouse are taxed (I.R.C. § 1041(d)).

C. Military Retired Pay:

1. Military retired pay received remains includable in income even after state court classifies it as property of both retiree and his former spouse. The Uniformed Services Former Spouses' Protection Act permits courts of competent jurisdiction to treat "disposable retired pay" payable to a member or former member as property of the member and his spouse (or former spouse) in accordance with the law of the jurisdiction of the court. However, for purposes of federal income taxation laws the state court order does not change the legal status of the retired pay from income subject to the income taxation to property subject only to the law of property. Priv. Ltr. Rul. 98-42-034 (Oct. 16, 1998).

2. Wife had taxable income on the amounts she received from her ex-husband's military retirement pay even though she received the payments under a property settlement. The payments were taxable because pensions are includable in gross income (I.R.C. § 61) and because the spouse had a property interest in her ex-husband's military retirement pension. Mess. v. Commissioner, T.C. Memo. 2000-37 (2000).

3. Under a property settlement agreement, wife was to receive fifty percent of her husband's monthly military retirement pay as a "property settlement." After the wife began to receive the payments, the husband deducted the amounts as alimony payments, and the wife did not report the monthly payments on her tax return. The Tax Court held that the payments the wife received were in fact alimony and includable in gross income. Labeling the payments as a "property settlement," without more, is not an explicit direction that the payments are not includable as gross income. The Tax Court noted that the provisions of the divorce decree and property settlement agreement did not specifically address the tax consequences of the payments, and a commonsense reading of the documents did not establish a nonalimony designation. Baker v. Commissioner, T.C. Memo. 2000-164.

4. See Appendix J for division of military retirement pay tax information.

D. Practical Considerations.

1. All other things being equal, the party in the lower tax bracket should be assigned assets with the greatest amount of unrealized gain. The value of appreciated property should be discounted by the amount of future tax liability.

2. Assets on which a loss will be recognized on sale should be assigned to the spouse in the higher income tax bracket.

3. If marital asset is family home, consider the impact of the transfer on eligibility to exclude the gain under I.R.C. § 121.

## XI. LEGAL FEES IN OBTAINING A DIVORCE.

A. General Rule. A taxpayer generally cannot deduct attorney fees incurred in connection with a divorce action. I.R.C. § 262, Treas. Reg. § 1.262-1(b)(7), (see United States v. Patrick, 372 U.S. 53 (1986); Gilmore v. United States, 290 F.2d 942 (Ct. Cl. 1961).

B. Exceptions.

1. The portion of attorney's fees allocable to consultation and advice on tax matters is deductible (I.R.C. § 212(3)).

a. Allocation of fees in billing statement required. Hall v. United States, 78-1 U.S. T.C. (CCH T 9126 (Ct. Cl. 1978); Carpenter v. United States, 338 F.2d 366 (Ct. Cl. 1964) (court permitted deduction of 70% of attorneys fees as allocable to tax matters).

b. Can include fees paid to appraisers, actuaries, and accountants for services in determining correct tax or in helping to get alimony.

c. Fees paid to a *spouse's* attorney for tax advice are not deductible. United States v. Davis, 370 U.S. 65 (1962).

d. Taxpayer paying attorney fees for soon-to-be-ex-spouse may increase "alimony" to include ex's attorney fees and obtain increased "alimony" tax benefit.

2. A taxpayer may deduct attorney fees connected with the quest for obtaining taxable income such as alimony (see I.R.C. § 212(1); Treas. Reg. § 1.262-1(b)(7); Wild v. Commissioner, 42 T.C. 706 (1964), acq.1967-2 C.B. 4).

a. Legal fees to collect past due amounts.

b. Seeking increases in alimony.

c. Working out an agreement for alimony.

3. A taxpayer who has been successful in reducing alimony payments may not deduct his attorney fees (Hunter v. United States, 219 F.2d 69 (2d Cir. 1955)).

C. Miscellaneous Deduction Rule. Allowable attorney fees are an itemized deduction subject to the 2% limit on miscellaneous deductions.

## XII. ESTATE PLANNING

A. Prior to or immediately after divorce.

B. Revise existing documents.

1. Wills.

2. Trusts.

3. Power of Attorney.

4. Living Wills/Advance Medical Directives.

C. Review inventory of assets and ownership. These items must be looked at by both the estate planning attorney and the family law attorney to make sure ownership is properly changed during the marital dissolution action.

D. Review all assets owned with beneficiary designations.

E. What are the new estate planning goals of the client?

1. Explain to clients that have no existing formal estate planning documents what will happen with their assets upon their death during the pendency of the divorce if nothing further is done.

2. Testate versus intestate pending divorce. What is the state law regarding disinheriting a spouse versus a surviving spouses right to elect to take a percentage of probate estate of the first spouse to die?

3. Guardianships and Trusts for Children.

a. Same guardian for children as control over assets or different trustees and successor trustees?

b. To protect against need for court-directed guardianships (cost and time).

## XIII. CONCLUSION.

**APPENDIX A**

# DIVORCE TAX CHECKLIST FOR THE DOMESTIC RELATIONS PRACTITIONER

A. General Tax Considerations.

1. What are the current taxable and nontaxable incomes of each of the parties? What are their projected incomes for the future? Their expenses?

2. Does either party presently plan to remarry in the near future?

3. Where will the parties' children live?

4. What is (a) the present fair market value, (b) the adjusted tax basis, and (c) the present holding period for each marital asset of the parties? Each material nonmarital asset?

5. What are the debts of the parties? Do they specifically encumber any assets?

6. Are there any business assets on which an investment tax credit has been claimed which may become personal assets of either spouse as a result of the divorce?

7. Does either spouse own stock in a closely held corporation?

8. Should parties file jointly this year? Any future years?

9. Allocation of dependency exemptions for children?

   a. Does party in higher tax bracket have right to claim exemption?
   b. Has custodial parent made waiver of right to claim child contingent upon timely receipt of support?

B. Support/Alimony Payments.

1. Does instrument expressly recite that payments cease on payee's death?

2. Are payments reduced or terminated on the happening of any contingency concerning an event in the lives of the parties' children or at a time which can clearly be associated with such an event?

3. Do any payments exceed $15,000 per year in any of the first three years if the agreement is signed after January 1, 1987?

4. Have parties considered making support payments nondeductible and nonincludible?

5. Has payor been advised to make support payments pursuant to a qualifying instrument?

C. Property Division Checklist. Basic rule: transfers between spouses/former spouses no longer taxable events.

1. Have all divisible assets been identified, valued, and assigned a proper adjusted basis?

2. Is any property to be sold?

   a. Will gain/loss be realized?
   b. Asset assigned to party able to maximize tax benefit of gain or loss?

3. Have the parties considered sales of assets to third parties to recognize gain or loss?

4. Is the transferee spouse a nonresident alien?

5. Have the parties considered encumbering any assets and dividing the cash?

6. Has investment tax credit been claimed on any assets which will become personal use assets after transfer?

7. Have the parties been advised of the advantages of Sections 121 and 1034 in deciding what to do with their principal residence?

8. Have high basis, low value assets been assigned to the party in the higher tax bracket? Have low basis, high value assets been assigned to the party in the lower tax bracket?

9. Has all information on basis and holding period of transferred property been exchanged?

**APPENDIX B**

# SAMPLE CLAUSES FOR FILING RETURNS

1. Clauses for filing a joint return.

   a. Husband and Wife agree that if no final decree of divorce has been entered on or before December 31, 20___ they will file joint federal and state income tax returns for that year. They shall divide equally any refunds received or shall equally pay any taxes due.

   b. Each party shall be responsible for that fraction of the total tax imposed on their combined income for that year which is the same as a fraction, the numerator of which is his or her gross taxable income for the year and the denominator of which is the parties' combined gross taxable income for the year. Each party warrants and represents to the other that the information he or she will provide in connection with the filing of this joint return will be accurate and complete, and each hereby agrees to indemnify and hold the other party completely harmless from the consequences of any breach of this representation and warranty.

   c. The undersigned do hereby agree to indemnify each other, and hold each other harmless, for any interest, penalty, or deficiency resulting from, or imposed against, the joint federal and state income tax returns to be filed by us for the year XXXX. We further acknowledge that each of us is signing said income tax returns without necessarily having any knowledge as to the truth or falsity of any statements contained therein, except as may be furnished by each of us with reference to his or her own income expenses. We also agree to indemnify each other, and hold each other harmless, for any accounting or counsel fees or costs arising out of, or attributable to, any such interest, penalty or deficiency. The execution of this agreement shall be without prejudice to the right of either party to assert any position or claim with respect to the pending matrimonial action between the parties.

2. Future years' returns.

   The parties agree to report all payments and transactions required by this agreement on their separate tax returns in accordance with the tax intent expressed in this agreement; to provide each other with such information (including, without limitation, information concerning the residence of the children and the basis and holding period for any asset) reasonably required by the other party in connection with the preparation of his or her federal and state income tax returns; and to execute and deliver to the other party such documents as may be required to implement the tax intent expressed in this agreement.

3. Clause for outlining rights on past years' returns.

The parties have previously filed joint federal and state income tax returns, paid all taxes due thereon, and divided all funds received for the years 20___ through 20___. In the event any further refund is received or any tax, interest, or penalty is determined to be due with respect to any such return after the date of this agreement, the parties shall equally divide any such refund or shall equally pay any such tax interest or penalty as the case may be.

**APPENDIX C**

# SAMPLE CLAUSES RELATING TO SUPPORT PAYMENTS

1. Clause acknowledging taxability of maintenance payments.

The parties acknowledge that under present law payments by the Husband to the Wife are intended and will constitute taxable income to the Wife and a tax deduction to the Husband, and the sums provided for herein for maintenance payments have been computed with those tax consequences in mind and in consideration of the relative tax burdens and benefits to each of the parties.

2. Clause making payments nondeductible and nonincludible.

Husband shall pay to Wife the sum of _____ per month until the death of either party or Wife's remarriage or cohabitation, whichever shall occur first. The parties agree that these payments shall not be deductible by Husband or includable in Wife's income pursuant to Section 71(b)(1)(B) of the Internal Revenue Code.

3. Clause listing social security numbers and requiring parties to cooperate.

The Wife represents that her Social Security number is 000-00-0000; the Husband represents that his Social Security number is 111-11-1111. Each party shall provide to the other on a timely basis such income tax forms and information as may be necessary or desirable to comply promptly with the laws and regulations of any taxing authority.

4. Clauses protecting alimony payor against possible change in tax laws.

If maintenance payments should be or become no longer fully tax deductible to the Husband (or not used to reduce his gross income by the full amount of said payments), appropriate adjustments shall be made so that the after-tax burden of payments by the Husband shall be equivalent to his burden as though said payments were tax deductible by him.

If maintenance payments should be or become no longer fully tax deductible by the Husband or should no longer be fully tax reportable as income by the Wife, then there shall be an adjustment of the maintenance payments so that the relative tax burdens and benefits to the parties will be in the same proportion as they existed as of the time of the execution of this agreement.

**APPENDIX D**

# EXAMPLE OF RECAPTURE RULES

This example illustrates the post-1986 recapture rules:

Colonel and Mrs. Ali Mony have decided to separate after years of marital discord. They've agreed to sell their family home for $160,000 and share the proceeds equally. Colonel Mony proposes to transfer his wife's share in three payments over three of the years following the separation so he can take an alimony deduction for the payments in these years. Since Mrs. Mony will be completing her college education in the next two years and will not be working, she agrees to the proposal and it is written into their separation agreement.

Colonel Mony makes alimony payments of $50,000 in the first post-separation year, $25,000 in the second year, and $5,000 in the third year. The payments made by COL Mony in years one and two are fully deductible by him and includable in Mrs. Mony's gross income. Colonel Mony must, however, recapture $5,000 in year three for the second year's excess payment. This amount is the sum by which payments in the second year ($25,000) exceed payment in the third year ($5,000) by more than $15,000.

Colonel Mony must also recapture $22,500 in year three for the excess payment made in year one. This is the amount by which payment in the first year exceeds the average of payments in years two and three by more than $15,000. When making this determination, note that only $20,000 is treated as being paid in year two because the average of payments made in the second and third year does not include the $5,000 that was recaptured.

Recapture for year two:

amount paid in year 2.....$25,000
amount paid in year 3..... $ 5,000
difference..... . $20,000
less differential allowed. .. $15,000
amount recaptured..... ... $ 5,000

Recapture for year one:

amount paid in year 1..... ...$50,000
average paid in years 2 & 3
($20,000 + $5,000 x .5).....$12,500
difference..... $37,500
less differential allowed.... $15,000
amount recaptured..... $22,500

Total recaptured in year three... $27,500

**APPENDIX E**

# SAMPLE CLAUSES RELATING TO DEPENDENCY EXEMPTION

1. Clause for release of dependency exemption to noncustodial spouse.

For the year 20_____ and any calendar year thereafter, the Husband provides any support to the Wife and/or for the children under paragraph _____, above, the Wife shall not claim the dependency exemption for any of the minor children of the parties for federal or state income tax purposes, the parties expressly agreeing that the Husband shall claim all such exemptions on his own returns. The parties further agree that each shall execute such documents, including any such form as may be provided by the Internal Revenue as the release of dependency exemptions, as are necessary and/or appropriate to effectuate the foregoing provision.

2. Clause for allocation of dependency exemption to a noncustodial spouse on a year-by-year basis.

As to any calendar year in which the Husband has made timely payment of all child care amounts for the benefit of JOHN (the minor child of the parties), that are required under paragraph _____ of this Agreement and that are due and payable as of December 31st of such year, the Husband shall be entitled to claim JOHN as his dependent for purposes of his federal and state income tax returns for such year; and, as to each and every such year as to which the Husband meets the foregoing requirement, the Wife shall execute an appropriate declaration releasing her right to claim JOHN as a dependent, such declaration to be executed and delivered to the Husband no later than January 31st of each year with respect to the preceding year.

3. Exemptions to be shared or alternated.

Husband shall be entitled to claim the parties' youngest child and Wife the parties' eldest child.

Husband shall be entitled to claim all three of the parties' children in odd-numbered years and Wife to claim them in even-numbered years.

**APPENDIX F**

# SAMPLE CLAUSES RELATING TO PROPERTY TRANSFERS

1. Clause reciting that transfer of property is tax-free transaction.

The parties believe and agree that the transfers of property between them required by paragraphs _____, ____, and ____, above, are tax-free transfers of property between them made pursuant to Section 1041 of the Internal Revenue Code and are not taxable sales or exchanges of property or payments for alimony or child support. Each party covenants and agrees not to take any position inconsistent with this belief and agreement, including, without limitation, any position with respect to the basis of any asset on his or her tax returns filed after the date of this agreement.

2. Clause containing transferor's warranties as to basis and holding period.

Husband warrants and represents to Wife that he has held the _____stock to be transferred to her pursuant to paragraph_____, above, since _____ and that his adjusted basis therein at the time of transfer to Wife will be _____. Husband hereby agrees to provide Wife with such documents and information as she may require from time to time to establish these matters.

**APPENDIX G**

# TAX & PARTICULAR ASSET TRANSFERS

**Annuities**: Under § 72, an annuitant excludes from gross income a pro rata portion of the annuity's cost from each annuity payment received. The transferor spouse may transfer his interest in an annuity to his transferee spouse and the latter continues to exclude from each payment a pro rata portion of the cost.

**Life insurance**: Transfer of a life insurance policy from the insured transferor spouse to the transferee spouse would normally not produce any income (§ 1041(b)(1)), estate (§ 2042), or gift (§ 2516) tax. [Note: Except for a qualifying transfer made pursuant to divorce, the proceeds and the gift tax paid on the transfer would be included in the decedent's gross estate if the transferor should die within three years of the transfer (I.R.C. § 2035(c), (d)(1)). I.R.C. § 2043(b)(2); however, places any qualifying transfer between divorcing spouses outside the gross estate, even if made within three years of death.] By reason of the transfer, the proceeds of the policy would be exempt from income tax if paid by reason of the death of the insured (§ 101(a)(1)). The premiums may be paid as alimony under a provision like this one:

> H shall transfer to W ownership of the _____ Life Insurance Company $____ life insurance policy on his life and shall pay all future premiums due on this policy until W's death or his death, whichever shall first occur, as alimony.

**IRAs**: Under § 408(d)(6), they may be divided tax-free between divorcing spouses upon the entry of an appropriate court order or execution of an appropriate agreement. The portion of the IRA paid to the nonowner spouse may be placed in a new IRA for his/her benefit. [NOTE: a non wage earning spouse receiving alimony remains eligible for a deductible IRA, providing that he/she is not covered under an employer's plan.]

**Marital home**: No tax on transfers pursuant to § 1041. If the spouses sell the home, there will be no tax on the gain provided that they have lived in the home for two years and the gain does not exceed $250,000 ($500,000 if they file a joint return). In addition, so long as the spouse who leaves the home does so pursuant to a divorce or separation instrument, he will be treated as having lived in the home for purposes of excluding the gain under I.R.C. § 121. There are some advantages to the spouse who retains the marital home:

a. Mortgage interest deduction (if itemize);
b. Real estate tax deduction (if itemize);
c. Eventual exclusion of the gain, if the two-year test is not met at the time of divorce.

**Transfers of savings bonds**. Rev. Rul. 87-112, 1987-2 CB 207, holds that the owner of Series E or EE savings bonds electing to defer annual reporting of income thereon must include in reportable income all accrued value of the bonds in the year of transfer to a spouse under a marital settlement agreement. Section 1041(a) is held not to shield "income," as opposed to "gain," from recognition. Effect - this ruling seeks to and treats the accrued and untaxed interest increment on bonds as an "assignment of income" problem and, in keeping with such characterization, as assignment of income to another, is recognized immediately as taxable income to the owner of the income so assigned. Of course, the spouse receiving the bonds receives a step-up in basis equal to the FMV of the bonds, including the income subject to tax in the transferor's hands.

**APPENDIX H**

# DIVIDING MORTGAGED PROPERTY

Under existing tax law, no gain is realized when a taxpayer borrows money and secures a loan with a mortgage on the property. The obligation to repay offsets the loan so that neither the taxpayer's basis in the property nor his/her net worth is affected. But on a later sale, gain (or loss) is calculated by subtracting the property's adjusted basis, without reference to the loan, from the amount realized on the sale of the property which includes the amount of the mortgage indebtedness.

> Example: H and W jointly own property, with a zero basis, subject to a $30,000 mortgage, and FMV of $150,000. Pursuant to divorce instrument, H transfers his interest to W, subject to the mortgage. Under the current law, H recognizes no gain and W's basis is $30,000 ($15,000 plus a carryover of $15,000).

Section 1041 makes planning in this area considerably simpler, inviting an encumber and divide strategy. In the above example, the property could have been mortgaged for an additional sum of $120,000, so that its "net value," i.e., value net of encumbrances, is zero. The spouses have taken advantage of the appreciation in the value of the property to "squeeze out" potential gain in the form of loan proceeds, which they own jointly. H could then transfer his interest in the property to W, with W assuming the mortgage. H is bailed out of the property and left with $60,000 cash in hand at no tax cost (§ 1041(b)(2)). When W later sells the property, gain will be recognized: if W sells for $10,000 cash subject to the mortgage liability of $150,000, she realizes $160,000. Since her basis is the pre-divorce basis of $30,000, there is a $130,000 gain on the sale.

**APPENDIX I**

# KEY DIVORCE TAX PRACTICE TIPS

1. If representing a custodial parent, agree to make annual waiver of right to claim an exemption on behalf of a child contingent upon receipt of timely, adequate support.

2. Advise clients making voluntary support payments (i.e., pursuant to AR 608-99) to execute a qualifying instrument.

3. Continue to specify in separation agreements that alimony payments cease on death of payee spouse.

4. Any support payments to be reduced upon a change in a child's status will be treated as nondeductible child support.

5. Ensure that clients receiving appreciated marital property discount the value of that property for future tax liability.

6. Advise divorcing taxpayer who had been claiming marital status for withholding to file a new Form W-4 within 10 days after divorce.

7. Counsel spouse regarding the Innocent Spouse rules and consider the liability election pursuant to I.R.C. § 6015.

**APPENDIX J**

# DIVIDED RETIREMENT PAY TAX INFORMATION

The Defense Finance and Accounting Service (DFAS) reports retirement income to military retirees using IRS Form 1099-R. For marriages ending on or after 3 February 1991, the military retiree is not taxed on that portion of retired pay the finance center pays direct to a former spouse. (See Public Law 101-510, section 555, enacted on 5 November 1990.) Disposable retired pay is now calculated before taxes are withheld. Under this law, DFAS will withhold taxes from and report payments to the IRS separately for each payee (retiree and former spouse) when making direct payment to a former spouse.

The retiree's Form 1099-R will reflect net retired pay (gross retired pay minus gross payment to the former spouse). DFAS will also issue the former spouse a Form 1099-R to show taxes withheld from any retired pay DFAS paid to the former spouse as property divided under a court order.

In cases where the retiree, and not DFAS, makes the payment to the former spouse, DFAS withholds and reports only with respect to the retiree, whose 1099-R will reflect the entire amount of the retirement pay. In these cases and those cases under the pre-3 February 1991 rules, retirees should subtract from income the amount paid to the former spouse during the year from the amount stated on the W-2 and attach an explanatory letter to the tax return. The letter should state that the amount subtracted was paid to a former spouse under the Uniformed Service Former Spouses' Protection Act (USFSPA) pursuant to a divorce decree and MUST identify the former spouse by name and Social Security number.

Before the amendment to the USFSPA (effective 3 February 1991), disposable retired pay (which is what can be divided) was calculated after income taxes were withheld, i.e., if a former spouse was entitled to 50% of the disposable retired pay, the 50% was figured on the amount left over after taxes were withheld. DFAS did not withhold taxes from, or report to the IRS, any amount paid directly to the former spouse. Although each party was responsible to pay taxes on the portion of the retired pay received, the parties had to make the adjustment on their respective tax returns.

**Example**: Suppose H receives $200 in retirement pay before taxes, W is awarded 50%, and the applicable tax rate is 20%. Under the pre-Feb 91 law, taxes ($40) are subtracted first from the total retirement pay to determine what is divided ($160). Thus, W's share is $80. If DFAS did not separately report and withhold for W, it would pay W $80 and H $80, but it would report $200 to the IRS as taxable income for H (no report for W). Thus, H is credited with the $40 tax withheld. This might result in W paying the tax on the $80 she received without any adjustment from H at the end of the year. Post-Feb 91, the tax calculation occurs after determining disposable retired pay (here $200, $40 tax); and DFAS reports $100 taxable income to each; and IRS "credits" each with $20 tax withheld.

Amounts of retired pay that go to a former spouse as alimony, child support, or a voluntary allotment continue to be reported as income to the retiree and appear on the retiree's Form 1099-R. They are not reported on a Form 1099-R to the former spouse.

# CHAPTER I

# INTRODUCTION TO SEPARATION AGREEMENTS

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## INTRODUCTION

## I. PROFESSIONAL CONDUCT CONSIDERATIONS

## II. BASICS

A. Types of Agreements.

1. Property Settlement Agreements

2. Separation Agreements

B. Legal Requirements

1. Valid marriage.

2. Capacity to contract.

3. Fact of separation or imminent separation.

4. Consideration.

5. Legal purpose.

6. Full disclosure of pertinent information between the parties.

7. Fair provision for the disadvantaged party.

8. Form.

    a. Written

    b. Oral

C. Choice of Law

1. Normally the law of the jurisdiction where executed.

2. Parties may express a contrary intent.

D. Scope of the Agreement

1. As comprehensive or as narrow as the parties can agree.

2. Omitting issues.

    a. Parties may cool off and later be able to reach agreement.

    b. Problems.

E. Duration of the Agreement

1. Interim agreements.

a. Courts generally recognize as interim if stated as such.

b. Problems may arise as they become more comprehensive or when the parties live under the provisions for a long time.

2. Final agreements.

a. What law may apply and are we capable of interpreting it?

b. Merger v. Incorporation v. Acknowledgement.

## III. PRELIMINARIES

A. Representation.

1. The attorney's role.

a. Setting the tone for the client.

(1) Client's relations with the other spouse.

(2) Ensure the client has realistic expectations of outcome.

(3) Explain the legal processes involved and the problems that the case presents.

(4) Explain your role: problem solver v. no-holds-barred advocate.

(5) Explain the client's role and responsibilities.

(6) Discuss asset preservation.

b. Advising the client on legal aspects vs. guiding the client towards a position.

c. Working through the client vs. negotiating with opposing counsel.

2. Dual representation.

a. Civilian advice - don't do it; the parties inevitably have adverse positions.

b. AR 27-3, paragraph 4-9c. LAA's from the same office should not see opposing spouses.

3. One-sided representation.

a. Avoid the situation.

**b.** Sample provision if you must proceed in this manner: **In the negotiation and execution of this separation agreement, ____ was not represented by legal counsel. During the negotiation and prior to the execution hereof he/she was advised of his/her right to consult with counsel, of the availability of free legal counsel, and of the desirability of consulting with counsel before executing this agreement because if affects important personal and financial rights. By his/her signature on the line below and his/her execution of this agreement, _____ represents that he/she has not received any advice from _____'s attorney other than the recommendation to consult with counsel of his/her choice, and he/she hereby waives his/her right to counsel.**

**_____(signature)**

c. Don'ts:

(1) Don't contact the other spouse except to advise him or her to consult with an attorney.

(2) Don't suggest that the spouse see a specific LAA (or any other named attorney) and don't let client do so.

(3) Don't "bend over backwards" to be watch out for the spouse - represent <u>your</u> client to the best of your ability.

B. Gather facts and documents.

1. Marriage certificate and prior divorce decrees.

2. SSN's

3. Antenuptial and postnuptial agreements.

4. Citizenship.

5. Education, training and work experience of the parties.

6. Date's of soldier's military service.

7. Children - names, DOB's, SSN's, other children being supported, special needs, natural or adopted children.

C. Property division. [Often used acronym is I-C-E-D]

1. IDENTIFY all of the property.

a. Real property.

b. Personal property - tangible (e.g., household furnishings, motor vehicles, lawn and garden equipment, books, china, crystal, jewelry, etc.)

c. Personal property - intangible (e.g., bank accounts, mutual funds, stocks and bonds, CD's, retirement benefits, IRA's, etc.)

2. CLASSIFY

a. Separate property - often described as premarital property, plus gifts or inheritances to one of the parties during marriage. Professional degrees or licenses may or may not be separate property. In some states, non-vested pension rights are separate property.

b. Marital (or community) property - generally described as all property acquired by either or both of the parties during the marriage (unless it falls into one of the above categories of separate property).

c. Mixed - this is property that starts as one category and then has added to it components of the other category.

3. EVALUATE the marital, separate and mixed property.

a. Certain items are easy to evaluate - bank accounts (look at bank statement), mutual funds (read stock market section of the newspaper).

b. Some items may require some research - motor vehicles ("blue book").

c. Some items may require an expert - house (real estate agent or appraiser), retirement rights (CPA, economist or actuary), business (CPA, financial advisor).

## IV. SPECIFIC PROVISIONS

A. Recitals.

1. Data and place of marriage.

2. Names, DOB's of children.

3. State that the parties are living separate and apart and the date they commenced to do so, or at least that they intend to do so when the agreement is completed or when transportation is available.

4. Identify any pending legal proceedings by case number and court.

5. State the reason for the action and the purpose of the agreement (e.g., "Unhappy and irreconcilable differences have arisen between the parties, and their health, welfare, and general happiness require that they live separate and apart. They do not intend to live together again as husband and wife.")

6. State each party's current employment status and expected future employment status.

7. State the consideration supporting the agreement (usually phrased in terms of "valuable consideration, the receipt of which is hereby acknowledged.")

8. Advice of counsel.

a. Include your name as counsel for your client.

b. Sample provision:

(1) Each party has consulted with counsel of his or her own choice, independently selected without suggestion by the other party. Neither party was precluded from obtaining an attorney of his or her choice because of the cost of attorney fees, and neither party has at any time received advice or counsel on this matter from the other party's attorney.

(2) Husband's attorney throughout the negotiation of this agreement has been __.

(3) Wife's attorney throughout the negotiation of this agreement has been __.

(4) The parties have reached agreement on the matters contained herein only after receiving advice from counsel on every question either of them has raised. Issues discussed by each party include legal rights and obligations under state and federal law and the legal effect of each clause in this agreement. The parties and their respective counsel have also generally discussed the tax consequences of this agreement but both parties have been advised and understand that their counsel are not tax specialists. Each party has been advised to seek specific tax advice in connection with this agreement, and each party sought such independent advice as each has deemed necessary.

(5) Each party has carefully read this agreement and each is fully aware of its contents and legal effect.

B. Personal property division.

1. Starting points.

a. Equitable distribution.

b. Community property - divide equally.

2. Attach a schedule to provide the details of who gets what.

3. List bank accounts, CD's, etc. by owner, account number, institution, and approximate balance.

4. Consider a waiver clause for property not mentioned in the agreement (e.g., "Each party has independently determined to his or her satisfaction the extent of property owned by the parties jointly and individually. Each is satisfied that this agreement divides all property and assets that should be divided between the parties. Notwithstanding contrary provisions of law, any property, asset or expectancy, be it real or personal, tangible or intangible, vested or contingent, that is not addressed in this agreement is the separate property of the party who now owns or possesses it.")

<u>If you are going to use a waiver clause, make sure you use a reliance on representations clause!</u>

5. Tips on division of tangible personal property.

   a. The "tag sale" method.

   b. The auction method.

6. Military retired pay.

   a. Should the issue be addressed?

      (1) Spouse - yes, even if only to preserve the matter for future resolution.

      (2) Soldier - may be the soldier's greatest reason for wanting a separation agreement.

      (3) Memorialize advice to the client if the matter is not raised.

b. Provide advice on direct payment requirements (10 U.S.C. ' 1408)

c. A common formula:

$\frac{1}{2}$ x [Relevant length of marriage] x 100 = spouse's
[Relevant length of service] percentage

d. Insulate former spouses against modifications or shortfalls in "Disposable Retired Pay" (DRP).

(1) Clarify intent is to divide DRP that is not reduced by VA disability, military disability, Dual Compensation Act, or civil service retirement waivers.

(2) Provide by direct payment by member to make up shortfalls.

(3) Direct member not to do anything that might decrease former spouses share.

(4) Reserve jurisdiction to make adjustments should changes occur.

C. Child custody and visitation.

1. Joint vs. sole custody.

2. Describe visitation rights with some specificity.

3. Allocate travel expenses and responsibilities incident to exercise of visitation rights.

4. Sample provision:

a. Noncustodial parent shall have the right to have the child with him during the following visitation periods:

(1) The first weekend each month, from 5:00 p.m. on Friday until 5:00 p.m. on Sunday; however, if the following Monday is a holiday, the visitation period shall extend until 5:00 p.m. on Monday.

(2) For the month of July every summer.

(3) For a one week period each Christmas, and the period will include December 24 and 25 in each even-numbered year.

(4) For 4 days during spring school break in each odd-numbered year.

(5) Such other times as the parties may agree.

b. The parties agree that upon the child's attaining the age that air carriers will allow him to travel unaccompanied, he will use this means for visitation purposes. Noncustodial parent will bear all transportation costs incident to exercise of visitation rights except as follows:

(1) Custodial parent will be responsible for delivering the child to and picking the child up at the major commercial airport nearest her home.

(2) If custodial parent moves to a new location so that transportation costs are higher, she will bear the additional cost.

c. Noncustodial parents exercise of the rights of visitation under this agreement shall be optional with him, and his failure to exercise such rights on any occasion, for whatever reason, shall not be construed as a waive of future rights. However, any such unused visitation shall not accumulate.

5. Include an obligation to avoid disparaging the other parent in the child's presence (e.g., "Neither party will disparage or criticize the other party in the child's presence, and each party will ensure that other adults refrain from disparaging or criticizing the other party in the child's presence.")

D. Child Support.

1. Amount.

a. What amount, if any, have the parties determined for child support?

b. Check military service guidelines.

c. Review state or local child support guidelines.

(a) Excessively low support amounts are self-defeating because the court may ignore this portion of the agreement.

(b) Even when the agreement is to be incorporated into court decree, the court may be required to determine whether the amount of child support conforms to the state guidelines.

2. Health care expenses.

a. Military medical care preferred for soldier but may not be convenient.

b. Insurance.

(1) CHAMPUS

(2) Civilian insurance.

c. Uncovered health care expenses (UHCE)

(1) Define what is health care - does it include psychological counseling? Orthodontia? Prescription drugs?

(2) Who pays for what? (Silence likely means the custodial parent will bear the burden.)

3. Termination - define "emancipation."

a. Age.

b. Education.

(1) States may require support past age 18 if the child is still in high school. Some may include college expenses as well.

(2) Scrutinize support while children are in college - should this money go to the child or the custodial parent?

c. Marriage (what about void or voidable marriages?).

d. Residence outside the custodial parent's home.

e. Military service.

E. Soldiers' and Sailors' Civil Relief Act Waiver

1. Purpose: expedite the court proceeding and help facilitate direct payment of retired pay to the former spouse.

2. Rights affected: see 50 U.S.C. App. ' 520, 521

3. Sample provision: "John hereby waives all rights and protection afforded by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. " 501-548 and 560-591), and any state law providing similar rights and protections, in any proceeding brought by Martha to dissolve the parties' marriage, provided that Martha requests the court to [merge][ratify and incorporate] this agreement in any decree the court may render; that she seek no relief or remedy in addition to the provisions of the agreement or contrary to its provisions; and that the court does [merge][ratify and incorporate] this agreement in its decree and does not render any remedy or relief in addition to or contrary to the provisions in this agreement.

## V. CONCLUSION

# CHAPTER J
# MILITARY TAX ISSUES

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# MILITARY TAX ISSUES

**Outline of Instruction**

## I. REFERENCES.

A. Internal Revenue Code (I.R.C.) of 1986, as amended.

B. Treasury Regulations.

C. Various IRS Publications found at the Internal Revenue Service Home page (www.irs.ustreas.gov)

D. CCH, 200X U.S. Master Tax Guide (annual).

E. Prentice-Hall, Federal Tax Handbook (annual).

F. JA 269, Tax Information Series (Dec. 2000).

G. JA 275, Model Income Tax Assistance Guide (Jun. 1998).

> Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.
>
> *Judge Learned Hand*
> *Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934)*

# II. FEDERAL INCOME TAX OVERVIEW.

## COMPUTATION STEPS

### *GROSS INCOME*

| | | |
|---|---|---|
| Wages, salaries, tips; | Taxable interest income; | **Capital gains & losses;** |
| Dividends; | State & local tax refunds; | IRA distributions; |
| Alimony received; | Business profits & losses; | Rents & Royalties; |
| Farm income; | Social security benefits; | Pension & annuities |
| Unemployment compensation | Other income | |

### *- ADJUSTMENTS*

| | | |
|---|---|---|
| **IRA deduction** | **Student loan interest deduction** | Medical Savings Account |
| One-half self-employment | Alimony paid | Moving Expenses |
| Penalty on early withdrawal of savings | | |

### *= ADJUSTED GROSS INCOME*

### *- DEDUCTIONS*

Standard Deduction or Itemized Deductions

| | | |
|---|---|---|
| Charitable contributions; | Taxes paid; | Interest paid; |
| Nonbusiness casualty & theft losses; | Medical expenses; | Miscellaneous deductions |

### *- EXEMPTIONS*

| | | |
|---|---|---|
| Taxpayer; | Spouse | Dependents; |

### *= TAXABLE INCOME*

### *TAX*

### *- TAX CREDITS*

| | | |
|---|---|---|
| Child & Dependent Care; | Credit for elderly or disabled; | **Education credits** |
| **Child tax credit** | **Additional Child tax credit** | Foreign tax credit |
| Adoption Credit | Earned income credit | |

### *+ TAXES*

| | | |
|---|---|---|
| Self-employment tax; | Alternative minimum tax; | Recapture taxes; |
| Household employment taxes | Advance EIC payments from W-2 | Tax on IRA; |
| Social security & Medicare tax on tip income not reported | | |

### *- TAXES PAID*

= **FINAL TAX LIABILITY**

## III. MILITARY TAX ASSISTANCE.

A. Scope of Tax Assistance Services. The Army Tax Program is a command directed program. It is designed to provide Federal and State income tax return preparation assistance to service members, their family members, and retirees. The Tax Program is conducted with the cooperation of the Internal Revenue Service (IRS) under its Voluntary Income Tax Assistance Program (VITA).

1. Unit Tax Assistor Component.

2. Volunteer Tax Assistor Component.

3. Outreach Component:

4. Tax Center.

a. During the income tax preparation season, the Legal Assistance Office may staff a consolidated tax center under the supervision of the Tax Officer. The tax center is responsible for assisting service members, retirees, and family members in the preparation and electronic filing of federal and state tax returns.

b. The services rendered by Legal Assistance Attorneys will be within the limitations prescribed by AR 27-3 (i.e., the preparation of partnership or corporate tax returns or matters relating to producing business activities is not authorized).

B. General topics included in JA 275 (Model Income Tax Guide).

1. Guide to setting up a tax program.

2. Sample Standard Operating Procedures (SOP).

3. Tax Assistance milestones.

4. Action memorandums to get command support.

5. Requesting materials and IRS support.

6. Sample articles, announcements, and publicity.

7. Reports.

8. Electronic filing information.

9. Consolidated Tax Centers.

10. Combination of Tax Centers and UTAs.

C. Military Tax Law Training Schedule.

1. 04-08 December 2000: Air Force Tax Course, Maxwell AFB, Alabama.

2. 11-15 December 2000: Tax Law for Attorneys, TJAGSA.

3. 02-05 January 2001: USAREUR Tax Course, Berlin, Germany.

4. 08-12 January 2001: PACOM Tax Course, Yongsan, Korea.

5. 16-19 January 2001: Hawaii Tax Course, Schofield Barracks, HI.

## IV. WHEN TO FILE.

A. Federal income tax returns are due 15 April (Treas. Reg. § 1.6072-1(a)) (unless the 15th falls on a weekend/holiday).

B. Overseas Extension (Treas. Reg. § 1.6081-5(a)(6)). Military personnel on duty outside U.S. or Puerto Rico on 15 April are allowed an automatic extension of two months (June 15) to file and pay tax (however, see below).

1. If taxpayer files a joint return, only one spouse has to qualify for this automatic extension.

2. Attach a statement to the return explaining what situation qualified the taxpayer for the extension.

3. If a taxpayer uses the overseas extension and waits to pay any taxes due, they will be charged interest from the regular filing date.

4. Attempts to legislatively fix this problem for the military (Uniform Filing Fairness Act) failed to be enacted in 1999/2000.

# V. EXTENSION OF TIME FOR MILITARY PERSONNEL IN A COMBAT ZONE OR QUALIFIED HAZARDOUS DUTY AREA

A. What is a Combat Zone (CZ) or Qualified Hazardous Duty Area (QHDA)?

1. Combat Zone (CZ).

a. A CZ is an area that the President of the United States has designated by Executive Order in which the Armed Forces are or have engaged in combat. I.R.C. § 112(c)(2).

b. Service members may invoke CZ tax relief only if they serve in a CZ on or after the date designated in the Executive Order.

2. Qualified Hazardous Duty Area (QHDA).

a. Legislation creates a "qualified hazardous duty area." The legislation will specify the date that members in the QHDA become eligible for tax relief.

b. Members serving in a QHDA receive the same tax treatment under the Internal Revenue Code as members serving in a CZ. P.L. 104-117, § 1(a)(2), (b) and (e)(1), 109 Stat. 827 (1996).

c. In the two QHDAs created by Congress, Congress has designated certain countries as QHDAs and has specified that each designated country will lose its status as a QHDA when the Department of Defense stops paying members either imminent danger or hostile fire pay for service in that country. In addition, Congress could also enact legislation terminating the QHDA.

B. How Does a Service Member Qualify for Service in a CZ or QHDA?

1. The service must be performed on or after the date of designation in the Executive Order issued by the President as the commencement date (or in the legislation in the case of the QHDA) and on or before the termination date in the Executive Order (or the date that members in that country stop receiving imminent danger/hostile fire pay in the case of the QHDA). I.R.C. § 112(c)(3).

2. Generally, to receive CZ tax benefits, a member must serve in a CZ or QHDA.

3. Service members outside of a CZ or QHDA receive CZ tax benefits when their service directly (as opposed to remotely or indirectly) supports military operations in the CZ upon the meeting of three basic conditions.

   a. First, the direct support of military operations has to have the effect of maintaining, upholding, or providing assistance for those involved in military operations in the CZ (or QHDA). Treas. Reg. § 1.112-1.

   b. Second, the service must qualify the service member for hostile fire pay or imminent danger pay. Treas. Reg. § 1.112-1.

   c. Finally, the reason for payment of imminent danger or hostile fire pay must be based on the risks or dangers related to the QHDA or CZ. DoD Reg. 7000.14-R, "Financial Management Regulation," para 440103B.5 (July 1996). *See also*, Guidance, Office of the Assistant Secretary of Defense Force Management Policy (Military Personnel Policy), subject: Guidance for Requesting/Approving Combat Zone Tax Benefits for Service in “Direct Support” of Military Operations (22 April 1999).

C. Extension of Time for Tax Actions.

1. Soldiers qualifying for service in a designated CZ or QHDA are entitled to special extensions of time for completing various tax actions. The suspension of time applies to the following acts pursuant to I.R.C. § 7508(a)(1):

a. Filing any return of income, estate, or gift tax (except employment and withholding tax);

b. Payment of any income, estate, or gift tax (except employment and withholding tax) or any installment thereof or of any other liability to the United States in respect thereof;

c. Filing a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by the Tax Court;

d. Allowance of a credit or refund of any tax;

e. Filing a claim for credit or refund of any tax;

f. Bringing suit upon any such claim for credit or refund;

g. Assessment of any tax;

h. Giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax;

i. Collection, of the amount of any liability in respect of any tax;

j. Bringing suit by the United States, or any officer on its behalf, in respect of any liability in respect of any tax; and

k. Any other act required or permitted under the internal revenue laws specified in regulations prescribed under this section by the Secretary;

2. The deadline extension also applies to the filing of all tax schedules and forms that are attachments to the federal individual tax return.

3. Spouses of service members entitled to the CZ tax benefits are entitled to the same suspension of time for handling tax matters. I.R.C. § 7508(c).

4. The suspension of time encompasses the period of service in the CZ, as well as any time of continuous qualified hospitalization resulting from injury received in the CZ and the next 180 days thereafter. I.R.C. § 7508(a).

5. The additional time is disregarded in determining tax liability under the Internal Revenue Code (including interest, penalty, additional amount, or addition to tax). I.R.C. § 7508(a).

6. The IRS has determined that this extension runs consecutively, not concurrently, with the tax-filing season (tax filing season = 01 Jan. to 15 Apr.).

a. Consequently, soldiers serving in a CZ may be entitled to up to 105 additional days for a total CZ extension of 285 days to complete action on tax matters after leaving the CZ.

b. For example, a soldier serving in the CZ from 01 October 1999, until 1 May 2000, will have the full 285 days to file the 1999 tax return. This extension equals the 180-day extension, plus the full 105 days in the tax-filing season. Soldiers beginning service in the CZ after 1 January 2000, will not have the full extension period. For example, a soldier arriving in the CZ on 01 February 2000, and serving until 1 May 2000, will have 254 days. This period of time is equivalent to the full 180-day extension, plus the seventy-four days remaining in the filing season since 1 February 2000. *See* I.R.S. Notice 99-30, 1999-22 I.R.B. 1.

7. The CZ extensions also apply to individuals serving in the CZ in support of the U.S. Armed Forces. These include Red Cross personnel, accredited correspondents, and civilians acting under the direction of the U.S. Armed Forces in support of those forces (both Department of Defense civilian employees and civilian employees of defense contractors). I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #13.

D. Current CZs and QHDAs.

1. Operation Desert Storm (Persian Gulf Area) CZ.

a. President Bush signed an Executive Order on January 21, 1991, designating the Persian Gulf Area as a CZ. Exec. Order No. 12744, reprinted in, 56 Fed. Reg. 2661 (1991). The CZ designation is still open, and will remain open until terminated by another Executive Order. Service members serving in the Persian Gulf CZ are still eligible for the previously mentioned benefits.

b. The Executive Order designated the following locations within the CZ: the Persian Gulf; the Red Sea; the Gulf of Oman; the Gulf of Arden; that portion of the Arabian Sea that lies north of 10 degrees north latitude and west of 68 degrees east longitude; and the total land areas of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates.

c. Service members serving outside of the CZ in direct support of the military operations within the Persian Gulf CZ under conditions which they are entitled to hostile fire pay are entitled to the CZ tax benefits.

***2.*** QHDA of Bosnia, Herzegovina, Croatia and Macedonia (Operation Joint Forge)

a. Tax relief was legislatively extended to service members in the QHDA of Bosnia, Herzegovina, Croatia, or Macedonia if they are serving in those areas and receiving hostile fire or imminent danger pay. P.L. 104-117, § 1(a)(2), (b) and (e)(1), 109 Stat. 827 (1996).

(1) These areas were specifically designated as a QHDA and result in service members receiving all the federal tax benefits of a CZ as if it was designated by Executive Order by the President. All of the CZ tax benefits previously mentioned apply to this QHDA.

(2) Service members assigned outside of the QHDA in direct support of the military operations within this designated QHDA under conditions which they are not entitled to hostile fire pay are entitled to very limited CZ tax benefits. Service members who are performing services as part of the operation outside of the United States while deployed away from their permanent duty stations in support of the QHDA are allowed an extension of time allowed for performing most acts required by the Internal Revenue Code. I.R.C. § 7508. This was the only CZ tax provision extended to these individuals. P.L. 104-117, § 1(a)(2), (b) and (e)(1), 109 Stat. 827 (1996).

b. On 20 June 1998, Operation Joint Guard was terminated and Operation Joint Forge commenced. Operation Joint Forge is a follow-on operation to Operation Joint Guard, which was a follow-on operation to Operation Joint Endeavor.

c. Service members serving in the geographic area of this QHDA are not affected by a change of the name of the operation. The IRS has stated that personnel serving under Operation Joint Forge will be treated that same as personnel serving under Operation Joint Endeavor since Operation Joint Forge is the substantive continuation of Operation Joint Endeavor. *See*, Letter from Tommy G. Deweese, District Director for the International District, Internal Revenue Service, to Lieutenant Colonel Thomas K. Emswiler, Armed Forces Tax Council, Department of Defense (17 July 1998), cited in footnote 6, Joint Committee on Taxation, (JCX-17-99) (Apr. 12, 1999), a description of present law and a proposal relating to tax relief for personnel in the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, and the Northern Ionian Sea. *Also see* Information Paper, Office of the Judge Advocate General, U.S. Army, DAJA-LA, subject: Operation Joint Forge Tax Treatment (14 Aug. 1998) http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf/d890b173f60f083a852566110059ec15/daf4ce7c63901d858525669100657a22?OpenDocument.*;* Major Mark Henderson, *Tax Law Note, Bosnian Tax Relief*, ARMY LAW., May 1996 at 27.

3. Operation Allied Force CZ (Federal Republic of Yugoslavia (Serbia/Montenegro), and Albania).

a. On April 13, 1999, President Clinton issued an Executive Order designating a CZ for the area of the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, the Ionian Sea north of the 39th parallel, including the airspace above the locations. Exec. Order No. 13,119, 64 Fed. Reg. 18797 (April 16, 1999); IR-1999-43, http://ftp.fedworld.gov/pub/irs-news/ir-99-43.pdf. . The Executive Order designated March 24, 1999 as the date of commencement of activities in the CZ.

b. Service members serving outside of the CZ in direct support of the military operations within the Operation Allied Force Combat Zone under conditions which entitled them to hostile fire pay are entitled to the CZ tax benefits.

c. The CZ designation is still open, and has not been terminated by another Executive Order. Service members serving in the Operation Allied Force CZ are still eligible for the previously described benefits.

4. Operation Allied Force QHDA (Federal Republic of Yugoslavia (Serbia/Montenegro), and Albania)

a. President Clinton signed legislation designating a QHDA on April 19, 1999, for the area of:

(1) The Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, the northern Ionian Sea above the 39th parallel during the period that a service member is entitled to hostile fire or imminent danger pay for service performed in the designated area. The Act is generally effective as of March 24, 1999. P.L. 106-21, 113 Stat. 34 (1999).

(2) The areas mentioned were specifically designated as a QHDA and result in service member's entitlement to all the tax benefits of a CZ as if it was designated by Executive Order by the President. All of the CZ tax benefits apply to the specified geographic locations of the QHDA.

(3) Service members serving outside of the CZ in direct support of the military operations within this designated QHDA under conditions for which they are not granted hostile fire pay are entitled to very limited CZ tax benefits. Service members who are performing services as part of the operation outside of the United States while deployed away from their permanent duty stations in support of the QHDA are allowed an extension of time allowed for performing most acts required by the Internal Revenue Code. I.R.C. § 7508. This was the only CZ tax provision extended to these individuals. P.L. 106-21, 113 Stat. 34 (1999).

b. The area of operations for Operation Allied Force has been designated as both a CZ by Executive Order and a QHDA by specific legislation.

(1) Generally, the two provide the same tax benefits, but the QHDA provides that service members performing services outside of the areas, but still a part of Operation Allied Force would qualify for the suspension of time to perform various tax acts. (I.R.C. § 7508) during the periods in which they are not paid hostile fire or imminent danger pay provided the services are performed both outside the United States and while deployed away from the service member's permanent duty station. P.L. 106-21, 113 Stat. 34 (1999); Joint Committee on Taxation, (JCX-17-99) (Apr. 12, 1999).

(2) The CZ designation for Operation Allied Force will remain open until terminated by another Executive Order. Likewise, the QHDA will remain in effect until terminated by Congress or the IRS determines that any future follow-on operation is not a substantive continuation of the QHDA.

(3) Although the Operation Allied Force area of operations is commonly referred to as the Operation Allied Force CZ, Judge Advocates must not forget that the area has been designated a CZ and a QHDA. In the event one of the designations is terminated in the future, relief may still be available under the rules of the other designation.

E. Filing Tax Returns for CZ Participants

1. Service members who qualify for extensions of time to file federal tax returns pursuant to the CZ extensions can file their returns in accordance with the filing extensions previously mentioned. In addition, the service member can elect to file their return before the end of the extension period.

2. Service members in a CZ can authorize someone else to file their taxes in their absence by executing a special power of attorney, a general power of attorney, or the IRS Form 2848 (Power of Attorney and Declaration of Representative). When someone will act on behalf of a service member to file a tax return using a power of attorney, the form, or a copy of the power of attorney must be attached to the tax return.

3. Service members using a CZ or QHDA extension to file any type of tax form should write the name of the CZ or QHDA at the top of any tax return, reply notice, or other correspondence sent by the IRS (i.e., "Operation Desert Storm Combat Zone", "Operation Joint Forge Combat Zone", "Operation Allied Force Combat Zone"). IR-1999-43, http://ftp.fedworld.gov/pub/irs-news/ir-99-43.pdf..

4. There are many resources available to Judge Advocates to use as preventive law handouts to service members on how to "invoke" the CZ extensions and properly notify the I.R.S. (and other taxing authorities) of the CZ application. See, Tax Relief for those Affected by Operation Allied Force, Internal Revenue Bulletin 1999-22 IRB 1; Notice 99-30, a copy of which can be found at http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf/d890b173f60f083a852566110059ec15/dae956d24ef22d9e85256775005e0e4d?OpenDocument.; I.R.S. Publication 3, Armed Forces Tax Guide, http://ftp.fedworld.gov/pub/irs-pdf/p3.pdf.

F. State Taxation Implications of CZ Designations.

1. Generally, most states follow the federal government's lead in granting tax relief for service members in a CZ or QHDA. However, the manner in which the various states reach that determination, the amount of exclusion, and the amount of time extended to handle tax matters and file tax returns varies from state to state.

   a. Some states have enacted legislation, which in effect adopts the applicable sections of the federal Internal Revenue Code dealing with CZ extensions, exclusions and other benefits. Other states enact specific legislation dealing with each CZ or a QHDA designation.

   b. The states are very diverse in the treatment of penalties and interest. Some states "waive" penalties and interest during the combat zone extension period. Other states "abate" or "forgive" penalties and interest during the combat zone extension period. A few states simply state in policy guidance that service members will not be charged interest and penalties during the CZ extension period. Some states simply do not provide explicit guidance regarding the treatment of interest and penalties.

2. While most states follow the lead of the federal government in providing CZ tax relief, the Judge Advocate should avoid providing general tax advice that "all states follow the federal government CZ tax rules." The advice could lead to false assumptions that are contrary to applicable state laws. Judge Advocates should also be aware of the legal basis for a states' CZ tax rules (based upon state statutes, administrative codes, and policy guidance) before providing tax advice to service members regarding individual state CZ tax rules.

3. An article appears in the December 1999 *Army Lawyer* which summarizes state CZ tax rules.

## VI. GROSS INCOME (FORM 1040, LINES 7-22).

A. General Principles.

1. Income includes "all income from whatever source" (I.R.C. § 61).

2. The person who earns income and is entitled to receive it cannot avoid tax by assigning it to another.

B. Gross Income Items.

1. All forms of compensation for services, including wages, salaries, fees, commissions, bonuses, termination pay, and severance pay. Specifically, for service members, the following items are included in gross income (also see Appendix A):

a. Basic pay.

b. Special pay - sea duty, diving, medical and dental officer pay, proficiency pay, hazardous duty pay, imminent danger pay, accrued leave payment, foreign duty pay, continuation pay (including JAGC Continuation Pay), flight duty, and Aviation Career Incentive Pay.

c. Bonuses - enlistment and reenlistment bonuses, overseas extension bonus, separation pay, and student loan repayments.

d. Personal money allowances (General Officer).

2. Pensions and annuities (Form 1040, line 16).

a. Generally reported to the taxpayer on Form 1099-R.

b. Pensions and retirement allowances are generally taxable to the recipient (Treas. Reg. § 1.61-11(a)). Armed Forces retirement pay based on length of service is taxable.

c. Members of the armed forces are able to exclude disability pensions if the payments are provided by the Department of Veterans Affairs (38 U.S.C. § 5301).

(1) Those eligible are individuals with service-related injuries or sickness. While armed forces retirement pay based on length of service is taxable, that pay is excludable to the extent it could be received as a disability compensation. *See also,* Priv. Ltr. Rul. 2000-07-018 (Nov. 18, 1999).

(2) If a taxpayer retires from the armed services and at a later date are given a retroactive service connected disability rating by the VA, and file a waiver for reduction of retirement pay in an amount equal to the VA disability compensation, the taxpayer does not include in income for the retroactive period the part of retirement pay he would have been entitled to receive from the VA during that period.

(3) A VA disability determination does not convert a military service retirement into a disability pension. The retiree has the burden of proving that pension payments that are received for a disability are incurred during active service in the military. *Scarce v. Commissioner*, 17 T.C. 830, 833 (1951).

(4) In some cases, a military retiree applies for disability benefits after retirement. Based upon the percentage disability determined by the VA, the retiree can elect to waive years of service retirement benefits to the extent of the VA benefits so that they can receive the VA benefits tax-free. In these cases, DFAS should make a reduction of retirement pay by the amount waved to receive the VA benefit. If DFAS makes this reduction properly, the retiree cannot exclude a second amount of retired pay on account of the same disability. Proper reporting by DFAS will exclude the VA benefits from the retirement pay on Form 1099-R. *Dale C. Holt, et ux. v. Commissioner*, T.C. Memo. 1999-348, No. 187-98 (1999).

d. A taxpayer does not include in income disability payments received for injuries resulting directly from a violent attack that occurs on a U.S. government employee performing official duties outside the U.S. For disability payments to be tax exempt, the Secretary of State must determine the attack was a terrorist attack. I.R.C. § 104(a)(5).

3. Gross income includes income from the discharge of indebtedness (I.R.C. § 61(a)(12)), unless discharged in Bankruptcy - Title 11 U.S.C. Section 32, or discharge results from an agreement among creditors if immediately thereafter the taxpayer's liabilities exceed value of assets (Treas. Reg. § 1.61-12(b)). The taxpayer should receive a 1099-C indicating the amount of income from discharge of an indebtedness.

# VII. ITEMS EXCLUDED FROM GROSS INCOME.

A. Military Benefits (see Appendix A of this outline).

1. Gross income does not include "qualified military benefits" (I.R.C. § 134(a)).

a. Defined as any allowance or in-kind benefit received by a member or former member of the uniformed services of the U.S., or his dependent, and which was excludable from gross income on Sept. 9, 1986, under any provision of law or regulation (other than the Internal Revenue Code) in effect on that date (I.R.C. § 134(b)).

b. Excludable benefits: veteran's benefits, medical benefits, professional education, group term life insurance, survivor and retirement protection plan premiums, subsistence, uniform, housing, overseas cost-of-living, evacuation, family separation allowances, death gratuities, interment allowances, various travel allowances, tuition assistance and dependent benefits (I.R.C. § 134(b))

(1) Dislocation allowances, temporary lodging allowances and expenses, move-in housing allowances provided in connection with permanent changes of station are excludable from income (Treas. Reg. § 1.61-2(b)(2)).

(a) Transportation allowances. The cost of transporting families and dependents paid by the government is not includable in gross income for the transfer is in the interest of the government and not for the benefit of the servicemember. Any excess of the allowance or reimbursement over the actual expenses incurred for such purposes is includable in gross income. Rev. Rul. 54-429, 1954-2 C.B. 53.

(b) Dislocation allowance. 37 U.S.C. § 407; 26 C.F.R. § 1.61-2(b)(2).

(c) Temporary lodging allowance (37 U.S.C. § 405) or expense (37 U.S.C. § 404a); 26 C.F.R. § 1.61-2(b)(2).

(2) Per Diem. Members of Armed Forces receiving per diem allowances are considered as having accounted to their employer for their travel and other business expenses and as such, the allowances are not taxable. I.R.C. § 134; Priv. Ltr. Rul. 59-01-205 (Jan. 20, 1959).

(3) Family separation allowances. Rev. Rul. 70-281, 1970-1 C.B. 16; 26 C.F.R. § 1.61-2.

(4) Uniform gratuity or clothing allowance. 26 C.F.R. § 1.61-2(b).

(5) Death gratuity.

(a) If death occurred on or before 20 August 1996, recipient can exclude $5,000 from gross income.

(b) If death occurred after 20 August 1996, recipient can only exclude $3,000 from gross income.

2. Exclusion of Compensation of Service Members Received in a Combat Zone (CZ) or Qualified Hazardous Duty Area (QHDA) from Gross Income.

a. Under the CZ/QHDA compensation exclusion tax rules, gross income does not include certain CZ/QHDA compensation of members of the Armed Forces. I.R.C. § 112.

b. Any official presence in a CZ/QHDA during the month will qualify the service member for the CZ/QHDA exclusion for the entire month. Likewise, if a service member is hospitalized outside of the CZ/QHDA for part of a month as a result of wounds, disease, or injury incurred while serving in a CZ/QHDA, he qualifies for the CZ/QHDA exclusion for the full month so long as combatant activities remain in the CZ/QHDA. Treas. Reg. § 1.112-1(b)(3).

(1) Enlisted personnel serving in a CZ/QHDA during any part of any month may exclude from gross income all compensation received for active service for that month. I.R.C. § 112.

(2) The same compensation exclusion rule applies to commissioned officers (the term commissioned officer does not include a commissioned warrant officer, I.R.C. § 112(c)(1)) however, the exclusion from income is limited to the "maximum enlisted amount." I.R.C. § 112(c)(5).

(a) "Maximum enlisted amount" means the highest rate of basic pay for such month to any enlisted member of the Armed Forces of the United States at the highest pay grade applicable to enlisted members plus the amount of hostile fire or imminent danger pay to an officer for the month.

(b) For 2000, commissioned officers may exclude up to $4,869 each month during any part of which they served in a CZ/QHDA. This represents the $4,719 payable monthly to the Sergeant Major of the Army and to the other senior enlisted advisors of the other services plus $150.00 for imminent danger/hostile fire pay. For 2001, commissioned officers may exclude up to $4,893 each month plus $150 for imminent danger/hostile fire pay ($5,043).

c. Student Loan Repayment Made on Behalf of Service Members in a CZ/QHDA.

(1) An issue that arises periodically concerns the taxability of student loan repayments made on behalf of service members in a CZ/QHDA as part of the Department of Defense Loan Repayment Program.

(2) Generally, a loan repayment under the program is compensation for services, but it is excluded as CZ/QHDA compensation for the months in the CZ/QHDA. Letter, Department of the Treasury, Internal Revenue Service, Office of Associate Chief Counsel (Employee Benefits & Exempt Organizations), to Lieutenant Colonel Thomas K. Emswiler, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, U.S. Army (12 Dec. 1997), http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf/d890b173f60f083a852566110059ec15/143d50701075677285256563006bb314?OpenDocument.

(3) If a service member serves one or more days in a CZ/QHDA during a particular month, and is able to exclude compensation for that month as CZ/QHDA compensation, the service member is also entitled to exclude 1/12 of the loan repayment corresponding to that month's service.

d. Separation Payments to Leave the Military Accruing While a Service Member is in a CZ/QHDA.

(1) Compensation earned in a CZ/QHDA does not include pensions and retirement pay. I.R.C. § 112(c)(4).

(2) Similarly, the Fourth Circuit Court of Appeals ruled that a separation payment for an agreement to leave military service early in lieu of retirement, which accrues while the service member is on active duty in a CZ/QHDA, does not constitute compensation for active service in a CZ/QHDA, and is not excluded from gross income under the CZ/QHDA pay exclusion. A separation payment is not a payment for service in a CZ/QHDA, but rather in exchange for an agreement to leave military service early and forego any right to pension benefits. Therefore, separation payments do not fall within the CZ/QHDA compensation rules. The time and place of acceptance of the separation payment are irrelevant to this determination. Waterman v. Commissioner, 179 F.3d 123 (4th Cir. 1999).

3. Exemption from Telephone Excise Tax

a. An excise tax is imposed on telephone or communications services, which are generally a percentage of amounts paid for the services. I.R.C. § 4251(a). The person paying for the communication services normally pays the tax.

b. The telephone excise tax is not imposed on any toll telephone service originating in a CZ/QHDA that is made by a service member. I.R.C. § 4253(d).

(1) If a service member uses a calling card or makes a collect call from a CZ/QHDA, a certificate of exemption must be furnished to the telephone service provider receiving payment for the call. The certificate, which is obtainable from the telephone service provider, should contain the signature and date of the telephone subscriber. The certificate should contain the amount, the point of origin of call, the name of the service member in the CZ/QHDA, the name of the telephone service provider, and a statement that the charges are exempt from tax under I.R.C. § 4253(d). *See*, I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #30.

(2) If there has been a payment of the federal excise tax for telephone services, a refund may be obtained either from the telephone service provider that collected the tax, or from the IRS by filing Form 8849 and providing an exemption certificate. I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #31.

4. While the service member is entitled to the CZ/QHDA exclusion, income tax withholding does not apply to the excludable compensation. I.R.C. 3401(a)(1). DFAS does not report these amounts to the I.R.S. on Form W-2 as "Wages, tips, other compensation."

5. Military pay for CZ/QHDA service is still subject to Social Security and Medicare taxes. The Form W-2 will report the excluded military pay in the boxes indicated "Social Security wages" and "Medicare wages and tips." It will also show the excluded amount in block 13, as a code Q item. Code Q represents military employee basic quarters, subsistence, and CZ/QHDA compensation. Compensation for active service includes basic pay and certain other forms of compensation.

6. The other types of compensation excluded under the rules include pay for accrued leave earned in any month served in a CZ/QHDA (Treas. Reg. § 1.112-1(b)(5), Example 2; I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #6); a reenlistment bonus if the voluntary extension or reenlistment occurs in a month served in a CZ/QHDA (Treas. Reg. § 1.112-1(b)(4), and (5) Example 5, 6); and awards for suggestions, inventions, or scientific achievements members are entitled to because of a submission they made in a month they served in a CZ/QHDA (Treas. Reg. § 1.112-1(b)(5), Example 4).

7. Service in direct support of military operations in a CZ/QHDA by performance of military service in an area outside the CZ/QHDA, results in the service member receiving CZ/QHDA tax benefits if they are receiving hostile fire or imminent danger pay. Service members meeting the criteria receive the same CZ/QHDA compensation exclusion benefits as individuals serving in the CZ/QHDA. Treas. Reg. § 1.112-1(e).

8. Tax Benefits for Service Members Missing in Action (MIA) or Prisoners of War (POW).

   a. A service member who becomes a POW or is MIA is considered to remain in active service in a CZ/QHDA. The period of service in a CZ/QHDA includes the period of time during which a service member is entitled to benefits pursuant to their status as missing. I.R.C. § 6013(f)(3). I.R.C. § 7508(d).

   b. A service member is in a "missing status" when he is officially carried or determined to be absent in a status of missing, missing in action, interned in a foreign country, captured, beleaguered, or besieged by a hostile force; or detained in a foreign country against his will and is entitled to continued pay and allowances based upon the missing status. 37 U.S.C.A. § 551(2); 37 U.S.C.A. § 552.

c. Generally, the CZ/QHDA compensation exclusion rules apply only if the service member performs active service in a CZ/QHDA. Periods during which the service member is absent from duties because of internment by the enemy, or other lawful cause will be considered periods of active service. I.R.C. § 112; Treas. Reg. § 1.112-1(b)(1). A service member in a CZ/QHDA who becomes a POW or MIA is deemed to continue in active service in the CZ/QHDA for the period for which the service member is treated as a POW or as MIA for military pay purposes. Therefore, the CZ/QHDA pay exclusion rules previously mentioned will be applicable to a service member that is MIA or a POW as a result of their time in the CZ/QHDA.

9. Death while Serving in a CZ/QHDA

a. A service member who dies while in a CZ/QHDA is entitled to an abatement of the income taxes for the tax year in which the death occurs. I.R.C. § 692(a). The abatement also applies if the death occurred as a result of wounds, disease or injury incurred while serving in a CZ/QHDA.

b. The income tax liability of a deceased service member is canceled for the last taxable year, ending on the date of death. The income tax liability is also canceled for any prior taxable year ending on or after the first day the service member served in a CZ/QHDA. I.R.C. § 692(a)(1); Treas. Reg. § 1.692-1(a)(2)(I). Upon the death of a service member as stated above, the service member will not be assessed any amount of income tax for prior taxable years. I.R.C. § 692(a)(2); Treas. Reg. § 1.692-1(a)(3).

c. A service member who dies in a CZ/QHDA is entitled to forgiveness of taxes for previous years in which the statute of limitations is still open. I.R.C. § 692(a)(2). The survivor is entitled to a refund of any taxes paid by the deceased service member in prior years for which the service member, if alive, could file an amended return. Generally, an individual can only file an amended return for three years. I.R.C. § 6511(a).

(1) For example, if a service member were to die in a CZ/QHDA in 1999, taxes owed or paid by that individual for 1996, 1997, 1998, and 1999 would be forgiven, provided that the survivor files the appropriate returns prior to 15 April 2000. If the survivor fails to file an amended return by 15 April 2000, the survivor could still receive a refund for tax paid by the decedent in 1997, 1998, and 1999, provided that the survivor files the appropriate returns prior to 15 April 2001.

(2) To claim the refund, the surviving spouse needs to file a Form 1040, or a 1040X if it is an amended return with the Internal Revenue Service . Rev. Proc. 85-35, 1985-2 C.B. 433. In addition, Form 1310 and a certification from the Department of Defense or the Department of State that the death was the result of terrorist or military action outside the United States must be attached. If the return in question is for a joint return, an apportionment must be done between the decedent's income and the surviving spouse's income. *See* Treas. Reg. § 1.692.1(b); Rev. Rul. 85-103, 1985-2 C.B. 176; Major Mark Henderson, *Tax Law Note, Assisting Survivors When Spouse Died in a Combat Zone*, ARMY LAW., May 1997, at 68.

(3) The survivor will also be entitled to a refund of any income taxes that were withheld from the service member's income during the tax year in which the service member died. If there is or has been an assessment of unpaid tax, there is an abatement of the assessments. In addition, if the amount of unpaid tax was collected after the date of death of the service member, the amount collected will be credited or refunded as an overpayment.

d. Where a service member has filed a joint return with his spouse, the tax abated, credited, or refunded will be prorated as a portion of the joint tax liability. The amount abated, credited, or refunded shall be an amount equal to the portion of the joint tax liability which is the same percentage of the joint tax liability as a tax computed upon the separate income of the service member is the sum of the tax computed upon the separate income of the service member and his spouse. Treas. Reg. § 1.692-1(b).

e. If the service member was in a missing status, the date of the death will be considered to be the date on which there has been a determination of death made. I.R.C. § 692(b). However, there will not be a forgiveness, abatement, or refund of taxes beginning more than two years after the date of termination of combatant activities. I.R.C. § 692(b)(2). Therefore, where a service member has been MIA in a CZ/QHDA and is found to have died in an earlier year, the surviving spouse is allowed to treat the date of death as either the date on which the official determination is made that the service member died, or the date two years after combatant activities in the CZ/QHDA have terminated, whichever is earlier. I.R.C. 2 (a)(3); Rev. Rul 76-468, 1976-2 CB 202.

10. Tax Consequences of Military Survivor Benefits Attributed to Death in a CZ/QHDA

a. Dependency and Indemnity Compensation (DIC). DIC is not taxable as income to the recipient. I.R.C. § 134(b).

b. Survivor Benefit Plan (SBP). Compensation earned in a CZ/QHDA does not include pensions and retirement pay. I.R.C. § 112(c)(4). The payments to the beneficiaries under SBP are taxable as ordinary income despite the death occurring in a CZ/QHDA. I.R.C. § 72(a), (n).

c. Servicemen's Group Life Insurance (SGLI). It is excluded from federal income taxation. I.R.C. § 101(a).

B. Foreign Earned Income Exclusion (I.R.C. § 911; IRS Publication 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad).

1. General.

2. Armed Forces assigned to NATO may not elect the foreign earned income exclusion for military compensation.

a. The IRS has concluded that service members assigned to NATO are employees of the U.S. and are ineligible to elect the exclusion of foreign earned income under I.R.C. § 911.

b. The IRS noted that a service member is assigned to NATO by the U.S. and performs services at NATO as a member of the U.S. military. Because the U.S. provides the member with benefits, pays the member's salary, and issues a Form W-2, the service member is an employee of the U.S. and, therefore, cannot take the foreign earned income exclusion.

c. References:

(1) Fact sheet on JAGCNET: http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf/d890b173f60f083a852566110059ec15/1ce19f07df6aba0b852567f60040990b?OpenDocument&ExpandSection=1#_Section1.

(2) *Tax Notes Today*, September 20, 1999, 1999 TNT 181-53..

C. Other Exclusions.

1. Property received as a gift, bequest, devise, or inheritance is excluded (I.R.C. § 102(c); Treas. Reg. § 1.102-1).

2. Child support (I.R.C. § 71).

## VIII. TAX CONSEQUENCES OF SELLING A HOME.

A. Gain or Loss on the Sale of a Personal Residence.

1. Gain derived from the sale of a personal residence is taxable unless deferred or excluded. Generally must be reported in year of sale. If the sale occurred on or after May 7, 1997 and the taxpayer elects to treat the sale under revised section 121, the taxpayer need not report the sale if the selling price was under $250,000 ($500,000 if married), the home was the taxpayer's principal residence, the entire amount is excludable under revised section 121, and the real estate reporting person certifies these facts on an information return to the Internal Revenue Service. I.R.C. § 6045 as amended by the tax Reform Act of 1997.

2. Losses sustained on the sale of a personal residence are nondeductible (I.R.C. § 165, Reg. § 1.165-9).

a. If a residence is converted to rental property, a loss will be allowed, but the taxpayer must compute the amount of the loss from the lesser of the adjusted basis or the fair market value at the time of the conversion (Reg. § 1.165-9).

b. Taxpayer has option to elect out of section 121. Allows taxpayer to treat an otherwise qualifying property as a rental. (I.R.C. § 121(f)).

B. Exclusion of Gain (I.R.C. § 121). Gross income does not include gain from the sale or exchange of property if, during the five year period ending on the date of the sale or exchange, the property had been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating two years or more (I.R.C. § 121(a)).

1. The two-year period of use need not be continuous (IRS Pub 17 (1998)).

2. The taxpayer may meet the *ownership* and *use* tests during two different two-year periods (IRS Pub. 17 (1998)).

C. Dollar Limitations.

1. $250,000 (I.R.C. § 121(b)(1)).

2. $500,000 exclusion for joint filers. In the case of a husband and wife who file a joint return for the tax year of the sale or exchange of the property, the $250,000 limitation is increased to $500,000 if: (I.R.C. § 121(b)(2)(A)),

   a. Either spouse meets the *ownership* requirements described in section 121(a) with respect to the property (I.R.C. § 121(b)(2)(A)(i)),

   b. Both spouses meet the *use* requirements described in section 121(a) with respect tot he property (I.R.C. § 121(b)(2)(A)(ii)), and

   c. Neither spouse is ineligible for the benefits of the exclusion with respect to the property by reason of the one sale every two years rule contained in section 121(b)(3) (I.R.C. § 121(b)(2)(A)(iii)).

3. Dollar limitations for married couples who file a joint return and do not qualify for the $500,000 limitation. In the case of a husband and wife who make a joint return for the year of sale or exchange and who do not meet the requirements for the $500,000 exclusion, the amount of gain eligible for the exclusion is the sum of the amounts to which each spouse would be entitled if the spouses had not been married. For purposes of this rule, each spouse is treated as owning the property during the period that either spouse owned the property (I.R.C. § 121(b)(2)(B)). Thus, if a married couple filing a joint return does not qualify for the $500,000 maximum exclusion, the amount of the maximum exclusion that may be claimed by the couple is the sum of each spouse's maximum exclusion determined on a separate basis.

D. Two-Year Rule. The exclusion of gain from the sale or exchange of a principal residence does not apply to any sale or exchange by the taxpayer if, during the two-year period ending on the date of the sale or exchange, there was any other sale or exchange by the taxpayer to which the exclusion applied (I.R.C. § 121(b)(3)(A)).

1. The use of the exclusion is generally limited to one sale every two years.

2. This limit of one sale every two years is applied without regard to sales before 7 May 1997 (I.R.C. § 121(b)(3)(B)).

3. If a single taxpayer who is otherwise eligible for an exclusion marries someone who has used the exclusion within the previous two years, the newly married taxpayer is allowed a maximum exclusion of $250,000 (H Rept. No. 105-148).

4. The rule limiting the exclusion to one sale every two years by the taxpayer does not prevent a husband and wife filing a joint return with each excluding up to $250,000 of gain from the sale or exchange or each spouse's principal residence provided that each spouse would be permitted to exclude up to $250,000 of gain if they filed separate returns (Conf Rept No. 105-220).

E. Reduced Exclusion. Certain taxpayers who fail to meet the ownership requirements or who have sold or exchanged principal residences within two years may qualify for a reduced exclusion.

1. Sales and exchanges eligible for the reduced exclusion. The reduced exclusion applies to any sale or exchanges if:

a. the exclusion would not (but for these rules relating to the reduced exclusion) apply to the sale or exchange by reason of:

(1) a failure to meet the ownership and use requirements (I.R.C. § 121(c)(2)(A)(i)), *or*

(2) the limit of only one sale every two years (I.R.C. § 121 (c)(2)(A)(ii)), *and*

b. the sale or exchange is by reason of a change in place of employment, health, or unforeseen circumstances. (I.R.C. § 121(c)(2)(B)).

2. Amount of the reduced exclusion. For taxpayers subject to the reduced exclusion, the dollar limitation (either $250,000 for single taxpayers or $500,000 for certain joint filers) is equal to:

a. the amount which bears the same ratio to the dollar limitation ($250,000 or $500,000), (I.R.C. § 121(c)(1)(A)) *as*

b. *the shorter of*: (I.R.C. § 121 (c)(1)(B)(i))

(1) the aggregate periods, during the five year period ending on the date of the sale or exchange, the property has been owned and used by the taxpayer as the taxpayer's principal residence, (I.R.C. § 121 (c)(1)(B)(i)(I)) *or*

(2) the period after date of the date of the most recent earlier sale or exchange by the taxpayer to which the exclusion applied and before the date of the sale or exchange (I.R.C. § 121 (c)(1)(B)(i)(II))

c. bears to two years (I.R.C. § 121 (c)(1)(B)(i)(II), I.R.C. § 121(c)(1)).

F. Recapture of depreciation. Gain attributable to depreciation taken after May 6, 1997 is not excludable under section 121. (I.R.C. § 121(d)(6)).

G. Reporting gain under section 121. A taxpayer who sells a residence for less than $250,000 ($500,000 for married taxpayers) need not report the transaction to the IRS if the company responsible for reporting the transaction certifies to the IRS that the taxpayer satisfies the requirements of section 121 and that the full amount of the gain is excludable. (I.R.C. § 6045(e)(5)).

# IX. ADJUSTMENTS TO INCOME

A. Student Loan Interest Deduction. (Form 1040, line 24.)

1. Taxpayers are entitled to a deduction (above the line) for interest paid during the first sixty months (even if loan repayments began before 1998) in which interest is required to be paid on an educational loan. A loan and any refinancings are treated as one loan. I.R.C. § 221.

   a. The 60-month period commences with the month in which a loan first enters mandatory repayment status and continues to elapse regardless of whether payments are actually made, unless the repayment period is suspended for a period of deferment or forbearance.

   b. The 60-month repayment period may expire at different times for different loans of the same borrower.

   c. The date on which a qualified education loan enters repayment status is determined by reference to the loan agreement or the federal regulations governing the applicable federal postsecondary education loan program.

   d. The 60-month period is suspended for any period when interest payments are not required on a qualified education loan because the borrower has been granted a deferment or forbearance (including postponement in anticipation of cancellation).

2. The maximum deduction allowed in 1999 is $1,500. It will increase to $2,000 in 2000, and $2,500 in 2001 and thereafter.

3. The deduction is phased out from $60,000 to $75,000 for joint filers and $40,000 to $55,000 for all others (I.R.C. § 221(b)(2)(C)).

4. The student loan interest deduction may be claimed only by a taxpayer that is legally obligated to make the interest payments pursuant to the terms of the loan.

5. An eligible student is one who:

   a. Is enrolled in a degree, certificate, or other program (including a program of study abroad that is approved for credit by the institution at which the student is enrolled) leading to a recognized educational credential at an eligible education institution, and

   b. Is carrying at least one-half the normal full-time workload for the course of study the student is pursuing.

6. A person who is claimed as a dependent on another's tax return cannot claim the education interest deduction (I.R.C. § 221(c)).

7. Married couples must file joint returns to take the deduction (I.R.C. § 221(f)(2)).

8. A qualified higher education loan is any debt incurred to pay qualified higher education expenses that are:

   a. Incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the debt is incurred,

   b. Paid or incurred within a reasonable period of time before or after the debt is incurred, and

   c. Attributable to education furnished during a period when the recipient was an eligible student (at least half-time student) (I.R.C. § 221(e)).

9. A qualified education loan includes debt used to refinance debt that qualifies as a qualified education loan, but does not include debt owed to a related person as defined by I.R.C. § 267(b) or I.R.C. § 707(b)(1) (I.R.C. § 221(e)(1)). However, refinancing a loan does not extend the 60-month period. The 60-month period is based on the original loan.

10. A revolving line of credit will qualify as an education loan only if the borrower agrees to use it only for qualified higher education expenses.

11. Qualified higher education expenses are the costs of attendance at an eligible educational institution, which is generally a post-secondary educational institution eligible to participate in the federal student loan program. An eligible educational institution also includes one conducting an internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility which offers postgraduate training (I.R.C. § 221(e)(2)).

12. Qualified higher education expenses include tuition, fees, room and board, and related expenses, but must be reduced by the amount excluded by reason of such expenses under the rules for employer-provided educational assistance benefits, income from U.S. Savings Bonds used to pay higher education expenses, distributions from an education IRA, and scholarships or fellowship grants (I.R.C. § 221(e)(2)).

13. No deduction is allowed under this section for any amount for which a deduction is allowable under any other provision of the Code (such as a home equity loan) (I.R.C. § 221(f)(1)).

14. In order to claim the student loan interest deduction, the taxpayer must complete the worksheet located in the tax form instructions and enter the allowable amount on Form 1040, line 24. The worksheet is located in the Form 1040 Booklet at page 28.

B. Moving Expenses (Form 1040, line 26; Form 3903) (I.R.C. § 62(a)(15), 217(g)).

1. An employee or self-employed individual may deduct as an adjustment to income the expenses of moving himself and his family from one location to another if the move is related to starting work in a new location and the amount is reasonable. I.R.C. § 217.

2. The moving expense deduction is computed on Form 3903 and the amount allowed as a deduction is taken on Form 1040, line 26. Since this is an adjustment to income there is no need to itemize to take a moving expense deduction.

3. Generally, deductible moving expenses are limited to the cost of: (I.R.C. § 217(b))

a. Transportation of household goods and personal effects, and

(1) Items deductible include cost of packing, crating, cost of storing and insuring household good and personal effects within any period of 30 consecutive days after the day goods are moved from the former home and before they are delivered to the new home.

(2) Can deduct costs of connecting or disconnecting utilities required because of the move, shipping of car, and pet.

b. Travel (including lodging but not meals) to the new residence.

(1) Can include lodging expenses in the area of the former residence within one day after the taxpayer could not live in the former home because of furniture being moved out of the home.

(2) Includes lodging expenses for the day arriving at new residence.

4. Where an automobile is used in making the move, a taxpayer may deduct either:

   a. The actual out-of-pocket expenses incurred (gasoline and oil, but not repairs, depreciation, etc.) or

   b. A standard mileage allowance of ten cents per mile in 1999.

5. Moving expenses do **not** include cost of meals and lodging for pre-move househunting trips; costs of meals and lodging (i.e., temporary living expenses); costs incident to sale (or lease) of old residence; costs incident to purchase (or lease) of new residence; car tags; and driver's license.

6. Generally, a taxpayer must meet a distance test, length of employment test, and a commencement of work test to be eligible to take the moving expense deduction. I.R.C. § 217(c), (d); Treas. Reg. § 1.217-2(a)(3), (d)(3).

7. Individuals that retire from an overseas job and return to the U.S. or a survivor (spouse or dependent) of any decedent who worked outside the U.S. at the time of death is also eligible to deduct moving expenses if, within six months of the decedent's death, the survivor move to the U.S. from a foreign residence that had been shared by the decedent. I.R.C. § 217(i).

8. Gross income does not include qualified moving expense reimbursements. These are amounts received from an employer as a payment for or reimbursement of expenses that would be deductible as a moving expense if directly paid or incurred by the employee. I.R.C. § 132(a)(6) and (g).

9. Any amount other than a qualified reimbursement received directly or indirectly by a taxpayer from the employer as a payment for or reimbursement of moving expenses must be included in the taxpayers gross income as compensation for services. I.R.C. § 82.

10. Employers are required to give employees a statement showing a detailed breakdown of reimbursements or payments of moving expenses. Treas. Reg. § 31.6051-1(e).

11. Foreign moves.

    a. A moving expense deduction is permitted in connection with the commencement of work at a new principal place of work located outside the U.S. and its possessions.

    b. The rules are similar to the general moving expense deductions rules, except that a deduction is also allowed for reasonable expenses of moving household goods and personal effects from storage, and of storing them for part or all of the time during which the new place of work abroad continues to be a taxpayer's principal place of work. I.R.C. § 217(h).

12. Moving Expenses of members of the Armed Forces (I.R.C. § 217(g)).

    a. A move by an active duty member of the armed forces under a military order and incident to a change of station can qualify for deduction regardless of the distance moved or the length of time worked at the new station. I.R.C. § 217(g). Therefore, a service member that moves because of PCS does not have to meet the distance and time tests mentioned before.

    b. A permanent change of station for purposes of this section includes:

        (1) A move from a home to the first post of active duty,

        (2) A move from one permanent post of duty to another, and

(3) A move from the last post of duty to a home or to a nearer point in the U.S.. The move must occur within one year of ending of active duty or within the period allowed under the Joint Travel Regulations.

c. If a service member deserts, is imprisoned, or dies, a PCS for the spouse or dependent includes a move to:

(1) The place of enlistment,

(2) The member's, spouse's, or dependent's home of record, or

(3) A nearer point in the U.S..

d. Cash reimbursements or allowances are excludable from income to the extent of moving and storage expenses actually paid or incurred, as are all in-kind moving and storage services provided by the military. This exclusion applies to the spouse and dependents of a servicemember when they do not accompany the member and move to a location different from that to which the servicemember moves or different from that from which the servicemember moves.

e. If total reimbursements or allowances received from the government because of the move are more than the actual moving expenses, the government should include the excess in wages on a Form W-2. This may be the case with some "Do it Yourself" moves or DITY moves. However, the excess portion of a dislocation allowance, a temporary lodging allowance, a temporary lodging expense, or a move-in housing allowance is not included in income.

f. Where the military moves the servicemember and the member's family to or from separate locations and they incur unreimbursed expenses, their moves are treated as a single move to the member's new principal place of work (I.R.C. § 217(g)).

g. No deduction is permitted for any moving or storage expense reimbursed by an allowance that is excluded from income (Treas. Reg. § 1.217-2(g)(6)).

h. If a service members reimbursements or allowances are less than the actual moving expenses, the service member can deduct the expenses that exceed reimbursements and allowances (including dislocation, temporary lodging, temporary lodging expense, or move-in housing allowances that are excluded from gross income).

i. If the above requirements are met by a service member, he/she can deduct reasonable unreimbursed expenses incurred for the following:

(1) Moving of household goods and personal effects, including expenses for hauling a trailer, packing, crating, in-transit storage, and insurance.

(2) Travel and lodging expenses from the old home to the new home, including automobile expenses and airfare.

C. Individual Retirement Arrangements (Traditional IRA). (Form 1040, Line 23)

1. Tax savings for a fully deductible $2,000 IRA contribution by income tax bracket:

| Tax Savings | Tax Bracket |
|---|---|
| $300 | 15% |
| $560 | 28% |

2. Characteristics.

a. Simple procedure for establishing personal retirement program.

b. Full contributions currently deductible, except by "active participants" in retirement plans who have adjusted gross income in excess of specified levels.

c. Earnings on “traditional” IRAs are not subject to federal income tax until distributed, unless involved in "prohibited transaction," used as security for a loan, or the IRA receives unrelated business income. I.R.C. § 408(d)(1).

3. Contribution Deadline. Normally due date for the return (15 April without regard to extensions); however, the IRA need not actually be established until such due date in order to claim a contribution (I.R.C. §219(f)(3)).

a. Contribution may be deducted if it is mailed before the return due date, even if it is not received by the IRA custodian until after the due date.

b. Deduction may be claimed on return--even if contribution not yet made--so long as contribution actually occurs by due date.

c. The CZ/QHDA extension, provides service members with an additional period in which to contribute to an IRA for a preceding tax year.

(1) To qualify, the service member must make a contribution before the earlier of the end of the income tax return filing period established under the CZ/QHDA tax extensions or the date on which the federal income tax return actually is filed. I.R.C. § 7508.

(2) For example, a contribution made on June 1, 2000 could be designated as a contribution for the 1999 tax year if it is made before the taxpayer's CZ/QHDA suspension period expires. The taxpayer would have to designate the contribution as a contribution for the 1999 tax year to claim it on his or her 1999 income tax return.

(3) For information on CZ/QHDA and IRA contributions *see* I.R.S. Notice 91-17, 1991-23 I.R.B. 25; I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #21; Major George Hancock, *Tax Note, IRA Contributions By Desert Storm Personnel,* ARMY LAW., Sep. 1991 at 35.

4. Taxpayer must have earned compensation.

a. Includes wages, salaries, tips, bonuses, commissions, partnership, alimony, self-employment income, and other amounts for personal services. Only compensation includible in gross income is used. I.R.C. § 219(f).

b. Does <u>not</u> include passive income such as profits from property, i.e., rental income, interest dividends, pensions, or annuities (including military retirement pay).

c. Compensation also does <u>not</u> include foreign earned income excluded from gross income.

5. There are special rules for certain married individuals which allow a taxpayer with no earned compensation or amounts less than $2,000 to participate in an IRA (I.R.C. § 219(c)). These special rules for spouses will be discussed in detail later in the outline.

6. Limits on IRA Contributions.

a. The maximum annual deductible contribution is the lesser of $2,000 per person or the total compensation included in gross income for the year. I.R.C. § 219(b)(1).

(1) Limitations for Participants in Employer-Provided Retirement Plans.

(a) The Tax Reform Act of 1986 established limits on the deductibility of contributions by taxpayers covered by an employer-provided retirement program.

(b) One is considered covered by an employer-provided plan even though the plan has not vested.

(c) Active duty service members are considered covered by an employer-provided retirement plan (I.R.C. § 219(g)(1); IRS Notice 87-16; Morales-Caban v. Commissioner, T.C. Memo 1993-466, 66 T.C.M. (CCH) 995 (1993) (active duty military covered by employer-provided plan).

(d) Members of the reserve components who are not on active duty for over 90 days are not, by virtue of their reserve status, considered covered by an employer-provided plan. I.R.C. § 219(g)(6).

(2) Taxpayers with an AGI less than the applicable amount are permitted a full deduction.

b. Full deduction of $2,000 allowed if taxpayer is not covered by employer-provided retirement plan and earns at least $2,000.

c. IRA contributions may be limited if the taxpayer is covered by an employer-provided retirement plan (e.g., service members).

(1) Phaseout of deduction depends on income and filing status (I.R.C. § 219(g)(2)(A)).

(2) Taxpayers may make nondeductible contributions to the extent a deduction is disallowed. Must be reported to the IRS on Form 8606.

**CAN YOU TAKE AN IRA ADJUSTMENT?**

| **If your 2000 Modified AGI* is:** | | **If you are covered by a retirement plan at work & your filing status is:** | | |
|---|---|---|---|---|
| **At Least** | **But Less Than** | **Single or Head of Household** | **Married filing Jointly or Qualifying Widow(er)** | **Married Filing Separately** |
| $0 | 10,000 | Full deduction | Full deduction | Partial deduction |
| 10,000 | 32,000 | Full deduction | Full deduction | No deduction |
| 32,000 | 42,000 | Partial deduction | Full deduction | No deduction |
| 42,000 | 52,000 | No deduction | Full deduction | No deduction |
| 52,000 | 62,000 | No deduction | Partial deduction | No deduction |
| 62,000 or over | | No deduction | No deduction | No deduction |

d. Deduction phaseout. The deduction is reduced or eliminated entirely depending on the taxpayer's filing status and income.

* Modified AGI (adjusted gross income) is: (1) for Form 1040A--the amount on line 14 increased by any excluded series EE bond interest shown on Form 8815, EXCLUSION OF INTEREST FROM SERIES EE U.S. SAVINGS BONDS ISSUED AFTER 1989, or (2) for Form 1040--the amount on line 33, figured without taking into account any IRA deduction or any foreign earned income exclusion and foreign housing exclusion (deduction), or any series EE bond interest exclusion from Form 8815.

7. Special rules for married taxpayers.

a. There are special rules for certain married individuals which allow a taxpayer with no earned compensation or amounts less than $2,000 to participate in an IRA (I.R.C. § 219(c)). This section is not specifically for nonworking spouses.

(1) An individual who files a joint return and has less taxable compensation than his spouse may contribute to a spousal IRA and deduct the lessor of $2,000, or the sum of that individual's includible compensation for that tax year, plus the includible compensation of the individual's spouse reduced by the spouse's allowable IRA deduction and Roth IRA contribution for that tax year. I.R.C. § 219(c), (f).

(2) The practical application of this provision permits IRA contributions (and perhaps a deduction) of up to $2,000 for each spouse (including a spouse with no compensation or less than $2,000 of compensation for the year) if their combined compensation income for the year equals or exceeds the contributed amount.

(3) Total contributions to both are limited to $4000. The maximum contribution to either spouse's IRA is limited to $2,000.

(4) Service members who serve an entire calendar year in a CZ/QHDA may have no taxable compensation or very little taxable compensation and may be unable to make an IRA contribution.

(5) A married service member filing a joint tax return whose service in a CZ/QHDA results in less than $2,000 of taxable income, but whose spouse is working and earns taxable compensation can make contributions to his or her IRA up to the dollar limitation based upon the couples Adjusted Gross Income (AGI) (I.R.C. § 219(c)).

(6) Because of recent changes to the tax laws relating to spousal IRAs, it appears that the compensation limitation will only come into play for service members in the CZ/QHDA if the combined includible compensation of a husband and wife for the tax year is less than the sum of their dollar limitations. The service member in the CZ/QHDA who has less than $2,000 taxable compensation for the calendar year can aggregate his/her compensation with his/her spouse's compensation in order to contribute (and possibly take a deduction) (I.R.C. § 219(c)).

b. The applicable dollar limit is higher than the usual limit for an individual who is not an active participant in an employer plan during any part of the year, but whose spouse is an active plan participant. I.R.C. § 219(g)(7). For these individuals, the IRA deduction phase-out begins at $150,000 AGI and it is eliminated at $160,000 AGI or more.

## X. STANDARD DEDUCTION. (I.R.C. § 63(c)).

2000 Amounts.

| Filing Status | 2000 Standard Deduction Amount |
|---|---|
| Single | 4,400 |
| Married filing jointly/qualifying widow(er) | 7,350 |
| Head of household | 6,450 |
| Married filing separately | 3,675 |

# XI. ITEMIZED DEDUCTIONS.

A. Taxpayer's Choice. If itemized deductions are less than the standard deduction, taxpayer should take the standard deduction. A taxpayer may change his mind even after filing the Form 1040 return by filing an amended return on Form 1040X.

1. Deductions must be authorized; i.e., the taxpayer must have some authority to justify any deduction (I.R.C. § 63(a)).

2. The authority must be in the I.R.C., regulations, case law, or Revenue Rulings.

B. Medical and Dental Expenses. Deductible only to the extent they exceed 7.5% of AGI (I.R.C. § 213(a)).

C. Taxes. (I.R.C. §164; Schedule A, lines 5-9).

D. Interest Expense. (I.R.C. §163(h); Schedule A, lines 10-14).

E. Charitable Contributions. (I.R.C. §170(a); Schedule A, lines 15-18).

F. Job Expenses and Most Other Miscellaneous Deductions. (I.R.C. § 67(a); Schedule A, lines 20-26).

1. General. The following items can be deducted only to the extent they exceed 2% of the taxpayer's AGI:

a. Professional society dues.

b. Employment related educational expenses.

c. Expenses of looking for a new job.

d. Professional books, magazines and journals.

e. Work clothes and uniforms.

f. Certain unreimbursed employee business expenses.

g. Safe deposit box rental.

h. Tax counsel and assistance.

i. Cost of work-related small tools and supplies.

2. Employee Business Expenses.

a. Employee business expenses in general and travel away from home, local transportation, entertainment and educational expenses, in particular, perhaps cause more controversy than any other item on a military member's return. The controversy usually revolves around (i) whether a particular item is deductible, (ii) the amount of deduction available, or (iii) proof of the deduction.

b. Under I.R.C. § 62, only expenses paid or incurred by the taxpayer in connection with the performance by him of services as an employee, under a reimbursement or other expense arrangement with his employer, are deductible in computing adjusted gross income.

c. Expenses which do not qualify for deduction under I.R.C. § 62 may still be deductible under I.R.C. §§ 162 or 212 if the taxpayer itemizes deductions.

(1) I.R.C. § 67 makes these expenses miscellaneous itemized deductions that are subject to the 2% floor.

(2) Effective December 31, 1993, deductible meal and "entertainment" expenses must be reduced by fifty percent (50%) (I.R.C. §274 (n)(1).

3. Reimbursed Expenses.

a. General Rule. An employee who adequately accounts to his employer is not required to report the reimbursement on his tax return if the advances or reimbursements equal the expenditures. Also, he need not report the advance or reimbursement as income, if he does not report the expense. No Form 2106 need be filed (Reg. § 1.162-17(b)(1)).

b. Where the reimbursements are in excess of the expenses, the excess constitutes income and must be reported as such. Form 2106 need not be filed; however, the income must be reported on Form 1040, 1040A or 1040EZ (Treas. Reg. § 1.162-17(b)(2)).

c. Where the expenses are in excess of the reimbursement, they may constitute a deduction. Form 2106 and Schedule A, Form 1040 must be filed to properly claim the deduction. However, if the excess employee business expenses do not exceed two percent of adjusted gross income, they are not deductible and Form 2106 need not be filed (Treas. Reg. § 1.162-17(B)(3)).

d. Per diem received by service members constitutes a tax-free allowance excludable from income. I.R.C. § 134, Letter from Assistant Secretary of Treasury to Undersecretary of Defense (Personnel and Readiness), dated 20 November 1996. However, see reimbursements above.

4. Substantiation. The employee must keep accurate records or sufficient evidence collaborating statements as to (1) amount, (2) time and place, (3) business purpose, and (4) business relationship of any entertained person. A detailed record must be kept, such as a diary, account book, or other statement of expense. The taxpayer must have documentary evidence for any lodging expense while traveling away from home and for any other expense of $75.00 or more (Treas. Reg. §1.274-5T(c)(2)(iii) ($25.00 for expenditures before October 1, 1995 (Treas. Reg. §1.274-5) Automobile use should be documented by recording the beginning and ending mileage readings.

5. Threshold Requirement - must be "***Business Expense***."

a. To be deductible, the expense must be an ordinary and necessary cost which bears a sufficient relationship to the taxpayer's business or income-producing activity and be reasonable in amount (I.R.C. §§ 162(a)(2), 212).

b. If the expenditure is incurred primarily for personal purposes and bears little or no relationship to the taxpayer's business, it is not a deductible expense (I.R.C. § 262).

c. The expenses must also be "ordinary and necessary."

(1) "Ordinary" means common and accepted in the business.

(2) "Necessary" means helpful or appropriate; it does not mean absolutely indispensable.

(3) The expenses must also be "reasonable" in amount; i.e., not lavish or extravagant.

(4) Expenses related to tax-exempt income are not deductible.

d. The following are ***not*** ordinary business expenses and are ***not deductible***:

(1) Dues paid by service-members to an officers' or a noncommissioned officers' club. Rev. Rul. 55-250, 1955-1 C.B. 270.

(2) Uniforms for "special occasions" (like dress blues), absent a showing that military regulation prohibit wearing the uniform while off-duty. Hatch v. Commissioner, 35 T.C.M. (CCH) 1737 (1976); Commissioner v. Motch, 180 F.2d 859 (6th Cir. 1950; Priv. Ltr. Rul. 81-20-036 (Feb. 18, 1981). Priv. Ltr. Rul. 80-34-132 (May 30, 1980);

(3) Servicemember required to have hair cut every two weeks. Drake v. Commissioner, 52 T.C. 842 (1969).

(4) Expenses incurred by a Marine Corps artillery officer for a law school education, bar review course, and bar examination in order to qualify as a legal officer are not deductible as "educational expenses." Rev. Rul. 72-450, 1972-2 C.B. 89.

(5) Out of pocket expenses for law books and other incidental expenses paid by Air Force FLEP student are nondeductible personal expenses under I.R.C. § 262. Priv. Ltr. Rul. 80-43-128 (Aug. 1, 1980).

(6) Stationery and callings cards. The servicemember failed to establish that the origin and character of these expenditures have a direct relationship to the servicemembers business. Fogg v. Commissioner, 89 T.C. 310 (1987).

e. The following have been considered ordinary and necessary expenses in carrying on a trade or business (***deductible***).

(1) A Navy Captain whose assignments involve primarily command and administration of personnel may deduct educational expenses incurred in obtaining a mater of arts degree in personnel administration. Rev. Rul. 69-199, 1969-1 C.B. 51.

(2) Officer assigned several positions relating to national security matters. Educational program (degree of M.A. in International Securities Studies) expenses are deductible. Priv. Ltr. Rul. 88-13-049 (Jan. 4, 1988).

(3) Entertainment of employees incurred by an employer (commander, section chief, OIC) are deductible provided they entertainment is not lavish or extravagant. Examples would be buying subordinates a meal during duty hours when business is being discussed. I.R.C. § 162.

(4) Leaders who provide social gatherings for all or selected organizational members and their families should be entitled to deduct those reasonable costs associated with the function as a business entertainment expense. I.R.C. § 274(e); Treas. Reg. § 1.274-2(f). However, a taxpayer is not allowed to deduct the expense of a party merely because he or she invited a few employees. These gatherings must pass the "directly related" to or "associated with" business test.

(5) Entertainment expenses incurred by a servicemember in connect with a change-of-command ceremony were deductible. Fogg v. Commissioner, 89 T.C. 310 (1987).

(6) Contribution to Unit Fund. A contribution to the "Squadron Fund," a fund maintained within a military unit by donations from the unit officers, that is used to purchase mementos, such as unit emblems, for departing personnel, to pay for flowers for personnel in hospital, etc., was held deductible. Note that this servicemember was expected to make a contribution as an officer/commander, and if he refused to contribute to the fund, his career might have been jeopardized. The servicemember did not receive any personal or substantial benefit from the fund. Fogg v. Commissioner, 89 T.C. 310 (1987).

(7) Military fatigue uniforms (BDU's). Fogg v. Commissioner, 89 T.C. 310 (1987).

(a) The amounts expended by servicemembers on active duty for the purchase and maintenance of BDU's, where local regulations prohibit their off-duty wear, are, to the extent the expenses exceed allowances received, are deductible for income tax purposes as ordinary and necessary business expenses. Rev. Rul. 67-115, 1967-1 C.B. 30.

(b) Cleaning of BDU's are deductible if meets the above test. Drake v. Commissioner, 52 T.C. 842 (1969);

6. "Travel" Expenses.

a. General Rule and Includible Expenses. To be deductible, "travel" expenses must be ordinary and necessary and incurred in connection with the performance of duty (usually TDY) while away from home overnight (or for substantially longer than normal duty hours and, during the time away from home, the taxpayer needs to get rest or sleep in order to perform duties).

b. Meals and Lodging. Deductible only if the travel is long enough to require sleep or rest. If the taxpayer returns home each evening, he may not deduct those expenses (Treas. Reg. § 1.162-1(g)).

c. Rules Applicable to Military Members. "Travel" expenses incurred by military personnel while on travel status on temporary assignments away from their permanent stations are deductible business expenses under I.R.C. § 162(a)(2).

(1) The deduction need not be offset by the basic subsistence and quarters allowance (which is non-taxable under Treas. Reg. §1.61-2(b)), unless the member is a reservist performing temporary active duty. Rev. Rul. 55-572, 1955-2 C.B. 45.

(2) Expenses incurred in connection with a change of permanent duty station do not qualify as "travel" expenses, but may be deductible as a moving expense. Rev. Rul. 76-2, 1976-1 C.B. 82.

(3) A military member's "tax home" is his duty station, not where his family lives, even if the family could not go with him. Rev. Ruls. 55-571, 1955-2 C.B. 44. and 67-438, 1967-2 C.B. 82.

(4) A member of the military services is "not away from home" while at his permanent duty station and may not deduct traveling expenses, including meals and lodging, incurred at such location. This is so even though it is not feasible or even permissible for his family to join him. CIR v. H.A. Stidger, 386 U.S. 287 (1967).

(5) Members of the U.S. armed forces on permanent duty assignments at official stations overseas are not traveling "away from home" and may not deduct their expenses for meals and lodgings at such locations, even though they are required to maintain homes in the U.S. for their families who are not allowed to accompany them. Rev. Rul. 55-571, 1955-2 C.B. 44.

(6) A naval officer on permanent duty aboard ship has a tax home aboard the ship. The IRS has stated it will apply this rule to crewmen of nuclear submarines who serve six months of the year aboard the vessel and the other six months ashore. Rev. Rul. 67-438, 1967-2 C.B. 82.

*(7)* An Army officer could not deduct the cost of his meals in an officers' mess, a voluntary organization to which he belonged, or the expense of a "striker fee" (janitor service for his living quarters), inasmuch as he was not "away from home". His place of business was his army post. Bercaw v. CIR, 165 F.2d 521 (4th Cir. 1948).

(8) A ready reservist on temporary active duty, who has a place of business or employment which he retained and to which he will return after his period of service, is in travel status and may deduct his meals and lodging at his official military post of duty to the extent such expenses exceed any nontaxable basic subsistence allowances received for those expenses. The deduction does not include expenses for family members. Rev. Rul. 63-64, 1963-1 C.B. 30.

(9) A serviceman's expenses in visiting home and in returning home after his discharge, including the cost of moving his family, are nondeductible personal expenses. Frederick Tilney, Jr., 12 T.C.M. (CCH) 92, 1953.

7. Entertainment Expenses.

a. Requirements for Deductibility. In order to be deductible, entertainment expenses generally must meet the following requirements:

(1) All "ordinary and necessary" expenses paid or incurred in carrying on a trade or business are deductible. A military officer is engaged in a trade or business. *Carlisle v. Commissioner*, 37 T.C. 424, 429 (1961); *Lindsay C. Howard*, 16 T.C. 157,161 (1951), *aff'd* 202 F.2d 28 (9th Cir. 1953).

(i) Ordinary means common and accepted in the field of business. Necessary means helpful and appropriate for the business.

(2) Effective for expenses paid after 1993, only 50% of otherwise deductible entertainment expenses qualify for deduction (I.R.C. § 274).

b. Application to the Military. Section 162(a) allows deductions for current business expenses while section 262 disallows deductions for "personal, living, or family expenses." The proper test to be applied in resolving the tension between section 162 and section 262 is "whether the expense was 'business' or 'personal.'" *Fogg v. Commissioner*, 89 T.C. 310, 316 (1987).

(1) The Personal Money Allowance received by Lieutenant Generals and Generals is gross income. However, Congress provided the allowance in recognition of the additional expenses peculiar to the military ranks or positions in question. *See* H.R. Rep. No. 640, 80th Cong., 1st Sess. 12 (1974). To the extent that the officer expends these funds for their intended purpose of defraying certain costs incurred in connection with their official duties, the expenses should be deductible as ordinary and necessary business expenses. Rev. Rul. 77-350, 1977-2 C.B. 21.

(2) Other officers must establish that "the origin and character of the events or circumstances that give rise to the expenditures in question are directly related to petitioner's trade or business of being a military officer." *Fogg v. Commissioner*, 89 T.C. 310, 317 (1987).

(3) In *Fogg,* a Marine LTC deducted the costs associated with a change in command ceremony reception and the cost of contributions to a squadron unit fund. LTC Fogg introduced evidence that showed all commanders were required to engage in "official entertaining," including change in command ceremonies and that his career might have been jeopardized if he failed to contribute to the squadron fund. The Tax Court found that the reception was required by LTC Fogg's employer (even though he was not under a direct order to do so) and that they directly flowed from a business ceremony. The Court drew an analogy between the officer and a "hard-headed businessman" and determined that the businessman would have incurred the expenses. Because LTC Fogg convinced the Court that he was expected to contribute to the squadron fund or his career would be jeopardized, the Court ruled that the expenses were deductible being appropriate, helpful, and necessary for his career.

(4) In *Pollock v. Commissioner*, 10 B.T.A. 1297 (1928), which is relied on in Fogg, the petitioner, a naval officer, was appointed as Governor of American Samoa. In connection with his duties, the petitioner was required to extend courtesies to representatives of other countries; amounts for which the petitioner was not reimbursed. Refraining from making the expenditures, however, would not have been consistent with the petitioner's duties. The court opined that the continuance of the petitioner's naval standing, from which his income was derived, would have been seriously jeopardized had he failed to make the expenditures; therefore, the amounts paid out of his personal funds were deductible as ordinary and necessary expenses. Thus, while the officer in *Pollock* may not have been under a direct order, the Court recognized that one need not be threatened with a court martial in order for an expenditure of a military officer to be considered "necessary."

(5) *Carlisle v. Commissioner*, 37 T.C. 424 (1961) held that expenses incurred in securing a medical discharge were not deductible because they were not ordinary and necessary to the business of being an Army officer. The Court had "difficulty in understanding how expenses incurred to expedite a discharge from the Army are ordinary and necessary in carrying on that business. Such expenses appear neither ordinary nor necessary to such a business under even the most broad reading of the statute." Similarly, it is unlikely that expenses incurred in connection with a retirement ceremony would be deductible.

8. Professional Persons' Special Expenses.

a. General Rule.

(1) Professional persons who are also employees (e.g., attorneys, physicians, teachers) can deduct as an itemized deduction on Schedule A the cost of supplies used in the practice of their profession, dues paid to professional associations, subscriptions to professional journals and the cost of professional books with a short useful life.

(2) The case law has allowed the deduction of the cost of a briefcase by a salesman; this rule should also apply to attorneys, teachers and other professionals for whom a briefcase is a necessary part of their professional duties.

b. Attorneys.

(1) Special expenses of attorneys which have been held to be deductible include bar association dues, cost of home telephone used for business and depreciation of tape recorder used for business only.

(2) Fees paid to take bar examinations and for admission to practice before federal court and travel expenses to obtain license to practice before Supreme Court have been held to be capital expenses amortizable over the taxpayer's life expectancy.

## XII. TAX CREDITS

A. Types of credits.

1. A credit is a dollar-for-dollar reduction of the taxpayer's tax liability.

2. A ***refundable credit*** can be greater than the tax owed. Taxpayers not only can have their tax reduced to zero, but they can also receive a refund of the excess credit.

3. A ***nonrefundable credit*** can also be greater than the tax, but the nonrefundable credit can only reduce tax liabilities to zero. Taxpayers do not receive a refund for any excess nonrefundable credit.

B. Child tax credit. (Form 1040, line 43 & 60; child tax credit worksheet in form 1040 instructions (page 33-34); form 8812)

1. A credit of $400 was allowed for 1998 and $500 for years after 1998 for each qualifying child. A taxpayer may be entitled to a child tax credit for each qualifying child for whom the taxpayer claims an exemption. This is a ***nonrefundable credit***. I.R.C. § 24.

2. A qualifying child is one who meets the following criteria.

a. The child must not have reached the age of 17 by the end of the tax year for which the credit is sought.

b. A citizen or resident of the United States.

c. The child must be the taxpayer's child (or descendant thereof), stepchild, or foster child of the taxpayer.

d. The taxpayer must be *allowed* the personal exemption deduction with respect to such child.

(1) The parent that is "allowed a deduction" with respect to such child will be entitled to the credit. Must be allowed to claim a dependency exemption for a child in order to take child tax credit (I.R.C. § 24(c)(1)(A)).

(2) IRS interpretation: In order to claim the child tax credit, the parent must claim the child as a dependency exemption. The parent claiming the child tax credit must list the child as a dependency exemption on the tax form and include the qualifying child's name and social security number. If the custodial parent waives the dependency exemption, the noncustodial parent gets both the exemption and the child tax credit.

e. The credit will be phased out by $50 for each $1,000 that the taxpayer's modified adjusted gross income exceeds $110,000 in the case of a joint return, $75,000 in the case of an individual who is not married, and $55,000 in the case of a married individual filing a separate return.

3. Additional Child Tax Credit. I.R.C. § 32(n). Form 8812.

a. For taxpayers with three or more children, a portion of the credit may be refundable under a special formula. This is actually a supplemental child credit under the earned income credit (I.R.C. § 32). It does not affect the total tax credits allowed to the taxpayer. This is a ***refundable credit***.

b. After all the other credits are applied according to the stacking rules to reduce the taxpayer's tax liability for the year, then the refundable credits are applied. The refundable credits first reduce the taxpayer's tax liability for the year, and any remaining credit in excess of the tax liability for the year is payable to the taxpayer.

c. The amount of the additional child tax credit is equal to the lessor of the child tax credit that would be allowed if computed without regard to the refundable additional credit and the tax liability limitation (I.R.C. § 26(a)), or the amount that the total nonrefundable personal credits (including the child credit but without regard to the refundable additional credit) would increase if the tax liability limitation were increased by the excess of the taxpayer's social security taxes for the tax year, or the earned income credit determined without regard to the additional child tax credit for the tax year.

C. Educational Credits. (Form 1040, line 44; form 8863).

1. Hope Scholarship Credit. I.R.C. § 25A.

a. A taxpayer is allowed a tax credit for money spent on qualified tuition and related expenses during the first two years of a student's post-secondary school education (***a per student credit***). I.R.C. § 25A(b)(2)

b. The student must carry at least half of the normal full-time workload for the course of study the student is pursuing. I.R.C. § 25A(b)(3)(B).

c. The credit can be as much as $1,500 and consists of 100% of the first $1,000 spent on tuition and related expenses and 50% of the next $1,000 so spent.

2. Lifetime Learning Credit. I.R.C. § 25A.

   a. The Lifetime Learning Credit, which applies to expenses paid after June 30, 1998, is available for any level of higher education (both credit and noncredit courses). The Lifetime Learning Credit differs from the Hope credit in that it covers a broader period and range of educational courses. Whereas the Hope credit applies only to the first two years of post secondary education, the Lifetime Learning Credit applies to expenses for undergraduate, graduate, and continuing education courses. Expenses for courses of instruction at an eligible institution *to acquire or improve job skills* that would not qualify for the Hope credit qualify for the Lifetime Learning Credit. I.R.C. § 25A(c)(2)(B)

   b. A credit is allowed for 20% of first $5,000 (= $1,000) of qualified tuition paid by the taxpayer (Will increase to 20% of $10,000 in 2003). Thus, the maximum credit allowed will be $2,000 in 2003 (***a per taxpayer credit***).

   c. A person who is eligible for the Hope Scholarship is not entitled to the Lifetime Learning Credit.

3. Qualified tuition and related expenses consist of tuition and mandatory fees paid by the taxpayer on behalf of himself, his spouse, or any dependent of the taxpayer for which the taxpayer is allowed the dependency exemption.

   a. Qualified tuition and related expenses mean tuition and fees required for the enrollment or attendance at a post-secondary educational institution eligible to participate in the federal student loan program. They do not include the costs of books, room and board, transportation, etc. Expenses for courses involving sports, games, or hobbies do not qualify unless they are part of the student's degree program. Nonacademic fees, such as student activity fees, athletic fees, insurance expenses, do not qualify. I.R.C. § 25A(f).

b. The taxpayer should be careful to reduce qualified tuition and related expenses by scholarships, Pell grants, employer-provided educational assistance, and other tax-free payments. However, qualified amounts do not have to be reduced by amounts paid by gift, bequest, devise, or inheritance. I.R.C. § 25A(g)(2). In addition, no credit is allowed for any expense for which an income tax deduction is allowed. I.R.C. § 25A(g)(5).

4. The Hope Scholarship and Lifetime Learning Credits are phased out for taxpayers with modified adjusted gross income from $80,000 to $100,000 in the case of a joint return and from $40,000 to $50,000 in all other cases.

5. For each eligible student, a taxpayer may claim only one of the education credits in a single tax year. I.R.C. § 25A(c)(2).

   a. Must be allowed to claim a dependency exemption for a child in order to take the Hope or Lifetime Learning Scholarship credits (I.R.C. § 25A(f)(1)(A)(iii)).

   b. An eligible student is a person that can be claimed as a dependency exemption. It generally includes unmarried children under age 19 or who is a full-time student under 24 if the taxpayer supplies more than half the child's support for the tax year. If a dependency exemption for an individual is allowed to another taxpayer, the dependent cannot claim the credit, and qualified tuition and expenses paid by the dependent during the tax year will be treated as paid by the taxpayer who is allowed the dependency exemption. I.R.C. § 25A(g)(3).

6. Taxpayers who are married (within the meaning of § 7703) are not entitled to either credit unless they file a joint return. Married taxpayers incurring qualified expenses must file a joint income tax return in order to claim the educational tax credits. No credit under I.R.C. § 25A is allowed for married taxpayers filing separate returns. In order to claim the credit, the taxpayer must include the student's name and social security number on his or her return.

7. If a student receives a tax free distribution from an education Individual Retirement Account (IRA) in a particular tax year, none of that student's expenses can be used as the basis of a higher education tax credit for that year. I.R.C. § 530(d).

8. These are nonrefundable credits.

D. Earned Income Credit. (Form 1040, line 59; Schedule EIC, EIC Worksheet)

1. General.

a. The Earned Income Credit (EIC) is a ***refundable tax credit***. Eligible taxpayers can receive a refund for this credit even if they owe no tax and had no income tax withheld. I.R.C. § 32.

b. EIC provides tax relief to low-income workers, including certain workers with no children.

c. Cannot claim the EIC if the taxpayer claims the foreign earned income exclusion. I.R.C. § 32(c)(1)(D).

2. Eligible taxpayers that can claim EIC:

a. Married taxpayers who are entitled to a dependency exemption for their child, grandchild, eligible foster child or stepchild.

(1) Married taxpayers generally must file married filing jointly.

(2) Certain married taxpayers who live apart from a spouse need not file a joint return to claim the credit.

b. A custodial parent, even if that parent agrees to allow the noncustodial parent to claim the child as a dependency exemption.

c. Surviving Spouses.

d. Heads of households who maintain a home for a child, adopted child, stepchild, eligible foster child or descendent of a child. (A married child must qualify as a "dependent" for whom the taxpayer is entitled to a dependency exemption.).

e. An individual who does not have a qualifying child may be eligible for the credit if the principal place of residence of the individual is in the U.S. for more than one-half of the tax year, the individual (or the spouse of the individual) is at least age 25 and under age 65 before the close of the tax year, and the individual is not claimed as a dependent by another.

3. Qualifying Tests.

a. Taxpayer with qualifying child(ren) must:

(1) Have earned income of under $27,413 if one qualifying child ($31,152 if two or more qualifying children);

(2) Have a qualifying child who lived with the taxpayer in the taxpayer's main home in the U.S. (or overseas if taxpayer is a member of the armed forces stationed overseas) for more than 6 months of the year;

(3) File a joint return if married; and

(4) Complete and attach Schedule EIC to the tax return.

b. Taxpayer without qualifying child(ren) must:

(1) Have earned income and AGI under $10,380;

(2) Have main home in U.S. for more than 6 months of the year or be a member of the armed forces stationed overseas;

(3) Be at least 25, but under 65 (If filing jointly, either spouse must satisfy age component of test.);

(4) File a joint return if married; and

(5) Not be a dependent or qualifying child of another taxpayer.

4. Definitions.

a. Earned Income. Includes both taxable and nontaxable earned income.

(1) Wages, salaries, tips, and other employee compensation.

(2) Military taxpayers must include:

(a) Wages, salaries, tips,

(b) Housing and subsistence allowances and in-kind equivalents received by service members,

(i) Include the Basic Allowance for Housing (BAH) and the Basic Allowance for Subsistence (BAS) received by service members and the value of meals and lodging furnished in kind to military personnel residing on military bases. *Neff v. U.S.*, Fed. Cl., No. 97-750 T, 5/25/99. A copy can also be found at http://www.ogc.gov/fedcl/opinions/99opin/98-750T.html.

(ii) To calculate the value of meals and lodging furnished in kind, the taxpayer may assume the value is equal to the combined BAH and BAS that the service member would have received had he/she been entitled to the allowance.

(c) Combat zone excluded pay.

(d) Earned income that is not taxable, such as combat pay, BAH, BAS, and certain in-kind equivalents, is reported on Form W-2, Box 13, Code Q.

b. Earned income does not include interest, dividends, social security payments, pensions or annuities, Veteran's benefits, and variable housing allowances.

c. Qualifying child. Taxpayer's son, daughter, adopted child, grandchild, stepchild, or foster child who at the end of the year was under 19 (or under 24 and a full-time student), or any age if permanently and totally disabled. I.R.C. § 32(c)(3).

d. Household requirement. The qualifying child must have lived in the taxpayer's main home for more than 6 months of the year. (Foster child must have lived there for all of the year.)

(1) Qualifying child must have lived with taxpayer in same main home for more than one-half the year.

(a) Taxpayer may still satisfy this requirement if away from home on a temporary absence due to special circumstance.

(b) Temporary absence examples:

(i) illness,

(ii) attending school,

(iii) business,

(iv) military service.

5. If a taxpayer is receiving EIC because of a qualifying child, the child must reside in the same principal place of abode as the taxpayer for more than one-half of the taxable year. The principal place of abode must be located in the United States. For purposes of determining whether a qualifying child meets the residence test, the principal place of abode shall be treated as in the United States for any period during which a member of the Armed Forces is stationed outside the United States while serving on active duty.

6. No credit is allowed for 10 years after a year in which the EIC was claimed fraudulently (two years for erroneously claimed credit due to reckless or intentional disregard of the rules). If the EIC is denied under deficiency procedures, no credit is allowed for any later tax year unless the taxpayer provides information the IRS requires demonstrating eligibility. I.R.C. § 32(k).

## XIII. TAX REFUNDS

A. Refund Offset:

1. If a taxpayer owes a past-due federal tax, state tax, child support, spousal support, or certain Federal nontax debts, such as student loans, all or part of an overpayment (refund) may be used to pay the past-due amount.

a. Priorities for Offset.

(1) First, by amount of any past-due support assigned to a State;

(2) Second, by the amount of any past-due, legally enforceable debt owed to a Federal agency;

(3) Third, by the amount of any qualifying past-due support not assigned to a State; and

(4) Fourth, by the amount of any past-due legally enforceable State income tax obligation.

b. States can seek an offset for federal income tax refunds payable after December 31, 1999. I.R.C. § 6402(e)(2). As extended to state income tax debts, the program allows the state taxing authorities to ask the federal government to offset a taxpayer's federal income tax refund against the taxpayer's state income tax liabilities. Thus, the federal government acts as a collection arm for the states. 31 C.F.R. Part 285; 64 F.R. 71228 (December 20, 1999).

(1) The state first must show that is has made reasonable efforts to collect the tax.

(a) The term "State" means not only the States of the United States, but includes the District of Columbia, American Samoa, Guam, the U.S. Virgin Islands, Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico.

(b) "State income tax" includes all taxes determined under state law to be State income tax, and includes any local income tax that is administered by the chief tax administering agency of the State.

(2) Second, the state must notify the taxpayer of its intent to offset the taxpayer's federal refund claim and give the taxpayer 60 days to demonstrate that the state tax levy is not past due or not unenforceable.

(3) States are required to certify compliance with pre-offset procedures and imposed by State law or procedures.

(a) The certification and pre-offset procedures include a requirement that States provide debtors with notice that they intend to collect the debt by referral to the Treasury for tax refund offset;

(b) That States afford debtors the opportunity to present evidence that all or part of the debt is not due; and

(c) That States establish procedures for reviewing evidence presented by debtors.

(4) For refunds payable after December 31, 1999, the IRS will only be able to apply a refund for a tax year to offset state tax obligations if the address shown on the Federal return for the year of the overpayment is within the state seeking the offset.

(a) If the taxpayer moves to a different state, he is effectively exempt from application of a refund for a year after the move to a state tax obligations owed to the state from which he has moved.

(b) The address shown on the return is controlling for this purpose. Thus, literally read, even if a taxpayer actually continues to reside within the state seeking the offset, if he files the return showing an address outside that state IRS cannot apply the refund offset.

(5) The reduction of a taxpayer's refund for past due state tax is not subject to review by any court of the U.S. or by the Secretary of the Treasury, Financial Management Service, or the I.R.S. in an administrative proceeding. I.R.C. § 6402(f).

2. A taxpayer subject to offset will receive a notice from the Treasury Department's Financial Management Service showing the amount of the offset and the agency receiving it.

## XIV. **CONCLUSION**.

# APPENDIX A

MILITARY PAYROLL TERMS - - TAX STATUS

| Status | Pay Term | Definition |
|---|---|---|
| I | Accrued leave pay | Lump sum for unused accrued leave when term of service expires. |
| I | Aviation Career Proficiency Pay | Incentive pay for Aviation Officers. |
| X | Basic Allowance for Housing (BAH) | Paid to members of the Armed Forces for housing. |
| X | Basic Allowance for Subsistence (BAS) | Paid for subsistence including rations furnished in-kind to enlisted members. |
| I | Basic Pay | Pay for active duty, training duty, drills, back pay, and attendance at designated service school. |
| X | Combat Exclusion (pay excludable up to max. enlisted pay per month for commissioned officers) | Pay received under Executive Order placing the Armed Forces in a combat area. |
| I | Continuation pay | Paid to certain personnel who extend their active duty period. |
| X | Cost of Living Allowances | Pay for members overseas to offset higher costs resulting from fluctuating exchange rates. |
| X (I) | Death Gratuity | $6,000 paid to the beneficiary of deceased service member ($3,000 is excluded from gross income). |
| X | Defense Counseling | Provided by the Armed Forces to represent military personnel in their defense before court-martial or at an investigation. |

| Status | Pay Term | Definition |
|---|---|---|
| X | Dislocation Allowance | Payments to defray extra costs of moving from a permanent duty station. |
| I | Diving Pay | Pay for diving operations. |
| I | Enlistment Bonus | Payable to certain "critical-skilled" enlistees upon entering the Service. |
| X | Evacuation Allowance | Paid to offset expenses for dependents who must leave for a place of safety. |
| X | Family Separation Allowance | Paid when military families are separated due to overseas assignments, for emergencies, and for certain educational expenses for dependents. |
| I | Flight Duty Pay | Monthly pay supplement for flight time. |
| I | Foreign Duty Pay | Paid to enlisted personnel serving outside the 48 contiguous state and D.C. |
| X | Group-term life Insurance (SGLI/VGLI) | Military life insurance. |
| I | Hazardous Duty Pay | Pay for hazardous duty. |
| I | Imminent Danger Pay | Pay for duty in an area in which soldier is exposed to hostile fire or imminent danger. |
| X | Interment Allowance | Burial expense allowance. |
| I | Medal of Honor Pension | Pension for Congressional Medal of Honor holder. |

| | | |
|---|---|---|
| I | Medical and Dental Proficiency Pay | Pay given to certain medical and dental officers. |
| X | Medical Benefits | Free medical services. |

| **Status** | **Pay Term** | **Definition** |
|---|---|---|
| X | Moving and storage | In-kind transportation and storage of household goods. |
| I | Nuclear Qualified | Pay to certain nuclear naval officers. Officers Pay |
| I | Overseas Extension Bonus | Paid to certain enlisted personnel upon extending their overseas tour. |
| X | Per Diem | An amount paid in place of subsistence and mileage When away from permanent duty stations. |
| I Allowances | Personal Money incurred in their official positions. | Pay to high-ranking officers to defray expenses |
| X | Professional Education | Education costs paid by the U.S. Government for Armed Forces personnel. |
| I | Proficiency Pay skill. | Awards to enlisted personnel who show special proficiency in a military |
| X | Qualified Hazardous Duty Pay | Exclusion of all military pay per month for enlisted personnel and warrant officers, limited to Maximum enlisted rate plus imminent danger pay For officers. |
| X | Qualified Military Benefits | Any allowances or in-kind benefit paid to Armed Forces personnel or dependents that were excludable from gross income on 9 Sep 1986. |
| I | Re-enlistment Bonus service. | Multiple of monthly basic pay times additional years of reenlistment |

| | | |
|---|---|---|
| X | ROTC Educational and Subsistence Allowances | Paid for education and subsistence. |
| X | Scholarships | Scholarships such as the FLEP, AFHSP or LL.M. programs. |

| **Status** | **Pay Term** | **Definition** |
|---|---|---|
| I | Sea Duty Pay | Paid for duty on a vessel under orders of a competent authority operating outside CONUS. |
| I | Separation Pay | Lump-sum payment paid upon involuntary discharge or release in certain cases. |
| I | Student Loan Repayment | Repayments from programs such as the General Educational Loan Repayment Program. |
| X | Subsistence Allowance | Paid for subsistence including basic allowance and other subsistence allowances and rations furnished in-kind to enlisted members. |
| X | Survivor and Retirement Protection Plan Premium | Premiums taken from the gross pay of retired personnel of the Armed Forces to provide a survivor annuity. |
| X | Trailer Allowance | Pay for moving a trailer from a permanent POD. |
| X | Uniforms (In-kind or allowances) | Uniforms furnished enlisted personnel and allowances paid to officers. |
| X | Variable Housing Allowance | Paid to personnel living in a high cost of living area. |
| X | Veterans' Benefits | Amounts paid by the Department of Veterans Affairs, generally based on a combat-related disability. |
| I | Veterinary Pay | Pay given to certain Veterinary Corps Officers. |

# CHAPTER K
# INTRODUCTION TO ESTATE PLANNING

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# INTRODUCTION TO ESTATE PLANNING

**Outline of Instruction**

## I. INTRODUCTION.

A. The need for coordinated military estate planning.

B. Understanding the estate planning process:

"The process by which an arrangement for the use, conservation, and transfer of one's wealth is created."

C. Primary objectives of estate planning are:

1. To secure to the property owner during his lifetime maximum benefits from the possession and use of his property, and

2. To enable that property owner to transfer that property to surviving beneficiaries with a minimum of shrinkage from death taxes and other transfer costs.

D. Goals of military estate planning.

1. Effective planning, or

2. Informed referral expertise.

## II. ESTATE PLANNING GOALS.

A. Lifetime Estate Planning.

1. Maximize accumulation of wealth ("Estate Building").

2. Protect estate from loss ("Asset Protection").

a. Plan for contingencies.

b. Incapacity or disability.

B. Dispositive Estate Planning ("Wealth Transfer").

1. Provide for the transfer of property according to the decedent's wishes.

2. Minimize delay and inconvenience.

3. Reduce administrative costs.

4. Provide liquidity during probate of the estate.

5. Reduce federal and state tax liability.

6. Provide for the care of minor children and their property.

7. Finally, the estate planner wants to prepare effective documents, which contain the client's intent and carry out the client's desires.

## III. ESTATE PLANNING STEPS.

A. Consider Ethical Preliminaries.

**"In all professional functions a lawyer should be competent, prompt, diligent, and honest. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client, except so far as disclosure is required or permitted . . ." (AR 27-26, para 6c).**

1. Competence (Rule 1.1).

   a. Legal assistance attorneys must provide competent representation.

      (1) No special training required.

      (2) Consists of skill, knowledge, thoroughness, and preparation necessary for representation.

   b. Supervisors determine subordinates competency to perform duties.

   c. Lawyers should refer matters outside their competence, i.e., complex estate planning, to specialists in the civilian community (AR 27-3, para 3-7h).

2. Communication (Rule 1.4).

   a. A lawyer must keep a client reasonably informed about the status of a matter.

   b. A lawyer must explain a matter to a client to the extent necessary to permit the client to make an informed decision regarding representation.

   c. Communicate effectively, use checklists (see appendices), listen to the client's desires, and establish scope of representation.

d. Competency of the client.

(1) A lawyer shall attempt to maintain normal lawyer-client relationship with a client even if the client's ability to make decisions is impaired.

(2) A lawyer may seek guardianship or other protective action if the lawyer reasonably believes the client cannot act in the client's best interests (Rule 1.14).

3. Conflicts of interest.

**"Conflict questions may also arise in estate planning. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise" (Rule 1.7, Comment).**

a. Dual representation in estate planning generally accepted. Prior to undertaking representation, the lawyer should obtain each client's consent after full consultation. A sample multiple-representation letter is at Appendix A.

b. Watch for conflicts that cannot be resolved.

4. Terminating the relationship.

a. A lawyer may have a duty to advise a client of any changes that might defeat a client's testamentary goals (ABA Formal Op. 210).

(1) Ensure the client understands when the attorney-client relationship is terminated.

(2) “Debrief” the client.

b. A lawyer must take reasonable steps to protect the client's interests upon termination to include giving notice and surrendering all papers and property (Rule 1.16).

5. Potential Malpractice Areas.

a. Faulty drafting.

b. Failure to revise plan.

c. Improper execution.

d. Failure to complete documents.

e. Failure to understand and implement substantive law.

B. Gather Information on the Client and Family.

1. Use a checklist (see Appendix B).

2. Conduct a thorough client interview using an estate-planning questionnaire (see Appendix C).

a. Development of a sound estate plan depends on full disclosure by the client.

b. The attorney should probe into the members of client's family and determine their strengths, weaknesses, and goals.

c. Develop and use an estate-planning questionnaire for your clients.

3. Some specific areas of inquiry.

a. Is client married?

(1) Is there an ante-nuptial agreement?

(2) Does the spouse have right of election?

(3) Does the spouse have any special needs?

(4) Is the spouse a non-U.S. citizen?

(5) Is either spouse a domiciliary of a community property state?

b. Has client been divorced?

(1) Review separation agreement or divorce decree.

(2) Does ex-spouse have any claim to the estate?

(3) Are there any children by a former marriage?

c. Does the client have children?

(1) Are any children under a disability?

(2) Does the client intend to benefit after-born children?

(3) Are children all born of present marriage?

C. Obtain a Complete Inventory of Assets.

1. Detailed information on the client's assets (and spouse if dual representation) (See Appendix C).

2. Distinguish type of ownership.

3. Estimate present value and probable date of death value of all assets (estimate "gross estate") (See Estate & Gift Taxation outline).

4. Determine if any property will require ancillary probate proceedings.

5. Ascertain if there are restrictions on the ability to transfer any asset.

6. Classify assets according to how they will be distributed.

   a. Probate.

   b. Non-probate property.

D. Develop an Appropriate Estate Plan.

1. Establish client's needs and goals.

2. The estate owner's objectives are the most important step in the estate planning process. To formulate a sound estate plan, the plan must be constructed on the foundation of the owner's objectives. See Appendix D, Beneficiary Objectives.

3. At least five professions are involved in estate planning:

   a. The attorney,

   b. The accountant,

   c. The life insurance underwriter,

d. The trust officer, and

e. The financial planner.

f. In addition, an investment adviser and an appraiser may from time to time become involved in the estate planning process.

g. While each of these practitioners has different duties and responsibilities, a team approach should be encouraged. In this way, the estate owner will benefit from the expertise of each profession, and each practitioner will contribute his or her knowledge and skills to the best advantage or the public.

4. Suggest methods of reducing liabilities.

5. Consider methods to increase value of the estate or improve liquidity.

6. Consider using alternatives to probate.

E. Prepare, review, and properly execute documents to implement and coordinate the estate plan.

F. Complete the Representation.

## IV. MILITARY ESTATE PLANNING.

A. Scope of Services.

1. Regulatory guidance

a. Army: see AR 27-3 at Appendix E.

(1) Estate planning services provided: see paragraph 3-6b.

(2) Limitations on estate planning services: see paragraph 3-6b.

"Legal assistance may be provided on other aspects of estate planning based on the availability of expertise and resources."

b. Navy-Marine Corps, see JAGINST 5801.2 on JAGCNet Legal Assistance Database.

(1) Estate planning services provided: see paragraph 7-2a-d.

(2) Limitations on estate planning services: see paragraph 7-2a-d.

c. Air Force, see AF Instruction 51-504 and TJAG Policy Number 18 on JAGCNet Legal Assistance Database.

(1) Estate planning services provided: see AFI 51-504, paragraph 1.3.1; AF TJAG Policy No. 18, paragraph 5.

(2) Limitations on estate planning services: AF TJAG Policy No. 18, attachment on Will Preparation and Execution Guidelines.

d. Coast Guard: see COMDTINST 5801.4C on JAGCNet Legal Assistance Database.

(1) Estate planning services provided: see paragraph 6.

(2) Limitations on estate planning services: see paragraph 7d.

2. Legal assistance will be provided on:

a. Wills.

(1) Testamentary trusts for the benefit of minors.

(2) Guardianships.

(3) Life insurance beneficiary designations (SGLI).

b. Advance Medical Directives.

(1) Living Wills.

(2) Health Care (Durable) Powers of Attorney.

c. Durable Power of Attorney (general or specific).

d. Anatomical gift designations.

3. Optional services (consult applicable service legal assistance regulation for limitations).

a. Wills.

(1) Credit Shelter or by-pass trusts.

(2) Use of disclaimers.

(3) Marital Deduction Trust.

(a) Qualified Terminable Interest Property (QTIP) trust.

(b) Qualified Domestic Trusts (QDOTs).

(4) Special needs trusts.

b. Tangible Personal Property Memorandums (TPPMs).

c. Letter or memorandum to personal representative or executor.

d. Review and update beneficiary designations.

e. Review and update property ownership.

f. Mortuary planning document.

g. Inter vivos trusts.

h. Life insurance trusts.

i. Probate.

B. Deployment preparation of estate planning documents.

1. Attorneys may draft powers of attorney and simple wills during deployment processing. They should, however, follow up to ensure that soldiers return for more complete legal assistance (AR 27-3, para 3-6b(2)(a)).

2. Commanders should not require soldiers to complete legal documents. Client determines whether (s)he wants legal document(s) prepared.

3. It is not appropriate to interview for or draft wills during deployment exercises unless it is done while maintaining client confidentiality. Moreover, there must be sufficient time to conduct an interview (AR 27-3, para 3-6b(2)(a)).

4. Priority and allocation of legal services should be based on need (AR 27-3, para 3-6b(2)(b)). When legal resources are limited, the following service members should receive priority for drafting and executing wills:

   a. Those who have a minor child;

   b. Those whose primary beneficiary is a minor;

   c. Those whose net estate (excluding insurance, jointly owned property, and other non-probate property) is valued at more than $10,000; or

   d. Those who desire their property to be distributed in a manner different from that which would occur under the applicable laws of intestate succession or under an existing will.

5. How to handle more complex estates during deployment preparation of estate planning documents?

6. Same standards for professional responsibility apply to deployment scenarios as standard preparation of documents.

C. Preventive law programs.

1. Legal assistance offices should make an aggressive effort to ensure that service members and their families are adequately prepared for deployment (installation newspaper, command bulletin, radio, TV, Internet websites, etc.).

2. Inform service members and their families about the advisability of keeping their personal affairs current. Remind them about the need for periodically reviewing their wills, powers of attorney, and insurance beneficiary forms.

3. Unit presentations.

4. Annual legal checkups.

D. Improving Office Efficiency.

1. Specialization.

2. Referrals (see AR 27-3, para 3-7h).

3. Computer assisted wills.

4. Use handouts and videotapes.

## V. DL WILLS PROGRAM.

A. Trusts:

1. Testamentary trusts (including for minor children).

2. Marital Deduction trust. The Marital Deduction Trust may be QTIP, QTIP with a limited power of appointment, general power of appointment, or "estate trusts." Qualified Domestic Trust (QDOT) provisions may be included. Two marital deduction trusts may be provided to facilitate allocation of the Generation Skipping Tax exemption.

3. Credit Shelter Trusts (both formula trusts and disclaimer trust). Credit shelter trust may be pre-residuary, residuary or fractional shares of the residuary.

4. Pour-Overs to Inter vivos trusts.

5. Provisions granting or exercising powers of appointment, purchases of annuities, and charitable trusts.

6. The residuary may be divided into equal shares with each share being given to the beneficiaries outright or in a variety of trusts. Trusts may be terminated or partially liquidated at specific ages.

B. Guardian for minor children.

C. Other options address disposition of realty, personal effects, cash bequests, sprinkling trusts, presumptions of survivorship, fiduciary bonds, disclaimers, disinheritance, pension plans, oil and mineral rights, apportionment of taxes, etc.

D. The program also prepares:

1. Advance Medical Directives (Living wills) and health care documents.

2. Powers of Attorney.

3. Asset summaries.

4. Execution checklists.

5. Tangible Personal Property Memorandums (TPPM).

## VI. SUMMARY OF ESTATE PLANNING MULTI-STEP PROCESS

A. Education.

B. Ascertain.

C. Plan.

D. Draft.

E. Explain and review.

F. Revise and refine.

G. Execute.

## VII. CONCLUSION.

## APPENDIX A

## SAMPLE DUAL REPRESENTATION LETTER FOR NEW ESTATE PLANNING CLIENTS

Re: Your Estate Plan

Dear Mr. and Mrs. _____:

This will confirm the following:

1. You have requested that I represent each of you and advise you on certain estate planning matters.

2. It is contemplated that the matters to which my representation will extend will include the following: (Choose from the following or modify as appropriate.)

a. Analysis of your existing wills, codicils, trust agreements, and property agreements if any;

b. Analysis of the assets owned by each of you at the time of your marriage, including consideration of the fair market value of such property and the nature in which title was then held;

c. Analysis of all property now owned by each of you, including consideration of its fair market value, the manner in which title to such property is now held, and a categorization of such property as separate, community, or quasi-community property;

d. Discussions about the manner in which you wish to dispose of any property over which you may have any power of disposition at the time of your death;

e. Analysis of the tax impact of such disposition and recommendations for alternative dispositions; and

f. Preparation of the documents necessary to accomplish the desired disposition, including the drafting of wills, trusts, property agreements, and other documents as may be required.

3. I have advised each of you that, during the course of the estate planning work, conflicts may arise between you with respect to the ownership of your property (separate, community, or quasi-community property) and its desired disposition during your lifetimes and at your deaths. Differences of opinion on the disposition of the property, under ethical rules, do not prevent me from continuing to represent both of you. However, during the course of the estate planning, conflicts of interest between you may arise, such as issues regarding the ownership of certain property.

Ordinarily, under such circumstances, one attorney cannot represent both of you. It may be better for each of you, under such circumstances, to have separate independent counsel to avoid the possibility that my advice to one of you is influenced by my representation of the other. Nevertheless, you have requested, with a full understanding of your right to, and the advantages of, independent counsel, that I represent both of you in all of the above matters.

4. Although I doubt that it will happen, if conflicts do arise between the two of you of such a nature that I believe it impossible, in my judgment, for me to perform any obligations to either of you in accordance with this letter, I will withdraw from all further dual representation of both of you in this matter at that time and advise one or both of you to obtain independent counsel.

5. You have each agreed that there will be complete and free disclosure and exchange of all information that I receive from either or both of you in the course of my representation of you, and that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you, including any conferences that may have taken place before the date of this letter.

Sincerely,

(Attorney's Signature Block)

APPROVED THE ___day of _____, 19__

(Signature of husband; typed name below)

(Signature of wife; typed name below)

## APPENDIX B

## ESTATE PLANNING CHECKLIST

**1. General.**

(a) Has/Have the estate(s) wisely used the marital deduction and given adequate consideration to the use of trusts that will provide income for life to the surviving spouse, but enable maximum use of the unified credit by the estate of the first spouse to die? [Failure to qualify sufficient property for the marital deduction may result in an unnecessary tax burden at the estate owner's death. Over-qualification will tend to increase the federal estate tax due upon the surviving spouse's death.]

(b) Would a gift program be advisable?

(c) Is either the husband or wife the current or anticipated beneficiary of other estates or trusts? Has the effect of potential inheritances been considered in the planning process?

(d) Are there any business interests or other assets that would require immediate attention following the estate owner's death?

(e) Has a current inventory of estate assets been prepared to assist the executor?

(f) Are the estate owner's wishes regarding burial and other personal matters (as opposed to binding dispositions of property) reflected in a letter or written memorandum kept with other important papers?

(g) Are liquid assets available?

(h) Are the names of all beneficiaries correct? [This is especially important with respect to charities.]

(i) Has the corporate fiduciary, if any, been informed of its selection, reviewed the instrument, and accepted the instrument?

(j) Have the settlor's insurance policy beneficiaries been changed in accordance with the estate plan?
For example, are policies made payable to the estate or the trustee if called for in the plan?)

**2. Wills and trusts.**

(a) Have current dispository instruments been executed by both husband and wife?

(b) Have the formalities of execution required by the state of domicile been *met?*

(c) Will ancillary administration be required?

(d) If an individual executor or trustee has been notified, has he or she agreed to accept this responsibility? Have an alternate and/or a successor been designated? Will the individuals named as executor and trustee, if any, qualify under the laws of decedent's domicile?

(e) Has a guardian been appointed (or nominated) for minor children? Will the guardian qualify under the laws of decedent's domicile?

(f) If a corporate fiduciary has been designated, will the corporate fiduciary qualify under the laws of decedent's domicile?

(g) Is the fiduciary to be bonded?

**3. Property ownership.**

(a) Is title to any property held in joint tenancy with right of survivorship? Does the estate plan contemplate the fact that joint tenancies may nullify certain testamentary dispositions and may result in unintentional over-qualification for the marital deduction?

(b) Are any assets held as community property? One-half of each asset held as community property is "owned" by each spouse by operation of law. This fact is important in valuing the estates of community property state domiciliaries.

(c) Do the estate owners hold a beneficial or reversionary interest in any property? Such interests are easily overlooked unless specific inquiries are made. Their effect on the potential estate tax and the liquidity requirements of the estates of both husband and wife should be considered.

**4. Military, veterans, and social security benefits.**

(a) Has a schedule of potential benefits to survivors been prepared? [The nature, amounts, and eligibility requirements for these benefits are subject to frequent modification.]

(b) Has a survivorship annuity been elected under the Survivor's Benefit Plan?

(c) Are beneficiary designations for all military and veteran's benefits current?

(d) Has the estate owner been reminded that eligibility for certain social security and veteran's benefits may be forfeited if the surviving spouse supplements other income by working?

(e) Are any benefits available to the estate owner's survivors by virtue of any civilian employment in which he or she has engaged?

**5. Life insurance.**

(a) Has the ownership of policies on the estate owner's life been ascertained? Are contingent owners designated? Would transfers of ownership be advantageous?

(b) Does the estate owner hold any policies on the lives of others? Would contingent ownership be advisable to keep such policies out of the estate owner's probate estate?

(c) Are all beneficiary designations current and properly designated?

(d) Has the use of settlement options been considered? Even when the proceeds are to be paid in a lump sum, it is often advisable for the insured to elect to have the proceeds placed under the "interest only" option, giving the beneficiary full withdrawal rights and the right to elect other options. This gives the beneficiary maximum flexibility. It assures that interest will be credited from the date of death to the date of actual withdrawal, and gives the beneficiary time to obtain advice before being required to make any irrevocable decisions with regard to the ultimate disposition of the proceeds.

(e) Do any settlement options elected by the insured include "spendthrift" provisions?

(f) Do policy provisions and the provisions of state law regarding presumptions as to survivorship coincide with any presumptions established in the dispositive instruments? Has a "delay" clause been considered? "Delay" clauses provide for payment to the primary beneficiary only if such beneficiary survives the insured by a specified period of time. A clause of this type is frequently used to avoid adding to the costs of probating the beneficiary's estate when the beneficiary's death occurs shortly after that of the insured. Periods of 30 to 180 days are usually specified. The proceeds will not qualify for the marital deduction, however, if the survivorship requirement exceeds 180 days.

(g) Will policy loans or collateral assignments interfere with the planned distribution of insurance proceeds?

(h) Have any policies on the insured's life been transferred for valuable consideration? Such a transfer may cause part of the death proceeds to be taxed as ordinary income to the beneficiary (See I.R.C. § 101(a)).

(i) Do any policies include options, endowment features, conversion privileges, supplemental benefits, or other provisions that deserve special consideration or require action by the policy owner? An Automatic Premium Loan, for example, is included in many policies to prevent the policy from lapsing due to the insured's failure to make a scheduled premium payment prior to the expiration of the grace period. If it is not included in the policy at the time of issue, most companies will add it, without cost, at the policy owner's request.

(j) Are policy dividends being applied under the most favorable dividend options? Which dividend option is "most favorable" will depend upon the insured's situation. If an individual's longevity is significantly impaired, he or she should consider having dividends applied toward the purchase of paid-up additional insurance.

(k) Is additional insurance needed to ensure estate liquidity or to provide a guaranteed level of income for surviving family members? Have all aspects of the estate plan been coordinated (or reviewed) by an attorney who is thoroughly conversant with the laws of the jurisdiction in which probate proceedings will be carried out?

**APPENDIX C**

# ESTATE PLANNING SCREENING QUESTIONNAIRE

**PERSONAL INFORMATION**

NAME:_____DATE: _____

| Circle or fill in your answers | |
|---|---|
| 1. Do you have a will or trust now? | Yes No |
| 2. If married, is your spouse a U.S. citizen? | Yes No |
| 3. Do you have children other than from your current marriage? | Yes No |
| 4. .Are you receiving or do you expect to receive property or money from (circle all that apply): If so, approximately how much? | Trust Inheritance Gift Lawsuit Other |
| 5. Do own a home or other real property? | Yes No |
| 6. If you own a home or other real property, what is the approximate equity value? | $ |
| 7. Do own investments? (stocks, bonds, mutual funds, etc…) | Yes No |
| 8. If you own investments, what is the approximate value? | $ |
| 9. Do own life insurance? | Yes No |
| 10. If you own life insurance, what is the face value of all policies? | $ |
| 11. Do you have a retirement account (401(k), TSP) or more than 20 years time in service? | Yes No |

# JOINT SERVICES PENTAGON LEGAL ASSISTANCE OFFICE

## WILLS, LIVING WILLS, AND POWERS OF ATTORNEY

CLIENT QUESTIONNAIRE

FOR: _____

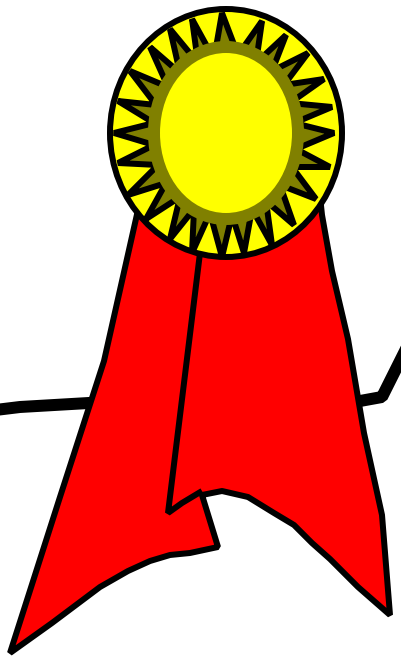
DATE AND TIME OF APPOINTMENT

_____

ATTORNEYS NAME

_____

**PENTAGON**
**ROOM 1D738**
**(703) 693-0107**



# ***INSTRUCTIONS FOR OBTAINING A WILL***

1. Please complete the attached will worksheet to the best of your ability prior to your appointment with a legal assistance attorney from the Joint Services Pentagon Legal Assistance Office in room 1D738.

2. You may schedule an appointment to see an attorney by calling 703/693-0107 or -0110 (DSN 223-0107 or -0110), or you can stop by room 1D738.

3. Please be prompt for your appointment. If you are delayed or cannot make your appointment, please call us as soon as possible to cancel, reschedule, or let us know how late you will be.

4. An attorney must interview each person before the will is prepared. If both you and your spouse need a will, you may be seen together so long as you have both seen and discussed each other's worksheets, and agree on the contents. Also, please let us know when you schedule your appointment if you would like to be seen together.

5. Please bring the following documents with you for your appointment:

a. A completed will worksheet. (A separate worksheet is needed for the preparation of each person's will.)

b. A **copy** of your current will, if possible (for reference purposes only). Please avoid bringing any existing, original will, and do not mark on it in any case, because doing so could invalidate it.

c. A list of any questions you may have for the attorney.

d. Your military identification card.

6. During your appointment, an attorney will review the will worksheet with you and answer any questions that you may have. After your appointment, we will prepare a draft copy of your will and either mail it to you or call you to pick it up from our office. Once you have reviewed the draft of your will, you can call us to make any minor corrections and to schedule an appointment to execute your will. If major corrections or changes are needed, please call for a follow-up appointment with the attorney that you have already seen. Will execution sessions are scheduled every Wednesday for 0830, 0930, 1030, and 1130.

7. The final step is the "execution" or signing of your will. The will execution session requires certain formalities to include a final review of the documents, the administration of oaths, the actual signing of the will, and the witnessing of such signatures, and a final briefing, all of which are time consuming. You should show up 15 minutes before your execution appointment to review the final version of your

documents if you asked us to make changes to your will when you called to schedule your execution appointment. Plan on spending about one hour for the actual execution session. We schedule up to four clients for each will execution session. Each person signs their own documents and acts as a witness for two of the others. This avoids the need for you to bring your own witnesses or to rely on our staff to act as witnesses. If you would prefer to bring your own witnesses, or you cannot possibly make a will execution session on a Wednesday, your attorney can arrange a special appointment for you to execute your documents at another time.

8. You must bring your military identification card with you to all appointments, even when in uniform. This is necessary to verify the client's identity for our notary publics and to determine eligibility for legal assistance. Due to the nature of legal assistance appointments generally, and the will execution session specifically, our office is regrettably unable to accommodate small children. This prohibition also allows us to provide faster and more efficient service to all of our clients.

Your cooperation is important and allows us to provide you the best in legal assistance. Please let us know how we may better serve your needs.

## ***WILL TERMINOLOGY***

WHAT IS A WILL? A will is a legally effective declaration of a person's wishes as to the disposition of his/her property upon his/her death. It must be executed with the formalities required by statute. The provisions of a wills do not take effect until after the death of the maker. A will never disposes of the proceeds of insurance policies with named beneficiaries, nor does it dispose of some items of property which are held under various forms of special ownership, such as joint tenancy with a right of survivorship, or tenancy by entirety. In a will, you will designate an executor/trix, and if minor children are involved, a guardian (see definitions below). It is important that you contact the prospective executor/trix and guardian prior to the preparation and execution of the will to ensure that he/she/they is/are willing to accept the position.

WHO IS THE BENEFICIARY? Anyone to whom the maker of a will (testator/trix) leaves a portion of his/her property.

WHAT DOES BEQUEATH MEAN IN A WILL? To give personal property by will.

WHAT IS A BOND? Money put up by a guardian or executor to insure against loss occasioned by their negligence or theft.

WHAT IS DOMICILE? A person's permanent home. The place to which, whenever he/she is absent, he/she has the intention of returning. You can have more than one residence, but you can only have one domicile. Your intent, voting, paying taxes, registering automobiles, obtaining a driver's license, and location of assets are factors considered in determining domicile. For military members, your domicile is often your legal residence (e.g., your home of record), not the place you are currently living.

WHAT IS AN ESTATE? All property, real and personal, in which a person has an interest, such as money, savings accounts, stocks, house, furniture, insurance policies, etc.

WHAT DOES RESIDUARY ESTATE MEAN? Residuary is a derivative of the word "residue." It means what is left over. Your residuary estate is the portion of your estate that is left over when everything else is disposed of.

WHAT DOES EXECUTION MEAN? To validate a will by correctly signing it and having it witnessed.

WHO IS THE EXECUTOR/TRIX? The person named in a will to carry out the wishes expressed in the will. An Executor is male; an Executrix is female. Upon the death of a maker of a will, the Executor/trix must take the will to the proper court for probate. Once the court accepts the will as valid, the court officially appoints the person as Executor/trix. An Executor/trix may be entitled to compensation for his/her services. Individuals serving in this capacity serve subject to court approval. While most courts follow the desires of the Testator/trix in his/her will, they are not bound to do so. A bond may be required of an Executor/trix. In some states the term "Personal Representative" means the same thing as Executor/trix.

WHO IS A GUARDIAN? One who is responsible for caring for the person and/or property of a minor child. Individuals serving in this capacity serve subject to court approval. While most courts follow the desires of the Testator/trix in his/her will, they are not bound to do so. Courts can require guardians to post a bond.

WHO IS THE TESTATOR/TRIX? You, the person making the will. A Testator is male; a Testatrix is female.

WHAT IS PERSONAL AND TANGIBLE PROPERTY? Property which is moveable.

WHAT IS A PROBATE? A court proceeding where the Executor/trix seeks to establish a will as genuine, settle all the debts of an estate, and distribute the property in the estate to the heirs according to the wishes of the will maker as expressed in the will.

WHAT IS A PROBATE ESTATE? The portion of an estate that requires court supervised administration to effect transfer of title. It does not include property transferred at the time of a person's death by other means, such as property held as joint tenants with right of survivorship, or life insurance paid to a designated beneficiary. For tax purposes, all property which the decedent owned or in which he/she had an interest, may be included in the taxable estate, although some of it is not within the probate estate.

WHAT IS REAL PROPERTY? Property that has a fixed location, such as land or a house.

## ***WILL QUESTIONNAIRE WORKSHEET***

1.) **PERSONAL INFORMATION:**

a.) Name (first, middle, last): _____

b.) Social Security Number: _____

c.) Are you a U.S. citizen? _____ yes _____ no

d.) Is your spouse a U.S. citizen? _____ yes _____ no

e.) State of legal residence: _____

f.) Current address: _____

_____

g.) Home telephone: _____ Work telephone: _____

2.) **MARITAL STATUS:**

_____ Married once, and my spouse is alive.

_____ Presently married, and had a prior marriage (previous spouse is deceased or divorced).

_____ Widow/ widower

_____ Divorced, not presently married.

_____ Single, never married.

**NOTE:** If both you and your spouse will be seeing the same attorney for your wills, you will both need to read and complete Appendix B.

3.) **CHILDREN:**

a.) How many children do you have (including adopted & stepchildren)? _____

b.) If you have adopted children or stepchildren, do you wish to treat them as natural children? _____

yes _____ no

c.) Is any child a minor? _____

4.) **VALUE OF ESTATE:**

To determine what type of will is appropriate for you, you need to provide a rough estimate of the value of your estate. For this purpose, include the value of all of the property you own in your name, and if married, the value of your spouse's property. If any of your property secures a debt (for example, a mortgage on your home), include your equity in the property. Also include the value of your life insurance policies (SGLI, VGLI, etc.). Note that life insurance ordinarily does **not** pass according to your will; it will go to the beneficiaries you designated on the insurance forms. However, the value of the insurance is typically included in determining whether estate taxes will apply in your case.

Approximate values of your estate (not including life insurance): $_____

Approximate value of your spouse's estate (not including life insurance): $_____

Value of life insurance (self and spouse): $_____

Total value of both your and your spouse's estate including life insurance: *$_____

*If the value of your estate is over $675,000 (or $1 million if you are married), please consult a civilian attorney about your will. Estates over this threshold will be subject to estate taxes and you will need estate planning advice to prepare your will properly. **NOTE:** If you need an emergency will generated by this office, you will need to read and complete Appendix A.

5.) **FAMILY FARM / FAMILY-OWNED BUSINESS:**

Do you have a farm or family-owned business? _____ yes _____ no

6.) **REAL ESTATE:**

a.) Do you own real estate? _____ yes _____ no

b.) If yes, how do you wish to give your real estate?

_____ All to my spouse.

_____ Different properties to different beneficiaries (below, please list each person, their relationship to you, and which piece of property they are to receive):

_____

_____

_____ To pass with the rest of my estate.

_____ My home to my spouse and the rest of my real estate to pass with the rest of my estate.

_____ My home to my spouse for as long as my spouse lives there and then my home and the rest of my real estate to pass with the rest of my estate.

7.) **PERSONAL EFFECTS AND TANGIBLE PERSONAL PROPERTY:**

How do you wish to give your personal property?

_____ All to my spouse.

_____ Specific items are to go to specific individuals, with all items not listed passing to my spouse. (Please attach detailed list of items, beneficiaries, and relationship to you.)

_____ Specific items are to go to specific individuals, with all items not listed passing with the rest of my estate. (Please attach detailed list of items, beneficiaries, and relationship to you.)

_____ To pass with the rest of my estate.

_____ Some other scenario not provided here (please explain): _____

_____

_____

_____

8.) **SPECIFIC BEQUESTS:**

You may elect to make specific gifts of cash, real estate, or personal property to specific people or charities in you will. However, these bequests will be distributed first and may deplete your estate. Also, specific bequests may complicate the probate of your estate if the property given cannot be found at your death. Therefore, if you make any specific bequests, you should only give property or amounts of cash that you are reasonably sure you will possess at the time of your death. If you make no specific bequests, all of your property will pass to your primary beneficiaries.

Note that you may leave a separate writing with your will, typically called a "letter of instruction," in which you give specific directions to your Executor/trix about funeral and burial arrangements, notifications to family and friends, upbringing of your children, etc. While this instruction is not legally binding in most states, your Executor should try to comply with your desires.

Many states also allow you to make a "personal memorandum," in which you can give specific items of personal property to named beneficiaries in a separate writing. While in most states memorandum gifts are not legally binding, your executor will give these gifts as much weight as state law allows.

a.) Do you wish to make any specific bequest in your will? _____ yes _____ no

b.) If yes, please list your specific bequest(s): _____

_____

_____

_____

9.) **RESIDUARY ESTATE:**

The residuary estate is whatever property remains in your estate after debts and expenses of administration have been paid, and any specific bequests have been paid. Because many people do not make specific bequests, "residuary estate" usually describes all the property that you will leave to your beneficiaries.

a.) To whom do you want to leave your residuary estate?

_____ All to my spouse if he/she survives me, and if not, then to my children and issue.

_____ A minimum bequest to my spouse, disinheriting him/her to the fullest extent of the law, with the remainder going to some other person(s).

_____ All to one specific beneficiary other than my spouse.

_____ To more than one beneficiary.

b.) If you have more than one beneficiary, are they:

_____ Specific people who are to share equally.

_____ A group of people described as a class (e.g., "my brothers and sisters") who are to share equally.

_____ Some other unequal division between the beneficiaries (e.g., 50% to one beneficiary and 25% each to two others).

_____ Some other arrangement (please explain): _____

_____

_____

_____

c.) If any of your beneficiaries is a minor, at what age do you want them to receive their gift?

_____ 18

_____ 21

_____ Some other age (please indicate the age): _____ (NOTE: Selecting an age greater than 21 will likely require the creation of a trust, which will cause your estate to incur additional expenses for the administration of the trust. These expenses would therefore diminish the amount available for your beneficiaries.)

10.) **EXECUTOR:**

The executor (or in some states, "personal representative") is the person who makes sure your estate is settled upon your death. This ordinarily involves going through probate, which is a court-administered procedure for settling an estate. Probate involves petitioning a court for letters of appointment, settling creditor claims, finding and distributing assets, and filing any necessary tax returns. Any adult may serve as your executor, although many states have a preference for or require an executor who is a legal resident of the state where probate is conducted. Therefore, if possible, you should select family members or responsible friends who are residents of the same state you claim as your legal residence or the state where you own real estate.

Whom do you wish to have as your executor?

_____ My spouse.

_____ My spouse and a co-executor.*

_____ My spouse and a successor executor.**

_____ One executor other than my spouse.

_____ Two co-executors, neither of whom are my spouse.*

_____ One executor and a successor executor, neither of whom are my spouse.**

*This option is not usually recommended because conflicts can arise between the executors that will complicate the administration of your estate.

**The successor will act only if your first choice is unable to act as your executor.

11.) **GUARDIAN:**

If your children are minors at the time of your death and if the other natural parent of the children is not alive or for any reason cannot act as guardian, the court will normally appoint the person(s) you name below to act as legal guardian(s) of the children. The individual(s) named below will have physical control and custody of the children until they reach age 18. If you are divorced, keep in mind the court will ordinarily appoint your former spouse to be the guardian (as the children's other natural parent), notwithstanding your direction here. You should still select a guardian, however, in case your former spouse predeceases you or for any reason cannot act as the children's guardian.

Do you wish to appoint:

_____ One guardian for any child when I die.

_____ One guardian and a successor guardian.

_____ Two co-guardians

_____ No guardian is to be appointed under this will.

If you wish to appoint a guardian or guardians, whom do you wish to have named? (Please list name and relationship):

1st choice: _____

2nd choice (optional): _____

3rd choice (optional): _____

12.) **TRUSTS (OPTIONAL):**

Instead of giving your estate directly to a beneficiary, you may elect to give your estate to a person designated as a trustee, to hold IN TRUST, for the benefit of your beneficiary/ies until he/she/they reach(es) the age you designate. The trustee will manage the trust under court supervision. Although the trustee's primary purpose is to safeguard the inheritance, the money can also be used for any beneficiary's health, education, welfare, or maintenance, at the trustee's discretion. Also, you may create a trust that "pools" your estate. Through pooling, your estate and insurance proceeds remain in a single trust until **all** the beneficiaries reach the age you choose. The trustee may provide funds from the trust to each beneficiary as each has a need. Thus, not all beneficiaries will receive equal amounts from the trust. Such an arrangement is useful where some beneficiaries will likely need more financial assistance over a longer period of time than other beneficiaries will. A trust is also advantageous where there is a need to protect the assets of your estate from third parties who may have claims to the assets of one of your beneficiaries.

For many people, a trust is unnecessary because, under the Uniform Gifts to Minors Act (UGMA) language that we include in your will, gifts to beneficiaries under the age of 18 (or, if you prefer, under the age of 21) will be controlled by your executor/trix initially, and guardian after probate, without establishing a trust. The executor/trix and/or guardian can still use the child's inheritance for the benefit of the child, and this arrangement is ordinarily less complicated and less expensive than establishing a trust. Therefore, unless you have children from a prior marriage, handicapped children, or a very large estate, a trust is generally not necessary to manage a child's inheritance.

One disadvantage, however, to the UGMA is it does not allow "pooling" of your estate. Put simply, under the UGMA your estate will be divided in as many equal shares as there are minor beneficiaries designated; each beneficiary will receive the remainder of his or her share as they turn 18 or 21, at your option. In a nutshell, a trust may be more appropriate if you want the trustee/guardian authority to spend more money on one child than another (e.g., a disabled child).

a.) Do you want a trust? _____ yes _____ no (If "no," skip to Item 13.)

If yes, would this be:

_____ one trust for the benefit of all beneficiaries.

_____ individual trusts for each of the beneficiaries.

b.) At what age would you like the trust(s) to terminate?
_____ 18 _____ 21 _____ other (please designate the age): _____

c.) Whom do you wish to have named as Trustee? (Please list name and relationship):

1st choice: _____

2nd choice (optional): _____

3rd choice (optional): _____

d.) Do you want the trustee to have the power to dissolve the trust if it becomes uneconomical to maintain it? _____ yes _____ no

e.) Do you want the trustee to exercise this power only if the trust is below a specific amount? _____ yes _____ no

If so, what amount? $_____

13.) **DISINHERITING SOMEONE:**

a.) Do you wish to disinherit someone other than your spouse? _____ yes _____ no

If so, whom (please provide the name and relationship to you.)? _____

b.) Do you wish to disinherit anyone who contests your will? _____ yes _____ no

c.) If you wish to disinherit your spouse, do you want your executor to have the authority to distribute your property, outright or in trust, to minimize any right of election your spouse might have under the laws of any jurisdiction? _____ yes _____ no

14.) **DISTRIBUTION OF ESTATE TO CHILDREN:**

a.) With regard to minors who may inherit under your will, do you want their gifts to be:

_____ Paid at the election of the executor (the executor may pay the child some or all of the gift, at various times, as the executor sees fit, even though the child is a minor).

_____ Held in trust until the child is no longer a minor.

b.) Hypothetically speaking, if you were to have stepchildren or adopted children, would you want to:

_____ Expressly include them in your will (treat them the same as natural children).

_____ Expressly exclude them from your will.

_____ Have the will remain silent as to stepchildren and adopted children.

c.) Is any child of yours in fact a stepchild or adopted child? _____ yes _____ no

15.) **FAMILY MEMBERS:**

a.) What is your spouse's name: _____

Please list your children's names, ages, and whether they are your biological, adopted, or stepchildren:

_____

_____

_____

_____

_____

16.)**MILITARY STATUS:**

I am: _____ Active duty military.

_____ Retired from the military.

_____ Married to someone on active duty.

_____ Married to a military retiree.

_____ A dependent of someone on active duty

_____ A dependent of a military retiree

_____ Other (please specify): _____

If you are on active duty or are the spouse or dependent of an active duty military member, where are you, your spouse, or your sponsor stationed?

_____

17.) **CHOICE OF EXECUTOR:**

If your primary beneficiary could qualify as your executor, you should consider appointing him or her as your first choice. This is more convenient and will avoid putting a third party between your beneficiary and the gift. In some states (such as Virginia), it is necessary that your executor (or if you indicated you wanted co-executors in Item 10 above, then one of your co-executors) be a resident of the state where your will is going to be probated. If you indicated earlier that you wanted co-executors, please indicate so again below.

Whom do you wish to have named as your executor? (Please list name and relationship):

1st choice: _____

2nd choice (optional): _____

3rd choice (optional): _____

18.) **PRIMARY BENEFICIARIES:**

a.) Whom do you want to receive all (or the majority) of your estate?

_____ My spouse, if he/she survives me, and if not, then my children.

_____ Disinherit spouse (to the fullest extent permitted by law).

_____ My children.

_____ My parents in equal shares, or if not, then my siblings in equal shares (please provide names and relationships):

_____

_____

_____

_____

_____ To the following beneficiaries (list name, relationship, and percentage of estate to each of the beneficiaries):

_____

_____

_____

_____

b.) If any of the above beneficiaries predecease you and leave descendants (issue), do you want the share of the deceased beneficiary to pass to their issue, or to pass only to the beneficiaries you have indicated above? (For example, if one of your child predeceases you and leaves children, do you want the share of your deceased child to pass to their children (your grandchildren) or to go only to your surviving children?)

_____ To the children of any deceased beneficiary.

_____ Only to the beneficiaries listed above.

19.) **SECONDARY BENEFICIARIES:**

If all of the primary beneficiaries you designated in Item 18 predecease you or die within 30 days of you, to whom do you wish to leave your estate (please provide name, relationship, and percentage of inheritance or list of which item(s) are to go to which individuals)?

_____

_____

_____

20.) **LIVING WILLS:**

A living will is not part of your will at all! But this is a good time to consider whether you want a living will, which is more accurately called an advance medical directive or declaration. This document states that in the event you have a terminal, incurable medical condition and your life is only being prolonged by means of artificially provided life support, and if you cannot communicate your desires at that point, the living will "speaks for you" so your doctors know and can act upon, your desires regarding the termination of life support.

The conditions that trigger the living will, and the extent of the medical care to be withdrawn, vary from state to state. Therefore, you should carefully review the language of the living will for the state you have chosen and decide if it truly reflects your choice for discontinuing life support. Once executed, the document is effective until it is revoked, which you may do at any time by physically destroying the document, or in an emergency, by verbally revoking it before witnesses who can testify that you did in fact revoke it.

Do you want a living will? _____ yes _____ no

21.) **SPECIAL POWER OF ATTORNEY FOR MEDICAL CARE:**

Another important health care document is the special power of attorney for medical care. You may execute this document in addition to, or in lieu of the living will.

This document appoints someone to make medical care decisions for you in the event that you cannot make your own medical decisions. It applies to more situations than the living will, which addresses only the issue of continued life support if you have a terminal condition. The power of attorney for medical care gives the person you designate as your agent the authority to make a wide range of medical decisions on your behalf. It also gives your agent access to your medical information and authority to fully participate with your treating physicians in deciding the care to be provided to you. Obviously, the person you designate to be your agent should be someone you trust with life and death decisions. Like the living will, the power of attorney is usually drafted in accordance with the laws of the state where you are residing.

a.) Do you want a Medical Power of Attorney? _____ yes _____ no

b.) Do you want your spouse to act as your agent? _____ yes _____ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please provide the name, address, phone number, and relationship of your first choice of agent:

_____

_____

_____

_____

_____

c.) If you have a second choice, do you want

_____ both agents to have the authority to act separately.

_____ to require both agents to act jointly unless one is incapacitated.

_____ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, phone number, and relationship of your second choice of agent:

_____

_____

_____

_____

d.) Do you wish to specify that you desire to donate your body organs for transplant upon death?
_____ yes _____ no

If yes, are you also willing to donate organs and tissue for medical, educational, or scientific purposes?
_____ yes _____ no

e.) Do you wish to specify that, if possible and if it does not place an undue burden upon your family, that you prefer to die at home rather than in a hospital? _____ yes _____ no

If you currently live in a state other than the one in which you are a legal resident, you may want your living will to be drafted in accordance with the laws of the state where you actually live and not your state of legal residence, because it is more likely to be used where you currently live.

f.) Do you wish to have the living will governed by the laws of the state where you currently live?
_____ yes _____ no We will ask you more about this below.

22.) **SPRINGING DURABLE GENERAL POWER OF ATTORNEY:**

Your will enables you to dispose of your property as you wish after your death. While you are living, you have the right to decide what happens to that property so long as you are of sound mind. But if you ever become incapacitated, whether through illness or accident, and are unable to handle your own affairs, a court order may revoke your right to manage your own money and appoint a guardian or

conservator. To protect yourself from this eventuality, you can appoint an agent for yourself through a power of attorney.

A power of attorney is simply a written authorization for someone to act on your behalf, for whatever purpose you designate in writing. Ordinarily, a power of attorney expires if you become mentally disabled – the time when you need help the most. A **springing, durable** power of attorney can take effect when you **become** unable to manage your own personal and financial affairs and will last as long as you are alive or until you revoke it. As long as you are mentally competent, you can revoke a durable power of attorney whenever you like simply by destroying the document.

If you choose to have a springing durable general power of attorney, remember to name someone who you trust as your attorney-in-fact. Your attorney-in-fact will have great authority over your affairs. Not only can they keep your affairs in order, but they have the potential to abuse this document at your expense and his or her gain.

a.) Would you like a springing durable general power of attorney? _____ yes _____ no

b.) Do you want your spouse to act as your agent? _____ yes _____ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please provide the name, address and relationship of your first choice of agent:

_____

_____

_____

_____

c.) If you have a second choice, do you want:

_____ both agents to have the authority to act separately.

_____ to require both agents to act jointly unless one is incapacitated.

_____ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, and relationship of your second choice of agent:

_____

_____

_____

_____

d.) If you selected your spouse to act as your agent, at what telephone number can her or she be reached?

_____

23.) **FUNERAL ARRANGEMENTS:**

You may have a strong desire regarding funeral arrangement (for example, burial or cremation). As a practical matter, your funeral arrangements are likely to have been carried out already by the time your will is read. Finding out after the fact that the arrangements were contrary to your will may cause some dismay for your survivors. Therefore, it is recommended that you communicate your desires to your next of kin at your earliest opportunity. If you wish, however, your preference may also be recorded in the will.

You may express your desires regarding the disposition of your remains (e.g. cremation, military honors, or burial at a certain location or gravesite). However, if you elect to state your desires in your will, do not rely on your will alone to communicate those desires, as wills may not be read prior to the funeral! You should tell the appropriate family members of your desires NOW!

_____ I do not wish to express my desires concerning my remains in my will and leave this decision to those who survive me. (Go to Item 24.)

At the time of death, I prefer:

_____ To be cremated.

_____ To have my body given for medical or scientific purposes.

_____ To be buried at a specified gravesite or location. (Please specify location): _____

_____

_____ To be buried at sea.

_____ To be buried with full military honors. (You may select this option in addition to one of the above.)

_____ Other: _____

24.) **ONE MORE QUESTION:**

The living will is ordinarily drafted in accordance with the laws of the state where you are currently living, because the laws of the state where you are hospitalized control the effectiveness of the living will.

Which state's laws do you want to govern your living will? _____

**REMINDERS:**

**If the value of your estate is over $675,000 (or $1 million if you are married), and you would still like a will generated by this office, please read and complete Appendix A.**

**If both you and your spouse will be seeing the same attorney for your wills, please read and complete Appendix B.**

*PRIVACY ACT STATEMENT*

*AUTHORITY: 10 USC 8013, F110 AFJAA, and EO 9397*

*PURPOSE: Used by attorney and client within attorney-client relationship to assist in providing a will and other related legal documents.*

*ROUTINE USES: Information will be used to aid attorneys and paralegals in drafting wins, living wills, and durable health care powers of attorney. Disclosure is voluntary, but if you do not provide the requested information, this office will be unable to prepare a will or other related documents for you.*

## APPENDIX A – Waiver of Liability

Dear Client:

Because of the value of your estate, and the concomitant adverse tax consequences associated with such an estate, it is the recommendation of this office that you see an estate planner to assist you in drafting your will. The costs associated with seeing a civilian attorney qualified to construct a will specifically tailored to your particular situation are far outweighed by the savings such a will can garner for you. Despite this recommendation, and with full awareness of the adverse tax consequences of doing so, you have requested a will drafted by this office, even though such a will does not have any tax avoidance features.

Very respectfully,

ATTORNEY NAME
Legal Assistance Attorney

I (we), (please print your name(s)) _____ (and _____) have read the foregoing letter, understand the same, and still desire to have a will prepared by (please print attorney's name) _____, of the Joint Services Pentagon Legal Assistance Office. I fully understand that this will does not take into account the effect of tax consequences on my estate or utilize any estate planning devices to minimize my estate's tax liability.

APPROVED THE _____ day of _____, 2000

_____
**Client**

_____
**Client**

## APPENDIX B – Dual Representation Authorization

Dear Clients:

You and your spouse have indicated that you both wish to meet together with the same attorney to discuss your will and ancillary documents. Due to the potential for conflicts of interest, it is the policy of this office to raise this issue with you and require your informed consent to proceed. Therefore, your signature below will confirm the following:

(1) You have requested that the same legal assistance attorney represent each of you and advise you both on certain estate planning matters.

(2) It is contemplated that the matters to which this representation will extend will include the following:

- Analysis of the assets owned by each of you at the time of your marriage, including consideration of the fair market value of such property and the nature in which title was then held;

- Analysis of all property now owned by each of you, including consideration of its fair market value, the manner in which title to such property is now held, and a categorization of such property as separate, community, or quasi-community property;

- Discussions about the manner in which you wish to dispose of any property over which you may have any power of disposition at the time of your death; and

- Preparation of the documents necessary to accomplish the desired disposition, including the drafting of wills, trusts, property agreements, and other documents as may be required.

(3) You are aware that, during the course of the estate planning work, disagreements may arise between you and your spouse with respect to the ownership of your property (separate, community, or quasi-community property) and its desired disposition during your lifetimes and at your deaths. Differences of opinion on the disposition of the property, under ethical rules, do not prevent the same attorney from continuing to represent both of you. However, during the course of the estate planning, conflicts of interest between you and your spouse may also arise, such as issues regarding the ownership of certain property.

(4) Ordinarily, under such circumstances, one attorney cannot represent both of you. It may be better for each of you, under such circumstances, to have separate, independent counsel to avoid the possibility that my advice to one of you is influenced by my representation of the other. Nevertheless, you have requested, with a full understanding of your right to, and the advantages of, independent counsel, that you both be represented by the same legal assistance attorney in all of the above matters.

(5) Although they rarely occur, if a conflict of interest does arise between the two of you of such a nature that I believe it impossible, in my judgment, for me to perform any obligations to either of you in accordance with this letter, I will withdraw from all further representation of either of you in this matter at that time and advise both of you to obtain independent counsel.

(6) You have each agreed that there will be complete and free disclosure and exchange of all information I receive from either or both of you in the course of my representation of you, and that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you, including any conferences that may have taken place before the date of this letter.

Very respectfully,

ATTORNEY NAME,
Legal Assistance Attorney,

We, (please print your names) _____

and _____, have read the foregoing letter, understand the same, consent to the disclosure and exchange of all information received by _____, our legal assistance attorney from either one of us, with the other one of us, and consent to our legal assistance attorney representing each and both of us in the aforementioned estate planning services.

APPROVED THE _____ day of _____, 2000

_____
Client

_____
Client

Dear Legal Assistance Clients:

To help us serve you better, please take a few minutes to complete this Client Satisfaction Survey. All of the questions may not apply, but please answer the ones that do. Your honest and constructive responses will help us provide quality legal services to our clients. Please mark the appropriate blocks and deposit the survey in our suggestion box located in the waiting room or ask the receptionist for help.

Thank you for your assistance.

Sincerely,

ATTORNEY NAME
Legal Assistance Attorney

Name and phone number (optional)

_____

1. Date of your visit:

_____

2. Reason for your visit:

_____

3. Attorney seen:

_____

3. Your branch of service: ____ Army ____ Navy ____ Air Force ____ Marines _____ Coast Guard

4. Your grade: _____ 5. Where are you stationed?

_____

6. How did you hear about our service?

_____

7. Were you referred to us by another Legal Assistance Office? _____ yes _____ no

If yes, please tell us why.

_____

_____

_____

8. The length of time it took to get an appointment was: _____ walk-in _____ within 3 days _____ within 10 days _____ over 10 days

Comments:

_____

_____

_____

9. How were you treated by the receptionist? _____ Great _____ Good _____ Fair _____ Poor

Comments:

_____

_____

_____

10. How were you treated by the legal technician? ____ Great _____ Good _____ Fair _____ Poor

Comments:

_____

_____

_____

11. How were you treated by the Notary? _____ Great _____ Good _____ Fair _____ Poor

Comments:

_____

_____

_____

12. How clear was your attorney's advice to you? _____ Great _____ Good _____ Fair _____ Poor

Comments:

_____

_____

_____

13. How well did the attorney answer your questions? _____ Great _____ Good _____ Fair _____ Poor

Comments:

_____

_____

_____

14. How did your attorney treat you? _____ Great _____ Good _____ Fair _____ Poor

Comments:

_____

_____

_____

15. If the attorney prepared documents for you, how long did you have to wait? _____ less than 3 days _____ less than 10 days _____ more than 10 days

Comments:

_____

_____

_____

16. How would you rate our services overall? _____ Great _____ Good _____ Fair _____ Poor

Comments:

_____

_____

_____

17. What can we do to serve you better?

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

# JOINT SERVICES PENTAGON LEGAL ASSISTANCE OFFICE

## COMPLEX ESTATE

## PLANNING WORKSHEET

CLIENT'S NAME: _____

DATE AND TIME OF APPOINTMENT: _____

_____

**PENTAGON**
**ROOM 1D738**
**(703) 693-0107**

# ESTATE PLANNING FINANCIAL QUESTIONNAIRE

**PERSONAL INFORMATION**

Name of husband: _____

Are you a U.S. Citizen or U.S. National? _____ yes _____ no

Name of wife: _____

Are you a U.S. Citizen or U.S. National? _____ yes _____ no

Current address: _____

Phone #s: (home): _____ (husband's office): _____ (wife's office): _____

E-mail: (husband's): _____ (wife's): _____

City and state of domicile (planned permanent residence): _____

Name your children, indicate whether they are natural children, adopted, or stepchildren, and provide their dates of birth:

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

**EXECUTOR: This is the person who presents your will to the court for probate, ensures that your wishes are carried out, and that your estate is settled upon your death. Whom do you wish to have serve as your executor (generally spouses can name each other as their primary executor)?**

**Husband**:
Primary:_____
Alternate:_____

**Wife**:
Primary:_____
Alternate:_____

**TRUSTEE: This is the person who supervises the management of any trusts created by your will. Whom do you wish to have serve as your trustee? (Spouses can name each other as their primary trustee.)**

**Husband**:
Primary:_____

**Wife**:
Primary:_____

Alternate:_____ Alternate:_____

**GUARDIAN: This is the person whom you would wish to raise your children should both you and your spouse die while the children are still minors; both of you should agree upon the choice(s). If you have minor children, whom do you wish to have serve as their guardian?**

Primary:_____ Alternate:_____

**FINANCIAL QUESTIONS**

Please detail any special circumstances or general estate planning concerns about which you may have questions.

_____

_____

**1. Asset Valuation Summary:**

To accurately determine the estate and gift tax consequences, if any, resulting from the distribution of your property, please provide the information requested below. You need only provide approximate figures. If you prefer, you can provide us with a recent financial statement that accurately reflects the current value of your joint and individual assets and liabilities.

| | Joint | Husband | Wife | Total |
|---|---|---|---|---|
| **Checking accounts** | | | | |
| **Savings accounts** | | | | |
| **Residence(s) equity** | | | | |
| **Other real estate equity** | | | | |
| **Investments (excluding retirement benefits)** | | | | |
| **Closely-held business(es)** | | | | |
| **Life insurance death benefits** | | | | |
| **Vehicles** | | | | |
| **Other personal property (e.g., furniture, jewelry, etc.)** | | | | |
| **Other assets (list)** | | | | |
| **Other assets (list)** | | | | |
| **Other assets (list)** | | | | |
| **Total** | | | | |

Have you ever filed an IRS Form 709 "U.S. Gift (and Generation-Skipping Transfer) Tax Return?"

_____ yes _____ no

**2. Residence Information.**

**A. Primary Residence:** (address): _____

_____

| Estimated Value | Amount of Mortgages | Equity | Monthly Mortgage Payment | Owned By (husband, wife, jointly) |
|---|---|---|---|---|
| | | | | |

(So that we can properly plan for its disposition, please provide us a copy of the deed and mortgages for this primary residence.)

Original Purchase Price: $_____ Cost of Additional Improvements: $_____

How long do you plan on retaining this as a primary residence? What are your plans for this property?

_____

_____

**B. Secondary Residence:** (address): _____

_____

| Estimated Value | Amount of Mortgages | Equity | Monthly Mortgage Payment | Owned By (husband, wife, jointly) |
|---|---|---|---|---|
| | | | | |

(So we can properly plan for its disposition, please provide us a copy of the deed and mortgages for this secondary residence.)

Original Purchase Price: $_____ Cost of Additional Improvements: $_____

How long do you plan on retaining this as a primary residence? What are your plans for this property?

_____

_____

_____

_____

Do you rent out this secondary residence? _____

**3. Other Real Estate Information (other than residences).**

**A. Other jointly owned real estate ( i.e., in both husband's and wife's names).**

| Location | Estimated Value | Amount of Deeds of Trust | Equity | Other Co-Owners? |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**B. Other real estate owned by husband only.**

| Location | Estimated Value | Amount of Deeds of Trust | Equity | Other Co-Owners? |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**C. Other real estate owned by wife only.**

| Location | Estimated Value | Amount of Deeds of Trust | Equity | Other Co-Owners? |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |

| | | | | |
|---|---|---|---|---|
| | | | | |
| **Total** | | | | |

**4. <u>Investment Account Information (other than retirement accounts)</u>.**

**A. Jointly owned investment accounts, mutual funds, etc. (i.e., in both husband's and wife's names).**

| **Location** | **Estimated Value** | **Amount of Margin Loans** | **Net Value** | **Other Co-Owners?** |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**B. Investment accounts owned by husband only.**

| **Location** | **Estimated Value** | **Amount of Margin Loans** | **Net Value** | **Other Co-Owners?** |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**C. Investment accounts owned by wife only.**

| **Location** | **Estimated Value** | **Amount of Margin Loans** | **Net Value** | **Other Co-Owners?** |
|---|---|---|---|---|
| | | | | |
| | | | | |

| | | | | |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**5. <u>Retirement Benefits</u>.**

**A. Husband's retirement benefits.**

| **Description** | **Current Value** | **Beneficiary** |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| **Total** | | |

**B. Wife's retirement benefits.**

| **Description** | **Current Value** | **Beneficiary** |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| **Total** | | |

**C. Please provide below any other information regarding retirement accounts and other deferred compensation arrangements:**

_____

_____

_____

_____

_____

**6. <u>Liability Information</u>.**

**A. Joint liabilities (i.e., those liabilities for which both husband and wife are responsible), other than those listed previously.**

| Creditor | Liability Amount | Payment Amount | Payment Frequency | Secured? |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| Total | | | | |

**B. Husband's liabilities, other than those listed previously.**

| Creditor | Liability Amount | Payment Amount | Payment Frequency | Secured? |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**C. Wife's liabilities, other than those listed previously.**

| Creditor | Liability Amount | Payment Amount | Payment Frequency | Secured? |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**7. <u>Life Insurance Information</u>.**

**A. Joint life insurance policies (i.e., life insurance insuring both husband's life and wife's life). (Please indicate those policies not <u>owned</u> by husband or wife with "*".)**

| Company | Type | Face Amount (Death Benefit) | Cash Surrender Value | Beneficiary |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**B. Husband's life insurance policies; i.e., life insurance insuring husband's life. (Please indicate those policies not <u>owned</u> by husband with "*".)**

| Company | Type | Face Amount (Death Benefit) | Cash Surrender Value | Beneficiary |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

| | | | | |
|---|---|---|---|---|
| | | | | |
| **Total** | | | | |

**C. Wife's life insurance policies (i.e., life insurance insuring wife's life). (Please indicate those policies not owned by wife with "*".)**

| Company | Type | Face Amount (Death Benefit) | Cash Surrender Value | Beneficiary |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| **Total** | | | | |

**D. Please provide any other information concerning the above life insurance policies which may be helpful (i.e., outstanding policy loans, whether pledged as collateral, whether owned by a trust, whether financed under a "split dollar" arrangement, etc.).**

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

**8. Miscellaneous Information. Please provide below any other information relating to your assets or liabilities which may have an impact on your estate planning.**

_____

**9. Living Will:**

A living will is not part of your will at all! But this is a good time to consider whether you want a living will, which is more accurately called an advance medical directive or declaration. This document states that in the event you have a terminal, incurable medical condition and your life is only being prolonged by means of artificially provided life support, and if you cannot communicate your desires at that point, the living will "speaks for you" so your doctors know and can act upon, your desires regarding the termination of life support.

The conditions that trigger the living will, and the extent of the medical care to be withdrawn, vary from state to state. Therefore, you should carefully review the language of the living will for the state you have chosen and decide if it truly reflects your choice for discontinuing life support. Once executed, the document is effective until it is revoked, which you may do at any time by physically destroying the document, or in an emergency, by verbally revoking it before witnesses who can testify that you did in fact revoke it.

Do you want a living will? _____ yes _____ no

**10. Special Power Of Attorney For Medical Care:**

Another important health care document is the special power of attorney for medical care (SPOAMC). You may execute this document in addition to, or in lieu of the living will. This document appoints someone to make medical care decisions for you in the event you cannot make your own medical decisions. It applies to more situations than the living will, which addresses only the issue of continued life support if you have a terminal condition. The SPOAMC gives the person you designate as your agent the authority to make a wide range of medical decisions on your behalf. It also gives your agent access to your medical information and authority to fully participate with your treating physicians in deciding the care to be provided to you. Obviously, the person you designate to be your agent should be someone you trust with life and death decisions. Like the living will, the power of attorney is usually drafted in accordance with the laws of the state where you are residing.

a.) Do you want a Medical Power of Attorney? _____ yes _____ no

b.) Do you want your spouse to act as your agent? _____ yes _____ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please list the name, address, phone number, and relationship of your first choice of agent:

_____

_____

_____

_____

c.) If you have a second choice, do you want

_____ both agents to have the authority to act separately.

_____ to require both agents to act jointly unless one is incapacitated.

_____ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, phone number, and relationship of your second choice of agent:

_____

_____

_____

_____

d.) Do you wish to specify that you desire to donate your body organs for transplant upon death?
_____ yes _____ no

If yes, are you also willing to donate organs and tissue for medical, educational, or scientific purposes?
_____ yes _____ no

e.) Do you wish to specify that, if possible and if it does not place an undue burden upon your family, that you prefer to die at home rather than in a hospital? _____ yes _____ no

If you currently live in a state other than the one in which you are a legal resident, you may want your living will to be drafted in accordance with the laws of the state where you actually live and not your state of legal residence, because it is more likely to be used where you currently live.

f.) Do you wish to have the living will governed by the laws of the state where you currently live?
_____ yes _____ no

We will ask you more about this below.

**11. <u>Springing Durable General Power Of Attorney:</u>**

Your will enables you to dispose of your property as you wish after your death. While you are living, you have the right to decide what happens to that property so long as you are of sound mind. But if you ever become incapacitated, whether through illness or accident, and are unable to handle your own affairs, a court order may revoke your right to manage your own money and appoint a guardian or conservator. To protect yourself from this eventuality, you can appoint an agent for yourself through a power of attorney.

A power of attorney is simply a written authorization for someone to act on your behalf, for whatever purpose you designate in writing. Ordinarily, a power of attorney expires if you become mentally disabled – the time when you need help the most. A **springing, durable** power of attorney can take effect when you **become** unable to manage your own personal and financial affairs and will last as long as you are alive or until you revoke it. As long as you are mentally competent, you can revoke a durable power of attorney whenever you like simply by destroying the document.

If you choose to have a springing durable general power of attorney, remember to name someone who you trust as your attorney-in-fact. Your attorney-in-fact will have great authority over your affairs. Not only can they keep your affairs in order, but they have the potential to abuse this document at your expense and his or her gain.

a.) Would you like a springing durable general power of attorney? _____ yes _____ no

b.) Do you want your spouse to act as your agent? _____ yes _____ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please provide the name, address, telephone number and relationship of your first choice of agent:

_____

_____

_____

_____

c.) If you have a second choice, do you want:

_____ both agents to have the authority to act separately.

_____ to require both agents to act jointly unless one is incapacitated.

_____ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, telephone number, and relationship of your second choice of agent:

_____

_____

_____

_____

e.) If you selected your spouse to act as your agent, at what telephone number can her or she be reached?

_____

**ONE MORE QUESTION:**

The living will is ordinarily drafted in accordance with the laws of the state where you are currently living, because the laws of the state where you are hospitalized control the effectiveness of the living will.

Which state's laws do you want to govern your living will? _____

*PRIVACY ACT STATEMENT*

*AUTHORITY: 10 USC 8013, F110 AFJAA, and EO 9397*

*PURPOSE: Used by attorney and client within attorney-client relationship to assist in providing a will and other related legal documents.*

*ROUTINE USES: Information will be used to aid attorneys and paralegals in drafting wins, living wills, and durable health care powers of attorney. Disclosure is voluntary, but if you do not provide the requested information, this office will be unable to prepare a will or other related documents for you.*

# APPENDIX D

# ESTATE OWNER'S BENEFICIARY OBJECTIVES

## I. ESTATE OWNERS OBJECTIVES.

The estate owner's objectives are the most important step in the estate planning process. To formulate a sound estate plan, the plan must be constructed on the foundation of the owner's objectives.

## II. BENEFICIARY OBJECTIVES:

A. Planning for the spouse: In planning for his or her spouse, the estate owner must decide how much of the estate is to be left to the spouse and the manner in which it should pass to such spouse. The following questions will help the estate owner make these decisions:

1. What portion of the estate should go to the spouse in preference to other beneficiaries? If the estate owner has difficulty arriving at a conclusion, the following subsidiary questions will be helpful.

   a. What are the financial needs of the spouse compared to the needs of other beneficiaries?

   b. What is the degree of love and affection for the spouse?

   c. What are the feelings of the estate owner regarding the possibility of the spouse remarrying?

   d. What is the likelihood the spouse will care for the children and other relatives out of the share left to such spouse?

2. Of the portion or the estate going to the spouse, should it, apart from any tax considerations, go outright or in trust? Subsidiary factors to consider are:

a. What is the financial ability and experience of the spouse?

b. Would the spouse consider outright ownership to be a burden?

c. Does the estate owner want to control the eventual disposition of the principal not used by the spouse during such spouse's lifetime?

3. If there is the a trust for the spouse, then

a. Who is to be the trustee?

b. Should the spouse receive all the income currently or should income distributions be discretionary with the trustee?

c. Should principal be available to the spouse?

d. If principal is to be available for the spouse, but the spouse is not to be the trustee, should the amount of the distributions be in the sole control of the trustee or should the spouse have an independent power of withdrawal, perhaps to a specified maximum?

e. Should the trust continue on the same terms for the spouse in the event of such spouse's remarriage?

f. On the surviving spouse's death, is the balance of the trust to go to named beneficiaries or to the surviving spouse's appointees?

4. Should gifts of life insurance or other assets be made to the spouse during the estate owner's' lifetime or should the entire estate pass only after the owner's death?

B. Planning for the Children**:** The estate owner must consider questions such as the following, to formulate planning objectives with regard to children:

1. What are the financial needs of the children?

2. What portion of the estate should go to the children in preference to other beneficiaries?

3. Of the portion of the estate going to the children, should an equal share go to each child or do any of the children have special needs?

4. Should the children receive at least some benefit from the estate while the surviving spouse is still living or should they wait until both parents die?

5. Should the children's shares be placed in trust or distributed outright?

6. If there is to be a trust for the children, then

   a. Who is to be the trustee?

   b. Should the children receive the income currently or should income distributions be discretionary with the trustee?

   c. At what ages should principal be distributed to the children?

7. If a child does not survive until the age of distribution, who is to receive his or her share- the child's children, the child's spouse, the estate owner's other children, or other beneficiaries?

8. If any of the children are minors, who should be nominated as the guardian or the children?

9. Should gifts be made to the children during the owner's lifetime or should the estate pass to them only on the owner's death?

C. Other Individual Beneficiaries: Other individuals whom the estate owner may wish to provide for may be his or her grandchildren, parents, brothers, sisters, and sons- and daughters-in-law. Also, he or she may wish to include more distant relatives such as nieces, nephews, and cousins or a good friend or loyal employee. The following are a few questions which will stimulate the estate owner's thinking in this regard:

1. Should a portion of the estate be left directly to the grandchildren even if the children survive the estate owner?

2. Are there any needs that the estate owner is supporting during his or her lifetime that will need funds after his death?

3. Are there any persons whom the estate owner wishes to "remember" in the estate plan, even in a token way, to repay a kindness or perhaps to spare a person from feeling slighted if left out?

4. To whom does the estate owner wish to leave the estate, if his or her primary beneficiaries, such as his or her spouse and issue, do not survive the owner?

D. Charitable Beneficiaries**:** A few questions should be considered to ascertain the owner's real objectives in this regard:

1. Should a portion of the estate be left on the estate owner’s death to charity in preference to other beneficiaries?

2. If a part of the estate is to be left to charity, to which charities should it be left?

3. Should the charitable bequests be outright or restricted to specific purposes?

4. Should a charity be designated as a contingent beneficiary in the event the primary beneficiaries do not survive?

5. Should charitable gifts be made during the owner's lifetime?

E. Retirement Objectives: Consider objectives regarding retirement to help plan for that period of the owner's life. The following questions are useful in this regard:

1. Does the estate owner have a strong desire to retire?

2. What is his or her anticipated lifestyle during retirement?

3. How much annual income will be needed during retirement?

4. At what age would he or she like to retire?

5. To what extent is the estate owner willing to save now, to create an adequate estate for retirement, either voluntary or forced by age or disability?

## APPENDIX E

## EXTRACT OF AR 27-3

Current AR 27-3, para 3-6b provision:

(b) *Estates*. Legal assistance will be provided on wills, testamentary trusts for the benefit of minors, guardianships, and the designation of beneficiaries under life insurance policies (including the Servicemen's Group Life Insurance (SGLI)). Legal assistance will also be provided on preparing AMDs and anatomical gift designations. Legal assistance may be provided on other aspects of estate planning based on the availability of expertise and resources.

(1) Every service member for whom a will is prepared will be provided legal advice on designating beneficiaries under SGLI (or other insurance policies, as applicable) that will best carry out the service member's intent in light of his or her personal situation. As a matter of Army policy, attorneys will not recommend so-called "by-law" or "by-will" (or "to my-estate") SGLI beneficiary designations to any service member, regardless of military service affiliation. Where the insured is a soldier, "by-law" and "by-will" designations are prohibited. See AR 600-8-1 (20 Oct 94) and Appendix C of this regulation for guidance on assisting service members with SGLI beneficiary designations. Non-Army clients who indicate that they have directed their SGLI benefits to be distributed "by-law" should be advised of the effect this direction has on distribution of SGLI proceeds. In cases where an existing designation does not comport with a service member's wishes, or simply needs revision in the case of a soldier who has not replaced an existing "by-law" or "by-will" designation, the service member will be assisted on executing VA Form SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate). This form may be obtained through normal publications channels. The form for soldiers will be executed in accordance with AR 600-8-1. Any designation or change of beneficiary by a soldier on a SGLV-8286 is not effective unless received by the custodian of the soldier's DA Form 201 (Military Personnel Records Jacket (MPRJ), U.S. Army) before the soldier's death. All clients should be advised to file newly executed forms in their military records. They should also be provided the telephone and room and building numbers (or address) of the custodian for those records.

(a) Attorneys who provide legal assistance should maintain sufficient copies of SGLV-8286 for use by their clients. Attorneys should not use any other form or continuation form to designate SGLI beneficiaries unless specifically approved by the proponent for AR 600-8-1 (20 Oct 94).

# CHAPTER L

# PERSONAL FINANCIAL PLANNING

## I. INTRODUCTION.

"Money is of a prolific, generating nature. Money can beget money, and its offspring am beget more."

-Benjamin Franklin, 1748

## II. REFERENCES.

A. Andrew Tobias, *The Only Investment Guide You'll Ever Need* (Harvest Books, 1999).

B. Thomas Stanley and William Danko, *The Millionaire Next Door* (Pocket Books, 1998).

C. David and Tom Gardner, You *Have More Than You Think: The Foolish Guide to Investing What You Have* (Simon and Shuster, 1999).

D. David Chilton, *The Wealthy Barber, Everyone's Commonsense Guide to Becoming Financially Independent* (Prima Publishing, 1998).

E. Internet Resources: The Internet contains innumerable financial planning sites covering every imaginable topic from retirement calculators to mutual fund reviews. To access these sites consider an initial search using the About.com site. This search engine/site contains reviews of many of the financial planning sites and provides an good initial starting point for Internet based research.

## III. ACHIEVING FINANCIAL SECURITY STEP-BY-STEP.

*"Thank you, but I've already provided for my children's college education."*

A. Goals.

1. Emergency Reserve.

2. Retiring Debt

3. Life Insurance.

4. Funding Major Purchases.

5. College Education Funding.

6. **Retirement.**

B. **Strategies** ("Act now. save more, and invest better!")

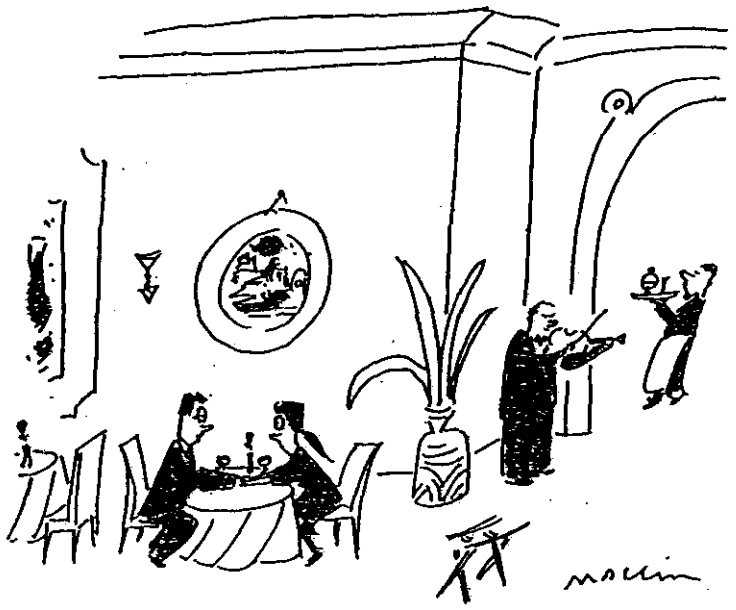
1. Pay yourself first (allotments).

2. Set aside the **incremental increases** in your income.

3. Eliminate credit card debt.

4. Budget.

# IV. INVESTING.



*"I meant everything I said last night, especially the part about how diversifying your equity portfolio allows you to participate in growth potential."*

A. Savings vs. Investing.

B. Constraints.

1. **Time Horizon.**

2. Inflation.

3. Risk Tolerance.

C. Investment Vehicles

1. Real Estate.

a Residence: Military specific and tax considerations that enter into the decision to buy versus rent.

b. Investment Property

2. Equities.

a Stocks.

b. Mutual Funds

3. Debt Instruments

a. Bonds.

b. Certificates of Deposit.

c. Savings Accounts

*"I've done the numbers, and I will marry you."*

(b) Those providing legal assistance to soldiers during EDREs, REMOBEs, MODREs, SRPs, and NEOs should request to be stationed before the personnel and finance sections so that soldiers can receive legal advice before they designate SGLI and final pay beneficiaries. This advice will be made available to soldiers regardless of whether or not wills are prepared for them.

(2) No will may be executed until an attorney interviews the client and reviews the will. An attorney shall be present to supervise the execution of the will and to review the will after the client and witnesses have signed it. The attorney who drafts the will shall insert his or her name on the will as its drafter, together with the designation for a state or other legal bar of which he or she is a member, using the following language: "This document was prepared under the authority of 10 U.S.C. § 1044 and implementing military regulations and instructions by *(name of attorney*), who is licensed to practice law in (*name of one State or other legal bar*)."

(a) When providing routine legal assistance, attorneys should encourage eligible clients who meet any of the criteria in para 3-6b(2)(b) to obtain wills, and should provide wills to all those who request them. The same legal and professional standards that apply to preparing and executing wills within an Army legal office apply to those that are prepared and executed during EDREs, REMOBES, MODREs, SRPs, and NEOs. Where those standards cannot be met, follow-up legal assistance appointments should be made to prepare or execute wills for soldiers who need them. In appropriate cases, soldiers may be encouraged to have wills (or new wills) drafted and executed following their mobilization or deployment.

(b) During mobilization or deployment, the priority and allocation of legal resources should be based on need. The absence of a will does not make a service member non-deployable. The need for a routine will by a service member being mobilized or deployed must be weighted against the needs of other service members for wills and other legal services (for example, resolving child custody, landlord-tenant, or consumer law problems). When legal resources are limited, the priority for drafting and executing wills should be given to service members to whom any of the following applies: (1) those who have a minor child; (2) those whose primary beneficiary is a minor; (3) those whose net estate (excluding insurance, jointly-owned property, and other non-probate property) is valued at more than $10,000 (or a higher dollar limit if applicable law allows small estate administration for estates of lesser amounts); or (4) those who desire their property to be distributed in a manner different from that which would occur under the applicable laws of intestate succession or under an existing will. The drafting and execution of wills (or new wills) for all other service members may be delayed until such time that legal resources are available following mobilization or deployment.

(c) The execution of preprinted fill-in-the-blank wills is limited to clients domiciled in states that specifically authorize the execution of such wills. If authorized by statute, a properly drafted and executed fill-in-the-blank will complies with JAGC standards.

(3) Consistent with this regulation, every effort will be made to assist PNOK in probating wills and settling estates (particularly uncontested or exempt-from administration proceedings) of service members who die while in a military duty status. (See paras 2-5a(9) and 3-7g(2)(d)). When available resources, personnel, or expertise are insufficient to provide the legal assistance required, clients should be referred to other attorneys who provide legal assistance or to civilian lawyers in accordance with para 3-7h. Attorneys assisting a PNOK with a problem related to a service member's designation of SGLI beneficiaries should review the provisions of Chapter 38, Code of Federal Regulations, Part 9 (Servicemen's Group Life Insurance and Veterans' Group Life Insurance) for restrictions on beneficiary entitlements.

(4) Priority will be given to handling the special needs of clients with life-threatening injuries or illnesses. With regard to service members, attorneys providing legal assistance should be generally familiar with the benefits payable from the military, the Department of Veterans' Affairs, and the Social Security Administration to the survivors of service members who die while on active duty or in a retired status. They should also be generally familiar with the reasons for carrying out so-called "death-bed retirements." Assistance in such cases may be obtained from the installation Physical Evaluation Board Liaison Officer, the installation Retirement Services Officer, or Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington DC 20310-2200. See AR 600-87, appendix C for a description of the Survivor Benefit Plan, and AR 40-3, chapter 8 regarding referral of cases to physical evaluation boards.

# CHAPTER M

# OATHS, NOTARIZATIONS, AND POWERS OF ATTORNEY IN THE MILITARY


I. REFERENCES. ..... 1
II. AUTHORITY OF U.S. MILITARY PERSONNEL TO ADMINISTER OATHS AND PERFORM NOTARIAL ACTS. ..... 1
III. GENERAL OVERVIEW. ..... 2
IV. OATHS. ..... 4
V. NOTARIAL ACTS ..... 6
VI. NOTARIAL CERTIFICATIONS AND CONTENTS OF OATH. ..... 8
VII. POWERS OF ATTORNEY (POA) ..... 9
VIII. CONCLUSION. ..... 15


Outline of Instruction

## I. REFERENCES.

A. 10 U.S.C. §§ 936 and 1044.

B. AR 27-55, Notarial Services (10 April 1997).

C. JA 272, Deployment Guide (Feb. 1994).

## II. AUTHORITY OF U.S. MILITARY PERSONNEL TO ADMINISTER OATHS AND PERFORM NOTARIAL ACTS.

A. 10 U.S.C. § 1044a grants named individuals the general powers of a notary public and of a consul of the United States.

B. 10 U.S.C. § 1044b is intended to increase the acceptability of general and special powers of attorney prepared by legal assistance attorneys for their clients.

C. 10 U.S.C. § 1044c is intended to increase the acceptability of advanced medical directives prepared by legal assistance attorneys for their clients.

D. 10 U.S.C. § 936 grants named individuals power to administer oaths necessary for military administration (to include military justice) and necessary in the performance of their duties.

## III. GENERAL OVERVIEW.

A. Authority to administer oaths and perform notarial acts may be based on state or federal law.

B. The authority granted by federal statutes (10 U.S.C. § 1044a and § 936) to administer oaths and perform notarial acts is

1. Separate and apart from, and in addition to,

2. Any authority provided by state law.

C. Oaths administered pursuant to 10 U.S.C. § 936 are legally effective for the purposes for which the oaths are administered (e.g., military administration).

D. Notarial acts performed under 10 U.S.C. § 1044a are legally effective as notarial acts for **all** purposes in all states (pursuant to the Supremacy Clause). In the past, not all states agreed; that is why § 1044b was passed in 1994:

Recognition by States of Military Powers of Attorneys codified at 10 U.S.C. § 1044b.

(a) INSTRUMENTS TO BE GIVEN LEGAL EFFECT WITHOUT REGARD TO STATE LAW. -- A military power of attorney

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and

(2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

(b) MILITARY POWER OF ATTORNEY -- For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal Law.

(c) STATEMENT TO BE INCLUDED. -

(1) Each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

(d) STATE DEFINED. -- In this section, the term 'STATE' includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

PRESCRIBED PREAMBLE FOR MILITARY POWERS OF ATTORNEY (insert at beginning of each general and special power of attorney in capital letters)

THIS IS A MILITARY POWER OF ATTORNEY PREPARED PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 1044b AND EXECUTED BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS THIS POWER OF ATTORNEY FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY OR RECORDING THAT IS PRESCRIBED FOR POWERS OF ATTORNEY UNDER THE LAWS OF A STATE, THE DISTRICT OF COLUMBIA, OR A TERRITORY, COMMONWEALTH, OR POSSESSION OF THE UNITED STATES. FEDERAL LAW SPECIFIES THAT THIS POWER OF ATTORNEY SHALL BE GIVEN THE SAME LEGAL EFFECT AS A POWER OF ATTORNEY PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

E. Advanced Medical Directives. 10 U.S.C. § 1044c, is identical to the military power of attorney provision except it deals with advanced medical directives.

1. STATEMENT TO BE INCLUDED: 10 U.S.C. § 1044c requires similar language on all advanced medical directives as is on military power of attorneys. Substitute the words "Title 10, United States Code, Section 1044c" for "Title 10, United States Code, Section 1044b" and the words "advanced medical directive" for "power of attorney" in the above language to make this protection effective.

## IV. OATHS.

A. Oaths and affirmations are pledges where the individual making the oath swears or affirms the truth of statements made by them. Oaths and affirmations are used when taking affidavits or sworn statements and documents.

B. Under 10 U.S.C. § 936(a) and AR 27-55, para. 3-2b, the following U.S. Armed Forces members on active duty, reservists serving on active or inactive duty for training, and Army National Guard members when serving on active duty under Title 10 U.S.C., may administer oaths for purposes of military administration, including military justice under the UCMJ:

1. All JAs and legal officers of the Army.

2. All summary courts-martial.

3. All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.

4. All commanding officers of the Navy, Marine Corps, and Coast Guard.

5. Persons empowered to authorize searches pursuant to MRE 315(d), MCM, 1984, for any purposes relating to search authorizations.

6. All other persons designated by Armed Forces regulations or by statute.

C. Under 10 U.S.C. § 936(b) and AR 27-55, para. 3-2c, the following U.S. Armed Forces members on active duty, reservists serving on active or inactive duty for training, Army National Guard members when serving on active duty under Title 10 U.S.C., may administer an oath to any person when it is necessary in the performance of their duties:

1. President, military judge, trial counsel and assistant trial counsel, for all general and special courts-martial.

2. President and counsel for any court of inquiry.

3. All officers designated to take a deposition.

4. All personnel designated to conduct an investigation.

5. All recruiting officers.

6. All other persons designated by regulations of the armed forces or by statute. [i.e., Civilian personnel officers and designated representatives]

D. Other Statutory Oaths. Any U.S. Armed Forces commissioned officer of any Regular or Reserve component, whether or not on active duty, may administer:

1. Oath of enlistment (10 U.S.C. § 502).

2. Oath required for the enlistment or appointment of any person in the Armed Forces (10 U.S.C. § 1031).

3. Any other oath required by law in connection with enlistment or appointment of any person in the Armed Forces (10 U.S.C § 1031).

E. Procedures.

1. Oaths administered for military justice matters should be administered according to AR 27-10, chapter 11.

2. All other oaths should be administered as described in AR 27-55, para. 4-4.

## V. NOTARIAL ACTS.

A. Under the authority of 10 U.S.C. § 1044a and AR 27-55, para. 2-2a, the following persons have the general powers of notary public and of a consul of the United States in the performance of all notarial acts to be executed by any of the individuals listed in paragraph B below:

1. Civilian attorneys serving as legal assistance officers.

2. All active duty and reserve component judge advocates and warrant officers with a primary MOS of 55A; **NOTE:** Reserve component judge advocates and warrant officers may perform notarial services even in a non-duty status.

3. All adjutants, assistant adjutants, and personnel adjutants;

4. All other persons who are designated by regulations of armed forces or by statute to have those powers.

5. The following also qualify as military notaries with the following restrictions pursuant to AR 27-55:

a. Active duty and reserve component NCOs (including corporals) and legal specialists (authorized by their supervising SJA pursuant to para. 1-6) who -

(1) Possess a primary MOS of 71D; **AND**

(2) Serve under the immediate supervision of a judge advocate or DA civilian attorney employee;

b. NCOs E6 and higher with primary MOS of 71D assigned as legal NCO to a brigade or higher unit even if not under the immediate supervision of an attorney.

c. Active duty and reserve component E3 and E4 legal specialists with a primary MOS of 71D may serve as military or civilian notaries when the SJA certifies in writing to the Legal Assistance Policy division that:

(1) the soldier possesses appropriate judgment and maturity;

(2) the soldier is serving under the immediate supervision of a judge advocate or DA civilian attorney; AND

(3) the soldier is trained pursuant to AR 27-55.

**NOTE: ENLISTED RESERVE COMPONENT NOTARIES CANNOT PERFORM NOTARY SERVICES IN A NON-DUTY STATUS WITHOUT THE AUTHORIZATION OF THE RESERVE COMPONENT SJA.**

d. All DA civilian attorney employees.

B. Individuals listed in paragraph A above may perform notarial acts for the following:

1. Members of **any** armed forces;

2. Other persons eligible for legal assistance under the provisions of section 1044, AR 27-3, or regulations of the Department of Defense;

3. Persons serving with, employed by, or accompanying the armed forces outside the U.S. and outside the commonwealth of Puerto Rico, Guam, and the Virgin Islands;

4. Other persons subject to the UCMJ outside the U.S.

C. In accordance with 10 U.S.C. § 973b, AR 27-55 prohibits active duty commissioned and warrant officers from obtaining or retaining commissions as civil notaries. (This prohibition does **not** affect the authority of an officer to serve as a civil notary under state law - the laws of most states authorize certain U.S. Armed Forces members to provide notarial services within the military without obtaining commissions or appointments as civil notaries).

## VI. NOTARIAL CERTIFICATIONS AND CONTENTS OF OATH.

A. 10 U.S.C. § 936: The signature of the officer taking acknowledgments or sworn instruments, together with the title of his or her office, is prima facie evidence of the officer's authority, and an impressed or raised seal is not required.

B. 10 U.S.C. § 1044a: The signature of any such person acting as notary, together with the title of that person's offices, is prima facie evidence that the signature is genuine, that the person holds the designated title, and that the person is authorized to perform a notarial act. A seal of any kind is not necessary.

C. Notarization vs. Certification: There is a difference!

1. NOTARIZATION: The notary signature and seal (if required) just indicate that the person purporting to sign the document appeared before the notary, produced identification or was known personally by the notary, and signed the document in the presence of the notary.

2. CERTIFICATION: Signifies that the document is an accurate and complete and copy of the original document. Most public records and documents like marriage licenses, birth certificates, divorce decrees, titles, etc. are recorded in public offices and those offices certify copies.

3. AR 27-55, para 4-5 prohibits notaries from certifying copies of public documents or records **except in the following circumstances**:

   a. Military finance purposes or personnel purposes;

b. Federal administration where authorized by law or regulation. Examples are certain Veterans Administration benefits or Immigration and Naturalization Service documents.

c. The military notary **must** indicate that these copies are certified for a limited purpose. (for example: certified copy for VA)

## VII. POWERS OF ATTORNEY. (POA)

A. Definition.

1. A written instrument executed by one person, the principal,

2. Designating another individual, the agent or "attorney-in-fact,"

3. To perform specified acts on the principal's behalf.

B. Purpose.

1. To notify third parties of the agent's authority.

2. Powers of attorney are usually designated as either "special" or "general" depending on the specified act(s) or kind(s) of act(s) for which authority to act on behalf of the principal has been given.

C. Overview of Dangers.

1. Execute only when a reasonable or immediate need for the instrument exists.

2. No law requires third parties to recognize the authority of the agent to act on the principal's behalf as set forth in the POA; however, the majority of persons, businesses, and institutions will do so.

3. Personnel should be fully advised of the inherent dangers involved in granting to another the authority to act in their stead.

D. Special Powers of Attorney.

1. Any POA can be dangerous to the grantor if improperly used.

2. To reduce the risk, a special POA should be used whenever it can fulfill the needs of the client, because the power or authority given is limited to the specific act or acts described in the instrument.

E. General Powers of Attorney.

1. General POAs giving broad powers and authority to the attorney-in-fact can be dangerous instruments in the hands of persons inexperienced in business matters, persons of unstable temperament, or anyone in whom the grantor does not have the utmost trust and confidence.

2. The possibility of strained marital relations should be considered.

3. General POAs **will not** be notarized until a legal assistance attorney or a civilian attorney has counseled the prospective grantor on the dangers of executing such a document and has ascertained that a special or limited POA would not accomplish the purpose for which the general POA was requested. [AR 27-55, para. 3-4a (11)]

4. Under no circumstances should an unrestricted general POA be used or produced unless it contains a specific termination date or other provisions for revocation.

F. Termination or Revocation.

1. If no expiration date is contained in the POA, it continues in effect until statutory provisions for termination, operation of law (i.e., death of the principal or agent), or an act of the principal or agent evidencing intent to revoke the power.

2. It is advisable to insert a termination clause in all POAs; for example, the principal may want the power to expire on or about the date of his or her expected return from an overseas tour of duty. This prevents the POA from being indefinite in duration and terminates it on a specific date, unless sooner revoked.

3. If no termination date is inserted in a POA or if the principal wishes to revoke the power prior to its stated termination date, notice of the revocation must be given to the agent.

   a. Such notice preferably should be in writing, although it may be made orally, and

   b. The agent then should be requested to acknowledge receipt of such notice.

4. Ordinarily, the revocation takes effect as soon as it is communicated to the agent.

5. As to third persons that have dealt with the agent, the revocation takes effect when they receive notice of the revocation.

6. Where a statute provides for the recording and revocation of POAs, third parties that do not have notice of an unrecorded revocation may be justified in relying on the continuance of the authority as recorded.

7. Additionally, in some states, the POA terminates upon the incapacity of the grantor, notwithstanding that the POA has no termination date or the termination date is subsequent to the date upon which the incapacity occurs.

G. Durable Powers of Attorney.

1. Durable POA is a special agency relationship that remains valid and operative despite the incapacity of the principal.

2. Under the common law, a POA becomes inoperative upon the disability of the principal. State statutory law has remedied this by giving powers to agents to act even during the incapacity of the principal.

3. Guardianship and conservatorship are a separate legal status that can conflict with the durable POA. Each state's separate rules control as to the relationship between these powers.

4. The lack of federal law dealing with durable POAs is a continuing problem.

   a. Since there is no federal law on the subject, state law controls, and can be in the form of either state common law or state statutes.

   b. Some statutes require the word "durable" to create a power that is capable of surviving the disability or incapacity of the principal.

   c. The problem of having several different states [X, Y, and Z, for example], involved is a conflict of laws question. The Restatement of the Conflict of Laws 2d § 291 states:

      The rights and duties of a principal and agent toward each other are determined by the local law of the state, which, with respect to the particular issue, has the most significant relationship to the parties in the transaction.....

   d. Another possible conflicts problem is the validity of the agent's acts. According to The Restatement on Conflict of Laws 2d § 292, the validity of the agent's acts is determined by the law of the state that has the most significant relationship to the parties and the transaction. In any case, a choice of laws clause should be included.

H. Using Powers of Attorney for Child Care - FAMILY CARE PLANS [See, AR 600-20. Interim Chi. 102 (1 Apr 92), para 5-5].

1. Mission, readiness, and deployability needs especially affect Active Component (AC) and Reserve Component (RC) single parents and dual military couples with dependent family members.

2. AR 600-20, Interim Chi. 102, requires those soldiers to implement a Family Care Plan to provide for the care of their family members when military duties prevent the soldier from doing so.

a. Plans must be made to ensure dependent family members are properly and adequately cared for when the soldier is deployed, on TDY, or otherwise not available due to military requirements.

(1) RC soldiers are subject to these policies and regulations, and will implement plans during any periods of absence for Annual Training, regularly scheduled unit training assemblies, emergency mobilization and deployments, or other types of active duty.

(2) All married soldiers who have dependent family members are encouraged, even if not required by the regulation, to complete and maintain a Family Care Plan.

b. Commanders are responsible for ensuring that affected soldiers complete the Family Care Plan.

c. Affected soldiers are considered nondeployable until a Family Plan is validated and approved.

d. The DA Form 5305-R (Family Care Plan) is the means by which soldiers provide for the care of their family members when military duties prevent the soldier from doing so.

(1) DA Form 5305-R (Family Care Plan) must include:

(a) Proof that guardians and escorts have been thoroughly briefed on the responsibilities they will assume for the sponsor/soldier and on procedures for accessing military and civilian facilities and services on behalf of the dependent family members of the sponsor/soldier,

(b) Attestation that the guardian and escort agree to provide care and have been provided all necessary legal authority and means to do so.

(2) Proof of the foregoing will consist of (as a minimum) attachments to the DA Form 5305-R:

(a) DA Form 5841-R (Power of Attorney), or equivalent delegation of legal control, which the legal assistance office prepares, the soldier executes and has notarized, and the guardian/escort receives,

(b) DA Form 5840-R (Certification of Acceptance as Guardian or Escort) which the guardian/escort completes, has notarized, and returns to the soldier,

(c) DD Form 1172 (Application for Uniformed Service Identification Card DEERS enrollment) which the soldier executes for each dependent family member (AR 600-8-14 directs that ID cards will be issued for children under age 10 who reside with a single parent or dual military couple),

(d) DD Form 2558 (Authorization to start, stop, or change an allotment for Active Duty or Retired Personnel) which the soldier executes, or other proof of financial arrangements for the care of dependent family members, and

(e) Letters of Instruction executed by the soldier which contain additional pertinent information for escorts, temporary or long-term guardians.

(3) DA Forms 5304-R, 5305-R, 5840-R and 5841-R will be locally reproduced.

(4) Forms and sample Letter of Instruction contained in 102, AR 600-20.

I. Extension of Powers of Attorney if POW/MIA.

1. 1991 SSCRA Amendments extended coverage of 50 U.S.C. app. ə 591 to soldiers missing in action (MIA). POAs are automatically extended if:

a. The POA was executed by an individual who is in missing status;

b. The POA designates the spouse, parent or other named relative as attorney-in-fact, and;

c. The POA expires by its own terms after the person entered missing status.

2. NOTE: The SSCRA provision does not cover Prisoner of War (POW) status!

3. The POA forms commonly used within the military will contain a POW-MIA clause.

## VIII. CONCLUSION.

# CHAPTER N
# SURVIVOR BENEFITS

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# SURVIVOR BENEFITS

**OUTLINE OF INSTRUCTION**

## I. REFERENCES.

A. Army Reg. 37-104-1, Payment of Retired Pay to Members and Former Members of the Army (15 Sep 1990).

B. Army Reg. 600-8-1, Army Casualty Operations/Assistance/Insurance (24 Oct 1994) (Supersedes old AR 608-2 (SGLI) and DA Pam 608-33 (Casualty Assistance Handbook).

C. Army Reg. 930-4, Army Emergency Relief (30 Sep 1994).

D. DA Pamphlet 360-526, The Transition to Civilian Life (Rev. 1992).

E. SBP Made Easy (published by The Retired Officers Association, 201 North Washington St., Alexandria, VA 22314-2529).

F. DA Pamphlet 608-4, A Guide for the Survivors of Deceased Army Members (23 Feb 1989).

G. Veterans Benefits Manual (Vols. I and II, 1991), The National Legal Services Project, 2001 S Street NW, Suite 610, Attn: Publication Sales, Washington, DC 20009.

H. Reserve Retirement Benefits (1992), The Retired Officers Association.

I. AFBA Financial Planning Guide, Armed Forces Benefit Association, 909 N. Washington Street, Alexandria, VA 22314-1556.

J. Army and Air Force Mutual Aid Association, Fort Myer, Arlington, VA 22211-5002.

K. Army Reserve Personnel Center, 9700 Page Blvd., St. Louis, MO 63132-5200.

## II. THE RELEVANCE OF SURVIVOR BENEFITS.

A. What Are Survivor Benefits?

B. Situations Requiring an Understanding of Survivor Benefits.

1. Lifetime planning.

a. Insurance needs.

b. The Survivor Benefit Plan.

2. Deathbed planning.

3. Casualty assistance.

C. References.

1. Publications.

2. The Army and Air Force Mutual Aid Association is available to assist by producing a benefits comparison tailored to the soldier's circumstances.

3. Websites (DFAS, VA, Private Organizations, etc.).

# SURVIVOR BENEFITS

| Monthly Payments | Lump Sum Payments | Other Benefits |
|---|---|---|
| DIC | SGLI | BURIAL REIMBURSEMENTS |
| SBP | DEATH GRATUITY | RELOCATION |
| SOCIAL SECURITY | SOC. SEC. | MEDICAL CARE |
| DEA | UNPAID PAY/ALLOWANCES | PX/COMMISSARY |
| | | EMERGENCY $ |

## III. DEPENDENCY AND INDEMNITY COMPENSATION (DIC) 38 U.S.C. §§ 1301-1322; 38 C.F.R. PART 3; INCLUDES COLAS THROUGH 1 JUN 99.

A. Conditions for Payment.

1. Active Component.

a. Death on active duty, by service-connected injury or disease, and not due to member's willful misconduct. If death occurs on active duty, a presumption arises that death was service-connected.

b. Death after active duty from service-connected causes, not due to member's willful misconduct.

c. Death after active duty not due to service-connected causes and not due to member's willful misconduct if decedent held a total service-connected disability rating.

2. Reserve Component.

a. "Active Duty" includes AD, ADT, and IDT. However, if death occurs in connection with IDT, only IDT deaths due to injury (not illness) are covered; and

b. Periods of travel to and from AD, ADT, and qualifying IDT are included, but only if travel accomplished by most direct means.

3. "Service connection."

4. Death or injury cannot be due to member's "willful misconduct."

a. Willful misconduct involves deliberate or intentional wrongdoing with knowledge of or wanton disregard of consequences.

b. Requires proximate cause to injury, disease, or death to prohibit payments.

5. The Department of Veterans Affairs makes the ultimate determinations on service-connection and "willful misconduct" for purposes of DIC. Appeal is to the Court of Veterans Appeals.

B. Beneficiaries.

1. DIC to widow(er).

a. Spouses must have continuously cohabited since date of marriage.

b. Any separation not due to fault of surviving spouse; temporary separations disregarded (38 C.F.R. §§ 3.52 and 3.53).

c. Fraudulent marriages. Generally, for soldiers that separate from active duty, subsequently marry, and then die under circumstances described in paragraphs A.1.b. and A.1.c. above, the marriage must:

(1) have begun within 15 years after separation from active duty;

(2) have existed for at least one year; or

(3) produced a child (38 C.F.R. § 3.54(c)).

d. Before 01 October 1998, DIC was paid for life unless remarriage occurred.

(1) A widow(er) lost entitlement to DIC upon remarriage regardless of age.

(2) DIC would not be reinstated if second marriage were terminated through divorce or through death of second spouse.

e. As of 01 October 1998, the eligibility of certain remarried surviving spouses can be reinstated for DIC upon termination of that marriage. 38 U.S.C. § 1311.

(1) The remarriage of the surviving spouse shall not bar DIC if the remarriage is terminated by death, divorce, or annulment unless it is determined the divorce or annulment was secured through fraud or collusion.

(2) If the surviving spouse ceases living with another person and holding himself or herself out openly to the public as that person's spouse, the bar to granting that person DIC as the surviving spouse shall not apply.

(3) The first month of eligibility for DIC will be the later of the month after the month the termination of such remarriage or the month of the cessation living with another person and holding himself or herself out openly to the public as that person's spouse.

(4) No payment may be made for any month before October 1998.

f. For deaths occurring before 1 January 1993, monthly spousal payment depends on the rank of deceased at death (Note the below numbers are adjusted for inflation annually):

| | | |
|---|---|---|
| | W4 - $1,030 | 010- $1,834 |
| E9 - $980 | W3 - 974 | 09 - 1,672 |
| E8 - 940 | W2 - 946 | 08 - 1,561 |
| E7 - 890 | W1 - 909 | 07 - 1,424 |
| E6 - 861 | | 06 - 1,318 |
| E5 - " | | 05 - 1,170 |
| E4 - " | | 04 - 1,062 |
| E3 - " | | 03 - 1,004 |
| E2 - " | | 02 - 940 |
| E1 - " | | 01 - 909 |

g. **For deaths occurring on or after 1 January 1993, the Veterans' Benefits Act of 1992 mandates a flat monthly payment, currently $881.**

2. DIC to children.

a. Children are broadly defined: Legitimate, adopted, stepchildren in household, or illegitimate if acknowledged or judicially decreed (38 C.F.R. § 3.57).

b. Must be unmarried and under age 18, or under age 23 if in school.

c. Amounts payable (children in the custody of a surviving eligible spouse).

(1) Under age 18 - $222 per child (Veterans' Benefits Act of 1992).

(2) Age 18 to under age 23 (in school) - $188 per child unless child is receiving Chapter 35 benefits (Dependent's Educational Benefits).

(3) Disabled child - $373 per child.

d. Amounts payable (if no surviving eligible spouse). DIC is calculated on the basis of the total number of eligible children.

(1) One child - $373.00.

(2) Two children - $558.00.

(3) Three children - $699.00.

(4) Each additional child adds $136.00.

(5) Additional sum will be paid for a disabled child over the age of 18 ($222).

3. DIC to parents (38 U.S.C. § 1315).

a. Must have been dependent on deceased.

b. Parent(s) must be below income ceiling.

c. Amounts paid based on number of parents surviving.

C. Tax Consequences.

1. Not includable in decedent's gross estate.

2. Not taxable income to the recipient.

D. Application.

1. Apply to VA within 12 months to receive full payment from date of death (VA Form 21-534, Application for DIC).

2. If application is received by VA more than 12 months after death, payments are retroactive to date of application only (38 C.F.R. § 3.400).

## IV. SURVIVOR BENEFIT PLAN (SBP) (10 U.S.C. §§ 1447-1460B).

A. Eligibility to Participate.

a. Active duty retired.

b. Active duty and eligible to retire.

c. Retired with 30% or more disability.

d. Reservists eligible to retire (includes Army National Guard). (See Pub. L. No. 95-397, 1 Oct. 1978, extended coverage (RC-SBP) to Reserve soldiers completing 20 years, but not yet 60 years of age).

B. Eligible Beneficiaries for SBP and RC-SBP.

1. Widow(er). 10 U.S.C. § 1447(3).

a. Defined. A spouse who survives a military retiree where the marriage either:

(1) was in effect when soldier became eligible to receive retirement pay,

(2) was in effect for at least one year immediately before retiree's death, or

(3) produced issue.

b. Remarriage before age 55 terminates the SBP annuity. Annuity may be reinstated if widow(er)'s second spouse dies or there is a divorce.

2. Former spouses.

3. Widow(er) and children. Full payment made to widow(er) as long as eligible; then full payment made to remaining eligible children as a group. Child eligibility:

a. Child under age 18 and unmarried.

b. Unmarried and under 22 if a full-time student.

c. Incapacitated before 18 or 22 - paid for life.

4. Children only. Usually elected when there is no eligible spouse.

5. Natural person with an insurable interest.

a. Any person with a financial interest in survival of the soldier.

b. This option may not be elected by eligible participants who are married or have children.

C. Annuity Amount.

1. If soldier elects to participate in SBP, soldier then selects a "base" amount. The base amount can be anything from $300 to the full amount of soldier's retired pay. The soldier also selects a beneficiary (discussed later), which in most cases will be the spouse. The soldier then has a premium deducted from each retirement check, and if the soldier dies before the spouse (or other eligible beneficiary), the beneficiary will begin receiving the monthly SBP payments.

2. If deceased became retirement eligible after 1 October 1985, the widow(er) receives an annuity calculated under a two-tiered system.

   a. Payments 55% of base.

   b. Payments reduced to 35% when widow(er) reaches 62, unless supplemental coverage also is chosen.

   c. Example: Base Amount = $2,000.

      55% x $2,000 = $1,100 before age 62.

      35% x $2,000 = $ 700 age 62 & older.

3. If deceased was eligible to retire before 2 October 1985, SBP payments to a widow(er) will also be reduced. Widow(er) may elect to have the reduction calculated under either the new two-tier system or under the old "social security offset."

4. Supplemental SBP (SSBP).

   a. A retiree may elect to pay an additional premium to raise annuity payments above 35% of the base amount when widow(er) reaches age 62. Under SSBP, payments may be made at 40%, 45%, 50%, or 55% of base amount.

b. The additional cost is determined in accordance with actuarial principles.

5. Payment to all other beneficiaries (nonspouses) is at 55% of base for as long as they maintain eligibility.

D. Active Component Cost for SBP Coverage.

1. Determine desired base.

a. Minimum = $300.00.

b. Maximum = full retired pay.

c. Any amount in between.

2. Determine type of coverage.

a. Widow(er)-only coverage.

(1) Formulas:

(a) 2.5% of first $484, plus 10% of selected base over $484 (OLD Formula); or

(b) Flat 6.5% rate of full base amount (NEW Formula).

(2) Example: Base Amount = $2,000.00.

(a) Old Formula:

2 1/2% of $ 484 = $ 12.10
10% of $1,516 = $ 151.60
monthly cost = $ 163.70

(b) New Formula:

$2,000 x 6.5% = $130.00

(3) The formula producing the least amount of cost will be used. In the example, the new formula produces the least cost. As a rule of thumb, if the base amount exceeds $1,037, then the new formula is used; if the base amount is less than $1,037, the old formula is used.

(4) For those entering the service on or after March 1, 1990, only the new formula (flat 6.5% of base) will be used.

b. Widow(er) plus children coverage.

(1) Cost of widow-only coverage, plus

(2) Actuarial amount that accounts for the difference in age between the retiree and the spouse and the age of youngest child.

c. Children-only coverage. Cost is based upon actuarial tables comparing the ages of the retiree and the youngest child. If married at time of election, spouse must approve in writing.

d. Natural person with insurable interest (10 U.S.C. § 1448(b)(1)).

(1) By statute, this can only be elected if retiree has no spouse or dependent children (*Cf*. Comp. Gen. B-179465, 1974 WL 7682, which allowed this coverage for a child).

(2) Cost is 10% of base amount plus 5% of base amount for each five years beneficiary is younger than retiree (to a maximum of 40% of base amount).

3. Withholding stops if the beneficiary dies or otherwise loses eligibility. Must notify finance office.

E. Reserve Component Cost for SBP (see Appendix A).

F. Election.

1. Soldiers who are on active duty and have completed 20 years of active federal service are automatically enrolled in SBP without any affirmative election. Enrollment is at the full base amount of retired pay calculated as if the soldier had been retired on the day of death. Both widow(er) and children are covered (10 U.S.C. § 1448(d)). Retirees, however, must make an election to participate in SBP.

2. Active Component: Retired soldiers must elect type and amount of coverage within 30 days of retirement.

3. Reserve Component: Retirement eligible reservists have 90 days to elect, with the period running from receipt of their letter of notification of eligibility for retired pay at age 60 ("20-year letter").

4. An election of no coverage, less than full coverage for a widow(er), or children-only coverage requires written spousal concurrence.

5. If a soldier is married at the time of retirement, the election made is generally irrevocable. However:

   a. Can withdraw from the SBP between second and third anniversary from date of enrollment with concurrence of spouse and/or notification to former spouse. 10 U.S.C. § 1448a.

   b. An eligible participant need not continue premium payments if beneficiaries are no longer eligible.

   c. An eligible participant who has spousal coverage and loses spouse to death or divorce may withdraw after remarrying. Finance must be notified of intent to withdraw, however, before second marriage produces issue or reaches its first anniversary.

   d. An eligible participant who becomes permanently and totally disabled may withdraw.

6. An unmarried soldier who retires and later marries and/or acquires dependent children may opt into the plan at that time.

G. Spousal SBP Reduction Due to DIC Offset.

1. Any SBP or RC-SBP annuity to which surviving spouse is entitled will be reduced by amount of spousal DIC entitlement. The offset is mitigated, however, by a pro rata, lump sum return of SBP premiums paid (10 U.S.C. § 1450(e)).

2. Any SBP or RC-SBP annuity payable to other beneficiaries is not reduced, even if that beneficiary is also eligible for DIC.

H. SBP Tax Consequences (Federal).

1. Amounts withheld (premium payments) are not reportable as income for tax purposes (I.R.C. § 122).

2. Payments to beneficiaries are taxable as ordinary income.

3. The present value of the SBP annuity could be subject to federal estate tax in the retiree's estate.

I. Paid up coverage under SBP.

1. 30 years of SBP premiums paid.

2. Over 70 years of age.

3. Effective date: 01 October 2008.

J. SBP Tax Consequences (state).

K. Advantages of SBP (in comparison with commercial life insurance). There are basically three commercial insurance alternatives to SBP: annuities, term life insurance, and universal/whole life insurance. For various reasons, commercial insurers do not pitch annuities as replacements for SBP. Rather, they recommend term, whole life, or some combination of the two. Upon the retiree's death, the surviving spouse is supposed to collect the lump sum insurance proceeds, invest them, and draw a monthly check from the investment (see reference in para I.G. for computer program comparing term life to SBP). This paragraph contains a list of factors that might favor SBP in such an analysis.

1. Government subsidized; no administrative costs or commissions.

   a. Premium costs for children coverage and small amounts of widow(er) coverage are particularly low. A fantastic bargain if child is incapacitated - child paid for life.

   b. SSBP and natural persons with insurable interests not so subsidized.

2. SBP premiums are not taxable income to the retiree.

3. SBP payments to beneficiary increase with cost of living adjustments to retired pay. A significant factor if significant inflation returns anytime in the next 40+ years.

4. Guaranteed insurability.

5. Commercial insurer more likely to go out of business than the government.

6. Value of SBP increases when factors exist which increase the probability retiree will not outlive spouse. Some factors include:

   a. Retiree is older than spouse;

   b. Retiree has poorer health or a less healthy lifestyle than spouse (i.e., smoker); and

   c. Retiree is male (vs. female).

L. Disadvantages of SBP in comparison with commercial life insurance.

1. SBP is subject to change by Congress.

2. Reduction in spousal SBP (e.g., 55% to 35%) at age 62 (but SSBP is available).

3. Factors exist that increase likelihood retiree will outlive spouse (e.g., retiree is female; younger than spouse; or spouse has a less healthy lifestyle).

4. Limited revocation period. You can only withdraw from the program between the second and third anniversary from the date of your enrollment. For example, if you retired and enrolled on 1 January 1998, you will only be able to withdraw from SBP during the period from 1 January 2000 to 31 December 2000. (Note that you will also stop making payments should you no longer have a covered beneficiary – i.e., divorce, death of spouse, etc.).

M. Participation statistics.

1. Officers enroll at a higher rate than NCOs.

2. In fiscal year 1996, 64% of all service members elected to participate in SBP.

# V. GOVERNMENT INSURANCE PROGRAMS.

A. Servicemen's Group Life Insurance (SGLI); 38 U.S.C. §§ 1965-1976; 38 C.F.R. Part 9; Veterans' Benefits Act of 1992, § 201. Office of SGLI (OSGLI), phone number: 1-800-419-1473.

1. Group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.

2. Active Component.

a. Active duty soldiers are automatically insured for $200,000 unless they opt out in writing.

b. Soldier can elect lower coverage or no coverage by completing VA Form 29-8286.

c. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations.

d. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120-day period.

e. Soldiers may lose entitlement to SGLI based on:

(1) Their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or

(2) Other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes). See AR 608-2, paras. 2-5 and 2-7.

f. Cause of death, however, is irrelevant to SGLI coverage.

g. Soldiers may convert to Veterans Group Life Insurance (VGLI) within 120 days of separation. No person may carry a combined amount of SGLI and VGLI in excess of $200,000 at any one time.

h. Amount is included in decedent's estate for purposes of federal estate tax, but generally exempt from the claims of creditors and other taxes, including federal income tax.

i. No loan, cash, paid-up, or extended insurance value.

3. Reserve Component.

a. Certain reservists are eligible for full-time coverage.

(1) Unit soldiers of the ARNG and USAR and –

(a) Unit soldier in pay status.

(b) Delayed entry soldiers.

(2) IRR or IMA soldiers attached for training in a non-pay status to units that are scheduled for at least 12 periods of IDT annually.

(3) Reservists who have completed 20 years of creditable service, but have not begun receiving retired pay.

b. Part-time coverage is also available during periods of AT and ADT.

4. Eligible beneficiaries.

a. Any person designated by the soldier on appropriate VA form (Active Component: VA Form 29-8286). SGLI Act gives service member absolute right to choose beneficiary.

b. If no designation, or "By Law" designation, then proceeds paid according to SGLI statute:

(1) All to spouse, but if none, then

(2) All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then

(3) All to parents (equally divided), but if none, then

(4) All to executor of soldier's estate, but if none, then

(5) Next of kin under state law.

c. Importance of proper designation.

(1) Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. Message, Total Army Personnel Command, TAPC-PEC, subject: Servicemen's Group Life Insurance (SGLI) Program Change (021131Z Mar 93).

(2) But ensure soldier keeps designation current!

(3) Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.

5. Settlement options.

   a. Accelerated Death Benefits under SGLI/VGLI for servicemembers in terminal condition (within nine months of death). See Appendix H.

   b. Soldier may elect lump sum or 36 monthly installments.

   c. If no election, beneficiary may elect type of settlement.

   d. Alliance Account & financial services.

6. Apply for benefits by submitting VA Form 29-8283, Claim for Death Benefits, to OSGLI, 212 Washington Street, Newark, N.J. 07102-2999.

B. Veterans Group Life Insurance (VGLI) (38 U.S.C. §§ 1977-1979).

1. Renewable group term life insurance available after soldier leaves active duty. VGLI is five-year renewable term insurance.

2. Up to $200,000 in coverage available.

3. Active Component soldiers should apply for VGLI within 120 days of leaving the service.

4. Reservists are also eligible when:

   a. Being released from AD, ADSW, or ADT under call or order specifying not less than 31 days; and

   b. Members of the IRR and ING.

5. VGLI rates (see Appendix C).

6. Certain reservists may also be eligible.

## VI. DEPENDENTS EDUCATIONAL ASSISTANCE (DEA) (38 U.S.C. §§ 3500-3566; 38 C.F.R. PART 21).

A. Death of member must be under same circumstances that qualify dependents for receipt of DIC. Additionally, dependents of a totally disabled, but living, veteran may qualify.

B. School must be approved for Department of Veterans Affairs (DVA) benefits (see 38 U.S.C. § 3523 and § 3672; 38 C.F.R. § 21.7120).

1. Each state establishes an agency that certifies educational programs according to standards established by the DVA.

2. Generally, the DVA will not allow approval of courses that are primarily a vocational or recreational in nature. The statute and regulation contain a list of specific courses which are either prohibited or discouraged.

C. Eligible Recipients.

1. Surviving spouses.

a. Period of eligibility for a spouse extends to 10 years from the date of the veteran's death; extension is possible.

b. Will not be reduced by DIC payments.

c. Remarriage permanently terminates DEA payments.

2. Children.

a. Eligibility for child ends at age 26 (unless extended under certain conditions such as the child serving on active duty with the Armed Forces).

b. Children must elect between DEA and DIC. Election of educational benefits is irrevocable and DIC may not be received once educational benefits begin. (Can receive DIC until age 23 and educational benefits to age 26)

c. Marriage does not bar payments.

D. Amounts Available (38 U.S.C. § 3532).

1. The DVA will pay the eligible recipient $485 per month if the schooling is full time. Lesser amounts are available for part-time schooling ($365) and half-time ($242).

2. Total of payments cannot exceed $3,636 per school year.

3. Payments made for a maximum of 45 school months (or to the equivalent thereof in part-time training).

E. State Programs.

## VII. SOCIAL SECURITY BENEFITS.

A. General Types of Benefits.

B. Eligibility. For an individual (or his/her survivors) to qualify for social security benefits, the individual will have to be either fully insured or currently insured, or both, depending on the benefit (but see para. C.2.d. below).

1. An individual is fully insured upon receipt of 40 quarters of social security work credits. If an individual dies before age 62, he/she may be considered as "fully insured" with less than 40 credits. The actual number of credits needed depends on age at time of death.

2. An individual is currently insured if the individual has at least six quarterly work credits in the past 13 quarters.

3. Generally, one social security work credit is awarded for each $600 of wages upon which FICA taxes are paid. A maximum of four credits can be earned in a year (hence, "quarterly credits").

C. Available Benefits for Survivors.

1. Lump sum death benefit of $255 (deceased must have been either fully or currently insured at time of death).

2. Monthly survivor benefit payments.

a. Children under age 18 (deceased fully or currently insured).

b. Widow(er) with children under 16 (deceased fully or currently insured).

c. Widower age 60 and over (deceased must have been fully insured at time of death).

d. If the death was service-connected, but the soldier was not either fully or currently insured, the VA will make up any of these social security payments for which the soldier's survivors do not qualify (38 U.S.C. § 1312(a)).

e. Amount of monthly benefits depends on work history of insured and family situation. Generally, the more social security (FICA) taxes paid by the insured, the greater the benefits available to the survivors. When calculating the amount of FICA taxes paid by an active duty soldier, most soldiers will qualify for an additional $1,200 annual credit above the actual amount of FICA taxes paid.

3. Social Security benefits may be reduced if surviving spouse has earned income.

4. Apply for benefits by submitting SS Form DA-C24 (Application for Survivor Benefits), which can be obtained from the Social Security Administration, to the Social Security Office in your area.

5. More specific information on social security entitlements can be obtained by calling 1-800-772-1213.

# VIII. OTHER PAYMENTS AND BENEFITS TO SURVIVORS OF DECEASED MEMBERS.

A. Death Gratuity (10 U.S.C. § 1475).

1. Conditions of payment.

a. Soldier died on active duty, or

b. 120 days after release if death resulted from disease or injury incurred while on active duty.

2. Amount.

a. Lump sum payment of $6,000 made by the local finance office.

b. The lump sum payment amount does not depend on the rank or years of service of the deceased. (National Defense Authorization Act for FY 1993).

3. Beneficiaries.

a. By law, to surviving spouse.

b. If no surviving spouse, to children equally without regard to age or marital status.

c. If no spouse or children, by designation among parents, brothers, and sisters. DD Form 93.

d. If no spouse or children and no designation - then to parents (if any survive), otherwise to brothers and sisters. If there are no parents, brothers, or sisters, the death gratuity is not payable (to the estate or otherwise).

4. Tax consequences (I.R.C. § 101(b)(1)).

a. If payment is for death occurring on or before 20 August 1996, a total of $5,000 is excluded from the gross income of the recipients. Remaining $1,000 is included in gross income. If gratuity is divided between more than one recipient, tax liability is split pro rata.

b. If payment is made for a death occurring after 20 August 1996, $3,000 is excluded from gross income and $3,000 is taxable. (Pub. L. No. 104-188, 110 Stat. 1755; Rev. Rul. 55-506; and I.R.C. § 134).

5. Apply by submitting DD Form 397, Claim Certification and Voucher for Death Gratuity Payments, to local finance office.

B. Unpaid Pay and Allowances. 37 U.S.C. § 501; Chap. 5, para. 40511, DOD Military Pay and Allowances Manual.

1. Amount.

a. All pay due soldier at death, including allowances.

b. Accrued leave, which can even exceed 60 days.

2. Beneficiaries.

a. Designated by soldier.

b. If no designation, to spouse, children, parents, or the estate (in that order).

C. Burial Benefits (10 U.S.C. § 1482; 38 U.S.C. §§ 2301-08 & 2402; 38 C.F.R. § 3.1600).

1. Burial in a national cemetery.

a. The following individuals are eligible for burial in a national cemetery:

(1) All active duty personnel;

(2) Veterans who served a minimum period of time on active duty (generally, 2 years) and were discharged with an other than dishonorable characterization; and

(3) Reservists who die on active duty, or die as a result of service-connected injuries, or die after completing 20 good years toward retirement. See Pub. L. No. 103-240.

b. Burial in a national cemetery is on a space available basis. Eligibility creates the rights to:

(1) A headstone (monetary reimbursement no longer available), and

(2) A graveliner (if actually buried in a national cemetery).

2. Additional assistance with burials.

a. All active duty soldiers. The next of kin are eligible for the following support:

(1) A primary burial allowance. Survivors are authorized reimbursement up to $1,750 to cover the expenses of recovery, preparation, casketing, and transportation of the body. At the request of the next of kin, however, the Army will assume responsibility for the recovery, preparation, casketing, and transportation of the body in lieu of the primary burial allowance.

(2) An internment allowance. The family may request reimbursement for additional funeral expenses, including funeral services and costs of purchase of a plot. The maximum amount of reimbursement ranges from $110 to $3,100 depending on whether the soldier is buried in a private cemetery or a national cemetery and whether a funeral home service is used.

(3) Reimbursement for next of kin travel to the burial site.

b. Certain veterans. The next of kin are entitled to:

(1) A burial allowance not to exceed $1,500 if death is service-connected.

(2) An allowance not to exceed $300 for preparation and transportation of remains and other funeral and burial expenses if death is not service-connected, but veteran was eligible for VA pension or compensation (i.e., the veteran was rated partially or totally disabled). An additional $150 plot or internment allowance is available to these next of kin if burial is in a private cemetery.

3. Military funeral honors have become a statutory benefit to all veterans effective 01 Jan 2000 pursuant to the National Defense Authorization Act of 2000. See Appendix I.

D. Other Military Benefits (see DA Pam 608-4).

1. Travel of dependents and shipment of household goods and personal effects. 37 U.S.C. § 406(f).

2. Temporary continuation of allowance for dependents of members dying on active duty to continue to occupy family housing for 180 without charge. If dependents not in family housing basic allowance for housing at the rate that is payable for members of the same grade and dependency status as the deceased member for the area where the dependents are residing for 180 days. If in family housing and vacate before 180 days, then the dependents can receive basic allowance for housing for the remainder of the 180 days. 37 U.S.C. § 403.

3. Emergency financial assistance (Army Emergency Relief and/or American Red Cross).

4. Continued service benefits and privileges for dependents of soldier dying on active duty.

   a. Commissary.

   b. Post Exchange.

   c. Medical care.

   d. Legal assistance.

   e. VA Death Pension (38 U.S.C. § 5112(b)(4); 38 C.F.R. § 3.660(d); and DA Pam 360-526, p. 16). This benefit is designed for surviving spouses and children of wartime veterans (i.e., those who served at least 90 days during designated war periods) whose survivors have limited income. Service during Desert Storm qualifies. Property holdings and date of marriage to the veteran also affect eligibility. Death need not be service-connected.

## IX. TERMINAL CONDITION: IS MEDICAL RETIREMENT APPROPRIATE?

A. Factors favoring retirement.

1. Availability of Survivor Benefit Plan.

a. DIC Offset?

b. Child only SBP?

2. Higher retirement pay?

3. Availability of Service Disabled Veteran's Life Insurance (38 U.S.C. § 1922; 38 C.F.R. § 8.116).

a. $20,000 of life insurance available to disabled retirees who are otherwise uninsurable.

b. Must be applied for by retiree within one year of retirement.

c. If retiree is mentally competent at any time between injury and death, the retiree must sign the insurance application (VA Form 29-4364). If serviceman is mentally incompetent for the entire period prior to death, the insurance may be applied for retroactively after the death of the retiree.

B. Factors favoring continued active duty.

1. Is family at risk for extensive medical costs?

a. How long might soldier continue to live?

b. If retired, when will soldier be removed from military medical care?

c. If retired, will care be available in a VA facility?

2. Eligibility for the Death Gratuity expires if death occurs more than 120 days after retirement.

3. Some commercial life insurance policies issued by companies which deal with the military provide for automatic termination or reduction of coverage upon retirement. Does the soldier have such a policy?

4. Survivors may have to pick up some additional burial expenses if soldier is retired vice remaining on active duty.

C. Summary Comparison on Selected Benefits in imminent death processing (See Information Paper at Appendix G)

| Benefit | Death on Active Duty | Death in Retired Status |
|---|---|---|
| Serviceman's Group Life Insurance (SGLI) | **YES** | **Yes**. Coverage retained for up to one year or until less than totally disabled. |
| Death gratuity | **YES** | **Yes**, if death occurs within 120 days from service-connected disability. |
| DVA Dependency and Indemnity Compensation (DIC) | **YES** | **YES** |
| Survivor Benefit Plan (SBP) Offset by DIC, but may be more than DIC. | **Only** if soldier has 20 years of active federal service. Election options restricted by law. | **Yes** without regard to years of service. Several election options, to include insurable interest for single soldier. |
| Supplemental SBP Increases basic SBP after age 62 reduction. | **NO** | **YES**<br><br>(Only for spouse or spouse/child elections.) |
| Eligibility for DVA Service Disabled Veterans Life Insurance (SDVI) | **NO** | **YES** |

## X. CONCLUSION.

**APPENDIX A**
**SBP FOR RESERVISTS**

# FORMULAS FOR RESERVISTS

A. Under Option A, where the member first elects to participate at age 60, the active duty method of calculating costs and benefits applies. If the reservist dies prior to reaching age 60, he is not covered by SBP.

B. Under Option B, coverage is in effect immediately, but the beneficiary does not receive the SBP annuity until the date the service member would have reached age 60.

C. Under Option C, coverage is in effect immediately. The beneficiary begins receiving SPB benefits immediately upon the reservist's death.

D. Cost of electing any coverage before age 60 (Options B and C) is shared by the retiree (through increased premiums) and the beneficiary (through decreased benefits). The cost is based on a complicated calculation involving:

1. The option elected;

2. Retiree's age at election;

3. Difference in age of retiree and beneficiary at election; and

4. Actuarial tables.

E. Under all three options, no SBP premiums are actually paid until the reservist reaches age 60 and begins to draw retirement pay.

## COST OF RETIREE SBP

Example of Reserve retiree who elects spouse only coverage in 1998 and is 55 years old and whose spouse is 52. Option A is no coverage at all until age 60. Option B coverage is in effect prior to age 60, but beneficiary does not receive any payments until service member would have been age 60. Option C is immediate coverage.

| | Base Amt. | Cost | Benefit |
|---|---|---|---|
| A | $1,000 | 65.00 | 550.00 |
| B | $1,000 | 81.20[1] | 541.09[2] |
| C | $1,000 | 85.10[3] | 538.94[4] |

[1] (.065 + .0162) * $1,000 = $81.20.

[2] [$1,000 - (.0162 * $1,000)] * .55 = $541.09.

[3] (.065 + .0201) * $1,000 = $85.10.

[4] [$1000 - (.0201 * $1,000)] * .55 = 538.94

## RESERVE PART OF RCSBP RATES

**METHOD: TWO-TIER**

**TYPE: DEFERRED TO MEMBER'S AGE 60 ("OPTION B")**

**OPTION: SPOUSE ONLY OR SPOUSE/CHILD**

| Age at Year of Election | Years Beneficiary Younger Than Member | | | Years Beneficiary Older Than Member | | |
|---|---|---|---|---|---|---|
| | 10-14 | 05-09 | 00-04 | 01-04 | 05-09 | 10-14 |
| 59.5 | .0022 | .0022 | .0020 | .0017 | .0017 | .0016 |
| 59 | .0044 | .0043 | .0039 | .0034 | .0033 | .0032 |
| 58 | .0083 | .0082 | .0075 | .0065 | .0063 | .0061 |
| 57 | .0118 | .0117 | .0107 | .0094 | .0091 | .0088 |
| 56 | .0148 | .0148 | .0136 | .0119 | .0115 | .0112 |
| 55 | .0175 | .0175 | .0162 | .0142 | .0138 | .0134 |
| 54 | .0198 | .0199 | .0185 | .0163 | .0158 | .0153 |
| 53 | .0218 | .0220 | .0205 | .0181 | .0176 | .0171 |
| 52 | .0235 | .0238 | .0223 | .0198 | .0192 | .0186 |
| 51 | .0250 | .0254 | .0239 | .0212 | .0206 | .0200 |
| 50 | .0262 | .0268 | .0253 | .0225 | .0219 | .0213 |
| 49 | .0273 | .0279 | .0265 | .0236 | .0230 | .0224 |
| 48 | .0282 | .0289 | .0275 | .0246 | .0240 | .0233 |
| 47 | .0290 | .0298 | .0284 | .0255 | .0249 | .0242 |
| 46 | .0296 | .0305 | .0292 | .0262 | .0256 | .0249 |
| 45 | .0302 | .0311 | .0298 | .0269 | .0263 | .0256 |
| 44 | .0306 | .0317 | .0304 | .0274 | .0269 | .0262 |

## RESERVE PART OF RCSBP RATES

**METHOD: TWO-TIER**

**TYPE: IMMEDIATE AT MEMBER'S DEATH ("OPTION C")**

**OPTION: SPOUSE ONLY OR SPOUSE/CHILD**

| Age at Year of Election | Years Beneficiary Younger Than Member | | | Years Beneficiary Older Than Member | | |
|---|---|---|---|---|---|---|
| | 10-14 | 05-09 | 00-04 | 01-04 | 05-09 | 10-14 |
| 59.5 | .0022 | .0022 | .0020 | .0017 | .0017 | .0016 |
| 59 | .0049 | .0048 | .0043 | .0038 | .0037 | .0036 |
| 58 | .0094 | .0093 | .0085 | .0076 | .0072 | .0071 |
| 57 | .0136 | .0135 | .0126 | .0113 | .0106 | .0104 |
| 56 | .0174 | .0175 | .0164 | .0148 | .0138 | .0137 |
| 55 | .0209 | .0212 | .0201 | .0183 | .0169 | .0168 |
| 54 | .0242 | .0246 | .0235 | .0216 | .0198 | .0198 |
| 53 | .0271 | .0277 | .0267 | .0247 | .0227 | .0226 |
| 52 | .0297 | .0306 | .0297 | .0276 | .0254 | .0252 |
| 51 | .0321 | .0332 | .0324 | .0304 | .0280 | .0277 |
| 50 | .0343 | .0355 | .0349 | .0329 | .0305 | .0300 |
| 49 | .0362 | .0376 | .0372 | .0353 | .0329 | .0323 |
| 48 | .0379 | .0395 | .0393 | .0375 | .0351 | .0344 |
| 47 | .0395 | .0413 | .0412 | .0395 | .0371 | .0364 |
| 46 | .0408 | .0428 | .0428 | .0413 | .0390 | .0383 |
| 45 | .0420 | .0441 | .0444 | .0429 | .0408 | .0400 |
| 44 | .0430 | .0453 | .0457 | .0444 | .0424 | .0417 |

## APPENDIX B
## BENEFICIARY CHECKLIST

The following steps should be taken by the survivor of a deceased soldier or veteran. See also DA Pam 608-4.

1. Contact all insurance companies. They will require:

   a. Policy Numbers, and/or;
   b. Full name of the decedent.

2. Request approximately 10 certified copies of the Death Certificate.

3. Contact the Department of Veterans Affairs for burial payment. They will require:

   a. Full name of the deceased.
   b. Social Security Number and Branch of Service.

4. Contact the Department of Veterans Affairs for possible benefits for next of kin if soldier died while on active military duty. They will require:

   a. Certified copy of the Death Certificate.
   b. Copy of Marriage Certificate.
   c. Copies of the Birth Certificates of all dependent children.

5. If soldier retired from military service after September 21, 1972, contact respective branch of service for Survivors Benefit Plan (SBP). They will require:

   a. Full name of the deceased.
   b. Social Security Number.

6. Contact soldier's respective branch of service for Retired Serviceman's Family Protection Plan (RSFPP). They will require:

   a. Full name of the deceased.
   b. Social Security Number.

7. Contact nearest Social Security Office. They will require:

   a. Certified copy of Death Certificate.
   b. Social Security Number of deceased.
   c. Social Security Numbers for spouse and dependent children.
   d. Birth Certificates for spouse and dependent children.
   e. Approximate earnings of deceased in the year of his death and present employer's name.

8. Contact veteran's present employer for possible insurance.

9. Contact your veteran's present employer for funds possibly due from Credit Union participation.

10. Contact Bank for possible mortgage insurance.

11. Notify all creditors of death; there may be Credit Life Insurance on installment loans.

12. Contact any fraternal organization to which the deceased may have belonged for possible life insurance.

13. Contact Civil Service if deceased was employed for more than 18 months in Civil Service.

14. Search for a Will. It may explain how the deceased wanted to disburse the funds and to determine if there are trust funds in existence.

15. Look for check stubs or any canceled checks for payments to an insurance company. Check for securities, real estate, and a safe deposit box.

16. Check for past enrollment in the Veteran's Education Assistance Program and/or payroll purchase plan for Savings Bonds.

17. If death occurred on a common carrier, survivors may be able to collect damages from the carrier (for fault or negligence) and/or insurance proceeds from the relevant travel agent/credit card issuer (no fault or negligence required).

18. If death occurred due to combat, there may be federal tax breaks, both on income tax (I.R.C. § 1692) and estate tax (I.R.C. § 2201).

19. Contact the DVA for information on possible state benefits, including bonuses,

educational assistance, employment preferences, and tax exemptions.

## APPENDIX C

## VGLI RATES* (Extract)

| Coverage Amount | Age 40-44 | | Age 45-49 | | Age 50-54 | |
|---|---|---|---|---|---|---|
| | Monthly | Annual | Monthly | Annual | Monthly | Annual |
| $200,000 | $68.00 | $748.00 | $88.00 | $968.00 | $130.00 | $1,430.00 |
| $100,000 | $34.00 | $374.00 | $44.00 | $484.00 | $ 65.00 | $ 715.00 |
| $ 10,000 | $ 3.40 | $ 37.40 | $ 4.40 | $ 48.40 | $ 6.50 | $ 71.50 |

| Coverage Amount | Age 55-59 | | Age 60-64 | | Age 65-69 | |
|---|---|---|---|---|---|---|
| | Monthly | Annual | Monthly | Annual | Monthly | Annual |
| $200,000 | $176.00 | $1,936.00 | $225.00 | $2,475.00 | $300.00 | $3,300.00 |
| $100,000 | $ 88.00 | $ 968.00 | $112.50 | $1,237.50 | $150.00 | $1,650.00 |
| $ 10,000 | $ 8.80 | $ 96.80 | $ 11.25 | $ 123.75 | $ 15.00 | $ 165.00 |

* Your age should be either your age on your 121st day after separation or your age on the date of application, whichever is later. Premium schedule is subject to change.

NOTE: If you pay annually, you can take advantage of a one-month discount, which is reflected in the annual premium shown above.

## APPENDIX D - RECOMMENDED SGLI LANGUAGE

SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) (**see AR 600-8-1, figures 11-12 to 11-14**):

* Testamentary Trust for Children:[1] "**My trustee to fund a trust established for the benefit of my children[2] under my will**."

* Living Trust for Children:[3] "**(Name of trustee), my trustee, pursuant to a trust agreement dated (date).**"

* Custodianship under the Uniform Gifts or Uniform Transfers to Minors Act:[4] "**(Name of custodian), as custodian for each of my children,[5] pursuant to the UGMA/UTMA of the state of (name of state), (with distribution to each minor when that minor reaches age (desired age)).**"

---

[1] The soldier's will must contain a trust.

[2] The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb, ...."

[3] The soldier must create a living trust prior to completing the SGLI form. A copy of the trust agreement should be provided to the SGLI office.

[4] Life insurance custodianships are recognized in every state. A separate custodianship will be established for each child. Either the soldier, the children, the custodian, or OSGLI should have some connection with the state named by the soldier. The age of distribution to the child in most jurisdictions is 18, although in CO, CT, IN, IA, MA, and TN the age of distribution is 21. In CA and NV (and only in these jurisdictions), the soldier may designate any age between 18 and 25 as the age of distribution.

[5] See discussion, supra, note 2.

**APPENDIX E**

**EXAMPLES OF COST VS. BENEFIT OF SBP**

# SBP-LTC

| YOUR AGE | ANNUAL COST | TOTAL COST | ANNUAL PAYMENT | YEAR INSURANCE | TOTAL PREMIUMS |
|---|---|---|---|---|---|
| **42** | **$1,431** | **$ 1,464** | **$14,290** | **$ 336** | **$ 344** |
| **47** | **$1,699** | **$ 10,732** | **$16,972** | **$ 793** | **$ 3,712** |
| **52** | **$2,018** | **$ 24,051** | **$20,158** | **$ 1,512** | **$ 11,335** |
| **57** | **$2,397** | **$ 42,774** | **$23,941** | **$ 2,560** | **$ 26,058** |
| **62** | **$2,847** | **$ 68,663** | **$28,435** | **$ 3,985** | **$ 51,310** |
| **67** | **$3,381** | **$104,000** | **$21,491** | **$ 6,921** | **$ 95,520** |
| **72** | **$4,015** | **$151,737** | **$25,525** | **$11,497** | **$173,107** |
| **77** | **$4,769** | **$215,685** | **$30,315** | **$18,718** | **$304,300** |
| **82** | **$5,664** | **$300,749** | **$36,005** | **$29,367** | **$520,817** |

Personal Assumptions:

| | |
|---|---|
| Retirement Year: | 1998 |
| Retirement Age and Sex: | 42 Male |
| Monthly Retired Pay: | $2,547.30 |
| Age of Spouse: | 39 |

Economic Assumptions:

| | | | |
|---|---|---|---|
| Retired Couple's Tax Rate: | 28% | Inflation: | 3.5% |
| Surviving Spouse's Tax Rate: | 15% | Interest Rate: | 6.5% |

Additional Information:

| | |
|---|---|
| Value of Retirement Pay without SBP: | $673,192 |
| Value of Retirement Pay with SBP: | $690,928 |
| Percent of Government Subsidy: | 30% |

# SBP-COL

| YOUR AGE | ANNUAL COST | TOTAL COST | ANNUAL PAYMENT | YEAR INSURANCE | TOTAL PREMIUMS |
|---|---|---|---|---|---|
| **52** | **$2,722** | **$ 2,785** | **$27,187** | **$ 2,039** | **$ 2,086** |
| **57** | **$3,232** | **$ 20,418** | **$32,290** | **$ 3,453** | **$ 18,550** |
| **62** | **$3,839** | **$ 45,756** | **$38,350** | **$ 5,374** | **$ 48,345** |
| **67** | **$4,560** | **$ 81,377** | **$28,985** | **$ 9,334** | **$102,611** |
| **72** | **$5,415** | **$130,630** | **$34,425** | **$15,506** | **$200,517** |
| **77** | **$6,432** | **$197,858** | **$40,886** | **$25,245** | **$368,991** |
| **82** | **$7,639** | **$288,678** | **$48,560** | **$39,608** | **$650,365** |

Personal Assumptions:

| | |
|---|---|
| Retirement Year: | 1998 |
| Retirement Age and Sex: | 52 Male |
| Monthly Retired Pay: | $4,846.20 |
| Age of Spouse: | 49 |

Economic Assumptions:

| | | | |
|---|---|---|---|
| Retired Couple's Tax Rate: | 28% | Inflation: | 3.5% |
| Surviving Spouse's Tax Rate: | 15% | Interest Rate: | 6.5% |

Additional Information:

| | |
|---|---|
| Value of Retirement Pay without SBP: | $1,011,879 |
| Value of Retirement Pay with SBP: | $1,068,330 |
| Percent of Government Subsidy: | 49% |

## APPENDIX F

## EXAMPLE OF DEATH ON ACTIVE DUTY VS. RETIREE DEATH

### HYPOTHETICAL CASE - DEATH ON AD
**0-4 with spouse and 2 children (7 and 11 years old)**

| Monthly Payments | | Lump Sum Payments | |
|---|---|---|---|
| DIC (Spouse) --- | $ 881 | SGLI ---------- | $200,000 |
| DIC (Child) ----- | $ 222 | Death Gratuity - | $ 6,000 |
| DIC (Child) ----- | $ 222 | Pay/Allowances - | $ 3,000 |
| Social Security - | $2,150 | Social Security -- | $ 255 |
| TOTAL | $3,475 | TOTAL | $209,255 |

0-4 HAD 15 YEARS TIS

### HYPOTHETICAL CASE - RETIREE DEATH
**0-4 with spouse and 2 children (7 and 11 years old)**

| Monthly Payments | | Lump Sum Payments | |
|---|---|---|---|
| DIC (Spouse) --- | $ 881 | SGLI ---------- | $200,000 |
| DIC (Child) ----- | $ 222 | Death Gratuity - | $ 6,000 |
| DIC (Child) ----- | $ 222 | Pay/Allowances - | $ 3,000 |
| SBP ---------- | $ 845 | SDVI ---------- | $ 20,000 |
| Social Security-- | $2,150 | Social Security -- | $ 255 |
| TOTAL | $4,320 | TOTAL | $229,255 |

0-4 HAD 15 YEARS TIS; 75% DISABILITY RETIREMENT
(Medical Retirement Pay = $3,082.05)

## EXAMPLE OF DEATH ON ACTIVE DUTY VS. RETIREE DEATH

### HYPOTHETICAL CASE - DEATH ON AD
### 0-5 with spouse and 2 children (13 and 17 years old)

| Monthly Payments | | Lump Sum Payments | |
|---|---|---|---|
| DIC (Spouse) --- | $ 881 | SGLI ---------- | $200,000 |
| DIC (Child) ----- | $ 222 | Death Gratuity - | $ 6,000 |
| DIC (Child) ----- | $ 222 | Pay/Allowances - | $ 3,000 |
| SBP ---------- | $ 745 | | |
| Social Security-- | $2,150 | Social Security -- | $ 255 |
| TOTAL | $4,220 | TOTAL | $209,255 |

0-5 HAD 22 YEARS TIS
(Regular Retirement Pay = $2,899.87)

### HYPOTHETICAL CASE - RETIREE DEATH
### 0-5 with spouse and 2 children (13 and 17 years old)

| Monthly Payments | | Lump Sum Payments | |
|---|---|---|---|
| DIC (Spouse) --- | $ 881 | SGLI ---------- | $200,000 |
| DIC (Child) ----- | $ 222 | Death Gratuity - | $ 6,000 |
| DIC (Child) ----- | $ 222 | Pay/Allowances - | $ 3,000 |
| SBP ---------- | $1,325 | SDVI ---------- | $ 20,000 |
| Social Security-- | $2,150 | Social Security -- | $ 255 |
| TOTAL | $4,800 | TOTAL | $229,255 |

0-5 HAD 22 YEARS TIS; 75% DISABILITY RETIREMENT
(Medical Retirement Pay = $3,954.37)

**APPENDIX G**
INFORMATION PAPER

TAPD-OEA 10 Feb 2000

SUBJECT: Imminent Death Processing

1. Purpose. To provide an overview of expeditious processing of imminent death cases and the benefits that result when a soldier pending death is expeditiously retired for physical disability.

2. Facts.

a. Expeditious processing of imminent death cases consists of procedures for completing physical disability evaluation and retirement on a 24-hour basis.

b. Imminent death procedures are applied to the cases of Active and Reserve Component soldiers when the Medical Treatment Facility (MTF) determines that the soldier is expected to die within 72 hours from a medical condition incurred or aggravated in the line of duty.

c. No regulatory and statutory requirements are omitted or accomplished after the fact of death. For example, if a line of duty determination is required, retirement is not executed until the required level of determination (informal or formal) per AR 600-8-1, chapter 39 (1986), is approved and confirms an in-line-of-duty finding. Retirement must be executed before death as defined by the laws of the state where the soldier is assigned, or if soldier is outside of the Continental United States, as defined under military medical standards.

d. To protect the interests of the soldier and the government should the soldier recover or improve, the soldier is placed on the Temporary Disability Retired List.

e. The MTF Physical Evaluation Board Liaison officer (PEBLO) and the Installation Retirement Services Officer (RSO) have joint responsibility to counsel the soldier and the soldier's next of kin.

(1) The PEBLO is responsible for counseling the soldier and the soldier's next of kin on the disability evaluation process, the soldier's rights in the process, the Physical Evaluation Board findings, estimated disability compensation, and potential Department of Veterans Affairs (DVA) benefits and programs.

(2) The RSO is responsible for counseling the soldier and the soldier's next of kin on retirement and survivor benefits, to include the Survivor Benefit Plan (SBP), and DVA and Social Security entitlements. The RSO must:

(a) Complete the DD Form 2656 (Data for Payment of Retired Personnel), which indicates the family's desired SBP election; and

(b) Coordinate with HQDA, Army Retirement Services--the Secretary of the Army designee to make SBP elections on behalf of death imminent soldiers.

(3) The Army and Air Force Mutual Aid Association is available to assist the PEBLO or RSO by producing a benefits comparison tailored to the soldier's circumstances. The Association will telefax or email the comparison to the PEBLO and RSO without regard to whether the soldier is a member of the Association. The questionnaire at enclosure 1 must be provided to the Association. The printout is generally available only during the Association's office hours: 0830 to 1630, Eastern Standard Time. The objective of the Association is to be of service to the soldier and his family by providing the maximum information available on benefits. However, as a private institution not under contract to Department of Defense, the Association cannot assume liability for the choices made.

f. Due to the variables that affect benefits, primarily under SBP, this information paper cannot provide an exact monetary comparison of benefits between death on active duty and death in retired status. These variables include: The age of the spouse; whether there are children; the ages of the children and whether any are handicapped; whether a wife is pregnant at time of the soldier's death; specifics of any divorce settlement regarding former spouse entitlement to SBP; effect of remarriage on benefit entitlement; and, whether a single soldier has a relative that would qualify as an insurable interest beneficiary.

g. In most cases when death is imminent, retirement for physical disability provides greater benefits than if death occurs on active duty due to the benefits described below. A summary matrix is attached.

(1) <u>Entitlement to the same active duty death benefits</u>.

(a) Soldiers retired under imminent death procedures are totally disabled soldiers. Totally disabled soldiers retain coverage under Servicemen's Group Life Insurance (SGLI) up to one year or until the disability ceases to be total in degree, whichever occurs first, with no premium cost during this period.

(b) The death gratuity is payable to certain survivors if the death occurs within 120 days following retirement and is related to service connected causes as determined by the DVA.

(2) Eligibility for DIC and SBP.

(a) Eligible survivors of soldiers who die on active duty are entitled to DVA Dependency and Indemnity Compensation (DIC). They are not entitled to SBP unless the soldier had at least 20 years of federal service. In that case the law directs a "spouse only" election for a married soldier or a "child(ren) only" election for an unmarried soldier with child(ren). No other options are available.

(b) Survivors of retired soldiers who die of a service-connected disability may be entitled to DIC. The DVA should be consulted to ensure eligibility based on the DVA's marriage requirements and in-line-of-duty considerations.

(c) Soldiers pending disability retirement are eligible to elect SBP and have several election options: Spouse only, children only, spouse and children, former spouse only, former spouse and children; insurable interest; and, no election.

(d) There is a dollar for dollar offset between DIC and SBP for SBP elections of spouse only or spouse and child. However, depending on the retired pay entitlement, SBP may exceed the DIC amount, in which case monies would be payable from both VA and DoD. DIC has no offsetting impact on a child's SBP receipt. Thus, the flexibility of options available to the soldier pending retirement allows for weighing long term versus short term benefits in light of the number of dependents and their ages.

(e) A single soldier with no children or one dependent child has the election option of "natural person with an insurable interest." An annuity can be provided to any relative more closely related to the soldier than a cousin or a close business associate with proof of being financially affected by the soldier's death. This option is not available to single soldiers who die on active duty eligible for retirement.

(f) When a soldier pending retirement is mentally incompetent to make an SBP election, the Secretary of the Army makes the appropriate election on behalf of the soldier. This authority has been delegated to Chief, Army Retirement Services, Office of the Deputy Chief of Staff for Personnel. The RSO coordinates the action.

(3) Eligibility for Supplemental SBP (SSBP). SSBP is the supplemental plan which increases basic SBP's after-age-62 annuity amount. SSBP is not part of the active-duty death survivor package, even when the member has more than 20 years active federal service. It can only be elected at retirement. It is not connected to DIC; it is payable at age 62 to a qualified surviving spouse in addition to any DIC amounts received.

(4) Possibility of Greater retired pay and greater SBP/SSBP annuity. Retired pay is computed using a multiplier equating to years of service or the disability rating—both limited to 75%. The disability rating for imminent death retirement is 100%. Thus, even a soldier who was eligible to retire for length of service would benefit from death imminent retirement processing because of the higher multiplier used to calculate retired pay as well as the SBP election flexibility afforded by retirement.

(5) Eligibility for Service Disabled Veterans Life Insurance (RH) (SDVI). This is a $10,000 policy for disabled veterans. A soldier must be retired in order to apply for it.

(a) Totally disabled veterans, may apply for waiver of premiums for the basic policy. After six months, totally disabled veterans may apply for an additional policy of up to $20,000.

(b) If the veteran is mentally competent, but physically incapable of signing the application, a statement to that effect can be submitted by his doctor or nurse. The statement must confirm that the veteran was totally aware of what was happening and why he couldn't sign. If he is mentally incompetent, only a court appointed guardian can sign the application.

(c) If the mentally incompetent soldier dies before a guardian is appointed, the soldier's beneficiary may apply for gratuitous SDVI ("ARH"). This is a lump sum payment, the approval of which rests with the DVA.

h. There are two considerations which may result in retirement posing a hardship.

(1) Civilian life insurance: Does the soldier have a civilian policy that provides greater benefits if death occurs on active duty? Usually these are policies offered by military oriented associations. The amount of such a policy should be carefully weighed against the overall entitlement package afforded by retirement.

(2) Hospitalization in a civilian facility: If the soldier is in a civilian facility when retired, the spouse becomes responsible for those medical costs not covered under the soldier's TRICARE plan. While this is a factor to consider, a death imminent soldier who survives but needs additional hospital level care may be transferred to a VA hospital, where TRICARE is not an issue. The installation Health Benefits Advisor (HBA) should be consulted on this matter.

Frances A. Dennis(202) 782-3064
USPDA Policy Officer
Dennis E. Brower(202)782-3002
USPDA Legal Advisor
(DSN 662)

**AAFMAA PEBLO/CAO QUESTIONNAIRE**

(No Cover Sheet Required – Page 1 of 1)

AAFMAA
Ft. Myer, VA 22211
FAX # (703) 875-0070

CAO/PEBLO Requesting:_____
Address: _____
_____
Phone: _____
FAX: _____

## XI. SERVICE MEMBER DATA

1. NAME: _____ 2. DATE OF BIRTH: MO _____ DAY _____ YR _____

3. PRESENT RANK/GRADE: _____ 4. DATE OF DEATH: MO _____ DAY_____ YR _____

5. SSAN: _____ - _____ - _____

6. PAY ENTRY BASE DATE (PEBD): MO_____ DAY _____ YEAR _____

7. BASIC ACTIVE SERVICE DATE (BASD): MO _____ DAY _____ YEAR _____

8. PRESENT MARITAL STATUS: SINGLE _____ MARRIED _____

9. DATE OF PRESENT MARRIAGE: MO _____ DAY _____ YEAR _____

## XII. FAMILY DATA

10. CURRENT SPOUSE NAME: _____

11. SPOUSE DOB: MO _____ DAY _____ YEAR _____

12. CHILDREN:

#1_____ DOB: MO _____DAY _____YR _____

#2_____ DOB: MO _____DAY _____YR _____

#3_____ DOB: MO _____ DAY _____ YR _____

#4_____ DOB: MO _____ DAY _____ YR _____

#5_____ DOB: MO _____ DAY _____ YR _____

#6_____ DOB: MO _____ DAY _____ YR _____

Please complete ALL date fields. Dates are more important than names if names are not readily available.

FOR AAFMA USE: PROCESS DATE: _____ INITIALS: _____

**APPENDIX H**

**INFORMATION PAPER**

DAJA-LA
25 March 1999

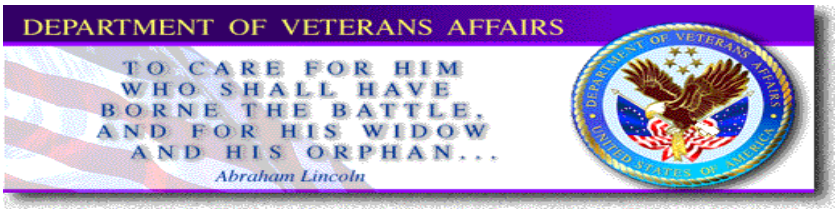
SUBJECT: Accelerated Death Benefit - SGLI

1. PURPOSE: To provide information on obtaining an accelerated death benefit for terminally ill SGLI policy holders.

2. FACTS.

a. The President signed in to law on Veterans Day (November 11) as part of the Veterans Programs Enhancement Act. Implementation date was February 9, 1999. Interim final rule under review.

b. The Department of Veterans Affairs will issue rules soon. Watch VA's web site for more details: http://www.va.gov.




c. Holders of Servicemen's Group Life Insurance (SGLI) or Veterans Group Life Insurance (VGLI) who have been diagnosed as terminally ill may receive up to half the face value of their SGLI/VGLI policy as a lump sum - $5,000 increments up to 50 percent available.

d. To qualify for the accelerated benefit, the policyholder must be diagnosed as having a life expectancy of less than 9 months. The member's subsequent SGLI/VGLI premiums will be reduced to reflect the remaining face value of the policy. The election may not be made more than once, and it will be irrevocable.

e. Not taxable - under the new law, the accelerated death benefit payment "shall not be considered income or resources for purposes of determining eligibility for or the amount of benefits under any Federal or federally-assisted program or for any other purpose."

f. Send proof of policy coverage & medical diagnosis to

Office of Servicemen's Group Life Insurance (OSGLI)
213 Washington Street
Newark, NJ 07102-2999

1-800-419-1473

COL Hancock/703-588-6708

**APPENDIX I**

P 170639Z DEC 99
FM CDRPERSCOM ALEXANDRIA VA //TAPC-PED-A//

MILPER MESSAGE NR 00-67
SUBJECT: **MILITARY FUNERAL HONORS**

1. THIS MILPER MESSAGE WILL EXPIRE NO LATER THAN JAN 2002.

2. MILITARY FUNERAL HONORS HAVE BECOME A STATUTORY BENEFIT TO ALL VETERANS EFFECTIVE 1 JANUARY 2000 WITH THE SIGNING OF THE NATIONAL DEFENSE AUTHORIZATION ACT 2000. CASUALTY AREA COMMANDS (CACS) MUST ENSURE THEY ESTABLISH MILITARY FUNERAL HONORS TEAMS TO MEET A SIGNIFICANT INCREASE IN REQUESTS ANTICIPATED FROM FAMILIES FOR FUNERAL HONORS. CACS HAVE THE ULTIMATE RESPONSIBILITY FOR PROVIDING MILITARY FUNERAL HONORS. CACS ARE RESPONSIBLE TO ENSURE PROPER DECORUM FOR MILITARY FUNERAL HONORS INCLUDING APPROPRIATELY TRAINED PERSONNEL AND PROPER EQUIPMENT, STANDARDIZED HONORS PROCEDURES, AND QUALITY CONTROL OF MILITARY FUNERAL HONORS TEAMS CONSISTENT WITH DEPARTMENT OF THE ARMY STANDARDS.

3. OSD HAS DEFINED "VETERANS" (FOR ELIGIBILITY FOR MILITARY FUNERAL HONORS)AS ANY PERSON WHO:

A. SERVED IN THE ACTIVE MILITARY, NAVAL, OR AIR SERVICE (AS DEFINED IN 38 U.S.C. 101(24)) AND WHO WAS DISCHARGED OR RELEASED THEREFROM UNDER CONDITIONS OTHER THAN DISHONORABLE; OR B. WAS A MEMBER OR FORMER MEMBER OF THE SELECTED RESERVE DESCRIBED IN 38 U.S.C. 2301(F)

(1) COMPLETED AT LEAST ONE ENLISTMENT AS A MEMBER OF THE SELECTED RESERVE OR, IN THE CASE OF AN OFFICER, COMPLETED THE INITIAL OBLIGATED SERVICE AS A MEMBER OF THE SELECTED RESERVE; OR
(2) WAS DISCHARGED BEFORE COMPLETION OF THE PERSON'S INITIAL ENLISTMENT AS A MEMBER OF THE SELECTED RESERVE OR, IN THE CASE OF AN OFFICER, PERIOD OF INITIAL OBLIGATED SERVICE AS A MEMBER OF THE SELECTED RESERVE, FOR A DISABILITY INCURRED OR AGGRAVATED IN LINE OF DUTY; OR

(3) DIED WHILE A MEMBER OF THE SELECTED RESERVE.

C. MILITARY BURIAL HONORS MAY NOT BE FURNISHED IN THE CASE OF A PERSON WHOSE LAST DISCHARGE FROM THE SELECTED RESERVE WAS UNDER DISHONORABLE CONDITIONS.

D. IN ACCORDANCE WITH 10 U.S.C. 985, MILITARY BURIAL HONORS MAY NOT BE FURNISHED FOR ANY INDIVIDUAL CONVICTED OF A CAPITAL OFFENSE UNDER FEDERAL OR STATE LAW FOR WHICH THE PERSON WAS SENTENCED TO DEATH OR LIFE WITHOUT PAROLE.

E. MILITARY FUNERAL HONORS FOR VETERANS WHO SERVED IN THE ARMY AIR CORPS OR THE ARMY AIR FORCE WILL BE PROVIDED BY THE U.S.AIR FORCE, UNLESS THE VETERAN'S FAMILY SPECIFICALLY ASKS FOR AN ARMY BURIAL HONORS TEAM.

F. PROOF OF ELIGIBILITY FOR MILITARY BURIAL HONORS CEREMONIAL FOLDING AND PRESENTATION OF THE INTERMENT FLAG AND PLAYING SHOULD BE REQUESTED FROM THE NEXT-OF-KIN.

4. AS OF 1 JANUARY 2000, A TWO-SERVICE MEMBER TEAM TO PERFORM THE OF TAPS IS THE MINIMUM REQUIREMENT FOR ALL VETERAN FUNERALS UPON RECEIPT OF A REQUEST FROM A FAMILY MEMBER OR HIS/HER REPRESENTATIVE. THIS MAY BE A REQUEST FROM A FUNERAL DIRECTOR OR VETERAN SERVICE ORGANIZATION (VSO). ONE OF THE MEMBERS OF THE TEAM MUST BE A MEMBER OF THE DECEASED VETERAN'S SERVICE. THE CHIEF OF STAFF, ARMY IS CURRENTLY REVIEWING THIS POLICY. HE MAY WITHIN THE NEXT SEVERAL MONTHS ENLARGE THE ARMY REQUIREMENT TO PROVIDE A BIGGER DETAIL AND TO EXPAND THE HONORS RENDERED. IN THE MEANTIME, FOR ANY REQUESTED VETERANS' FUNERAL, CACS MUST ENSURE A MINIMUM OF TWO SOLDIERS.

5. PROCEDURES: THE FOLLOWING PROCEDURES WILL BE IMPLEMENTED TO ENSURE COMPLIANCE WITH THE MILITARY FUNERAL HONORS PORTION OF NDAA 2000 (AN ABBREVIATED CHECKLIST IS PROVIDED AT PARAGRAPH 9). PREPARATION FOR FUNERAL HONORS BEGINS WITH THE REQUEST FOR ARMY ASSISTANCE USING THE DOD HOTLINE AS FOLLOWS:

A. REQUESTS FOR MILITARY FUNERAL HONORS WILL BE INITIATED BY THE NEXT-OF-KIN, OR HIS/HER AUTHORIZED REPRESENTATIVE (IN MOST CASES THE FUNERAL DIRECTOR), TO THIS 24 HOUR SYSTEM AT 1-877-MIL-HONR (1-877-645-4667). THE REQUESTOR WILL BE ASKED BY AUTOMATIC DEVICE THE BRANCH OF SERVICE OF THE DECEASED VETERAN AND THE STATE AND COUNTY THAT THE INTERMENT WILL BE MADE. THE REQUESTOR WILL THEN BE AUTOMATICALLY TRANSFERRED TO THE APPRORIATE CAC FOR SERVICE. DOD HAS DIRECTED THAT ALL REQUESTS FOR MILITARY FUNERAL HONORS MUST BE ANSWERED BY THE CAC WITHIN 12 HOURS FROM WHEN THE REQUEST IS MADE, NOT FROM WHEN THE REQUEST IS RECEIVED. AN ALTERNATIVE IS TO CONTACT A CAC DIRECTLY.

B. ONCE THE ARMY CAC IS ALERTED, IT MUST ARRANGE FOR THE DETAIL TO ARRIVE AT THE INTERMENT SITE AT THE APPROPRIATE TIME IN ORDER TO PROVIDE GRAVESIDE HONORS BY THE PLAYING OF TAPS AND THE FLAG FOLDING AND PRESENTATION TO THE APPROPRIATE FAMILY MEMBER. THE LEADER OF THE DETAIL HAS A NUMBER OF RESPONSIBILITIES. THESE INCLUDE CONTACTING THE FUNERAL DIRECTOR TO CONFIRM THE DATE, TIME AND LOCATION OF THE INTERMENT SERVICE. THE LEADER WILL ENSURE THAT THE FUNERAL DIRECTOR HAS OBTAINED A FLAG AND WILL BRING A BACKUP FLAG TO THE CEREMONY "JUST IN CASE" IT IS NEEDED. THE LEADER WILL CONFIRM AND COORDINATE PARTICIPATION OF THE SECOND MEMBER OF THE DETAIL. ONCE EVERYTHING IS COORDINATED, THE FINAL PREINTERMENT ACTIVITY IS TO TRAIN AND REHEARSE THE DETAIL. A MANDATORY TRAINING ITEM IS TO CAREFULLY WATCH A COPY OF THE VIDEO DEMONSTRATION TAPE PROVIDED BY DOD TO EACH INSTALLATION. ON THE DAY OF THE INTERMENT CEREMONY, THE DETAIL LEADER WILL CONFIRM ARRANGEMENTS WITH THE FUNERAL DIRECTOR. HE/SHE WILL WORK OUT NECESSARY CUES AT THE INTERMENT SITE WITH THE FUNERAL DIRECTOR.

C. THE RENDITION OF TAPS MAY BE BY A BUGLER OR BY DEVICE. THE CAC WILL CONDUCT AN ACTIVE SEARCH FOR A BUGLER. BUGLER SUPPORT MAY BE FROM AN ARMY BAND (ACTIVE OR RESERVE COMPONENT), CONTRACTED, OR VOLUNTARY. IF A BUGLER IS NOT AVAILABLE, THE CAC WILL USE THE HIGH QUALITY RECORDING PROVIDED BY OSD ON COMPACT DISK OF THE U.S. ARMY BAND BUGLER. MANY NATIONAL AND PRIVATE CEMETERIES HAVE SOUND SYSTEMS THAT PLAY TAPS AT THE INTERMENT SITE. HOWEVER, CACS CANNOT ASSUME AVAILIBILITY OF SUCH AND MUST POSSESS A SUFFICIENT NUMBER OF HIGH QUALITY PORTABLE CD PLAYERS TO PROVIDE THEIR OWN SOUND SYSTEM AT FUNERALS. RECOMMENDED IS A "BOOM BOX" SYSTEM THAT IS EASILY HEARD BY ALL ATTENDEES AT THE INTERMENT CEREMONY. BEFORE DEPARTING FOR A FUNERAL, THE DETAIL LEADER MUST ASCERTAIN IF A SOUND SYSTEM IS AVAILABLE OR IF THE CAC MUST PROVIDE A SOUND SYSTEM TO THE HONORS DETAIL.

D. THE DETAIL WILL ARRIVE AT THE INTERMENT SITE EARLY AND CONDUCT A RECONNAISSANCE AND REHEARSAL. PART OF THE REHEARSAL SHOULD BE THE SELECTION OF A LOCATION OUT OF SIGHT OF THE MOURNERS FOR THE BUGLER OR CD PLAYER THAT WILL SOUND TAPS. THE DETAIL LEADER WILL SET UP AND TEST THE CD PLAYER, ENSURING THE UNIT AND ITS REMOTE CONTROL ARE WORKING PROPERLY. ONCE EVERYTHING IS PREPARED, THE DETAIL LEADER WILL POSITION THE DETAIL IN THEIR DESIGNATED PLACE PRIOR TO THE ARRIVAL OF THE FUNERAL CORTEGE. THE DETAIL LEADER WILL POSITION HIMSELF NEAR THE RECORDING DEVICE; THE OTHER MEMBER(S) WILL BE POSITIONED NEAR THE FOOT OF THE GRAVE. THE LEADER WILL BRING THE TEAM TO "ATTENTION" AND "PRESENT ARMS" AS THE REMAINS ARE CARRIED TO THE GRAVESITE BY CIVILIAN PALLBEARERS. HE WILL COMMAND "ORDER ARMS" WHEN THE REMAINS HAVE BEEN PLACED ON THE LOWERING DEVICE. AT THE CONCLUSION OF THE COMMITTAL SERVICE, THE DETAIL LEADER WILL SOUND "TAPS" ELECTRONICALLY OR DIRECT THE BUGLER TO SOUND "TAPS". INSTALLATIONS MUST ENSURE THAT TRAINING FOR DETAILS INCLUDES INSTRUCTION ON ENSURING THE RECORDING DEVICE IS POSITIONED OUT OF SIGHT FROM THE FAMILY AND PLAYED IN A DIGNIFIED MANNER AS SHOWN IN THE TRAINING VIDEO FROM DOD. ALTHOUGH THE CD SHOULD BE OUT OF SIGHT, ACTIVATING THE "PLAY" BUTTON SHOULD BE PERFORMED WITH PRECISION AND DISTINCTION BY BENDING OVER, ACTIVATING THE RECORDER AND THEN STEPPING BACK ONE STEP BACK AND ASSUMING THE POSITION OF "ATTENTION". EACH DETAIL MEMBER WILL "PRESENT ARMS" DURING "TAPS" AND "ORDER ARMS" AT ITS COMPLETION. AT THE CONCLUSION OF "TAPS", THE DETAIL LEADER MUST ENSURE THE RECORDING DEVICE IS TURNED OFF; AND THEN PROCEED IN A DIGNIFIED AND MILITARY MANNER TO THE HEAD OF THE CASKET.

E. FOR FLAG FOLDING, UPON CONCLUSION OF "TAPS", THE REPRESENTATIVE AND HIS ASSISTANT WILL MOVE CLOSER TO THE CASKET. ONCE THE FLAG IS SECURED AND RAISED, THE DETAIL WILL TAKE THREE SIDE STEPS AWAY FROM THE MOURNERS. AFTER COMPLETING THE THREE SIDE STEP MOVEMENT, THEY WILL FOLD THE FLAG. WHEN THE FLAG IS PROPERLY FOLDED, THE DETAIL ASSISTANT WILL HAND THE FLAG TO THE DETAIL LEADER AND POST TO A POSITION NEXT TO THE SIDE OR REAR OF THE FAMILY. THE DETAIL LEADER WILL PRESENT THE FLAG TO THE NEXT OF KIN. THE FLAG WILL NOT BE PRESENTED UNTIL THE ASSISTANT DEPARTS. THE LEADER WILL THEN PRESENT THE FLAG TO THE NEXT OF KIN USING THE FOLLOWING WORDING:

"THIS FLAG IS PRESENTED ON BEHALF OF A GRATEFUL NATION AND THE UNITED STATES ARMY AS A TOKEN OF APPRECIATION FOR YOUR LOVED ONE'S HONORABLE AND FAITHFUL SERVICE." AFTER PRESENTING THE FLAG, THE DETAIL LEADER WILL OFFER CONDOLENCES.

F. THERE ARE TWO TYPES OF REMAINS; CASKETED AND CREMATED. EACH HAS ITS OWN SEQUENCE OF EVENTS FOR THE GRAVESIDE SERVICE. THE SEQUENCE DESCRIBED ABOVE IS FOR CASKETED REMAINS. PROCEDURES FOR CREMATED REMAINS ARE DIFFERENT ONLY IN THAT THE FLAG IS CARRIED BEHIND THE URN AND PLACED ON A DISPLAY DEVICE NEXT TO THE URN. AFTER "TAPS" IS SOUNDED, THE FLAG IS UNFOLDED, SECURED AND REFOLDED APPROXIMATELY THREE SIDE STEPS FROM THE MOURNERS. IT IS THEN PRESENTED TO THE NEXT OF KIN IN THE SAME MANNER AS FOR CASKETED REMAINS DESCRIBED ABOVE. THE DETAIL LEADER WILL THEN OFFER CONDOLENCES.

G. THE RESERVE COMPONENTS (RC) ALONG WITH THE ACTIVE ARMY WILL BE REQUIRED TO PARTICIPATE IN THIS SENSITIVE MISSION. THE ARMY NATIONAL GUARD (ARNG) AND U.S. ARMY RESERVE (USAR) WILL HAVE A SINGLE POINT OF CONTACT (POC) IN EACH ARNG STATE AREA COMMAND (STARC) OR USAR REGIONAL SUPPORT COMMAND (RSC) TO WHICH A REQUEST FOR ASSISTANCE CAN BE MADE. WHEN THE ACTIVE ARMY IS UNABLE TO SUPPORT THE REQUEST OR IT IS MORE PRUDENT FOR THE RC UNIT TO PROVIDE HONORS, THE CAC WILL CONTACT THE RC POC AT EITHER THE STARC OR RSC FOR MILITARY FUNERAL HONORS SUPPORT. IF THE RC POC HAS NOT RESPONDED TO THE REQUEST FOR SUPPORT WITHIN TWO HOURS, THE CAC SHOULD AGAIN CONTACT THE RC POC. WHEN THE RC IS UNABLE TO SUPPORT THE REQUEST FOR ASSISTANCE, THE CAC WILL BE RESPONSIBLE FOR PROVIDING THE HONORS. CACS WILL BE PROVIDED A LIST OF RC POCS BY THE CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM. CACS SHOULD ESTABLISH MEMORANDUMS OF AGREEMENT WITH RC POCS, AND OTHER MILITARY ORGANIZATIONS WITHIN THEIR AREA OF RESPONSIBILITY SPELLING OUT REQUIREMENTS AND RESPONSIBILITIES.

H. VETERAN SERVICE ORGANIZATIONS HAVE INDICATED A WILLINGNESS TO CONTINUE TO ASSIST THE ARMY IN SUPPORTING MILITARY FUNERAL HONORS. CACS WILL MAINTAIN LIAISON WITH THESE ORGANIZATIONS WITHIN THEIR AREA OF RESPONSIBILITY AND ENSURE THAT HONORS PROCEDURES ARE REHEARSED WITH VSO MEMBERS TO ENSURE A PROFESSIONAL CEREMONY IS CONDUCTED.

6. DOD/HQDA ASSISTANCE: IN ORDER TO FACILITATE PERFORMANCE OF THE PROVISIONS OF NDAA 2000, DOD AND HQDA ARE PROVIDING THE FOLLOWING ELEMENTS OF ASSISTANCE:

A. A TOLL FREE TELEPHONE ACCESS SYSTEM HAS BEEN ESTABLISHED. THIS LINE WAS ACTIVATED ON 17 DECEMBER 1999 AND WILL BE OPERATIONAL ON 1 JANUARY 2000.

B. A WEBSITE HAS BEEN ESTABLISHED FOR ACCESS BY FUNERAL DIRECTORS, ACTIVE AND RETIRED SOLDIERS, VETERANS, AND FAMILIES FOR THE PURPOSE OF ASSISTING THEM IN OBTAINING INFORMATION PERTAINING TO FUNERAL HONORS AND A REGISTRY OF THOSE GROUPS AUTHORIZED TO PROVIDE HONORS. THIS INCLUDES THE DOD MILITARY FUNERAL HONORS INFORMATION WEBSITE AT HTTP://WWW.MILITARYFUNERALHONOR.OSD.MIL. THE WEBSITE CONTAINS INFORMATION ON WHAT CONSTITUTES MILITARY FUNERAL HONORS, ELIGIBILITY FOR MILITARY FUNERAL HONORS, FLAG AND HEADSTONE INFORMATION, AND FREQUENTLY ASKED QUESTIONS. THE WEBSITE WILL BE FULLY OPERATIONAL ON 1 JANUARY 2000.

C. INFORMATIONAL KITS WILL BE DISTRIBUTED TO ALL FUNERAL HOMES TO INFORM AND UPDATE THEM ON MILITARY FUNERAL HONORS PROCEDURES. THESE KITS WILL BE DISTRIBUTED FROM DOD PRIOR TO 1 JANUARY 2000. THE KITS WILL CONTAIN A BROCHURE RELATING TO MILITARY FUNERAL HONORS, A DIRECTORY OF FUNERAL HONORS POCS, FLAG FOLDING PROTOCOL, FREQUENTLY ASKED QUESTIONS REGARDING DEATH BENEFITS, AND A COPY OF THE PORTION OF THE LAW RELATING TO FUNERAL HONORS.

D. THE MILITARY DISTRICT OF WASHINGTON WILL ALSO PRODUCE A VIDEO TRAINING TAPE TO INSTRUCT TEAM MEMBERS ON THE PROPER CUSTOMS AND COURTESIES FOR MILITARY FUNERAL HONORS INCLUDING HOW TO PROPERLY FOLD THE FLAG. THESE TRAINING TAPES WILL BE DISTRIBUTED BY DOD TO ALL ACTIVE AND RESERVE COMPONENT UNITS. LOCAL REPRODUCTION IS AUTHORIZED AND ENCOURAGED, PROVIDED THE QUALITY IS NOT DEGRADED. THE MDW WILL ALSO PROVIDE ON SITE TRAINING UPON REQUEST AND AT CAC EXPENSE. REQUESTS SHOULD BE COORDINATED THROUGH THE CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM.

E. DOD WILL DISTRIBUTE CDS OF A RECORDING OF TAPS PRODUCED BY THE UNITED STATES ARMY BAND TO ALL CACS AND ACTIVE AND RESERVE COMPONENT UNITS FOR USE IF A BUGLER IS NOT AVAILABLE. LOCAL REPRODUCTION IS AUTHORIZED AND ENCOURAGED.

7. ARBITRARY GEOGRAPHIC LIMITS OF SUPPORT WITHIN CACS ARE ELIMINATED. CACS ARE TO PROVIDE APPROPRIATE MILITARY FUNERAL HONOR SUPPORT TO ALL VETERANS WITHIN THEIR COMPLETE GEOGRAPHIC AREA OF RESPONSIBILITY.

8. CACS MUST STILL ENTER MILITARY FUNERAL SUPPORT DATA INTO THE DOD WEBSITE. CACS HAVE BEEN PROVIDED THE UNIT IDENTIFICATION CODES (UICS) FOR THE WEBSITE. THIS IS A CRITICAL TASK AS THE INFORMATION EXTRACTED BY DOD FROM THE WEBSITE WILL BE USED TO DETERMINE FUTURE FUNDING AUTHORIZATIONS. IN ADDITION, CAC'S WILL SUBMIT A MONTHLY REPORT TO CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM THAT INCLUDES THE NUMBER OF FUNERAL DETAILS PROVIDED BY "ACTIVE", "RETIREE", AND "VETERAN"; AND THE NUMBER OF SOLDIERS SENT ON EACH MISSION. THIS REPORT WILL BE DUE THE LAST WORKING DAY OF THE MONTH. DATA FROM THIS REPORT WILL BE USED TO BRIEF THE CSA AND WILL HELP DETERMINE FUTURE RESOURCING.

9. REQUEST THE FOLLOWING CHECKLIST PROCEDURES BE INCORPORATED INTO EACH INSTALLATION MILITARY FUNERAL HONORS SOP.

A. BEGIN COORDINATION WITH THE FUNERAL HONORS REQUESTOR ASAP; HOWEVER THE REQUEST MUST BE ANSWERED WITHIN 12 HOURS AFTER THE REQUEST IS MADE.

B. DETERMINE IF THE REQUIREMENT CAN BE FULFILLED USING TRAINED CAC PERSONNEL.

C. IF NOT, REQUEST ASSISTANCE FROM EITHER THE RSC OR STARC POC OR OTHER MILITARY ORGANIZATION IN YOUR AOR. THE RC SHOULD BE CONTACTED ON A ROTATING BASIS.

D. IF SUPPORT CAN NOT BE PROVIDED BY THE RC, REQUEST ASSISTANCE FROM A SISTER SERVICE. IF ASSISTANCE IS NOT FORTHCOMING, THE CAC IS STILL RESPONSIBLE FOR PROVIDING THE MILITARY FUNERAL HONORS.

E. IF REQUIREMENT CANNOT BE ACCOMODATED, COORDINATE WITH FUNERAL DIRECTOR TO HAVE THE INTERMENT HELD AT A DIFFERENT DATE AND/OR AT A DIFFERENT TIME WHEN THE REQUEST CAN BE ACCOMODATED.

F. CONFIRM ARRANGEMENTS WITH THE REQUESTOR.

G. ENSURE THE FUNERAL DETAIL IS PROPERLY TRAINED AND EQUIPPED WITH THE PROPER UNIFORM PRIOR TO DISPATCH.

H. ENSURE SUCCESSFUL EXECUTION OF THE BURIAL HONORS DETAIL AT GRAVESITE.

I. UPON COMPLETION OF THE MISSION, ENTER DATA INTO THE DOD WEBSITE AND SUBMIT THE MONTHLY REPORT TO PERSCOM.

10. FULL MILITARY FUNERAL HONORS FOR ACTIVE DUTY SOLDIERS AND MEDAL OF HONOR RECIPIENTS CONTINUE TO CONSIST OF A TEAM OF AT LEAST NINE SOLDIERS. THIS TEAM CONSISTS OF AN OIC OR NCOIC, BUGLER, CHAPLAIN, AND A SIX-SOLDIER PALLBEARER/ FIRING PARTY. THIS NINE-SOLDIER TEAM IS THE ARMY STANDARD FOR FULL MILITARY FUNERAL HONORS. LIKEWISE, CURRENT ARMY POLICY FOR MILITARY FUNERAL HONORS RENDERED TO RETIREES UPON REQUEST CONTINUES TO BE FULL MILITARY FUNERAL HONORS WHEN RESOURCES ARE AVAILABLE. IF FULL MILITARY FUNERAL HONORS ARE NOT POSSIBLE FOR A RETIREE, THE REQUIREMENT TO FURNISH A TWO-SERVICE MEMBER TEAM TO FOLD AND PRESENT THE INTERMENT FLAG AND TO RENDER TAPS REMAINS IN EFFECT. ONE OF THE MEMBERS OF THE TEAM MUST BE A MEMBER OF THE DECEASED RETIREE'S SERVICE.

11. THE POC FOR THIS ACTION AT PERSCOM IS LTC STEWARD OR MR. ELLIS AT DSN 221-5314/5304.

# CHAPTER O
# FEDERAL ESTATE AND GIFT TAXATION

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# FEDERAL ESTATE & GIFT TAXATION

**Outline of Instruction**

## I. REFERENCES.

A. AR 27-3, The Army Legal Assistance Program (10 Sep 1995).

B. Army Regulation 27-26, Rules of Professional Conduct for Lawyers (1 May 1992).

C. Internal Revenue Code.

D. Federal Estate and Gift Taxes *Explained* (CCH) (1999).

E. CCH Financial and Estate Planning Guide (CCH) (1998).

F. Andersen, Understanding Trusts and Estates (1999).

G. Beyer, Wills, Trusts, and Estates: Examples & Explanations (1999).

H. March, Practical Applications of the Law: Wills, Trusts, & Estates (1998).

I. Miller, Estate Planning Primer (CCH) (1998).

J. Caron, Federal Wealth Transfer Tax Anthology (1998).

K. Hoops, Family Estate Planning Guide (1994).

L. Price, Price on Contemporary Estate Planning (1992).

M. Stephens, Federal Estate and Gift Taxation (1991).

N. JA 262, Wills Guide (1997) (*Military Estate Planning Guide, Fall 2000*).

## II. INTRODUCTION.

## III. ESTATE BUILDING.

A. Goal Setting.

1. Adequate reserves to cover contingencies.

2. Pay for future educational needs of children.

3. Maintain financial security upon retirement.

B. Possible Techniques for Military Clients.

1. Military Retirement / Survivor Benefit Plan (SBP).

2. The Principal Residence.

3. Individual Retirement Arrangements / Thrift Savings Plan (?).

4. Investments.

5. Life insurance.

6. Inheritance.

7. Lottery?

## IV. UNIFIED TRANSFER TAX SYSTEM (SEE APPENDIX A).

A. Concept.

B. Lifetime and Testamentary Transfers - aggregated and taxed at unified tax rates (I.R.C. § 2001; see Appendix A).

Marginal Tax Rates

| Minimum Rate | Maximum Rate |
|---|---|
| 37% over $675,000 | 55% over $3,000,000 |

C. Unified Credit.

| Year | Unified Credit | Gross Estate Equivalent |
|---|---|---|
| 1997 | $192,800 | $ 600,000 |
| 1998 | $202,050 | $ 625,000 |
| 1999 | $211,300 | $ 650,000 |
| 2000 and 2001 | $220,550 | $ 675,000 |
| 2002 and 2003 | $229,800 | $ 700,000 |
| 2004 | $287,300 | $ 850,000 |
| 2005 | $326,300 | $ 950,000 |
| 2006 | $345,800 | $1,000,000 |

# V. THE FEDERAL GIFT TAX.

A. Scope. An excise tax on the transfer of property during donor's life.

B. Determining Amount of Taxable Gift (I.R.C. §§ 2501 - 2524).

1. Taxable gift – the total amount of gifts made during the year less the deductions and exclusions allowed.

2. Exclusions and Deductions.

a. There is an annual exclusion of $10,000 for gifts of a present interest made to any one person during a calendar year. This $10,000 annual exclusion will begin to increase for inflation beginning in 1999; however, it will only increase in increments of $1,000. As of this date, the annual exclusion remains at $10,000.

Example 1: You gave your brother $8,000 in cash last year. If it were your only gift, it is not a taxable gift because it is less than the annual donee exclusion.

b. The annual exclusion is not available for gifts of future interests (either vested or contingent).

c. Gift-splitting. I.R.C. § 2513.

(1) Taxpayer or spouse gives gift to third party. Gift considered as if made one-half by taxpayer and spouse if both consent. If so, each takes the $10,000 annual exclusion for parts of gift. As a result, a maximum exclusion of $20,000 per donee is available to married couples.

(2) Permits a married donor to treat a gift as though it were made one-half by the spouse. Thus, a married donor can avail himself of "two" annual exclusions (the donor's and the spouse's).

(3) Split gifts can be made only while both spouses are alive and each is either a U.S. citizen or resident at the time the gift is made. Treas. Reg. § 25.2513-1(a).

(4) Split gifts must be reported on a timely filed gift tax return. Treas. Reg. § 25.2513-2(a)(1).

(5) Although the personal representative of a deceased spouse may consent on a gift tax return to a split gift, the gift must have been made during the consenting spouse's lifetime. Treas. Reg. § 25.2513-1(b)(1).

Example 2: Harold and his wife, Helen, agree to split gift so that each can give gifts of more than $10,000 without making a taxable gift. Harold gave Jeff $17,000 last year. Harold's gift is treated as split in two, half ($8,500) from Harold and half ($8,500) from Helen.

d. The following are excluded from the definition of a gift for estate tax purposes (gift tax returns are not required):

(1) Payment of educational expenses (tuition) and medical care so long as the transfer is made directly to the educational institution or medical care provider. I.R.C. § 2503(e).

(a) IRS has ruled that this exclusion applied to a grandmother's payments of many years of future tuition for grandchildren. Priv. Ltr. Rul. 1999-41-013 (July 9, 1999).

(i) This allows individuals with large estates to pay tuition for future schooling free of gift taxes, and thereby reduce the size of their estates.

(ii) Making advance payments are beneficial for grandparents or older donors who because of health conditions may be unable to reduce their estates by substantial amounts.

(b) Transfers to qualified state tuition programs are not eligible for this unlimited gift tax exclusion.

(i) However, transfer to a qualified state tuition do qualify for the normal $10,000 annual gift tax exclusion, and

(ii) Five years of annual exclusion gifts can be made to state tuition programs in a single year. I.R.C. § 529.

(2) Gifts to charitable organizations (I.R.C. § 2522).

(a) Qualifies for a tax deduction in the current year, if the taxpayer itemizes (I.R.C. § 161).

(b) Evaluate making a charitable gift instead of a charitable bequest so that he can both decrease the estate and obtain an income tax deduction in the year of the gift.

e. Marital deduction (I.R.C. § 2523).

(1) Gifts to U.S. citizen spouses get an unlimited marital deduction.

(2) Gifts made to resident and non-resident aliens get a $103,000 annual exclusion.

3. Gifts in excess of the annual exclusion.

a. Gifts in excess of the annual exclusion are subject to gift tax and reduces the client's unified credit.

b. The value of adjusted taxable gifts is added back to the donor's estate to "gross up" the estate to the highest applicable marginal rate for estate tax purposes. I.R.C. § 2001(b).

4. Filing a gift tax return is required whenever a taxable gift is made regardless of whether any gift taxes are actually owed.

C. Gift Tax Liability.

1. The donor is liable for gift taxes.

2. A gift is valued at fair market value at the time of transfer.

D. Basis of Property Received as a Gift.

1. For property acquired by lifetime gift, the donee's basis is the same as the donor's basis with an adjustment for gift tax paid ( I.R.C. § 1015).

   a. Upon sale of the property, the donee will be subject to tax on the appreciated gain.

   b. If property is given to a person who dies within one year of receiving the gift and it is willed back to the donor (or his spouse), the basis of the property will be the original basis of the donor (no stepped-up basis at death of donee) (I.R.C. § 1014(e)).

2. Loss Property.

   a. For the purpose of determining loss, the donee takes the fair market value at the time of the transfer.

   b. Donor should consider selling property to take advantage of loss on his or her own income tax return.

3. Income tax considerations.

   a. Step-up basis at death: good for highly appreciated assets transferred at death.

   b. If want to give highly appreciated asset as a gift, there could be some income tax savings if gift is to someone in a lower income tax bracket.

E. Determine Gift Tax.

1. Determine total taxable gifts for the year.

   a. Gift to the same individual during the year.

   b. Reduce its value by the annual exclusion amount to arrive at the taxable gift.

   c. Add all taxable gifts made to all individuals during that year to arrive at the total taxable gifts for the year.

2. Add all taxable gifts made in prior years.

3. Apply tax rate schedule.

4. Subtract the amount of taxes on all prior taxable gifts to determine this year's amount of gift tax.

5. Until unified credit amount, $220,550 (for 2000-2001), has been used, no gift tax will be paid.

Example 3: After winning the state lottery in 1999, Ms. Winner gave her brother $660,000 in 1999 and she gave him $110,000 in 2000. Assume that Ms. Winner had not previously made any taxable gifts. Determine Ms. Winner's taxable gifts for 1999 and 2000. Must she actually pay any gift tax for 1999 or 2000?

# Gift Tax Computation

| | 1999 | 2000 |
|---|---|---|
| Gift | $660,000 | $110,000 |
| - annual per donee exclusion | 10,000 | 10,000 |
| taxable gift | 650,000 | 100,000 |
| + prior taxable gifts | 0 | 650,000 |
| Total taxable gifts: | $650,000 | $750,000 |
| Tax from tax schedule: | 211,300 | 229,800 |
| - Tax from prior year | 0 | 0 |
| Gift tax in current year: | 211,300 | 248,300 |
| Unified Credit | 211,300 | 220,550 |
| **Gift tax owed:** | **0** | **27,750** |

## VI. LIFETIME TRANSFERS.

A. Purposes for Making Lifetime Transfers.

1. Reduce state and federal tax liability.

2. Avoid probate.

3. Benefit individual, public, or charity.

4. Receive a charitable contribution deduction on federal income tax return (I.R.C. § 170; Treas. Reg. § 1.170A-1).

5. Qualify donor to receive public benefits **(Caution may be illegal to advise clients to do so as result of Health Insurance Portability Act of 1997)**.

6. Keep future appreciation on gifted assets out of the donor's estate.

B. Disadvantages.

1. Gift must be irrevocable.

2. Donee takes with a "carryover" basis.

3. Increases income tax liability of donee.

C. Gift Giving.

1. Gifts between spouses.

a. Inter vivos gifts can be used to create an estate for the terminally ill spouse, equalize the spouses' estates, unwind joint tenancy and community property, and preserve a charitable income tax deduction.

b. The healthy spouse could transfer appreciated property to the terminally ill spouse and if the property is transferred back to the donor (healthy spouse), that spouse will obtain the decedent's estate tax basis in the property, provided the original transfer occurred more than one year before the ill spouse's death. I.R.C. § 1014(e).

c. Because of the unlimited marital deduction, there are no gift tax consequences to inter vivos transfers between spouses. If, however, the donee spouse is not a U.S. citizen, the unlimited marital deduction does not apply. The maximum amount a donor spouse can transfer annually free of gift tax to a noncitizen spouse is $103,000, provided the gift is of a present interest and is in a form that would qualify for the marital deduction if it were made to a U.S. citizen spouse. I.R.C. § 2523(i)(2) and 2503(b).

2. Annual exclusion gifts when death is imminent are almost always appropriate.

a. However, a gift does not provide a step-up basis, so gifts of highly appreciated assets may not be desirable.

b. When death is imminent, the client should make gifts that will not be included in the estate if the client dies within three years of the gift. I.R.C. § 2035(d).

c. Use of Durable Powers of Attorney (DPOA) to make gifts.

(1) DPOA must expressly authorize making gifts. For example, see *Estate of Swanson v. U.S.*, 2000 U.S. Claims LEXIS 46 (March 13, 2000).

(2) Exception: Virginia and Alabama.

(3) Any unauthorized gifts made pursuant to the DPOA are includable in the donor's estate.

3. Selecting assets to give as gifts.

a. Do not give property with a basis higher than its current fair market value (FMV) if the donee is someone other than the donor's spouse.

(1) Instead, the donor should sell the property, realize the loss (for income tax purposes) and make a gift of the proceeds.

(2) If the property is given away, the donee's basis in the property for determining a loss is its FMV at the time of the gift. I.R.C. § 1015(a).

(3) If the donee is the donor's spouse, the donor should make an inter vivos marital deduction gift to the spouse in order to preserve the potential tax benefits. The donee spouse will receive the donor spouse's adjusted basis for purposes of determining loss. I.R.C. § 1041(b), expressly overrides the general rule of § 1015.

b. Do not give away property with a positive tax attribute, such as property that generates tax-exempt income or is expected to produce an income tax loss or that shelters other income.

c. Do not give away property that is encumbered and that has a basis less than the present balance of the encumbrance. The assumption of the indebtedness by the donee will cause the donor to realize gain to the extent the debt exceeds the basis of the property.

d. Do not give "donor-owned" life insurance if death is imminent. A gift of the incidents of ownership in a life insurance policy within three years of death will not remove the policy proceeds from the donor's estate because of the three-year recapture rule of I.R.C. § 2035(d)(2).

e. It is almost always better to give cash, and it certainly is better to receive cash!

D. Gifts to Minors (see Appendix C).

1. Outright gift.

| Advantages | Disadvantages |
|---|---|
| The entire property is removed from the transferor's estate. | The property is gone! The transferor has lost the income and use of the property as an asset. |
| The property's future appreciation is removed from the transferor's estate. | The recipient of the property may not have sufficient maturity, judgment, or expertise to properly manage the property. |
| Income produced by the property is shifted to the recipient, often in a lower tax bracket than the transferor. | The recipient takes a carryover basis (same as the transferor's basis) in the property. |
| | The property is subject to the claims of the recipient's creditors. |

2. Trusts and UGMAs/UTMAs.

E. Tax on Unearned Income of Children Under 14 (see IRS Publication 929, Tax Rules for Children and Dependents).

1. Children under 14 may have to pay tax as if part of their unearned income (e.g., dividends, interest) had been received by their parents. The first $700 of the under-age-14 child's unearned income is tax-free, and the second $700 is taxed at the child's rate (usually 15%). Any unearned income over $1,400 is taxed to the child at the parents' marginal rate.

2. The tax applies whether property was transferred to child as gift under a custodian arrangement (Uniform Gift to Minors Act), trust, inheritance, or unearned income generated from savings.

3. Allocable parental tax means the tax that would be imposed on the parents' taxable income if their income included the net unearned income of all of the parents' children under 14.

   a. If more than one child under 14 is involved, must determine each child's share of allocable parental tax.

   b. Child's tax liability must be recomputed if there's a change in the parent's tax.

   c. If child's parents are divorced, the parental tax is based on the income of the custodial parent.

4. Reporting the income.

   a. On parents' return - Form 8814.

   b. On child's return - Form 8615.

## VII. THE FEDERAL ESTATE TAX.

A. Scope. An excise tax on the transfer of property at death.

B. Property Included in the Gross Estate (§§ 2033 - 2046).

1. Property decedent owns at death.

2. Life insurance.

3. Annuities (e.g., SBP).

4. Property transferred with certain "strings attached."

5. Joint property.

a. The value of property decedent owned in joint tenancy with a right of survivorship, except to the extent it can be shown that the surviving co-tenant contributed to the acquisition of the property.

b. Special rules apply to certain joint interest held by spouses, in which each spouse will be considered as owning one-half interest in the joint property for estate tax purposes.

(1) The estate of the first spouse to die includes only one-half of the value of a “qualified joint interest” in property regardless of which spouse furnished the consideration for the property. For purposes of this provision, “qualified joint interest” is defined as any interest in property held solely by spouses as joint tenants with the right of survivorship or as tenants by the entirety. I.R.C. § 2040(b).

(2) For gifts made to noncitizen spouses after July 14, 1988, the entire value of jointly held property is includible in the deceased spouse's estate, reduced by the portion of the property for which consideration was received. I.R.C. § 2056(d)(1)(B).

6. The value of all property with respect to which the decedent had a general power of appointment at death.

7. The value of certain transfers of life insurance by the insured; releases or exercises of general powers of appointment; and releases of certain powers in property interests retained from previous inter vivos transfers (within three years before death).

C. Deductions from the Gross Estate (I.R.C. §§ 2051- 2056).

1. Expenses and indebtedness (I.R.C. § 2053).

2. Losses (I.R.C. § 2054).

3. Charitable bequests (I.R.C. § 2055).

4. Marital deduction (I.R.C. § 2056).

a. Eligibility.

(1) U.S. citizen spouses get an unlimited marital deduction.

(2) Non-U.S. citizen spouses do not get a marital deduction. (However, can set up a Qualified Domestic Trust - § 2056A).

b. Effects.

(1) Any amount given during life (I.R.C. § 2523) or at death (I.R.C. § 2056) to a surviving U.S. citizen spouse escapes federal estate tax at decedent's death.

(2) Tax deferral for survivor's lifetime.

(a) The unlimited marital deduction for a citizen spouse permits the first spouse to die to pass his or her entire estate to the surviving spouse without any federal estate tax being due.

(b) At the surviving spouse's death, however, a federal estate tax will be due on whatever property the surviving spouse still owns or has the right to benefit from.

(c) Because the property passing under the marital deduction will be diminished by the estate taxes payable at the later death of the second spouse, some planning may be appropriate.

D. Additional Federal Estate Tax Rules.

1. Inherited property is not income to the recipient.

2. Inherited property gets a stepped-up basis.

## VIII. ESTATE PLANNING FOR SERVICE MEMBERS.

A. When is more detailed estate planning necessary?

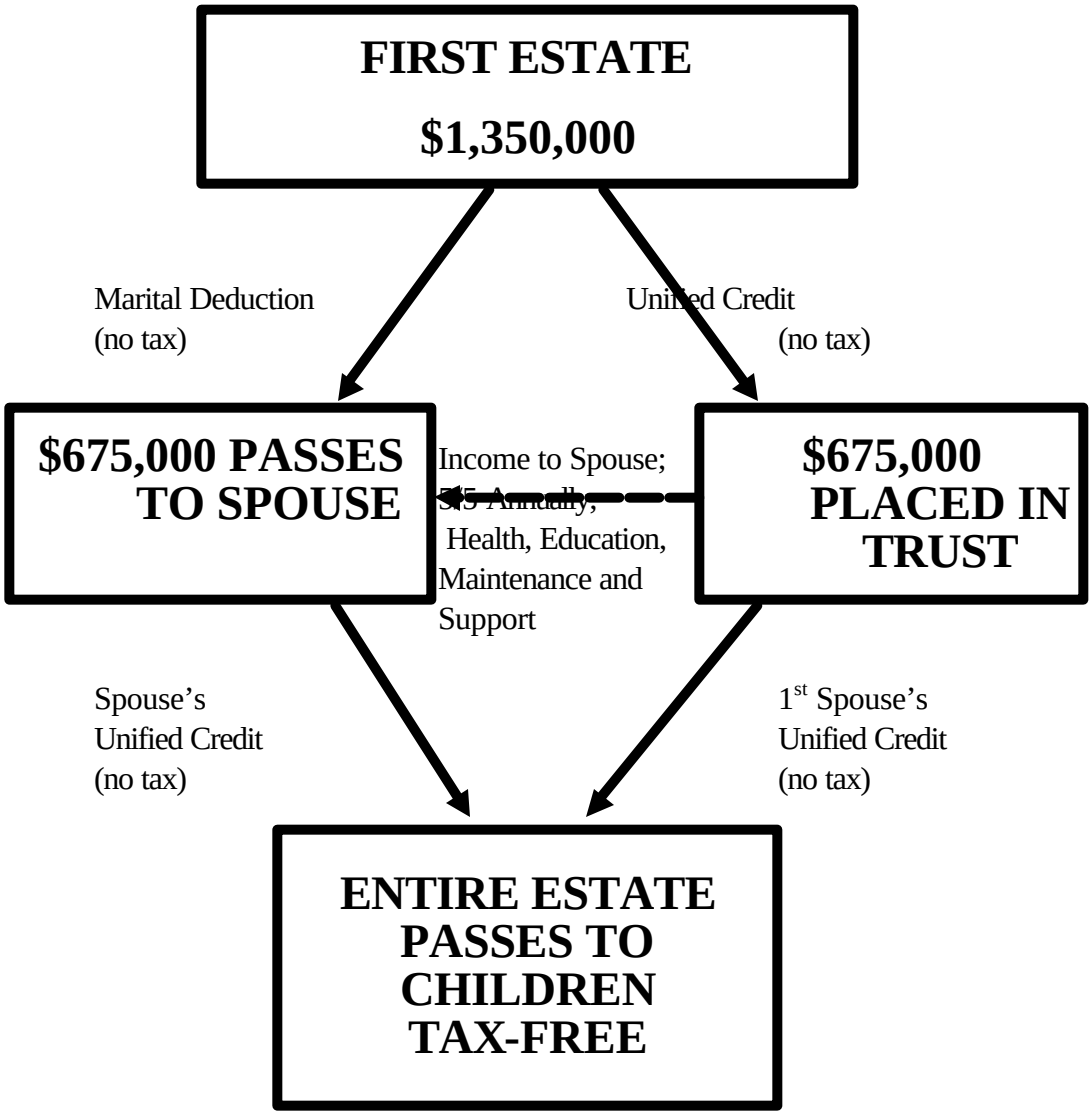
1. Gross estate > unified credit.

2. Non U.S. spouse.

3. “Mixed or blended” families.

4. Minor children or a disabled child.

B. Effective Use of the Unified Credit.




The key to maximizing the effective use of the unified credit is to have a measured amount of the estate (i.e., $675,000 in 2000-2001) go to a "credit shelter" trust. This trust is taxed at the first spouse's death, with the tax being paid by the deceased's unused unified transfer credit. This "bypass trust" may provide a life income interest to the surviving spouse as represented above by the dotted line.

C. Methods using the Unlimited Marital Deduction.

1. Outright gift of qualifying property.

2. Trusts.

a. Estate Trust - distributes to surviving spouse's (SS) probate estate at death, for estate tax and probate purposes. Not favored except where important to have income accumulated in trust and not paid out during SS's life. This is only type of marital deduction trust that allows income accumulation. All assets in this trust are in SS's estate for estate tax purposes and are subject to probate.

b. Marital Trust – (sometimes referred to as an "A Trust") Spouse has the right to all income plus the right to say during life and / or at death who receives the remaining principal.

c. Qualified Terminable Interest Property (QTIP) Trust (Appendix B) - Spouse has the right to all income during life. No one else can benefit from the principal, but the donor (or decedent) can direct who will get the principal at the surviving spouse's death.

D. Methods using the Marital Deduction and Unified Credit.

1. Credit Shelter Trust (a.k.a. "By-Pass Trust" or "Exemption Trust")

a. The credit shelter trust or A-B trust is designed to make certain that the unified credit of each spouse is used, while allowing the surviving spouse to have the use of the deceased spouse's assets during the remainder of his or her lifetime.

b. A decedent can pass any size estate to his/her spouse without concern for the federal estate tax because of the unlimited marital deduction. However, when the surviving spouse later dies and passes the combined estate to his/her heirs, there is only the surviving spouse's unified credit to reduce the estate tax. This results in the first spouses unified credit amount being wasted.

c. Because of tax deferral of the unlimited marital deduction, the taxation occurs at the death of the second spouse (if estate exceeds unified credit).

d. To preserve the unified credit of the first spouse to die, many couples use a credit shelter trust. When the first spouse dies, an amount equal to (or less than) the unified credit is placed in the credit shelter trust. This trust is not taxed at that time nor later at death of the surviving spouse, even though it may appreciate greatly in value.

e. The surviving spouse can have access to the income from the credit shelter trust for life, and can use the principal if necessary for health, education, support and maintenance.

f. Result:

(1) At the death of the surviving spouse the amount in the credit shelter trust is not included in the estate of the second spouse to die. The second spouse to die can then pass an estate to his/her beneficiaries up to their unified credit amount with any estate taxation.

(2) The credit shelter trust (Trust B) is generally not taxed at the death of either spouse. The marital share (Share A) is generally taxed when the surviving spouse later dies, but an estate less than the unified credit will result in no estate taxes payable.

2. Disclaimers (I.R.C. § 2518).

a. Can be used as an **after**-death planning tool. Can be used to shift property to a younger generation while avoiding a gift tax liability to the disclaiming party.

b. Beneficiary's are not forced to take what is coming to them under another person's will. The beneficiary disclaims a bequest.

c. If a qualified disclaimer is made by someone who does not wish to accept an interest in property, the interest disclaimed will be treated for federal tax purposes as if it had never been transferred to that person, and he / she will not be treated as having made a gift, for either gift or estate tax purposes, to the person to whom the interest passes by reason of the disclaimer.

d. A surviving spouse can make a valid disclaimer even though the property disclaimed goes to a trust in which he / she has an income interest, so long as this result is without the surviving spouse's direction. As a result, a provision is included in the decedent's will directing the disposition of any disclaimed property.

e. Mechanics of disclaimers.

(1) To be effective for tax purposes, a disclaimer must be qualified. A qualified disclaimer is an irrevocable and unqualified refusal to accept an interest in property.

(2) A qualified disclaimer must satisfy four requirements:

(a) The refusal must be in writing;

(b) The refusal must be received by the transferor, his or her legal representative, or the holder of legal title to the property not later than nine months after the day on which the transfer is made;

(c) The person who disclaims must not have accepted the interest or any of its benefits before making the disclaimer; and

(d) The interest disclaimed must pass to someone other than the person making the disclaimer without any direction on the part of the person making the disclaimer.

f. Both state and federal law applies to disclaimers.

(1) State law determines ownership.

(a) The extent to which disclaimers are effective for nonprobate transfers is unclear in many jurisdictions.

(b) Both the UPC and the tax law recognize disclaimers of nonprobate transfers. UPC § 2-801; Treas. Reg. § 25.2518-2(c)(4).

(2) Federal law determines tax consequences.

g. Disclaimers and Joint Tenancy Interests.

(1) In general, an individual must make a qualified disclaimer of the interest to which the disclaimant succeeds upon creation of the joint tenancy within nine months after the creation of the tenancy. Treas. Reg. § 25.2518-2(c)(4)(i).

(2) However, a qualified disclaimer of the survivorship interest must be made no later than nine months after the death of the first joint tenant to die. The timing for disclaiming the survivorship interest is not affected by the power of the disclaimant to unilaterally sever the tenancy under local law. *P.M. Kennedy*, CA-7, 86-2 USTC, rev'g TC, 51 TCM 232, CCH Dec. 42,804, TC Memo. 1986-3. Similarly, *J.S. Dancy Est.*, CA-4, 89-1 USTC, rev'g TC, 89 TC 550, CCH Dec. 44,184; *G.L. McDonald*, CA-8, 88-2, USTC, rev'g TC, 89 TC 293, CCH Dec. 44,118, cert denied.

(3) Special rules apply to disclaimers of joint tenancy interest in bank, brokerage, and investment accounts. The transfer creating the survivorship interest in a cotenant's contributions occurs on the death of the cotenant only if the contenant possessed the right to unilaterally regain sole possession of the contributions. In such case, the surviving cotenant may make a qualified disclaimer within nine months of the deceased cotenants death. Treas. Reg. § 25.2518-2(c)(4)(iii). In addition, a joint tenant may not make a qualified disclaimer of any portion of the joint interest attributable to consideration furnished by that tenant.

h. For a good analysis of the law and case law of disclaimers, see, *Disclaimers: New Developments, Opportunities, and Unsettled Areas*, by Virginia F. Coleman, ALI-ABA Course of Study Materials, Advanced Estate Planning Techniques, Volume I, February 1999, available on LEXIS.

3. Credit Shelter or By-Pass Disclaimer Trust.

   a. The will first makes an outright gift of all the desired property to the surviving spouse followed by an express provision that any property that the surviving spouse disclaims passes into a bypass trust for the surviving spouse's benefit.

   b. The benefit for the bypass disclaimer trust is that the surviving spouse can examine the actual situation at the time of the deceased spouse's death and make the best decision.

4. Qualified Terminable Interest Property Trust (QTIP Trust) (a.k.a. "A-B-C Type Trust") (I.R.C. § 2056(b), see Appendix B).

   a. Sometimes a third trust is added to the A-B Trust called a QTIP trust.

   b. The QTIP allows the first spouse to die to give lifetime benefits (like income earned on the trust assets) to his / her spouse, while still retaining the right to name the persons who will ultimately receive the trust assets.

   c. Useful in protecting children of a prior marriage from being cut off by the surviving step-parent.

   d. Reduces the possibility of estate passing to a subsequent marriage partner or "close friend" of the surviving spouse.

5. Qualified Domestic Trust (QDOT) (I.R.C. § 2056A, see Appendix G).

a. Transfers at death to a non-citizen spouse will not qualify for the unlimited marital deduction unless the assets pass to a QDOT.

b. If a QDOT is not used, then all assets above the decedent's unified credit amount are taxable upon transfer to a non-citizen spouse.

c. The QDOT rules require a U.S. Trustee and other measures which help ensure collection of estate tax at the surviving non-citizen spouse's later demise.

d. Gift Tax Note: Can gift up to $100,000 per year to non-citizen spouse during life.

e. QDOT Requirements:

(1) Essentially a QTIP with QDOT language established in the will;

(2) At least one trustee us s U.S. citizen / domestic corporation;

(3) Any distribution of corpus is subject to estate taxation while income is not;

(4) Trustee must make irrevocable election on estate tax return;

(5) If the trust assets are over $2 million certain security arrangements required.

# IX. ESTATE TAX RETURN.

A. Steps in filing the estate tax return.

1. Executor files Form 706.

2. Filed only if gross estate exceeds $675,000 in 2000 - 2001.

3. File no later than nine months after date of decedent's death unless extension obtained.

4. The estate tax is due when the return is filed unless an extension is obtained.

5. Form 706NA required for estate of nonresident alien if that part of the gross estate situated in U.S. exceeds $60,000.

B. Determining the Taxable Estate.

GROSS ESTATE (as defined in §§ 2033-2044)
**LESS**: i) Administrative expenses, losses, indebtedness, etc. (deductible under §§ 2053 and 2054);
ii) Marital deduction (deductible under § 2056); and
iii) Charitable deduction (deductible under § 2055).
**EQUALS:** TAXABLE ESTATE (as defined by § 2051).
**ADD:** The amount of all taxable gifts made during life that are not included in the gross estate.
**EQUALS:** The "Grossed up estate."
**DETERMINE** tentative tax from Tax Schedule.
**SUBTRACT:** The amount of gift tax payable on all prior taxable gifts not included in gross estate.
**REDUCE** by the unified credit to determine estate tax due.

**EQUALS** the amount of estate tax due.

## FEDERAL ESTATE TAX ILLUSTRATION

CALCULATION OF FEDERAL ESTATE TAX

EXAMPLE 4: MS. WINNER DIES IN 2000.

| | | | |
|---|---|---|---|
| STEP 1: | Gross estate: | | $ 950,000 |
| STEP 2: | Deductions: | | |
| | Admin. expenses: | 50,000 | |
| | Marital deduction: | 0 | |
| | Charitable deduction: 100,000 | | 150,000 |
| STEP 3: | Taxable estate: | | 800,000 |
| | PLUS: Sum of taxable gifts: | | 750,000 |
| | = Grossed up estate | | 1,550,000 |
| STEP 4: | Tax on $1,500,000 | | 578,300 |
| STEP 5: | Subtract gift tax **payable** on prior gifts: | | |
| | Total gifts: | $750,000 | |
| | Tentative tax: | 248,300 | |
| | LESS unified credit: | 220,550 | |
| | = Gift tax payable: | | 27,750 |
| STEP 6: | Gross estate tax | | 550,550 |
| | LESS unified credit: | | 220,550 |
| | Estate tax due: | | $330,000 |

## X. CONCLUSION.

# APPENDIX A

## FEDERAL ESTATE AND GIFT TAX RATE SCHEDULE

| COLUMN A | COLUMN B | COLUMN C | COLUMN D |
|---|---|---|---|
| Taxable amount over | Taxable amount not over | Tax on amount in Column A | Rate of tax on excess over amount in Column A |
| $ | $ | $ | Percent |
| 0 | 10,000 | 0 | 18 |
| 10,000 | 20,000 | 1,800 | 20 |
| 20,000 | 40,000 | 3,800 | 22 |
| 40,000 | 60,000 | 8,200 | 24 |
| 60,000 | 80,000 | 13,000 | 26 |
| 80,000 | 100,000 | 18,200 | 28 |
| 100,000 | 150,000 | 23,800 | 30 |
| 150,000 | 250,000 | 38,800 | 32 |
| 250,000 | 500,000 | 70,800 | 34 |
| 500,000 | 750,000 | 155,800 | 37 |
| 750,000 | 1,000,000 | 248,300 | 39 |
| 1,000,000 | 1,250,000 | 345,800 | 41 |
| 1,250,000 | 1,500,000 | 448,300 | 43 |
| 1,500,000 | 2,000,000 | 555,800 | 45 |
| 2,000,000 | 2,500,000 | 780,800 | 49 |
| 2,500,000 | 3,000,000 | 1,025,800 | 53 |
| 3,000,000 | . . . . . | 1,290,800 | 55 |

## Using the Unified Rate Schedule

Assume you are single and have a taxable estate of $700,000. Look in column A until you see "Taxable amounts over $500,000" and in column B, "Taxable amounts not over $750,000." In column C, you see that the tax on $500,000 is $155,800. In column D, you see that the excess amount over $500,000 is taxed at a 37% rate; $700,000 minus $500,000 = $200,000. A tax of 37% on $200,000 is $74,000. Add that amount to $155,800 to get the tentative tax of $229,800. This amount is reduced by the unused unified credit, $220,550. Thus, estate tax liability here is $9,250.

This same tax table is used to determine gift tax liability. Assume you make a single gift of $200,000. The tax would be computed as follows: First, deduct the $10,000 annual per donee exclusion from the $200,000. The tax on the remainder ($190,000) is $38,800 (the tax on $150,000) plus $12,800 (32% of $40,000). The total tentative tax is $51,600. If you have previously used your unified credit, you will owe $51,600. If you have not used any of your unified credit, you pay no tax on this gift, instead using $51,600 of your unified credit, leaving a $168,950 credit remaining (or more, since the unified credit is steadily increasing until 2006) to offset future gift or estate taxes.

## APPENDIX B

## QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP)

The unlimited marital deduction is not available for property passing to the surviving spouse if the interest will terminate or fail because of a lapse of time or the occurrence of an event or the failure of an event to occur and then pass to some other person (I.R.C. ə 2056(b)). If the surviving spouse's interest will terminate upon his/her death or remarriage, the interest is terminable and does not qualify for the marital deduction. It will not be included in the surviving spouse's estate. This terminable interest rule ensures that property escaping estate tax on the death of the decedent spouse will be subject to tax on the subsequent death of the surviving spouse.

For decedents dying after 1981, The Economic Recovery Tax Act of 1981 introduced the QTIP concept. Under this concept, if the bequest passes to a QTIP trust and the decedent's executor elects QTIP treatment, taking the marital deduction, such deduction will be allowed. To qualify, the surviving spouse must be entitled to receive all the income from the trust, payable at least annually, for life, and no one may have the power to appoint the property to any third person during the surviving spouse's lifetime. Because this type of bequest does not require the surviving spouse to have the ultimate power of disposition over the trust assets, many estate owners prefer it over the outright bequest. By using a QTIP trust, the decedent can leave the surviving spouse the income only during the survivor's life and the remainder to the children on the surviving spouse's death. This device enables the decedent to defer the estate tax until the surviving spouse's death, without giving the surviving spouse control over the ultimate disposition of the marital deduction bequest.

The value of the bequest to a QTIP trust qualifies for the marital deduction only if the decedent's executor elects to take it on a timely filed federal estate tax return. The election is irrevocable (I.R.C. § 2056(b)(7)(B)(v)). It may not always be beneficial to make the QTIP election, because the assets in the QTIP trust will be includable in the surviving spouse's estate (I.R.C. § 2044).

Consider a situation where Husband's will divides his $1,350,000 estate into two trusts: $675,000 in a QTIP trust; $675,000 in a left over or residuary trust. The provisions of both trusts are identical: income to Wife for life, principal to Children upon Wife's death. Wife has no other powers over, or interests in, either trust. When Husband dies, his executor elects to have the QTIP trust qualify for the marital deduction. Husband's estate pays no tax ($675,000 marital deduction and $675,000 exemption equivalent to the credit). When Wife dies, while the value of the QTIP trust is taxed in Wife's estate because of the election made by Husband's executor, that $675,000 is offset by Wife's own credit.

## APPENDIX C

## BASIC FORMS OF GIFTS TO MINORS COMPARED

| Item Compared | Outright Gift | Custodianship | Guardianship | Trusts | | |
|---|---|---|---|---|---|---|
| | | | | Regular | Sec 2503(b) | Sec 2503(c) |
| Use of income for minor | Generally, no | Yes | Yes | Trust controls | Mandatory Distribution | Discretionary |
| Use of principal for minor | Generally, no | Yes | Yes | Trust controls | Trust controls | Discretionary |
| Close judicial supervision | No | No | Yes | No | No | No |
| Accounting | No | Record kept; possible accounting | Yes | Generally, only private records kept | | |
| Investments | Unlimited | Limited | Generally, unlimited | Generally, unlimited--within donor's control | | |
| Minor gets title when: | Immediately | | | On termination or earlier distribution of income or principal | | |
| Minor gets possession when: | Immediately | Age of majority | | Trust controls | | Generally, age of majority |
| Minor can dispose of gift property | Generally, at majority; younger for money | Age of majority | | Trust controls | | |
| Fiduciary's death | No fiduciary | Possible inclusion of fund in fiduciary's estate | No effect, except on successor appointment | No effect, generally, if trust is irrevocable and settlor retains no interest; otherwise includable in settlor's estate | | |
| Minor's death | Heirs of minor take unless minor has will effective under local law | | | Trust controls | | Estate of minor or appointees |
| Tax liability-distributed income | Minor* | Minor is generally taxable except as it is used to discharge parent's obligation of support (then taxable to parent) | | | | |
| Tax liability-undistributed income | Minor* | | | Trust | Must distribute | Trust |
| Gift tax annual exclusion | Yes | Yes | Yes | If present income interest | Yes | Yes |
| Exclusion of gift from donor's estate | Yes | Yes, except if donor is custodian | Yes | Yes, except if settlor dies possessing forbidden powers or rights | | Yes |
| Cost | None or minimal | None or minimal | Legal fees, bonding costs, possible guardian fees | Legal fees varying with complexity, size of trust and other factors, possible trustee fees | | |

* Unearned income of a minor under the age of 14 in excess of $1,400 annually is taxed at the parent's top rate, assuming the parent's rate is higher than that of the child.

## APPENDIX D

## COMMON TRUST TYPES - BENEFITS & TAXATION

| Trust Type | Characteristics | Nontax Benefits | Tax Treatment | | |
|---|---|---|---|---|---|
| | | | Income | Estate | Gift |
| Irrevocable Living | Settlor gives up property forever. | Supervised control & investment; avoids probate. | Currently distributed. Taxed to Bs. Accumulated first to trust, then to B on dist. | Not in settlor's estate unless life ins. on life transferred within 3 years of death. | Taxable to settlor. Annual exclusion available for present gift of income interest, not remainder. |
| Revocable Living | Settlor can revoke. May be funded or unfunded. | Same as above. | Taxable to settlor. | Includable in settlor's estate. | No liability. |
| Testamentary | Created by will. | Supervised control & investment. | Same as for irrevocable living trust. | Includable in creator's estate. Can avoid tax on death of life B. | No liability. |
| Grantor Retained Interest Trust (GRIT), GRAT GRUT | Grantor reserves a qualified term interest in the form of an annuity or unitrust under I.R.C. § 2702, after which principal passes to remaindermen. | Often negligible. | Taxable to settlor (grantor). | Not taxable in grantor's estate unless grantor dies w/in reserved income term, subject to special rules under I.R.C. § 2702. | Tax based on value of remainder at time of creation of trust. |
| Standby | Generally revocable, but may be irrevocable on settlor's permanent disability. | Supervised control and investment on settlor's disability or absence. | Taxable to settlor. | Includable in settlor's estate. | No liability. |
| Pourover | Living trust, revocable or irrevocable, funded or unfunded. | Receptacle for employee benefits, life ins. proceeds, estate assets. | Taxable to settlor. | Same as irrevocable or revocable trust depending on revocability. | No liability. |

GRAT, Grantor retained annuity trust: a trust to which the grantor transfers income-producing property in exchange for the right to receive a fixed cash annuity for a specified term of years or for the grantor's life (the grantor's retained interest).

GRUT, Grantor retained unitrust: identical to the GRAT, except that, the grantor retains the right to receive a fixed percentage of trust value annually.

**APPENDIX E**

## XI. GENERATION-SKIPPING TRANSFER TAX (I.R.C. §§ 2601-2663).

Defined. A tax on a generation-skipping transfer, i.e., a transfer of income or principal to a beneficiary assigned to a generation at least two generations below the generation of the transferor.

## XII. CONCEPTS.

A. Skip Person - person who is two or more generations below transferor's generation.

B. Generation-Skipping Transfers (GST).

C. Taxable Termination.

D. Direct Skip.

E. Taxable Distribution.

F. Tax Computation.

G. Valuation.

H. Who Pays?

I. Tax Base and Liability.

1. Taxable distribution. The base for the GST is the value of the property received by the transferee, reduced by any expenses incurred by the transferee in connection with the determination or collection of the GST tax. If the trust pays the GST tax for the recipient of a taxable distribution, the amount of the GST so paid is considered a taxable distribution. The transferee is liable for the GST tax.

2. Taxable termination. The taxable amount of a taxable termination is the fair market value of all property at the time of termination with respect to which the taxable termination has occurred, reduced by the allocable deductions. The trustee is liable for the GST tax.

3. Direct skip. The taxable amount of a direct skip is the fair market value of the property received by the transferee. The GST tax base does not include the amount of any federal estate or federal gift tax payable with respect to the transfer.

   a. If the direct skip is a taxable gift, the amount of the gift for purposes of the federal gift tax is increased by the amount of any GST tax imposed on the transferor with respect to the gift (I.R.C. § 2515).

   b. In the case of a direct skip from other than a trust, the transferor is liable for the GST tax (I.R.C. § 2603(a)(2) and (3)).

J. Exemption and Exclusion.

1. A $1,000,000 exemption allocable by the transferor or his executor to any property the transferor has transferred that is subject to GST.

2. Predeceased child exclusion. A transfer is not considered a direct skip where the transfer is made to a grandchild of the transferor (or of the transferor's spouse or former spouse) if the parent of the recipient is a lineal descendant of the transferor and is dead at the time of the transfer.

3. Special exclusions. Excluded from the GST tax are any amounts paid on behalf of an individual for educational and medical expenses and the annual per donee exclusion.

K. Tax Computation. The amount of the GST is the taxable amount (tax base) multiplied by the "applicable rate" (I.R.C. § 2602).

1. Applicable rate - the maximum federal estate tax rate in effect on the date of the generation-skipping transfer multiplied by the "inclusion ratio" (I.R.C. § 2641).

2. Inclusion ratio - the reciprocal of a fraction that has, as its numerator, the amount of the GST exclusion allocated to the trust (or direct skip property) and, as its denominator, the value of all the property transferred to the trust (or transferred in the direct skip) less any federal estate or death taxes actually paid from the property).

Example: On Parent's death in 1998, $2,000,000 was transferred in trust for grandchild. Assume the full $1,000,000 GST exemption is allocated to the trust and that there are no permitted deductions. The inclusion ratio is:

$$1 - \frac{\text{GST exemption}}{\text{property value}} \text{ or } \frac{\$1{,}000{,}000}{\$2{,}000{,}000} = .5$$

The GST tax rate is .5 x .55 = .275, and the GST is .275 x $2,000,000 or $550,000.

L. Planning Consideration. Transfers that "skip" a generation are subject to special complex tax rules that ordinarily are beyond the scope of legal assistance.

## GENERATION-SKIPPING TRANSFER TAX COMPUTATION

In 1998 Grandfather gave Grandchild $2,010,000.

Determine the taxable gift, the gift tax, and generation-skipping transfer tax (GSTT) liabilities (without regard to the $1,000,000 exemption). Assume further that the grandfather paid the GSTT for the grandchild.

GENERATION-SKIPPING TAX

| | |
|---|---|
| Taxable gift: (gift less annual exclusion) | $2,000,000 |
| Applicable rate: | .55 |
| GST tax: | $1,100,000 |

GIFT TAX

| | |
|---|---|
| Taxable gift: | $2,000,000 |
| + GST tax | $1,100,000 |
| Total taxable gifts: | $3,100,000 |
| Tax (from schedule) | $1,345,800 |
| Unused unified credit: | $ 192,000 |
| Gift tax liability: | **$1,153,000** |

**APPENDIX F**

**FEDERAL TAX CONSEQUENCES UPON DEATH**

## XIII. DECEDENT'S FINAL INCOME TAX RETURN.

A. Filing requirements.

1. A return on behalf of a decedent must be filed if 1998 gross income exceeds:

   a. $12,700 if a joint return is filed.

   b. $2,750 if married filing separately.

   c. $7,050 if filing a single return.

2. A return should also be filed to obtain a refund. File Form 1310, Statement of Person Claiming Refund Due a Deceased Taxpayer.

3. The executor or personal representative may file a joint return with the surviving spouse. If an executor or personal representative has not been appointed, the surviving spouse may file the joint return.

4. If decedent dies after close of year, but before return is filed, a final return for the year of death must also be filed.

B. Income to Include in Final Return.

1. All income actually or constructively received before death must be included. All rules of income applying to individual taxpayers apply.

2. Death while Serving in a CZ/QHDA

a. A service member who dies while in a CZ/QHDA is entitled to an abatement of the income taxes for the tax year in which the death occurs. I.R.C. § 692(a). The abatement also applies if the death occurred as a result of wounds, disease or injury incurred while serving in a CZ/QHDA.

b. The income tax liability of a deceased service member is canceled for the last taxable year, ending on the date of death. The income tax liability is also canceled for any prior taxable year ending on or after the first day the service member served in a CZ/QHDA. I.R.C. § 692(a)(1); Treas. Reg. § 1.692-1(a)(2)(I). Upon the death of a service member as stated above, the service member will not be assessed any amount of income tax for prior taxable years. I.R.C. § 692(a)(2); Treas. Reg. § 1.692-1(a)(3).

c. A service member who dies in a CZ/QHDA is entitled to forgiveness of taxes for previous years in which the statute of limitations is still open. I.R.C. § 692(a)(2). The survivor is entitled to a refund of any taxes paid by the deceased service member in prior years for which the service member, if alive, could file an amended return. Generally, an individual can only file an amended return for three years. I.R.C. § 6511(a).

(1) For example, if a service member were to die in a CZ/QHDA in 1999, taxes owed or paid by that individual for 1996, 1997, 1998, and 1999 would be forgiven, provided that the survivor files the appropriate returns prior to 15 April 2000. If the survivor fails to file an amended return by 15 April 2000, the survivor could still receive a refund for tax paid by the decedent in 1997, 1998, and 1999, provided that the survivor files the appropriate returns prior to 15 April 2001.

(2) To claim the refund, the surviving spouse needs to file a Form 1040, or a 1040X if it is an amended return with the Internal Revenue Service . Rev. Proc. 85-35, 1985-2 C.B. 433. In addition, Form 1310 and a certification from the Department of Defense or the Department of State that the death was the result of terrorist or military action outside the United States must be attached. If the return in question is for a joint return, an apportionment must be done between the decedent's income and the surviving spouse's income. *See* Treas. Reg. § 1.692.1(b); Rev. Rul. 85-103, 1985-2 C.B. 176; Major Mark Henderson, *Tax Law Note, Assisting Survivors When Spouse Died in a Combat Zone*, ARMY LAW., May 1997, at 68.

(3) The survivor will also be entitled to a refund of any income taxes that were withheld from the service member's income during the tax year in which the service member died. If there is or has been an assessment of unpaid tax, there is an abatement of the assessments. In addition, if the amount of unpaid tax was collected after the date of death of the service member, the amount collected will be credited or refunded as an overpayment.

d. Where a service member has filed a joint return with his spouse, the tax abated, credited, or refunded will be prorated as a portion of the joint tax liability. The amount abated, credited, or refunded shall be an amount equal to the portion of the joint tax liability which is the same percentage of the joint tax liability as a tax computed upon the separate income of the service member is the sum of the tax computed upon the separate income of the service member and his spouse. Treas. Reg. § 1.692-1(b).

e. If the service member was in a missing status, the date of the death will be considered to be the date on which there has been a determination of death made. I.R.C. § 692(b). However, there will not be a forgiveness, abatement, or refund of taxes beginning more than two years after the date of termination of combatant activities. I.R.C. § 692(b)(2). Therefore, where a service member has been MIA in a CZ/QHDA and is found to have died in an earlier year, the surviving spouse is allowed to treat the date of death as either the date on which the official determination is made that the service member died, or the date two years after combatant activities in the CZ/QHDA have terminated, whichever is earlier. I.R.C. 2 (a)(3); Rev. Rul 76-468, 1976-2 CB 202.

3. Income in respect of decedent.

a. Items of income that decedent earned or was entitled to before death (i.e., income that was not recognized for income tax purposes until after the decedent's death). Included in gross income of:

(1) The decedent's estate,

(2) The beneficiary, or

(3) Anyone to whom the property is properly distributed.

b. Character of income remains the same.

c. Special rules for Series EE bonds.

(1) Executor can elect to include all interest earned in decedent's return.

(2) If election is not made, the interest earned up to date of death is income in respect of decedent.

C. Deductions, Exemptions, and Credits.

1. Generally, the rules for deductions, exemptions, and credits are the same allowed to individuals.

2. Medical expenses paid before death are deductible on decedent's final return. Executor may also treat all medical expenses paid by the estate one year after the date of death as a deduction.

3. If deductions are not itemized, the full standard deduction may be claimed.

4. The personal exemption is allowed in full.

## XIV. ESTATE INCOME TAX RETURNS.

A. An estate is considered a separate taxable entity and continues to exist until the final distribution of assets of the estate.

1. Must be reported on an annual basis - executor chooses accounting method.

2. Tax is generally computed in same manner, except no personal exemption is allowed and the standard deduction is only $600. Also, an estate is subject to much higher tax rates.

B. Filing Requirements.

1. Form 1041, U.S. Fiduciary Income Tax Return, must be filed if estate Gross income exceeds $600.

2. A Schedule K-1, Form 1041, must be provided to each beneficiary.

3. Form 1041-ES, Estimated Tax for Fiduciaries, must be filed if estate is open for over two years.

4. Copy of will need not be filed.

C. Taxable Income.

1. Gross income consists of all items of income received during year (interest, rents, royalties, dividends, etc).

2. Income in respect of decedent received by the estate before settlement.

3. Gain from sale of property if title has not yet vested in beneficiary.

   a. Basis is fair market value or basis on alternative valuation date.

   b. File Schedule D, Form 1041, to report capital gains.

D. Deductions.

1. Charitable contributions from income that is included in gross income.

2. Losses sustained on sale of property, or casualty and theft losses.

3. Medical and dental expenses paid by the estate (and not deducted on decedent's final return).

4. Expenses of administration not claimed as estate tax deduction.

5. Exemption deduction of $600 per estate.

E. Distribution Deductions.

1. An estate is allowed a deduction for all income or property actually distributed to beneficiaries out of the estate.

2. The deduction for distributions is limited to "distributable net income" (DNI). DNI is determined on Schedule B, Form 1041. It is the estate's income available for distribution.

3. A distribution deduction may be taken for income even though distribution is not made until final dissolution.

4. Support allowances are deductible when made.

F. Termination of the Estate.

1. An estate will be considered terminated when all assets are distributed (even if a small amount is set aside for contingent liabilities).

2. Unused loss carryovers and deductions existing on termination of an estate are allowed to beneficiaries succeeding to the property.

## XV. RECIPIENT'S TAX CONSEQUENCES.

A. Gifts and Bequests. Not income to recipient.

B. Distributions to Beneficiary from Estate. Beneficiary reports all income estate is required to distribute and any other amount actually distributed or credited to the beneficiary to the extent of the beneficiary's DNI.

Example:

George's will required his estate to pay his wife $5,000 a year and his daughter $2,500 a year out of the estate's income during the period of administration. Assume the DNI for the year is only $6,000. Since the DNI is less than the currently distributable income ($7,500), the widow must include in her gross income only $4,000.

$$\frac{\$5,000}{\$7,500} \times \$6,000$$

and the daughter must include only $2,000 in her gross income:

$$\frac{\$2,500}{\$7,500} \times \$6,000$$

## XVI. TAX BASIS.

A. Stepped-Up at Death (I.R.C. § 1014).

B. Stepped-Up Basis Suspended (I.R.C. §§ 2032 and 2032A).

## XVII. TAX RATES FOR ESTATES AND TRUSTS (I.R.C. § 1(e)).

| Taxable Income | Marginal Tax Rate |
|---|---|
| $ 1 - 1,700 | 15% |
| 1,700 – 4,000 | 28% |
| 4,000 – 6,100 | 31% |
| 6,100 – 8,350 | 36% |

| | |
|---|---|
| over 8,350 | 39.6% |

# APPENDIX G

## NON-U.S. CITIZEN SURVIVING SPOUSES--
## ESTATE & GIFT TAXATION RULES SUMMARIZED

### DECEDENT's ESTATE TAX

**The Marital Deduction and the Noncitizen Surviving Spouse**. Because of the marital deduction, a decedent may give his entire estate (even one valued at several million dollars) to his surviving spouse without incurring any federal estate tax. The marital deduction reduces the gross estate by the value of the property that is in the gross estate passing to the surviving spouse (I.R.C. § 2056(a)). The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) limits the marital deduction when the surviving spouse is not a U.S. citizen. I.R.C. § 2056(d)(1) now disallows the marital deduction where the surviving spouse is not a U.S. citizen *unless* the property passes to the surviving spouse in a "qualified domestic trust" (QDOT) or the surviving noncitizen spouse becomes a U.S. citizen before the date on which the decedent's estate tax return is filed (I.R.C. § 2056(d)(4)). This limitation also applies even if the property is owned jointly with right of survivorship (I.R.C. § 2056(d)(1)).

For a decedent whose surviving spouse is a noncitizen to use the marital deduction, the property must pass in a QDOT or be placed in a QDOT before the date on which the decedent's estate tax return is filed (I.R.C. § 2056(d)(2)). QDOT trust rules are in I.R.C. § 2056A:

1. The trust must require that at least one Trustee of the trust be an individual citizen of the U.S. or a domestic corporation.

2. The surviving spouse must be entitled to all income from the trust, payable at least annually.

3. The trust must meet the requirements of regulations to ensure the collection of estate tax from the trust.

4. The executor must make an election on the estate tax return claiming the marital deduction with regard to the trust.

**Planning Thoughts**. If the noncitizen spouse acquires U.S. citizenship (even while holding foreign citizenship), property passing to the surviving spouse qualifies for the marital deduction without a QDOT. This does, however, subject the former noncitizen surviving spouse's worldwide estate to U.S. estate tax, although there will be a credit for any foreign estate tax paid. Before advising a noncitizen spouse, consider any tax treaties and be sure to check for any foreign laws in the noncitizen spouse's country that might penalize the surrendering of foreign citizenship solely for estate tax purposes.

**Estate Tax**. For a nonresident who is not a U.S. citizen, only the value of his property located in the U.S. at death is subject to federal estate tax. The gross estate is determined in the same manner as the gross estate of a U.S. citizen or resident, without regard to the location of the property. Only the part located in the U.S., however, is subject to the federal estate tax (I.R.C. §§ 2103, 2104). With respect to the unified credit, where permitted by treaty, the estate of a nonresident alien is allowed the same unified credit as a U.S. citizen multiplied by the percentage of the total gross estate situated in the United States. In other cases, unlike U.S. citizens and residents who have a unified credit of $211,300 (I.R.C. § 2010), a nonresidents alien is allowed a unified credit of the greater of $13,000 (which exempts the first $60,000 of the estate from estate tax, see I.R.C. § 2102) or a pro rata share of $46,800 based on the percentage of property located in the United States (I.R.C. § 2102(c)). (See IRS Publication 448, Federal Estate and Gift Taxes, for more information).

**Estate Tax Return**. If the decedent was neither a resident nor a citizen at death, file Form 706NA, United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of nonresident not a citizen of the United States, if the value of the gross estate located in the U.S. exceeds $60,000. The gross estate may be reduced in the same manner as for a citizen of the U.S. The return is due 9 months after the date of death unless an extension is granted. File the return with the Internal Revenue Service Center, Philadelphia, PA 19255. (See the instructions for Form 706NA for more information).

## GIFT TAX

**General**. The federal gift tax applies to the gratuitous transfer of property. The person making the gift (the donor) must generally pay the tax. If the donor does not pay the tax, the person receiving the gift (the donee) may have to pay it. Whether a person is subject to the gift tax may depend on whether the person is a U.S. citizen or resident. For an individual who is neither a citizen nor a resident of the U.S., the federal gift tax applies only to gifts of property in the U.S.

**Gifts to Noncitizen Spouses**. Like the marital deduction for estate tax purposes, there is a marital deduction for gift tax purposes (I.R.C. § 2523). Most gifts to citizen spouses are free from gift tax. For gifts to a noncitizen spouse made after July 14, 1988, however, there is no gift tax marital deduction (I.R.C. § 2523(i)). Instead, the annual $10,000 per donee exclusion is increased to $103,000 (I.R.C. § 2523(i)(2)). In addition, I.R.C. § 2523(i)(3) applies to lifetime transfers between spouses certain repealed provisions concerning the tax consequences of joint ownership between spouses. For example, this means that a transfer of real property owned by the spouses as tenants by the entirety to the noncitizen spouse alone will be a gift to the noncitizen spouse. The value of the gift for gift tax purposes will be based on the proportion of the value that the noncitizen-donee spouse receives in excess of the donee spouse's contribution to the purchase price. Thus, only annual lifetime gifts to non-citizen spouses less than $103,000 now avoid the federal gift tax.

For gifts made after June 29, 1989, the $103,000 annual exclusion for gift transfers to a noncitizen spouse is allowed only for transfers that would qualify for the marital deduction if the donee were a U.S. citizen. Thus, a gift in trust would not qualify for the annual exclusion unless it satisfies one of the exceptions to the terminable interest rule. The $103,000 annual exclusion for gifts to a noncitizen spouse is available regardless of whether the donor is a citizen, resident alien, or a nonresident alien. On the other hand, a gift to a citizen spouse will qualify for a gift tax marital deduction regardless of the citizenship of the donor spouse.

**Example** (from IRS Publication 448): Don, a U.S. citizen, is married to Mary, a resident alien. In 1998, Don transfers to Mary 100 shares of X Corporation stock valued for federal gift tax purposes at $130,000. The transfer is a gift of a present interest and is a deductible interest for gift tax purposes. Accordingly, $103,000 of the $130,000 gift is not included in the total amount of gifts made by Don during the calendar year for federal gift tax purposes. Don must report $27,000 on his annual gift tax return, Form 709, as a taxable gift.

# CHAPTER P

# WILL DRAFTING

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# WILL DRAFTING

*Outline of Instruction*

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## II. INTRODUCTION.

## III. WILLS IN GENERAL.

A. Purpose of Wills.

1. To reduce the intentions of the Testator to clear, concise written form that disposes of his property after his death with the minimal amount of shrinkage to the estate.

2. To provide for the care, maintenance and support of any minor aged beneficiaries.

B. Avoiding Probate.

1. Disadvantages of Probate.

a. Cost. The cost of probate is state specific but may not be that much.

b. Delays. The delays in processing probate can be lengthy depending on the state.

c. Publicity.

2. Methods of Avoiding Probate.

a. Lifetime gifts.

b. Living Trusts.

c. Joint Ownership with right of survivorship.

d. Contractual arrangements with third party beneficiaries. For example:

(1) Payment on death (POD) or transfer on death (TOD) forms of registration on personal property (e.g., Individual Retirement Arrangements and bank accounts).

(2) Life insurance.

C. Advantages To Having a Will.

1. Statute of descent and distribution may not coincide with decedent's actual intent.

a. Client may move to a state with different intestate scheme or intestacy law may change before client dies.

b. Property owned in more than one state may be subject to different intestate schemes.

c. Transitory population of the military.

2. Cost of administering an intestate estate may be significantly greater.

a. Proceedings require court approval.

b. Administrator usually required to post bond.

c. Passing property to children may require appointment of a guardian of the property (conservator).

3. Will affords a testator the opportunity to nominate a suitable executor and alternate.

4. Will allows parents to make arrangements for minor children.

a. To appoint guardians of the persons and property of the child on the death of the surviving parent.

b. To select alternatives to outright bequests such as custodial accounts or testamentary trusts.

5. Will allows testator to minimize federal and state estate tax liability.

D. Obtain Data on Client and Family Circumstances.

1. Use Will Questionnaire and Will Checklist (See Appendix D for Will Drafting Checklist; DL Wills Program; and questionnaires available on the JAGCNet)

2. General Information.

a. Is client married?

(1) Is there a pre-nuptial agreement?

(2) Will spouse have right of election?

(3) Community property issues.

(4) Spouse's citizenship.

b. Has client been divorced?

(1) Review separation agreement or divorce decree. Are there any continuing alimony, maintenance, or support obligations after death.

(2) Does ex-spouse have any claim to the estate?

(3) Has client changed insurance policies so ex-spouse is not the named beneficiary?

c. Does the client have children?

(1) Number of children and age.

(2) Are any children under a disability?

(3) Does client intend to benefit after born children?

(4) Are any children step-children?

(5) Adopted children?

(6) Illegitimate children?

d. Testator's Assets.

e. Develop a complete inventory of the assets listing type of ownership, value, and probable date-of-death value.

f. Debts and Claims Against Estate.

(1) Is any property encumbered?

(2) Does estate have sufficient liquid sums to pay debts?

3. Coordinate Will with Other Non-Probate Assets.

a. Beneficiary selection on DD Form 93.

b. Commercial insurance.

c. Property ownership.

E. Determining an Estate's Worth.

1. Probate vs. Non-Probate Estate.

a. Probate estate consists of property in the client's name only, with no contractual beneficiary designation, or property that would pass by intestacy if not for a will.

b. Non-probate estate consists of property that passes due to some sort of beneficiary designation or by operation of law.

(1) Jointly owned property with a right of survivorship—including bank accounts, stocks, or realty.

(2) Totten Trusts – "in trust for" bank accounts that pass to beneficiary.

(3) Insurance proceeds.

(4) Employee benefits that pass to beneficiaries –IRAs, pension plans, SBP for military members.

(5) Property in Revocable/Irrevocable Inter Vivos Trusts.

2. Gross Estate. The gross estate is a combination of both the probate and non-probate estates. Determining the gross estate is essential to determine whether the client needs additional estate planning beyond a simple will.

3. How much is too much?

a. Single client. Someone with over $675,000 in a gross estate would benefit from additional estate tax planning.

b. Married client. Consider the **combined gross estate** of the married couple in figuring the $675,000 limit.

c. Decision is the client's after full disclosure of the limitations of a simple will versus the other estate planning options. If a client wants a simple will consider having them sign a memo to the effect they were counseled on the limitations and agree to have you draw up a simple will.

F. Types of Wills.

1. Holographic. Completely written and signed in the handwriting of the testator.

2. Oral. Typically, must be made during last sickness. Can generally only dispose of personalty.

3. Statutory fill in the blank wills.

4. Contractual Wills.

a. Description. A contract between the Testator and someone else for the Testator to leave property a certain way usually in return for a promise for the other person to leave that property a certain way in their will.

b. Avoid contractual wills.

(1) Not authorized under the Legal Assistance Program.

(2) Most commentators think they are a bad idea.

5. Joint and Mutual Wills.

a. Description.

(1) A joint will is one will purporting to dispose of the property of two people.

(2) Mutual wills are two wills that virtually mirror the distribution provisions of each other.

b. Mere execution of joint or mutual wills does not create a presumption of a contract not to revoke the will; either may be revoked at any time.

6. Formal Wills. Every state has a statute prescribing certain formalities but generally a formal will is:

a. In writing;

b. Signed by the Testator (or by another at the request of and in the presence of the Testator);

c. Is published (declaration by the Testator that the instrument is testator's last will);

d. Is witnessed or attested to, and

e. All this is done in the presence of the witnesses and Testator.

7. Wills for domiciliaries of Puerto Rico and Louisiana.

G. Codicils.

1. A codicil may be executed to modify or add provisions to an existing will.

2. Must be executed with same formalities as a formal will.

3. It is generally preferable to execute an entirely new will instead of a codicil.

## IV. TESTAMENTARY ISSUES.

A. Capacity.

1. Competent testator of sound mind and requisite age.

2. Who physically complies with state statutory requirements.

3. Possesses the intent to make the document his last will and testament. A testator must know and understand:

a. The nature and extent of his property;

b. The persons who are the natural objects of his bounty; and

c. What disposition of his property he wants to effect.

B. Undue Influence.

1. Definition. Influence which deprives the person influenced of free agency or destroys freedom of his will and renders it more the will of another than his own.

2. Undue influence may invalidate the entire will in some jurisdictions or just the portion effected by the undue influence in jurisdictions that recognize the partial invalidity doctrine.

3. Duress and undue influence are closely associated but duress requires some unlawful threat. Undue influence is more a domination of the testator's mind.

4. Presumption of undue influence. A confidential relationship between the testator and someone who participates in the preparation of the will (even if not necessarily for their benefit) often leads to a presumption of undue influence.

a. The relationship of attorney and client, conservator and ward, trustee and beneficiary, doctor and patient, nurse and patient, and pastor and parishioner most courts classify as confidential.

b. The presumption arises when someone in this type relationship participates in preparing the will.

C. Classification of Gifts.

1. Specific Bequests.

a. Definition: A gift of a specific article or part of a testator's estate which is identified and distinguished from all things of the same kind.

b. Specific bequest can be useful to avoid property going to the residuary trust and possibly causing the executor to either sell or hold as non-income producing property.

c. Reasons for making specific bequests.

(1) Heirlooms.

(2) Avoid fighting amongst beneficiaries.

(3) Sentiment.

(4) Control.

d. Construction Problems. The wording of the specific bequest is important to classification and effecting the actual intent of the testator.

(1) Gifts of "my furniture" or "my automobile" are specific bequests but raise issues of construction regarding intent of the testator.

(2) Such terms should be defined where possible to account for the intent of the testator; construed at the time of execution? or time of death? Generally, courts construe such bequests as of the date of death.

e. Change in Form of the Specific Bequest.

(1) Changes in form only will not generally void the bequest.

(2) Usually arises with intangible property. For example: Testator bequests his ABC stock to Mary but after execution and before Testator's death ABC Corporation merges with XYZ Corporation and Testator's ABC stock is converted to XYZ stock. Testator never changes his will and thus dies owning XYZ stock. Mary would get that bequest because it is a change in form.

f. Alternatives to Lengthy Specific Bequests.

(1) Incorporate a separate writing by reference in the will.

(2) A non-binding (or binding if allowed in that state) memorandum of instruction to the executor.

(3) In either case, the separate document or the memorandum must exist at the time of the will's execution.

(4) Memorandum or letter of instruction as to the distribution of personal property is permitted in 22 states.

(5) Caution: Unclear designations can give rise to litigation.

2. Demonstrative.

a. A sum paid from a specified sum.

"I give to Fred $100 to be paid from the sale of my 1957 Chevy."

b. May have a problem with ademption.

3. General Bequests.

a. Definition. A bequest which is payable out of the assets of the estate generally and does not require the delivery to the beneficiary of any specific item.

b. Generally cash gifts but not limited to cash. Usually a stated sum of money.

c. Classification as a general bequest places an obligation on the estate to provide that gift.

4. Conditional Bequests.

a. Definition. A bequest which takes effect, or continues in effect, according to the happening of some future event.

"to X for tuition provided she is accepted in law school before her 25th year."

b. Generally conditions are valid unless too indefinite, illegal or against public policy.

c. Conditional bequests often lead to litigation.

5. Residuary Bequests.

a. Definition. The property and assets remaining after debts, administrative expenses, and specific and general gifts are paid, and by its nature cannot be determined at the time of execution of the will.

b. Usually, but not necessarily, the residuary beneficiaries are the primary objects of the testators affection and most of the estate passes under the residuary clause.

c. Even if the entire estate appears to be disposed of by the other types of bequests/devises always include a residuary clause to avoid intestacy as to omitted or after acquired assets.

d. Helpful to use percentages rather than amounts.

e. Residuary language from DL Wills:

**PARAGRAPH X**: I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

(a) If JERRY JEFF survives me, to JERRY JEFF .

(b) If JERRY JEFF does not survive me, my residuary estate shall be paid and distributed to BETTY LOU THELMA LIZ if she shall survive me.

(c) If none of the beneficiaries described in clauses (a) and (b) above shall survive me, then I give, devise and bequeath my residuary estate to those who would take from me as if I were then to die without a will, unmarried and the absolute owner of my residuary estate, and a resident of the State of Confusion.

D. Encumbered Bequests.

1. Generally, a beneficiary takes the gift subject to any liens or encumbrances on the property.

2. The Testator must specify in the will if their intent is that the estate will assume the cost of paying off any liens.

E. Disinheriting Relatives.

1. Spouse. Difficult to disinherit a spouse.

a. Right of election. State statute governs what the right is but generally a spouse gets some share of the estate. The UPC fixes it at 1/3 of the estate. Some states increase or decrease the elective share depending on whether there are children.

b. Timing. The elective share is not automatic. There is usually a time limit under which the right of election must be made by the spouse or she loses her interest.

2. Children and Other Relatives.

a. Be specific in the will as to the intent to omit.

b. Do not use precatory language to describe why the relative is disinherited.

3. DL Wills provisions disinheriting individuals.

**FIFTH**: I give and bequeath to XYZ the smallest portion of my estate, if any, required to be given to XYZ under applicable law, after taking into account the aggregate value of any other property passing to XYZ under this will or otherwise. It is my desire and intent that XYZ be disinherited by me to the fullest extent permitted by law. All provisions of this will, including without limitation any provisions which may refer to persons taking by intestacy, shall be construed to effectuate such disinheritance of XYZ.

**OR THIS IF DISINHERITING A CHILD:**

**THIRD**: I give and bequeath to my son BOB MARLEY, if he survives me, the smallest portion of my estate, if any, required to be given to my child under applicable law, after taking into account the aggregate value of any other property passing to my child under this will or otherwise. It is my desire and intent that my child be disinherited by me to the fullest extent permitted by law. All provisions of this will, including without limitation any provisions which may refer to my "child", "children" or "issue", and any provisions which

may refer to persons taking by intestacy, shall be construed to effectuate such disinheritance of my child.

4. Pretermitted Heirs.

a. Most states have statutes allowing an unmentioned child to take a share of the estate.

b. Most pretermitted heirs statutes allow an intestate share to the omitted child.

c. State statutes differ on several points—

(1) Many state statutes include only children who were born after the will was executed but some are not limited.

(2) Most states limit their pretermitted heirs statute to children but many cover issue of deceased children.

(3) Some states allow extrinsic evidence of an intent to omit but most require that the intent to omit appear from the will itself.

d. DL Wills provision to provide for unborn children in will:

**FOURTH**: I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

(a) If my wife survives me, to my wife outright.

(b) If my wife does not survive me, then to those of my children who survive me and to the issue who survive me of those of my children who shall not survive me, in equal shares per stirpes.

F. Distribution of Property.

1. Per Stirpes Distribution.

a. "Per Stirpes" is Latin meaning "by roots". A per stirpes disposition or distribution of property is made to persons who take as issue of a deceased ancestor in the following manner:

(1) The property so passing is divided into as many equal shares as there are

(a) Surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and

(b) Deceased issue in the same generation who left surviving issue, if any.

(2) Each surviving member in such nearest generation is allocated one share.

(3) The share of a deceased issue in such nearest generation who left surviving issue shall be distributed in the same manner to such issue.

b. Thus, distribution per stirpes allows a grandchild of the testator to take by representation the share of the estate the grandchild's deceased parent would have taken.

c. There are two variations of per stirpes distribution.

(1) Strict. The survivors divide equally the share their decendant would have taken.

(2) UPC. If all the takers are of the same generation they take equally.

d. A memorandum that can be printed out as part of the DL Wills Program defines per stirpes:

> The term "**per stirpes**" describes the way a bequest is to be divided among a person's issue. Most people want bequests to their children to be divided equally among the children. A per stirpes distribution does this, and it also governs what happens if any child has died. If a child has died, his (or her) share is divided among his issue if he has any issue. For example, presume that you have three children (Sue, Sally and John) and that your will provides for a bequest to your children per stirpes. If all three children survive you, each would get one third of the property. If, however, John has died, his one third share would be divided among his children if he had any, or if he had no living issue his one third share would pass to Sue and Sally.

2. Per Capita Distribution.

a. "Per Capita" is Latin meaning "by the heads". This type of distribution allows survivors to take according to the number of individuals; share and share alike. The distribution of property is per capita when it is made to persons, each of whom is to take in his own right an equal portion of such property.

b. "Issue per capita" can result in a slightly different distribution of property. A parent and child would receive equal shares while the parent is alive.

c. Practice Pointer: Many clients select a per capita designation without realizing the drastic effect it may have on their grandchildren. The drafting attorney may want to add the following language to make sure the clients desire (and understanding) is clear:

> "In equal shares to my children or to the survivors of them. It is my intent that should there be any grandchildren or other issue of one of my children who fails to survive me, those grandchildren or is sue shall not share in any way in my estate."

3. Per Capita at each generation: A disposition or distribution of property made in the following manner to persons who take as issue of a deceased ancestor.

a. The property so passing is divided into as many equal shares as there are:

(1) Surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and

(2) Deceased issue in the same generation who left surviving issue if any.

b. Each surviving member in such nearest generation is allocated one share.

c. The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue.

G. Charitable Bequests.

1. Check for exact name and make sure it is on the IRS list of qualified charities.

2. Provide contingency in the will in the event the charity ceases to exist, changes name, or losses IRS qualification.

H. Funeral Arrangements and Special Instructions.

1. Funeral arrangements are best handled outside the will (See Appendix A).

2. Anatomical gifts may be made by will request.

a. Invalidity of will does not invalidate the gift.

b. It is generally better for the testator to make an anatomical gift through separate document (See sample form at Appendix B).

3. Consider making special requests by separate memorandum.

## V. CHANGES AFTER EXECUTION OF THE WILL.

A. Ademption.

1. Property described in a **specific bequest** that is sold, transferred, or destroyed prior to testator's death "adeems." The estate is under no obligation to distribute another asset or pay for the failed gift.

2. For example, if a testatrix gives her son "my red car with serial number 1234567," but later sells that red car, the bequest adeems. Thus, upon her death, the son does not receive any property as a result of that specific bequest.

3. Malpractice tip: T draws will leaving realty to A; after will drawn attorney draftsman represents T in sale of realty, then T dies. Court held the devise to A adeemed. -Court held attorney liable in malpractice for not advising T of ademption , and thwarting T Is intent. Held that beneficiary T could maintain action. Schreiner v. Scoville, No. 86-521 (slip opinion), Iowa, 1987.

B. Lapse.

1. The general rule at common law is that if a beneficiary dies after the execution of a will but before the testator, a **specific bequest** fails or lapses. Unless otherwise provided, a lapsed bequest becomes part of the residuary estate.

2. Testator can anticipate the death of an intended beneficiary and provide for an alternate or place a condition of survival on the gift.

3. All states have an "anti-lapse" statute substituting intended beneficiary's issue. The degree of relationship varies from state to state (almost always children and sometimes parents and siblings). These statutes prevent the bequest from automatically lapsing (and becoming part of the residuary estate).

4. Practice Pointer: Always determine the long range plan of the client and specifically provide for bequests in the event any beneficiary predeceases the testator.

C. Abatement.

1. If there are insufficient assets in the estate to pay its obligations, legacies, administration expenses, and taxes, legacies may have to be reduced.

2. Usually a tiered plan as to priorities pursuant to state statute (12 states do not have) usual plan. General priority to cover deficiencies:

   a. Residuary loses first;

   b. General legacies;

   c. Demonstrative legacies; and

   d. Specific bequests.

3. Classification of the gift can determine abatement hierarchy.

D. Simultaneous Death.

1. The Uniform Simultaneous Death Act (USDA) provides for common disaster situations where there is no proof of survivorship. Generally, the Act presumes property owner survives intended beneficiary. Purposes of USDA:

   a. Avoids two probate proceedings within a short time.

   b. Testator would probably want his property to flow to his relatives, not relatives of deceased beneficiary.

   c. Could save estate taxes by avoiding doubling of estate of spouse.

2. USDA doesn't apply if the will provides for a different presumption.

3. Testator should consider providing for survivorship for a specified period as a condition of the bequest. USDA (1991 version) incorporates 120 hour survivorship requirement.

   a. Extended survivorship requirement serves same policies served by original USDA without risking litigation over evidence of survivorship.

   b. If the survivorship condition for gifts to a spouse exceeds six months, however, the marital deduction will be disallowed.

4. Almost all states have enacted the USDA, except Alaska, Louisiana, Montana and Ohio.

5. Practice Pointer:

a. It is not only important to include USDA language in the will, but provide/explain for disposition of property should the beneficiary predecease the testator.

b. Some estate plans may want to reverse the simultaneous death presumption in order to balance the value of the estates. Perhaps may want to have the "poorer" spouse or spouse that owns less assets to always survive the "wealthier" spouse to take advantage of tax saving devices.

6. DL Wills USDA provision:

**TWELFTH**: I direct that for purposes of this will a beneficiary shall be deemed to predecease me (or any other person upon whose death the interest of such beneficiary depends) unless such beneficiary survives me (or such other person) by more than thirty days..

## VI. SGLI COUNSELING.

A. Importance of SGLI in Legal Assistance.

B. What is SGLI?

1. Group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.

2. How the SGLI Program Works.

C. Soldiers Covered.

1. Active Component.

a. Active duty soldiers are automatically insured for $200,000 unless they opt out in writing.

b. Soldier can elect lower coverage or no coverage by completing VA Form SGLV-8286.

2. Reserve Component. Certain reservists are eligible for coverage.

D. Scope Of Coverage.

1. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations

2. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120 day period. Soldier may convert to Veteran's Group Life Insurance (VGLI) within 120 days of separation.

3. Soldiers may lose entitlement to SGLI based on:

a. their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or

b. other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes).

4. Cause of death, however, is not relevant to the payment of SGLI proceeds.

E. Eligible Beneficiaries.

1. Any person or legal entity designated by the soldier on appropriate VA form (Active Component: VA Form SGLV-8286). SGLI Act gives service member absolute right to choose beneficiary. Ridgway v. Ridgway, 454 U.S. 46 (1981).

2. If no designation, or "By Law" designation, then proceeds are paid according to SGLI statute:

   a. All to spouse, but if none, then

   b. All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then

   c. All to parents (equally divided), but if none, then

   d. All to executor of soldier's estate, but if none, then

   e. Next of kin under state law.

3. Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. See AR 27-3, para 3-6b(1) (10 Sep 95); AR 600-8-1 (20 Oct 94).

4. SGLI definition of "parents" for purposes of beneficiary designations. Pursuant to 38 U.S.C. ∋1965(9), the term "parent" is limited to the father/mother of a legitimate child, the father/mother of an adopted child, and mother of an illegitimate child. The father of an illegitimate child is considered the parent also, but only if

   a. acknowledged in signed writing prior to death;

   b. judicially decreed either to be the father or to provide support; or

c. proof of paternity is established from official records (e.g., birth, school or welfare records) which show that, with his knowledge, claimant was named father.

See Lanier v. Traub, 934 F.2d 287 (11th Cir. 1991) (Despite fact service member raised by stepfather, "by law" designation precluded stepfather from sharing in SGLI proceeds, which went to natural father and mother).

5. SGLI definition of "children" for purposes of beneficiary designations. Pursuant to 38 U.S.C. § 1965(8) the definition of "child" is limited to a legitimate child or a legally adopted child. An illegitimate child is also included within the term if the insured is the child's mother or, if the insured is the father, the relationship meets the requirements of para. a.(1) through a.(3), above.

F. Currency of Designation.

1. Soldiers should be cautioned to keep their SGLI form updated. See Ridgway v. Ridgway, 454 U.S. 46 (1981) (A spouse was designated by name on SGLI election form. Soldier did not change election following subsequent divorce; ex-spouse was entitled to all the proceeds). See also Zawrotny v. Brewer, 978 F.2d 1204 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1418 (1993). (Oklahoma statute stated that, by operation of law, divorce causes ex-spouse to lose all entitlement to life insurance proceeds on life of previous spouse. Court of Appeals held Oklahoma statute ineffective to change ex-spouse designation on SGLI form.).

G. Minors as Beneficiaries.

1. OSGLI will not pay to a minor (except a minor spouse).

2. Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.

3. SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) (see AR 600-8-1, figures 11-12 to 11-14):

a. Testamentary Trust for Children:

(1) "My trustee to fund a trust established for the benefit of my children under my will."

(2) A soldier who wishes to designate a trustee under a trust established in a will (a testamentary trust) as a primary or contingent beneficiary will be advised that before completing the SGLV-8286, the soldier must have a will prepared that contains a trust, and the soldier must sign (execute) the will. The trust in the will may be established for minors or adults, regardless of their relationship, if any, to the soldier. The soldier will be further advised of the following--

(a) Advantages are--

(i) The need and (related expense) of maintaining a surety bond may be waived in the will.

(ii) The trustee can use the SGLI proceeds for the benefit of the minor for the period of time, and in the manner specified, in the will. Direct distribution of SGLI proceeds may be delayed beyond the 18th birthday of the minor (e.g., upon completion of college, or age 25, which ever occurs first).

(b) Disadvantages are--

(i) The will, which might not have otherwise required probate (e.g., because of the small amount of other property in the soldier's estate), will have to be probated and the court will need to appoint the trustee before the designated trustee may receive the SGLI proceeds. Court and legal expenses will have to be paid.

(ii) The distribution of SGLI proceeds will be delayed.

(iii) There is no surety bond required that could protect the minor's funds from theft, fraud, waste, and other such acts by the trustee.

b. The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb, ...."

## VII. CLAUSES OF THE WILL.

A. The Preamble.

1. Declare the proper state as testator's domicile. The declaration is evidence of domicile, but is not irrebuttable. Domicile is not necessarily where probate will occur but may be the substantive law that applies.

a. Determining domicile or venue for probate.

(1) Vote.

(2) Driver's license & registration.

(3) Own real property.

(4) Pay taxes.

(5) Membership in local organizations.

b. Where most likely will probate occur (or be required)?

c. Where best to probate?

2. Revoke all previous wills and codicils. In the absence of express revocation of prior wills and codicils, the new instrument revokes them only insofar as its provisions are inconsistent.

3. Insure client's name and social security number are accurate.

4. DL Wills Preamble:

**I**, **HOMER STAR**, a resident of the State of Florida, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by

me. I am in the military service of the United States, currently stationed at Fort TJAGSA, Virginia.

B. Selection of Personal Representatives and Trustees.

1. Select qualified, trustworthy, and competent fiduciaries.

a. Can select corporate or individual fiduciaries. Some factors to consider:

(1) Cost

(2) Security

(3) Permanence

(4) Investment experience and policy

(5) Conflicts of interest

b. Institutional Fiduciaries: Benefits are professional experience and perpetual nature of relationship. Drawbacks are sometimes higher commissions, impersonal, and complications relating to the size of the estate.

c. Individual Fiduciaries: The testator must exercise due care in selection. Must be intelligent, trustworthy, and have some business sense.

d. Compensation.

(1) Will fiduciaries be compensated?

(2) If fiduciaries will be compensated, will the testator require that they be paid pursuant to statutory commissions or other schemes?

(3) Bequest in lieu of commissions.

(4) Bequest in addition to commissions.

(5) Bequest payable only upon executor qualifying (treated as a gift). Bequest payable upon completion of duties is compensation and taxable income.

e. Consider whether to appoint co-fiduciaries or a single fiduciary.

f. Consider waiving bond for individual fiduciaries.

g. Consider whether nonresident fiduciary can serve.

(1) Some states prevent non-residents from being named executor. Some allow non-residents if they are related to the testator.

(2) Non-resident executors usually have to consent to jurisdiction or appoint a local contact for purposes of service of process.

(3) Can provide for a selection by nominated fiduciary in the will:

"In the event X does not qualify as executor of my estate due to his lack of residency in the state where this will is probated, then X shall have the power to nominate such executor."

2. Always appoint alternate fiduciaries.

a. Always provide for alternate or successor fiduciary if possible or the court may choose. When testator designates co-fiduciaries and one fiduciary cannot serve, the will can designate that the survivor chooses successor co-fiduciary.

b. When drafting fiduciaries, always consider all contingencies (death, incapacity, unwillingness to act, resignation, etc..).

3. Specify fiduciary's management powers.

a. Seventeen states and the District of Columbia have enacted statutes the same as or similar to section 3-715 of the Uniform Probate Code which grants to executors 27 stated powers except as otherwise restricted by the will (Alaska, Arizona, Florida, Hawaii, Idaho, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, and Utah).

b. Eight states (Arkansas, Connecticut, Georgia, Massachusetts, Nevada, North Carolina, Tennessee, and Virginia) have statutes granting a list of powers to executors and trustees that must be incorporated by reference in the governing instrument to be effective.

c. List out or spell out the powers the fiduciary will have since not all states have fiduciary powers enumerated in statute.

(1) Bind client to specific state statute for fiduciary power (as specifically indicated by DL Wills), or

(2) Delete the reference to specific state statutes (powers listed in the will control).

d. Does the testator want to restrict the fiduciary to certain types of investments?

"…. I limit the assets in which my trustee may invest to obligations of the United States Government and/or accounts in institutions that are insured by the Federal Deposit Insurance Corporation (FDIC)."

C. Tax Apportionment.

1. Statutes in 22 states deal with the apportionment of estate taxes, usually apportioned by the amount.

2. Exercise great care in the drafting of tax apportionment clauses to insure that it is "clear and unambiguous" or susceptible to only one construction.

3. In the basic estate plan it is usually better to have estate tax apportioned among all who take, probate and nonprobate property, by the taxable amount they receive, and not have all taxes paid by residue (Be careful with specific bequests when testator wants recipient to receive exact amount or the property with no deduction.). In DL Wills must select out of a basic will by selecting the highest value of an estate (regardless of its actual value) in order to see all the options and reach the apportionment choice.

4. Having marital or charitable property, usually the residue, pay the tax can have drastic effects, and in some cases can more than double the effective tax rate.

5. Do not use boilerplate language in DL Wills without reading and understanding.

D. Expense Clauses.

1. Payment of debts, funeral, and administration expenses.

a. Generally, personal representative required to pay expenses as a matter of state law. If assets of the estate are insufficient, statute creates a priority among creditors:

(1) Administrative costs

(2) Funeral expenses

(3) Debts and taxes to Federal government

(4) Medical expenses of last illness

(5) State law claims

(6) Others

b. Claims against the estate must generally be filed within 4 months of notice to creditors.

c. Avoid requiring executor to pay "all just debts."

d. Grant executor the power to extend or renew indebtedness upon such terms and for such time as the executor deems appropriate.

E. Providing for Management of Minors' Property.

1. Outright bequests.

a. Property held by guardian until child reaches age of majority.

(1) Guardianships involve expense and inconvenience.

(2) Can be a very restrictive arrangement for investments, loans, and use of funds.

b. Absolute ownership and control of property passes to child at age 18 or 21.

2. Transfer under Uniform Gifts to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA).

a. What are "UGMA" and "UTMA?"

b. Most states permit testamentary transfers to custodians under UTMA and/or UGMA (as revised).

c. The guardian of the property does not have to be the other natural parent.

d. Potential Advantages.

(1) Avoids cumbersome restrictions found in guardianship arrangements.

(2) You (the Attorney) can understand UGMA/UTMA.

(3) "Uniform" laws mean uniform application - even with mobile clients like those we have in the military.

(4) UTMA allows transferor choice of law options and has clear conflicts of law provisions.

(5) Transferor may designate a nonresident to serve as custodian.

(6) Custodianship is not a separate taxable entity.

e. Potential Disadvantages (in comparison with trust options).

(1) One beneficiary per custodianship. Must split assets into shares for each child.

(2) Mandatory age of distribution to beneficiary - too early?

(3) Less control and accountability than trusts.

(4) No protection against spendthrifts (only a potential problem if custodianship continues into majority).

f. Practice pointer: Modification of DL wills guardian provision to create a guardian of the property:

"I appoint G to be the Guardian of the person and property of any children of mine who have not attained the age of majority, ***as I believe it to be in the best interests of my children***. ***[Think about inserting other information, i.e., the children have bonded with G, my sister and have strong ties to her children; the children have never spent any time with their father, etc..]*** If G shall fail or cease to act as Guardian, I appoint G2 as Guardian. Said Guardian **[**may] ***shall*** act as Guardian of any property passing to my children ***[insert names of children from former relationship/marriage if this is a case where now remarried with children of present marriage]*** under this will even if my children at any time may be living with ***[their father]*** my former husband. No Guardian shall be required to file or furnish any bond, surety or other security in any jurisdiction. If my Trustee or any trust hereunder is the beneficiary of any life insurance policy, my Trustee shall be entitled to the insurance proceeds rather than my Guardian. ***[It is my direction that {insert name of father} have no control nor management of any assets passing to my children X and Y by reason of my death, whether or not passing under this will.]"***

g. See Appendix F for sample clause to use if state does not recognize testamentary transfers under UGMA.

3. Testamentary trusts for children.

a. Elements.

(1) Settlor, Creator, Grantor: the testator

(2) Trustee: legal title; the money manager.

(3) Beneficiary: equitable title; the recipient.

(4) Corpus: the value of assets in trust.

(5) Income.

(6) Duration: beware of the rule against perpetuities, use a saving clause, i.e., "any trust must terminate not later than 21 years after the death of the youngest beneficiary alive at my death."

b. Generally, for most "traditional families" the testamentary trusts for children are contingent trust or they come into being should the spouse predecease the testator.

c. However, a testamentary trust can be a "family trust" for the benefit of the spouse and children. This type of testamentary trust is commonly used for "mixed or blended families" in second marriages (or beyond) when children of the first marriage are to receive bequests in addition to the spouse or when it is necessary to have someone other than the spouse manage the assets.

d. Advantages.

(1) Court control over sales, investments, and accountings may be lessened or eliminated.

(2) Greater flexibility may be achieved in design of trust.

(3) Title to property vests in trustee. Transfers from trustee to 3d parties are not voidable.

(4) Testator controls age of distribution.

e. Types of trusts.

(1) Unitary or Sprinkling Trust (Pooled Asset).

(a) One combined trust for several children. All assets held in one trust and drawn upon for the benefit of all children with no proportionate scheme required.

(b) Terminates when the youngest child reaches age specified by testator.

(c) Trustee acts as parent, distributing trust assets to beneficiary based on need.

(d) Less costly to administer than single trusts.

(e) Unitary trust has certain disadvantages:

(i) Children not treated equally.

(ii) Older child may receive nothing.

(2) Single trust ( or separate trust for each child).

(a) Testator establishes one trust for each child.

(b) Typically, every child takes equal share. Testator may, however, set up trusts in unequal amounts.

(c) Trust(s) terminate upon age specified by testator.

(d) Single or separate trust has certain disadvantages:

(i) Separate trust may be better suited to larger estates, where the share of each child will be enough to take care of possible expenses (tuition, medical, etc.).

(ii) Cannot draw upon the share of one child to use for another child.

(iii) Added expense for separate trust administration and accounting.

f. Trust terms.

(1) Powers and duties of the trustee. May be incorporated by reference to state statute.

(2) Spendthrift trust provisions.

(a) Most American jurisdictions permit a settlor to provide that any beneficial interest shall be free from anticipation or assignment and not be subject to claims of creditors.

(b) In minority of states that do not recognize spendthrift trusts, the settlor may provide that in the event of an assignment, or attempted assignment, the interest of the beneficiary is divested.

(3) Rule against perpetuities. Include a savings clause requiring interests to vest within 21 years of a life in being.

(4) Provide for terminating trust when administration becomes uneconomical.

(5) Include a last resort clause specifying alternate beneficiaries.

F. Selection of Guardian for Minor Children.

1. Testator should always name guardians of the person for minor children.

2. Guardianships terminate at local age of majority (usually 18).

3. Law of guardianship varies from state to state. Many will be reluctant to designate a non-resident of the state as guardian.

4. Guardianship provisions are even useful if parents are divorced and one parent survives the testator. The will and guardianship provisions can set out the custodial parents reasons for not wanting the other parent to be the guardian (fitness). Although courts are not required to follow the testators wishes, the test that the court will follow will be the "best interest of the child."

G. The Testimonium Clause.

1. Establishes that document is intended to be testator's last will.

2. Testator's signature should be at the logical conclusion of the will.

3. Include date will was signed.

H. Attestation Clause.

1. Comply with state statutory requirements.

2. Most states do not provide any specific form.

3. Several states (e.g., California, New York, and South Dakota) specify that witnesses should give their addresses.

I. Self-Proving Affidavit.

1. A self-proving affidavit establishes the authenticity of a will.

2. Ensure witnesses sign both the will and the self-proving affidavit.

## VIII. EXECUTION OF THE WILL.

A. Will Execution Procedure (See Appendix E.)

1. Attorney must supervise entire execution ceremony in the Army under AR 27-3.

2. The attorney (draftsman) will include his name, rank, and state of admission are indicated on the document. AR 27-3, para. 3-6b(2). (The attorney may have to provide testimony in a will contest or construction proceeding.)

3. Testator should orally declare document to be last will and testament.

4. Testator should sign at the end of the will proper in front of all witnesses.

5. Execute one will (not copies) and do not permit alterations.

6. Do not ever remove staples or take apart will and re-assemble.

B. Witnesses.

1. Use at least two young, disinterested witnesses. The attorney drafting the will can be one of the witnesses.

2. Avoid mass will executions and having deploying soldiers serve as witnesses if at all possible.

3. All witnesses should sign the will and self-proving affidavit in presence of the testator and of each other in an attestation clause after the testator's signature.

4. Self-Proving Affidavits.

a. Only go to due execution.

b. They will not avoid a contest on the lack of testamentary capacity, undue influence or fraud.

c. In the event testimony of witnesses will be necessary, or will you find the military witnesses?

C. Debriefing Clients.

1. Advise the client where to safekeep the will. Make it very clear to the client not to keep the will with him.

2. Explain circumstances and situations where updating the will would be beneficial.

3. Explain how to revoke the will and caution about unintentional revocation.

a. Revocation by Operation of Law.

(1) Marriage.

(2) Divorce.

(3) Birth of child.

b. Intentional Revocation

(1) Destruction with intent to revoke.

(2) Revocation by subsequent will or document executed with same formality as will.

(3) The client may not always desire to destroy a previous will when executing a new one. Can be important to show intent or plan.

4. Explain the termination of the attorney-client relationship.

5. Explain that copies are not kept in the legal assistance office.

6. Allow only executed wills to leave your office and execute only one document.

## IX. CONCLUSION.

**APPENDIX A**
**MORTUARY PLANNING SHEET**

TO THE NEXT OF KIN OF: _____

This is an expression of my preferences and desires regarding the disposition of my remains and other arrangements at the time of my death. I am writing this to make things easier for you and to make my thoughts known.

I feel it would be best if preparation, casketing and transportation were handled by :

___ Next of kin working with local funeral home.

___ The military authorities, through their contact with a local funeral home (applicable only if on active duty).

___ Next of kin working with:

(Name and address of funeral home)

At the time of death, I prefer:

___ Conventional Burial.

___ Cremation.

___ I would like to be in _____ Uniform:
(Branch of Service)

___ No preference.

My preference for a burial place or disposition of ashes is:

___ Private Cemetery.
(Show name and location)

___ National or other Gov't Cemetery, contingent on availability of space.
(Show name and location)

___ Burial at sea.

___ Wherever you decide it would be easiest for you.

___ Other:

In the event that my body should have to be shipped to another location, I prefer that the following funeral home be selected as "receiving" funeral home.

_____

_____

I desire the following religious services be conducted:

___ Church services.
(Show name and location)

___ Funeral home services.

___ Memorial services.
___ Graveside committal services.
___ Other, please explain:

(More than one block may be marked)
Military honors desired if available from _____ resources.
(Service)

___ _____ Chaplain
(Service) (Please indicate religious preference)
___ Pallbearers. ___ Bugler.
___ Firing Party. ___ Color Guard.
___ Other, Please explain:

My preference concerning:

a. Government-furnished headstone or marker: ___ Yes ___ No
   If preferred, type:
b. Clergy:
c. Flowers, memorials, agencies, contribution should be made to:

d. Favorite soloist or organist, psalms or other special requests:

e. Friends to notify:

OTHER DESIRES OR NOTES:

_____
(SIGNATURE) (DATE)
(A copy of this document should be given to your next of kin, executor and other close relative).

## APPENDIX B - ANATOMICAL GIFT BY A LIVING DONOR

I am at least 18 years of age and make this anatomical gift to take effect upon my death. The marks in the appropriate blanks and words filled into the blanks below indicate my desires.

1. I give: My body _____;
   Any needed organs or parts _____;
   The following organs or parts:

2. To the following person:
   _____;

   To any person, tissue bank, or institution authorized by law:
   _____;

   To the following named physician, hospital, tissue bank or other medical institution:

   _____.

3. For the following purposes:
   Any purpose authorized by law: ____;
   Transplantation: ____;
   Therapy: ____;
   Medical research and education ____.

_____
Signature of Donor Address of Donor
Date:
Signed by the Donor in the presence of the following who sign as witnesses:

_____
Signature of Witness Address of Witness

_____
Signature of Witness Address of Witness

## APPENDIX C
## SAMPLE DUAL REPRESENTATION LETTER FOR EXISTING ESTATE PLANNING CLIENTS WITH SEPARATE FAMILIES

Dear _____:

This letter is written to you in order to insure, as much as can be insured, the validity and objective independence of the advice, counseling, and planning that I have given or done for each of you through the years. I have, of course, represented each of you particularly in the planning of your respective estates, which planning provides for your respective separate families.

Matters to which such representation has extended, and likely will extend, include the following:

1. Analysis of your wills, codicils, trusts, and property agreements, if any.
2. Analysis of the assets owned by each of you, including consideration of their value and the nature in which title is or should be held, and the categorization of such assets as separate or community property.
3. Discussions about the manner in which you wish to dispose of such property.
4. Analysis of the tax impact of such disposition and recommendations relative thereto.
5. Preparation of the documents necessary to accomplish the desired disposition.

We have talked from time to time about differences that may arise between you with respect to the ownership of your property and its desired disposition, particularly in view of your respective separate families. Such differences, under our ethical rules, do not prevent me from continuing to represent both of you. Of course, if conflicts of interest arise, ordinarily one lawyer cannot represent both of you, and it might be preferable for each of you to have separate independent counsel to avoid the possibility that advice to one is influenced by representation of the other. Nevertheless, as you have in the past, you have again expressed your continued interest in having me represent both of you notwithstanding the foregoing explanation.

Although it is doubtful that it will happen, if conflicts do arise of such a nature that it is impossible for me to perform my obligations to each of you, I will withdraw from continued dual representation and advise one or both of you to obtain independent counsel. It is, of course, implicit in such dual representation that there will be a complete and free disclosure and exchange of all information that I receive from either one or both of you in the course of my representation of you, and that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you.

Assuming that you are satisfied with my continued representation of each of you and both of you, please sign the enclosed copy of this letter and return it to me for our files. A previously addressed and postmarked envelope is enclosed for your convenience. Should you have any questions concerning this letter or my representation of either of you or both of you, please feel free to call me.

Sincerely,

(Attorney's Signature Block)

I have read the foregoing letter, understand the same, consent to the disclosure and exchange of all information received by you from either one of us, with the other one of us, and consent to representing each and both of us in the aforementioned estate planning services.

Dated: _____, 19____

(Signature of husband; typed name below) (Signature of wife; typed name below)

## APPENDIX D

## WILL DRAFTING CHECKLIST

### I. DATA ACCUMULATION.

A. Personal.

1. Names, aliases, former names, social security numbers (SSN's).
2. Dates of birth (DOB).
3. Prior divorces - date, final verified.
4. Residence.
5. Domicile.
6. Citizenship/immigration status of parties.
7. Children: Names, DOB's, SSN's
    a. Of this marriage.
    b. Prior marriages.
    c. Others expected.
8. Any antenuptial contract?
9. Any property declarations or transmutation agreements?
10. Any prior marital termination contract?
    a. This marriage.
    b. Prior marriages.
11. Occupations of parties and children.
12. Work histories.
13. Education levels.
14. Special needs/handicaps.
15. Community property?

B. Insurance policies.

1. Name of the insurer.
2. Policy number.
3. Policy owner.
4. Type.
5. Face value.
6. Transferable?
7. Beneficiary? SGLI & Death Gratuity "By Law" designations-is there a need to revise them?

C. Assets.

1. Stocks, bonds, and notes.
    a. Certificates? Street name?

b. Location of certificate/instrument.
c. Security perfected.
d. Valuation; date and method used.
e. Income tax basis.
f. Form of title.

2. Tangible personal property.

a. Automobile(s).

(1) Make, model, and year.
(2) Fair market value and method of valuation.
(3) Outstanding loan balance and monthly payment.
(4) Form of ownership.

b. Collectibles, furnishings, and appliances that client believes are significant.

(1) Describe.
(2) Value and method of valuation.
(3) Outstanding loan balances and monthly payments.

c. Miscellaneous items.

(1) Describe.
(2) Value and method of valuation.
(3) Outstanding loan balances and monthly payments.

3. Intangibles.

a. Financial accounts.

(1) Type.
(2) Account number.
(3) Owner.
(4) Institution (name, address).
(5) Value.

b. Partnership Interests/Shelters.

(1) Income tax basis and date of acquisition.

(2) Expectancies and Non-vested Assets.

(a) Nature.
(b) Date contingency to be fulfilled.
(c) Controlled by whom?

4. Realty.

a. Present occupant.
b. Popular description.

c. Legal description.
d. Title in whose name? Form?
e. Encumbrance?
(1) Who is creditor?
(2) Type of security?
(3) Who is debtor?
(4) Perfected?
(5) Amount due? Payment rate?
(6) Any balloon?
(7) Interest rate? Fixed or Variable?
(8) Any unrecorded claims - i.e., amount owed to family?
(9) Valuation - method used.
f. If leased, length of lease - rental received/obligations of owner.
g. Basis for income tax purposes (depreciation, gain previously deferred).

D. Debts and Claims.

1. General creditors.

a. Who are the creditors?
b. Type of debt (unsecured loan, revolving charge account, mortgage, etc.)
c. Reason for incurring the debt.
d. Encumbered property.
e. Who is obligated to pay?

2. Estate Taxes.

a. Federal.
b. State.

3. Death and Funeral Expenses.

## II. FORMALITIES.

A. Testamentary capacity.
1. Age.
2. Competent.
3. U.S. citizen.

B. Revoke prior wills.

1. Codicil.
2. New will.

C. Type of will.

1. Holographic.
2. Oral.

3. Formal.

D. Advice to testator.

1. Liquidity problems.
2. Probate avoidance vehicles.
3. Coordinate beneficiary forms on life insurance.
4. Ways to increase value of estate.

## III. DRAFTING THE WILL.

A. Preamble.

1. Identify testator(trix).
2. Declare domicile.
3. Military status.
4. Revoke prior wills.
5. Recitals (optional).
    a. Spouse.
    b. Children.

B. Funeral/Burial Desires.

1. Left in separate memorandum?
2. Anatomical gifts.
3. Living will.

C. Specific bequests.

1. Carefully described.
2. Ademption problems?
3. Insurance proceeds pass with property.
4. Property subject to encumbrance.
5. Real estate.
    a. Ancillary probate.
    b. Encumbered?
    c. Freedom to distribute.
6. Demonstrative bequests.
    a. Ademption problems.
    b. True intent of testator ascertained?
7. General bequests.
8. Conditional bequests.
    a. Condition clearly spelled out.

b. Time for performance clear.
c. Not expressed as a mere wish.

9. Charitable bequests.

a. Organization qualifies as charity.
b. Organization described carefully.

10. Will testator leave a personal property letter?

a. Binding letter.
b. Incorporate by reference?
c. Referred to in will.

D. Residuary Bequests.

1. Primary beneficiary(ies).
2. Alternate beneficiary(ies).
3. Catchall beneficiary.
4. Property to minors.

a. Alternatives to guardianship (custodian account/trust).
b. Per stirpes/per capita?
c. Benefit after-born.

E. Testamentary Trusts.

1. Type of trust.

a. Unitary.
b. Single trust.

2. Purpose of trust.

3. Name of trustee.

a. Specify alternate.
b. Powers.
c. Bond.
d. Compensation.

4. Distribution.

a. Income.
b. Principal.
c. Age of distribution.

5. Rule Against Perpetuities.
6. Spendthrift trust clause.
7. Bailout clause.

F. Appointment of Fiduciaries

1. Primary and alternates named.

2. Bond waived.
3. Corporate or individual.
4. Single individual, not co-fiduciary.
5. Ancillary probate required.
6. Residence of fiduciary.
7. Compensation.
8. Powers.
    a. Enumerated powers.
    b. Incorporate state statutory powers.

G. Administrative Clauses.

1. Survivorship clause.
    a. Simultaneous death.
    b. Survivorship period less than 6 months.
    c. Specified in terms of hours.
2. Debts/apportionment clause.
    a. Does will unnecessarily require testator to pay "all just debts"?
    b. Clause give power to extend or renew?
    c. Tax apportionment.
        (1) Apportioned among all beneficiaries.
        (2) Paid for out of residuary.
    d. Abatement problems considered?
3. No contest (in terrorem) clauses.
4. Disinheritance of relative.
    a. Omit reasons for disinheriting.
    b. Specifically disinherit relative by name.
5. Severability Clause.
6. Veteran's benefits clause.

H. Definitions.

1. Per Stirpes (or per capita).
2. Children.
    a. Stepchildren.
    b. Adopted.
    c. After-born.
3. Issue.

4. Terms such as personal property and household goods.

I. Attestation, Exordium, and Self-Proving.

1. Contains signature for testator and witnesses.
2. Place for date.
3. Self-proving affidavit included for state domicile.

## IV. WILL EXECUTION.

A. Supervised by attorney.

B. Witnesses.

1. At least 3 adults.
2. Disinterested.
3. Initial pages.
4. Sign will and self-proving affidavit.
5. Testator.
6. Declare document is will.
7. Sign will.
8. Sign self-proving affidavit.

C. Procedure.

1. Follow SOP.
2. Witnesses sign in front of each other and testator.
3. Execute only one will.
4. Don't remove staples.

## V. TERMINATING RELATIONSHIP.

A. Advice to client.

1. Need to revise will.
2. Where to keep will.
3. How to revoke will.

B. Terminate attorney-client relationship.

## APPENDIX E
## STANDARD OPERATING PROCEDURE FOR EXECUTING WILL

The following, or a procedure covering substantially the same points, is recommended as standard operating procedure with respect to the execution of wills:

a. If the will consists of more than one page, the pages should be fastened together securely. The will should specify the exact number of pages of which it consists. This page numbering should not include the self-proving affidavit, which is not part of the will.

b. The testator should read the will in its entirety and the legal assistance attorney should ensure that the testator understands the terms of the will.

c. The testator and two persons who have no interest, vested or contingent, in the property disposed of by the testator's will or in the testator's estate in the event of intestacy, along with the legal assistance attorney supervising the execution of the will, should be in a room from which everyone else is excluded, and should remain therein until the execution is completed.

d. The legal assistance attorney supervising the execution of the will should ask the testator the following question: "Do you (state the name of the testator) declare in the presence of (name the witnesses) that the document before you is your will, that you have read the document, that you understand the document, and that the document expresses your desires as to the disposition of the property referred to therein upon your death?" The testator should answer "yes" and the answer should be audible to the two mentioned witnesses. The legal assistance attorney should also ask if the testator is executing the document voluntarily, without any duress or coercion. The testator should again make an audible "yes" response.

e. The testator should initial or sign on the margin of each page of the will. This is done for purpose of identification and to prevent the subsequent substitution of pages. The testator should then sign his or her name at the end of the will. The three witnesses should be standing or sitting so that all can see the testator sign.

f. The legal assistance attorney supervising the execution of the will should then ask the testator the following question: "Do you request (names of witnesses) to witness the signing of your will?" Again the testator should answer "yes", and the answer should be audible to the three mentioned witnesses.

g. The legal assistance attorney should ask the witnesses if the testator appears to be of sound mind, to understand the nature of his or her actions, and to be under no duress or coercion.

h. One of the witnesses should then read aloud the attestation clause.

i. Each witness should declare that the attestation clause is a correct statement.

j. Each witness should then sign his or her name in the place provided for the signatures of the witnesses following the attestation clause. As each witness signs, the testator and the other two witnesses should be so placed that each one can see the witness sign. The witness should place his or her full address and social security number opposite the signature. If the witness is in the military service, grade should also be included opposite the signature.

## APPENDIX F
## CLAUSE FOR INCORPORATING UNIFORM TRANSFERS TO MINORS ACT

"If any beneficiary entitled to receive distribution of property (under this will) (from this trust) is a minor at the time of distribution, I direct that my (personal representative) (trustee) deliver the property to a custodian for the beneficiary under the Uniform Transfers to Minors Act, Uniform Gifts to Minors Act, or a similar custodian law of the State of _____ or any state in which the beneficiary may then reside; and I give to my (personal representative) (trustee) the power to designate any adult person or trust company, including my (personal representative) (trustee), custodian for the property distributed to each beneficiary under such law.

"If the law of the designated state does not provide for custodianship created in this manner, the distribution shall be made to the custodian as trustee for the minor and the terms of the trust shall be the Uniform Transfers to Minor Act as promulgated by the National Conference of Commissions on Uniform State laws, with the trust to terminate when the minor is twenty-one years of age."

# CHAPTER Q

# LEGAL ASSISTANCE

# TECHNOLOGY & RESOURCES

(***Materials will be distributed by the Professor in class.)***

# CHAPTER R

# SOLDIER LEGAL READINESS PROGRAMS


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**II. OBJECTIVES ..... 1**

**III. SOLDIER READINESS PROCESSING (SRP) ..... 2**

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B. OVERVIEW OF THE PERSONNEL PROCESSING PROGRAM ..... 2
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# OUTLINE OF INSTRUCTION

## I. REFERENCES

A. AR 600-8-101, Personnel Processing (In- and Out- and Mobilization Processing), 26 February 1993.

B. AR 27-3, The Army Legal Assistance Program, 10 September 1995.

C. AR 27-1, Judge Advocate Legal Services, 3 February 1995.

D. JAGINST 5801.1, Legal Checkup Program, 20 December 1976. **NOTE:** This instruction is outdated and the Navy Legal Assistance Division (Code 36) recommends not using it. They are updating the program.

E. JAGMAN Chap. 7, Legal Assistance. **NOTE:** A new instruction, JAGINST 5801.2, addressing legal assistance is forthcoming.

F. AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs, 1 May 1996.

G. TJAGSA Pub JA 272, Legal Assistance Deployment Guide, February 1994.

## II. OBJECTIVES

A. Familiarize students with Soldier Readiness Processing (SRP) program requirements.

B. Inform students of regulatory requirements and practical solutions to legal issues arising in the SRP context.

C. Identify issues, policies, and practical solutions to legal assistance services provided in the SRP environment.

# III. SOLDIER READINESS PROCESSING (SRP)

A. What is it?

1. Replaces the Preparation of Replacements for Overseas Movement (POR).

2. SRP "prepares, validates, and reports, individual soldier and unit readiness for deployment, including shortfalls, to the unit commander." AR 600-8-101, para. 1-7.

3. The foundation of the program is that "all soldiers will be administratively ready for deployment at all times." AR 600-8-101, para. 4-1a. To accomplish this, the program "[i]incorporates planned checks on the soldier readiness status of the individual soldier." AR 600-8-101, para. 4-1c.

B. Overview of the Personnel Processing Program

1. Soldier readiness is integrated into all parts of personnel processing.

2. HQDA sets specific administrative requirements that are checked and updated throughout the process.

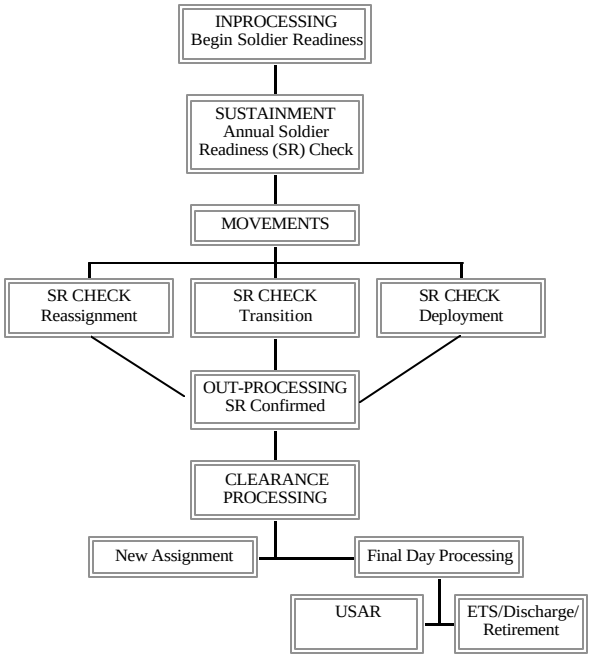
3. At a minimum, these requirements must be checked: (AR 600-8-101, para. 4-2b)

   a. Annually

   b. During out-processing

***The Personnel Processing Program***

*(AR 600-8-101, Fig. 1-2)*



c. Within 30 days of deployment

d. Within 30 days of departure on extended TDY (90 Days or more).

C. Soldier Readiness Requirements (Extract). *See* AR 600-8-101, paras. 4-3 - 4-7 for detailed processing requirements.

1. Level 1: Basic Movement Requirements

a. Personnel

(1) Soldiers requiring a Family Care Plan (DA Form 5304-R) must have an approved plan on file.

(2) SGLI Form reviewed/revised

(3) DD Form 93 reviewed/revised

(4) Each soldier will wear two ID tags around their neck at all times.

(5) Each will soldier will carry a current ID Card (DD Form 2A) at all times.

b. Medical

(1) Soldiers deploying OCONUS for more than 179 days must have a negative HIV test within 6 months of departure.

(2) Soldiers deploying for less than 179 days must have a negative HIV test within 24 months of departure.

c. Dental. Soldiers must have a complete record to include a panographic X-ray.

2. Level 2: Wartime Movement Stopper Requirements

a. Personnel

(1) Soldiers will not be sent to countries where they have been held as POWs.

(2) Unless waived by the soldier, sole surviving family members will not be sent to an area where duties would normally involve actual combat with the enemy.

(3) Soldiers with a 3 or 4 physical profile will not deploy (unless declared deployable by an MMRB).

b. Medical

(1) Pregnant soldiers will not deploy.

(2) Soldiers without current immunizations will not deploy.

(3) Soldiers requiring eyeglasses will have two pair plus NBC inserts to deploy.

c. **Legal Affairs**. Soldiers must have received a Geneva Convention briefing at some point in their current enlistment/career.

d. Security Clearance. Soldiers must meet security clearance requirements for their position and for the area they are deploying to.

e. Training. Soldiers must have qualified with their individual weapon within the 12 months prior to deployment.

3. Level 3: Other Requirements.

a. Personnel

(1) Commanders may restrict soldiers pending discharge, separation, compassionate reassignment, etc. from deployment.

(2) Soldiers who have been approved for 1-A-O Conscientious Objector status will not be deployed to an area where their normal duties would require the handling of weapons.

b. Medical

(1) Soldiers receive medical history screening.

(2) Soldiers queried for exceptional family member program.

c. Dental

(1) Soldiers with dental classification 3 or 4 will not deploy until treatment is complete.

(2) Each soldier will have a duplicate panographic x-ray on file at the Central Panographic Storage Facility.

d. **Legal Affairs**

(1) Soldiers pending civil felony charges will be provided assistance. The soldier may not be deployable because of the charges.

(2) *Given time and other resources*, POA support may be provided.

(3) *Given time and other resources*, Will support may be provided.

(4) Soldiers will be counseled on insurance and other civil matters.

4. Level 4: Deployment Area/Mission Unique Requirements.

a. Personnel. Soldiers will be processed for a passport if required.

b. Medical. Soldiers will receive appropriate immunizations for the area.

c. **Legal Affairs**. Soldiers will be briefed on the applicable local laws for the deployment area.

d. Training.

(1) Soldiers will receive a terrorist briefing before deploying.

(2) Family members will receive an unclassified briefing about the soldier's deployment mission and area.

5. Level 5: Peacetime PCS/Transition Requirements. *See* AR 600-8-101, para. 4-7.

D. Readiness Requirements for Movement:

1. Annual Check: Not specified in the regulation. Common sense dictates checking Levels 1-3.

2. Contingency Operations: Commanders physically review on-site, within 30 days of departure, processing requirements in Levels 1-4.

3. Administrative Movement: Prior to actual movement during peacetime, commanders will review the processing requirements in Level 1.

# IV. LEGAL READINESS PROCESSING

A. Who Gets It? AR 27-3, para. 2-5.

1. Active component soldiers and their families.

2. Reserve Component soldiers and their families (but supervising attorneys may limit assistance based upon availability of expertise or resources.

3. DoD Civilians who are:

a. Designated "mission-essential" or "emergency -essential."

(1) Only for those matters related to deployment.

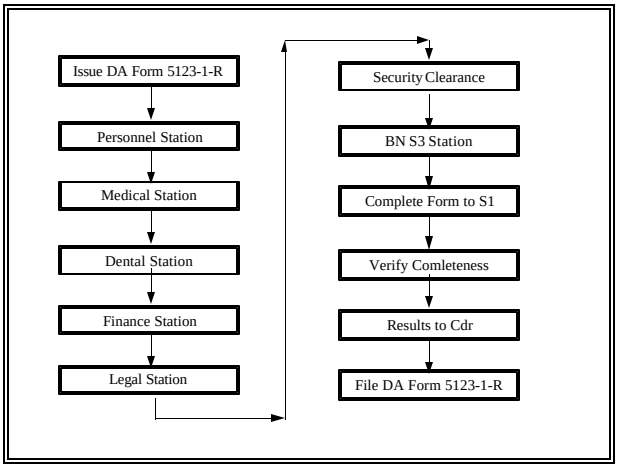
(2) Family members may receive assistance on deployment-related matters, but only while the employee is deployed.

b. Not "mission-essential" or "emergency-essential," but who deploy to a combat zone or on a contingency operation.

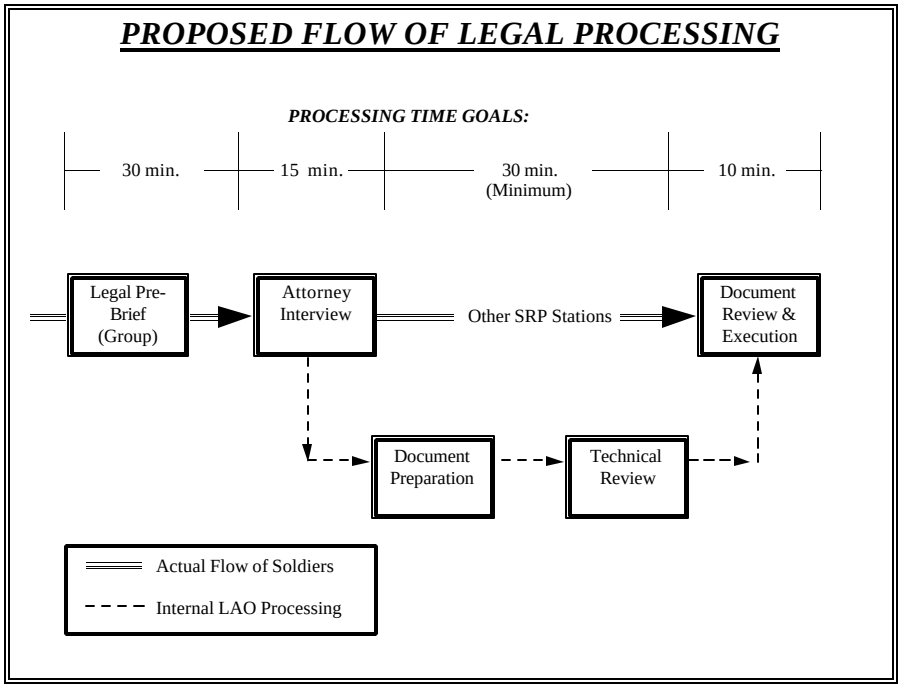
(1) Only for matters related to their imminent or actual deployment.

(2) Family members may receive assistance on deployment-related matters, but only while the employee is deployed.

B. Flow of SRP Processing. AR 600-8-101, table 5-1.




C. Proposed Flow



D. Practical Considerations

1. Place Legal Station Near the Beginning of the Processing Area (AR 27-3, para. 3-6b(1)(b)). Consider "two-station" approach.

a. May face resistance - different than the regulation.

b. Allows time for document preparation

c. Allows legal advice to precede SGLI elections.

2. Develop a Standard Legal Checklist

a. DA Form 5123-1-R does not include any legal processing steps.

b. See Appendix A for a sample legal checklist.

3. Get Involved as OIC or Deputy SJA – influencing G-Staff needed.

4. Demand an SOP from your LAO.

5. Prior Planning Prevents Poor Performance

E. Professional Responsibility Considerations

1. The same legal and professional standards that apply in an Army legal office apply during SRPs. *See* AR 27-3, para. 3-6b(2)(a).

2. LAAWS-LA. AR 27-3, para. 4-4.

a. LAAWS-LA represents Army policy for the appropriate format for legal assistance documents, records, and reports.

b. REMEMBER, it is ONLY a guide and NOT a substitute for the attorney's professional judgment and advice.

c. Factors, such as the unavailability of updated LAAWS programs or compatible equipment, the availability of suitable alternatives, or military or client needs or requirements may warrant the use of computer software programs other than LAAWS.

3. Attorney-Client Privilege/Confidentiality. AR 27-3, para. 4-8.

a. Protections and standards are NOT automatically waived!

b. You must make room at the SRP for confidential counseling.

4. Conflicts of Interest. AR 27-3, para. 4-9.

a. Supervising attorneys are responsible for ensuring procedures are in place to ensure that:

(1) Clients are screened to avoid inadvertent conflicts

(2) Full explanations are given to clients who cannot be assisted in an Army legal office because of a conflict.

(3) Clients who cannot be assisted are referred in accordance with AR 27-3.

(4) Confidentiality is maintained.

b. These procedures must be in place for SRP as well.

c. This affects the amount of clerical support/work stations that will be needed. PLAN for it!!!

5. Competence

a. Have a plan to "backup" your LAO.

b. Training is key – when did your trial counsel last think about estate planning? Taxes? Powers of Attorney?

## V. SELECTED LEGAL SERVICES

A. Wills & Estates. AR 27-3, para. 3-6b.

1. GENERAL RULE: Any eligible client who wants a will, gets one.

2. When legal resources are limited, priority is given to clients to which ANY of the following apply:

a. Those with minor children;

b. Those whose primary beneficiary is a minor;

c. Those with a net estate valued at more than $10,000; OR

d. Those desiring to distribute their property in a manner different than what would occur under the applicable intestacy statute or existing will.

3. Drafting and execution of wills for others may be delayed until resources are available.

4. The execution of pre-printed fill-in-the-blank wills is limited to clients domiciled in states that specifically authorize the execution of such wills.

5. The same legal and professional standards that apply to will-drafting in the office apply at the SRP.

B. Powers of Attorney

1. Preamble to all Powers of Attorney:

This is a MILITARY POWER OF ATTORNEY prepared pursuant to Title 10, United States Code, Section 1044b and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney under the laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.

2. General Powers of Attorney. AR 27-3, Par. 3-7e(2).

a. NEVER advisable if a specific power will accomplish the desired purpose.

b. A client requesting a general power of attorney for use by someone other than a trusted spouse or relative must be warned about the serious legal problems that can arise from its misuse.

C. SGLI/Insurance Counseling

1. EVERY client obtaining a will MUST be given advice on designating beneficiaries under SGLI (or other insurance). Advice on SGLI designation of beneficiaries will be available to ALL soldiers in the SRP.

2. Army policy is that soldiers will NOT use "by-law," "by-will," or "to-my-estate" designations on SGLI forms. AR 600-8-1, para. 11-29b. Instead, soldiers must designate beneficiaries BY NAME. *Id.* Attorneys will not recommend "by-law" type designations to any client regardless of service component

3. Practical Tips

a. Watch for "war exclusion" clauses on private insurance.

b. Avoid the estate beneficiary or "by will" - creditor access.

c. Encourage testamentary trusts with SGLI funding for minor beneficiaries to avoid court-appointed guardianships.

(1) Consider the laws of the domicile and advise client if a trust will cause the will to be probated when it otherwise would not have been.

(2) Inter vivos trusts may be prepared with approval of a supervisory attorney.

D. Other areas to plan for.

1. Living wills and durable POAs for health care

2. Tax problems/assistance.

3. Family Care Plans

4. Employment Concerns (Reserves)

5. SSCRA Protections

## VI. PREVENTIVE LAW MEASURES - STOP PROBLEMS BEFORE THEY START. AR 27-3, PARA. 3-3 - 3-4; AFI 51-504, CHAPTER 3.

A. Supervising Attorneys should be aggressive and innovative in disseminating information.

B. Preventive law is a COMMANDER's program. AR 27-3, para. 1-4f(3).

1. Use this to gain access to soldiers.

2. Use this to justify requests for supplies and equipment. *See* AR 27-1, para. 9-3a.

C. Use all media and training and education programs possible to inform soldiers and their families about: (AR 27-3, para. 3-4b.)

1. Their legal rights and entitlements.

2. Timely legal issues and local legal problems and solutions.

3. Thinking about the legal consequences of their actions before signing documents.

4. Getting legal advice as soon as they recognize a potential problem.

5. The location of the legal assistance office and how to contact it.

D. Practical Suggestions

1. Service Members

a. Coordinate with commanders to "volunteer" for routine (weekly/monthly) training. (Payday, OPD/NCOPD, etc.)

b. Participate in routine SRPs to reduce load at deployment. *See* AR 27-3, para. 2-1b.(1) ("*Readiness*. Because Active Army and RC soldiers and emergency-essential DoD civilian employees must be prepared for immediate mobilization and deployment, their personal legal affairs must be in order at all times.")

c. Bulletin Boards in Unit Areas.

d. Post-Access channel

e. Newspaper/Newsletter Pubs.

2. Using the Internet

a. Much material is now readily available for download and use.

b. Post/SJA Web Page

3. Family Members

a. Be involved with and volunteer to brief the Family Support Group (FSG).

b. Support the Army's new Army Family Team Building (AFTB) training.

# APPENDIX A

# LEGAL PROCESSING CHECKLIST

| *Item* | *Yes (initial)* | *No (initial)* |
|---|---|---|
| Please list the state where you vote _____ Pay taxes _____ Obtain Driver's License _____<br>Listed as you home of record in your military records _____ Car Registered _____<br>Own real property _____ What state do you consider you permanent home? _____ | | |
| **1. Do you have a will?**<br>*If YES, the will is located at:*<br>_____<br>*If NO, go to #3.* | | |
| **2. Do you need to UPDATE your will?**<br>*If any of these events have occurred since you signed your will, you should discuss updating your will with an attorney. Therefore, you should check "Yes".*<br>• *Change in martial status (married, divorced, separated, widowed)*<br>• *Birth or adoption of a child*<br>• *Death of a person mentioned in your will*<br>• *Significant change in assets (Purchase home, large inheritance, etc.)* | | |
| **3. Do you need to MAKE a will?**<br>*If any of the conditions below apply to you, you should speak with an attorney about making a will. Therefore, check "Yes."*<br>• *You have minor children at home;*<br>• *Your primary beneficiary is a minor;*<br>• *Your estate (all assets) is valued at more than $10,000; OR*<br>• *You desire to distribute your property in a manner different than what would occur under your home state law or an existing will. (For example, giving property to non-family members, limiting distribution to certain family members, etc.).* | | |
| **4. Do you want to make a living will or health care power of attorney?**<br>*If you desire to limit the use of extraordinary medical procedures to prolong your life or to give someone else authority to make medical decisions for you, you should speak to an attorney about these legal documents.* | | |
| **5. Do you have a Power of Attorney (POA)?**<br>If YES, the POA is a (circle one) GENERAL or SPECIAL POA and is located at:<br>_____ | | |

| | | |
|---|---|---|
| **6. Do you want to make a POA or change your POA?**<br>*If you have previously executed a GENERAL power of attorney or need to authorize a person to handle your bills, move your property, sell property, or handle other affairs, you should speak with an attorney about a POA.* | | |
| **7. If you are a SINGLE PARENT or a member of a TWO-SOLDIER FAMILY, do you have an approved Family Care Plan?** | | |
| **8. How you designate the beneficiaries of you SGLI and other insurance can greatly affect the actual amount of money paid to your loved ones. Do you wish to speak to an attorney about your options for making this designation?**<br>*If any of your beneficiaries (primary or alternate) is a minor, this counseling is critical. You should check "yes" in this block. If your SGLI form says "By Law" or "By Will" it is essential that you speak with an attorney about changing these designations.* | | |
| **9. Are you facing any civil or criminal legal actions?** *If YES, you should speak with an attorney about these matters and how deployment might affect them.* | | |
| **10. Do you have any other legal matters (credit/consumer problems, landlord-tenant problems, etc.) that you wish to discuss with an attorney?** | | |

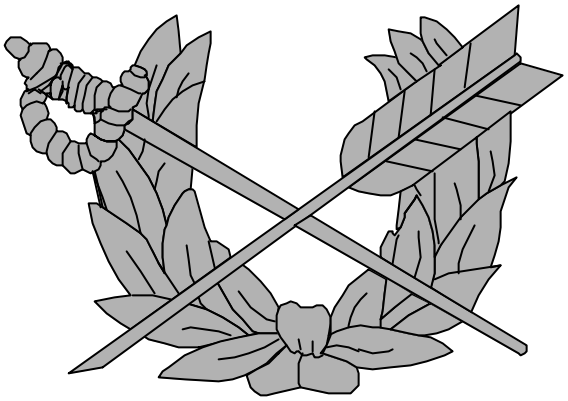
My signature below indicates that I have received a legal briefing covering the areas on this form. I understand how my personal circumstances are affected by and can be changed by these legal actions. I have been afforded the opportunity to consult with an attorney about these matters and have used this opportunity to the degree that I feel I need to. I am satisfied that my legal affairs are in adequate order for me to deploy.

SIGNATURE OF SOLDIER: _____

SIGNATURE OF LEGAL AFFAIRS PROCESSOR: _____

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

# *BASIC COURSE DESKBOOK*



## Part II
## Claims

The Judge Advocate General's School

United States Army

MARCH 2001 JA 280

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A. AR 27-20, Claims (31 December 1997).

B. DA Pamphlet 27-162, Claims (1 April 1998).

C. DA Pamphlet 27-50-328, *The Army Lawyer* (Claims Report).

D. Claims Forum, JAGCNET.

# III. RESPONSIBILITIES, OPERATIONS, POLICIES, AND GUIDANCE.

A. Responsibilities and Operations.

1. Secretary of the Army.

a. Promulgates regulations in compliance with federal claims statutes.

b. Designates subordinate officials to act as settlement authority.

c. In some instances, acts as settlement authority.

2. The Judge Advocate General (TJAG).

a. Has Army Staff responsibility for administrative settlement of claims worldwide by and against the U.S. Army.

b. Responsibilities extend to the effect of claims administration on such other functions as relations with host governments abroad, domestic maneuvers, and morale and preventive law programs.

3. United States Army Claims Service (USARCS).

a. Effective 1 October 1997, USARCS, located at Fort Meade, Maryland, became a subordinate element of the U.S. Army Legal Services Agency (USALSA).

b. Responsible for managing the Army Claims System.

c. Commander, USARCS may publish bulletins, manuals, handbooks, notes, and pamphlets to provide claims personnel with guidance on administrative and procedural matters. Valuable sources of practical information are *The Army Lawyer* and the claims forum and files on the JAGCNET.

d. Other responsibilities.

(1) Supervise and inspect Army claims activities worldwide.

(2) Form and implement claims policies.

(3) Provide advice to field claims offices.

(a) Area Action Officers (AAOs).

(b) Assist and guide field offices; provide technical supervision.

(c) Maintain mirror file of all claims pending in area of responsibility.

(d) First stage in requesting approval of settlement beyond local authority.

4. Command Claims Services.

a. Exercise general supervisory authority over claims matters arising within their assigned areas of operations.

b. The following commands have command claims services.

(1) U.S. Army South (USARSO).

(2) U.S. Army Europe (USAREUR).

(3) Eighth U.S. Army, Korea.

c. With the approval of USARCS, command claims services may designate area claims offices.

5. Area Claims Offices.

a. Principal offices for the investigation, adjudication and settlement of claims.

b. Responsible for staffing and training all claims offices within their areas of responsibility.

6. Claims Processing Offices.

a. Normally small legal offices or subordinate elements of area claims offices.

b. Investigate all potential or actual claims within their jurisdiction.

c. Four types of claims processing offices.

(1) Claims processing offices with approval authority.

(2) Claims processing offices without approval authority.

(3) Medical claims processing offices.

(4) Special claims processing offices.

7. Claims Judge Advocate.

a. JA officer in charge of claims activities for SJA.

b. Primary action officer.

c. Supervises personnel in claims office.

8. Claims Attorney.

a. Civilian attorney designated to approve claims.

b. Primary action officer.

c. Must be GS-11 or above and a member of the bar of a state, the District of Columbia, or a jurisdiction where U.S. federal law applies.

B. Policies and Guidance.

1. General.

a. Claims investigation and adjudication should be accomplished at the lowest level possible, that is, by the claims processing office or area claims office with monetary authority over the estimated total value of all claims arising from the incident.

b. Where technical errors exist in the filing of a claim or in its format, claimants should be advised of such errors and the need for correction.

2. Investigative environment.

a. Should be cooperative and engender a free exchange of information and evidence.

b. Personal contact with claimants is often essential.

c. If settlement is not feasible, issues of disagreement or dispute should be clearly documented to facilitate the resolution of any reconsideration, appeal, or litigation.

# IV. CLAIMS AGAINST THE GOVERNMENT.

A. Personnel Claims Act (PCA). 31 U.S.C. § 3721; AR 27-20, chapter 11.

1. Provides limited protection to soldiers and DA civilians for loss or damage to their personal property that occurs incident to service or employment.

2. Is a gratuitous payment statute. PCA claims do not sound in tort even though we use some tort concepts in adjudicating them.

3. Does not make the United States a total insurer of proper claimants' personal property.

4. Not a waiver of sovereign immunity.

5. Generally, the maximum amount that the U.S. can pay for each claim is $40,000. Maximum payment may be as high as $100,000 in cases arising from an emergency evacuation or from extraordinary circumstances. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, sec. 1088.

B. Federal Tort Claims Act (FTCA). 28 U.S.C. §§ 2671-80; AR 27-20, chapter 4.

1. A limited waiver of sovereign immunity for damage to property, personal injury, or death caused by the negligent or wrongful acts or omissions of U.S. employees acting within the scope of employment.

   a. Claimants must file proper administrative claims as a jurisdictional prerequisite to suit.

   b. U.S. is generally liable under state law to the same extent as a private person under the same circumstances.

   c. Immunities and defenses available under state law apply under the FTCA.

2. Claimants may file suit in U.S. district court if their claims are not settled administratively. 28 U.S.C. § 1346(b). Bench trial only.

3. Statutory exclusions to liability include maritime and admiralty claims; overseas claims; assault, battery, and other intentional torts; combat activities; and discretionary function.

4. *Feres* bar to suit. Servicemembers cannot sue the federal government for injuries incurred "incident to service."

C. Military Claims Act (MCA). 10 U.S.C. § 2733; AR 27-20, chapter 3.

1. A claim for personal injury, death, or damage to or loss of property is payable when:

a. Caused by a negligent or wrongful act or omission of military personnel or civilian officers or employees acting within the scope of their employment; or

b. Incident to the noncombat activities of the Department of the Army.

(1) Noncombat activities are acts that are essentially military in nature, having little or no civilian parallel.

(2) Examples include practice firing of missiles and weapons, training and field exercises, and maneuvers that include the operation of aircraft and vehicles designed especially for military use.

2. Applies worldwide, but application is limited to those claims that cannot be settled under the FTCA or the Foreign Claims Act (FCA).

3. Not a waiver of sovereign immunity.

4. Applicable law.

a. General principles of law applicable in a majority of American jurisdictions.

b. Contributory negligence. Apply the law of the place of the occurrence, including the law of foreign countries when the claim arises in a foreign country.

D. National Guard Claims Act (NGCA). 32 U.S.C. § 715; AR 27-20, chapter 6.

1. Mirrors the MCA.

2. All tort claims caused by ARNG personnel engaged in training or duty under 32 U.S.C. §§ 316, 502, 503, 504, 505, or 709 that arise out of incidents occurring on or after 29 December 1981 will be processed under the FTCA. Tort claims arising before this date will be processed and settled under the MCA.

3. Claims incident to the noncombat activities of the ARNG while engaged in duty or training under Title 32 may be settled under the NGCA.

E. Nonscope Claims Act (NCA). 10 U.S.C. § 2737; AR 27-20, chapter 5.

1. An administrative remedy for property damage, personal injury, or death caused by DA personnel acting outside the scope of their employment.

2. Substantive bases for nonscope claims.

a. Use of U.S. vehicles at any location.

b. Use of other U.S. property on government installations.

3. Payments cannot exceed $1,000.

F. Foreign Claims Act (FCA). 10 U.S.C. § 2734; AR 27-20, chapter 10.

1. Purpose is to maintain the good will of the local population in overseas areas where U.S. troops are stationed or deployed.

2. Applies only outside the United States and its territories, Commonwealths, or possessions.

3. Proper claimants include "inhabitants" of foreign countries, foreign governments and political subdivisions thereof, and corporations.

4. Claims payable. AR 27-20, paragraph 10-3.

   a. Noncombat activities.

   b. Negligent or wrongful acts of U.S. military personnel or civilian employees. Scope of employment is not required in all cases.

   c. Real property not founded on contract.

5. Claims excluded. AR 27-20, paragraph 10-4.

   a. Status of Forces Agreements (SOFAs) or other international agreements that contain claims provisions will be used in lieu of the FCA. If the SOFA or international agreement does not cover the claim, the FCA applies.

   b. A claim that results from action by an enemy or results directly or indirectly from an act of the armed forces of the United States in combat may not be allowed under the FCA.

6. Foreign claims commissions settle FCA claims.

## V. CLAIMS IN FAVOR OF THE GOVERNMENT (AFFIRMATIVE CLAIMS).

A. Medical Care Claims.

1. Federal Medical Care Recovery Act (FMCRA). 42 U.S.C. §§ 2651-53; AR 27-20, chapter 14.

   a. The United States may recover from third parties the reasonable costs of medical care furnished to injured persons when the injuries were suffered under circumstances creating tort liability upon some third person.

(1) The National Defense Authorization Act for Fiscal Year 1997 expanded the FMCRA's coverage to include recovery of lost wages of active duty servicemembers who are unable to perform their military duties due to the wrongful conduct of a third party tortfeasor.

(2) The FY97 Authorization Act also amended the FMCRA to permit recovery in no-fault states.

b. Under the FMCRA, the government may pursue recovery of medical costs using any of the following tactics.

(1) Subrogation.

(2) Intervention.

(3) Independent action.

(4) Item of special damages.

c. The United States can recover costs actually paid or reasonably expected to be paid in the future. The most common measures of recovery are diagnostic related group rates (DRGs) and rates established by the Office of Management and Budget as representing the value of care provided in government medical facilities.

2. Third Party Collection Program. 10 U.S.C. § 1095.

a. Applicability.

(1) Medical care provided at or by a military treatment facility (MTF).

(2) Claim is filed against a third-party payer, i.e., a private health benefits insurer, Medicare supplemental insurer, automobile insurer, or participating health maintenance organization. Note that the National Defense Authorization Act for Fiscal Year 1997 contains significant provisions clarifying the definition of "third party payers" for purposes of 10 U.S.C. § 1095.

b. Money collected is returned to the Operations and Maintenance Account of the MTF providing the care.

c. Implementation.

(1) Installation claims offices collect from automobile insurers.

(2) MTFs collect from health benefits/Medicare supplemental insurers/participating HMOs, etc.

3. Other medical care recovery authority.

a. State workers' compensation laws.

b. Contract rights under terms of injured party's insurance policies.

(1) Medical payment provision.

(2) Uninsured and underinsured motorist provision.

(3) Personal injury protection provision (no-fault).

B. Property Claims—Federal Claims Collection Act (FCCA). 31 U.S.C. § 3711; AR 27-20, chapter 14.

1. A number of regulations establish systems for recovering compensation for damage to U.S. Government property. When such systems cannot be used or no other method of collection applies, Federal agencies may assert claims in favor of the United States under the FCCA.

2. FCCA allows heads of agencies to collect money for damage to agency property.

a. Recovery judge advocates or attorneys may accept repair or replacement of the property in lieu of payment of the claim. The staff officer responsible for the property must certify that the repair or replacement has been accomplished before executing a release.

## VI. ARTICLE 139, UCMJ (AR 27-20, CHAPTER 9).

A. Article 139, UCMJ:

*Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint....The assessment of damages done by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved (emphasis added).*

B. Purpose: To provide a means for individuals (civilian or military), businesses, or state and local governments to receive restitution from loss, damage or destruction to their personal property (or property in their lawful possession) by military members of the Armed Forces of the United States. [*See also* DA PAM 27-162, Claims, Chapter 9].

C. Claims cognizable under Article 139:

1. Willful Property Damage.

   a. Intentional damage caused without justification.

   b. Damage caused by riotous, violent, or disorderly acts or acts showing reckless and wanton disregard for property rights of others.

2. Property Wrongfully Taken.

   a. Includes larceny, wrongful appropriation, forgery, embezzlement, and fraud.

   b. The mere fact that a service member is acquitted on larceny charges is not dispositive of Article 139 claim. Independent findings made in on issues other than guilt/innocence in Article 139 board proceeding.

3. Article 139 proceedings as part of military restitution is required under victim's rights laws in appropriate cases.

4. Claims not cognizable include:

   a. Negligent acts.

b. Personal Injury, death, or theft of services.

c. Military Member Acts or Omissions within Scope of Employment.

d. Acts of Reservists not subject to UCMJ at time of offense (non-Title 10 status).

e. Subrogation (insurer) claims.

f. Debts based on contractual or fiduciary disputes.

D. Damages are limited to direct damages for loss or damage to property. No consequential or indirect damages will be considered.

E. Procedure:

1. Claimant presents claim in writing, signed, for a sum certain amount to their immediate commander within 90 days from the incident, unless good cause for delay.

2. Claim is forwarded to the Special Court-Martial Convening Authority (SPCMCA) [normally Battalion Commander], within 2 working days of receipt by immediate commander.

3. Within 4 working days of receipt the SPCMCA appoints an investigating officer (IO) to conduct an informal investigation UP AR 15-6, if the claim appears to be valid. If the claim appears to be invalid or not against a military member, the matter is referred to the servicing SJA claims office for a legal review. If the SJA concurs that the claim is invalid, the SPCMCA can deny the claim

4. The investigating officer notifies the accused of the claim against them and gives them the chance to make full voluntary restitution so that when restitution is complete, the matter is dismissed by the SPCMCA.

5. If the accused refuses to make full restitution, within 10 working days, the IO makes findings as to whether the claim is legitimate and meritorious, and recommends the amount to be assessed against the accused.

6. The SPCMCA refers the matter for legal review by the installation SJA within 4 working days of receipt of the IO's findings and recommendations.

7. The SJA claims section provides a written legal opinion, within 5 working days from SPCMCA referral, that discusses:

   a. Whether the claim is meritorious under Article 139, UCMJ, and service regulations.

   b. Whether the evidence supports the findings and recommendations.

   c. Whether the claimant, the SPCMCA, and the IO have properly followed the procedural due process requirements of Article 139, UCMJ, the service regulations, and AR 15-6.

   d. Whether the claim is not valid, and whether final action may be taken by the SPCMCA without appointing an IO.

8. Claims Approval:

   a. $5000 and under-SPCMCA.

   b. $5000 to 10, 000-GCMCA, upon area claims office approval.

   c. Over $10,000, must be approved by the Commander, U.S. Army Claims Service (USARCS).

9. Claimant and/or Accused may request reconsideration by the approving authority, in writing, which is subject to SJA claims legal review.

## VII. CONCLUSION.

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# Outline of Instruction

## I. INTRODUCTION.

## II. GENERAL.

A. Purpose of the Personnel Claims Act (PCA).

1. Provides a limited substitute for hazard insurance to relieve hardships that arise when personnel are exposed to unusual risks of loss because of their service.

2. The PCA is a gratuitous payment statute.

3. The PCA does not provide insurance coverage.

4. Payment is not conditioned on tort liability.

B. Definition of a Claim.

1. A written demand for compensation. The demand need not state a sum certain.

2. Must be presented in writing to a military installation within 2 years of accrual.

3. A claim accrues on the day that the claimant knows or should know of the loss.

a. Loss in shipment.

(1) A claimant knows or should know of obvious loss or damage on the date of delivery.

(2) Exceptions.

(a) Officially recognized absence for a significant portion of the notice period.

(b) Extended hospitalization.

b. Loss in storage.

(1) Partial damage notification.

(2) Complete loss notification.

c. Damage or loss on the installation or in quarters.

C. Property and Expenses Covered by the PCA.

1. The PCA covers losses of tangible personal property.

2. The PCA provides for payment of reasonable estimate fees after the claimant has paid for them or becomes obligated to pay for them.

a. An estimate fee is a fixed cost charged by a person in the business of repairing property to provide an estimate of what it would cost to repair damaged items.

b. A reasonable estimate fee is compensable if it is not going to be credited toward the cost of repair should the repair be done.

c. If an estimate fee will be credited toward the cost of repair, the estimate fee is not compensable, regardless of whether the claimant chooses to have the work done.

3. The PCA provides for payment of fees to replace certain documents if the original or certified copy is lost or destroyed incident to service (documents include marriage certificates, birth certificates, and passports).

D. Property and Expenses Not Covered by the PCA.

1. The PCA does not cover loss of, or damage to, real property, i.e., land, crops, and other things permanently joined to the land.

2. The PCA does not allow compensation for the loss of intangible property. Intangible property is merely representative of value and has no value in and of itself. Examples of intangible property include nonnegotiable stock certificates, bankbooks, insurance policies, and leases.

3. Incidental expenses not directly connected with the loss of or damage to personal property are not compensable.

a. Food or lodging costs, vehicle rental costs, or similar expenses incurred because a claimant's goods or vehicle was not delivered in a timely manner may not be considered under the PCA.

b. These indirect costs may be recovered directly from the carrier. Claims personnel should direct individuals who have incurred such costs to the installation transportation or legal assistance office.

E. Findings Necessary to Award Compensation Under the PCA.

1. The claimant is a proper claimant.

2. The evidence substantiates each of the following:

a. Ownership or possession.

b. Loss or damage.

c. Value of the property.

3. The loss, damage, or destruction of the property involved was sustained incident to the claimant's military service or employment.

4. The type and quantity of property claimed was reasonable or useful under the attendant circumstances.

5. There is no bar to the allowance of compensation for either the type of property involved or for the type of loss, damage, or destruction upon which the claim is based.

6. No part of the loss is covered by insurance.

## III. FINDING 1 - PROPER CLAIMANT.

A. Proper Claimants. AR 27-20, para 11-4.

1. Servicemembers on active duty.

2. Members of the Army Reserve or the Army National Guard engaged in active or inactive duty training.

3. Civilian employees of the Army, the Army National Guard, and the Department of Defense.

4. The spouse, legal representative, or agent of any of the above.

5. Survivors of deceased proper claimants.

B. Improper Claimants. AR 27-20, para 11-4(d) & (e).

1. Private employees and contractors.

2. Insurers and other third parties.

## IV. FINDING 2 - SUBSTANTIATION.

A. Claimants are entitled to compensation only if they substantiate each of the following.

1. Ownership or possession.

2. Loss or damage.

3. Value.

B. There is no set rule as to how much proof claimants must provide. The following factors should be considered.

1. Documentary evidence.

a. Inventory. The single most important document in evaluating a household goods claim.

b. Statements. Check for bias.

c. Purchase receipts and prior appraisals. These establish ownership and can be used to assist in determining value.

d. Photographs and videotapes. Other than inventories, the best evidence of ownership and condition.

e. Estimates, paid bills, and subsequent appraisals. These establish replacement or repair costs. Estimates are required for repairs over $100.00.

f. Police reports. Be careful, however. Such reports vary considerably in quality.

2. Report of loss.

a. The greater the delay in reporting the loss, the more substantiation is required.

b. Claimants are expected to list missing inventory items and obvious damage at time of delivery. Such losses are listed on DD Form 1840, commonly referred to as "the pinks."

c. A claimant has 70 days to unpack and discover loss and damage that is not obvious at delivery. Additional loss or damage is reported on DD Form 1840R (the reverse side of DD Form 1840).

d. Claimants must return DD Forms 1840/1840R to the installation claims office within 70 days of delivery. Failure to do so may result in a substantial reduction in their payment.

3. Claimant credibility. It is Army policy to assume claimants are credible unless there is evidence to the contrary.

4. Inspections.

a. Whenever a question arises about damage to property, the best way to determine the proper award is to examine the item closely to determine the nature of the damage.

b. Claims personnel should conduct inspections on all large claims (settlement over $1,000).

## V. FINDING 3 - LOSS IS INCIDENT TO SERVICE.

A. Categories of Incident to Service Losses.

1. Extraordinary hazard not required.

2. Extraordinary hazard required.

B. Losses Not Requiring an Extraordinary Hazard.

1. Government-sponsored Transportation Losses. AR 27-20, para 11-5e.

a. Loss or damage to a vehicle during shipment or storage at government expense is compensable, unless it was the result of a mechanical defect in the item.

b. Loss or damage to a vehicle shipped at government expense is compensable.

c. Loss or damage that occurs while property is being shipped or stored at the claimant's expense is not compensable.

d. Loss of the claimant's luggage and carry-on items is compensable when a claimant is traveling pursuant to orders authorizing travel at government expense, including space available travel.

2. Vehicle Losses - Official Use Pursuant to Orders for the Convenience of the Government. AR 27-20, para 11-5h.

a. Written orders are normally required.

b. Does not include commuting to and from work.

c. Damage due to a collision, including a hit-and-run incident, is compensable.

d. Damages due to mechanical failure are not compensable.

3. Losses Due to Enemy Action or Public Service. AR 27-20, para 11-5f.

a. Losses due to enemy activity or unjust confiscation are compensable.

b. Losses due to terrorism, mob violence, and other hostile acts directed against the United States or its officers and employees in a foreign country are compensable.

c. Losses due to evacuation from a foreign country on the recommendation or order of competent authority are compensable.

d. Losses incurred in quelling riots, rendering emergency first aid, or assisting during a declared public disaster are compensable.

e. Losses resulting from saving human life or government property are compensable.

4. Loss of Money Delivered to an Agent of the United States. AR 27-20, para 11-5g.

5. On-post Robberies. AR 27-20, para 11-5j.

a. Losses due to theft from persons on a military installation by the use of force, violence, or threat to do bodily harm may be compensable.

b. Consider processing under Article 139, Uniform Code of Military Justice if a servicemember is a fault. See AR 27-20, chap 9.

6. Property Held as Evidence. AR 27-20, para 11-5k. If property belonging to the victim of a crime will be held in excess of two months and this circumstance will work a grave hardship on the victim, a claim for the loss may be considered. This provision will not be used until it has been determined that secondary evidence may not be substituted for the item.

C. Losses that Require an "Extraordinary Hazard."

1. Extraordinary hazards. DA Pam 27-162, para 11-5c.

a. Fire.

b. Flood.

c. Hurricane.

d. Unusual occurrence.

(1) An unusual occurrence is a hazard outside the normal risks of day-to-day living and working.

(a) Incidents of an unusual nature.

(b) Incidents of a common nature that occur to an unexpected degree of severity.

(2) The following are normally not considered unusual occurrences:

(a) Storms, power surges, and power outages.

(b) Gradual deterioration of furniture and other items due to prevailing climatic conditions.

(c) In areas where it is common, infestation (termite, insect, rodent).

(d) In regions subject to very cold weather, ice and snow falling off the roof onto a vehicle or collapsing the roof of a shed.

(e) A hailstorm.

(f) Balls "escaping" from ball fields and golf courses, and rocks thrown up by lawn mowers, weed-eaters, or vehicles.

(g) Damage to moving vehicles caused by defects or foreign objects in the roadway.

(h) Collisions during personal use of privately owned vehicles, e.g., hit-and-run accidents, vehicles hitting deer or other wildlife.

(i) Tears, rips, or snags in clothing.

e. Theft.

f. Vandalism.

2. Quarters Losses. AR 27-20, para 11-5d.

a. Losses from assigned quarters, wherever situated, are compensable if they result from an extraordinary hazard. "Quarters" includes garages, carports, driveways, assigned parking spaces, and lots specifically provided and used for the purpose of parking at one's quarters.

b. Losses from any other place on the installation where the claimant is either authorized or directed to store property are compensable if they are the result of an extraordinary hazard.

c. Losses from temporary quarters that the claimant is authorized to occupy in the performance of temporary duty (TDY), regardless of where those quarters are situated, are compensable if they are the result of an extraordinary hazard.

d. Losses from authorized off-post housing overseas are compensable if they are the result of an extraordinary hazard.

e. Losses from off-post housing in the continental United States (unless the housing is Government-owned or -leased) are not compensable, even if they are caused by an extraordinary hazard.

3. Vehicle Losses - Personal Use. AR 27-20, para 11-5h(3), (4), (5), and (6).

a. Located at quarters, other place of lodging, or located on a military installation. ("Quarters" is defined in outline section V.C.2. above.)

(1) May be considered if damage to or loss of vehicle is caused by fire, flood, hurricane, other unusual occurrence, theft, or vandalism.

(2) Theft and vandalism are presumed to have occurred off-post. Such claims are payable only if claimants prove that the damage or loss occurred while the vehicle was located at their authorized quarters or on the installation.

(3) Vehicle theft or vandalism on the installation at any location other than quarters is only compensable if it occurred on or after 1 April 1998.

(4) Vehicle must be properly on the installation.

(i) A vehicle properly on the installation is presumed to be incident to the claimant's service unless it is unreasonable to do so under the particular circumstances.

(ii) A vehicle is not properly on the installation if it is not registered or insured in accordance with local law or regulation.

b. Located off the Installation.

(1) Payment is authorized for theft and vandalism that is directly connected to the claimant's service.

(2) Loss or damage must have occurred at an off-post location other than the claimant's off-post quarters.

(3) Payment is only authorized for losses or damage off-post that occurred on or after 1 April 1998.

4. Loss of clothing or other items being worn on the installation or during the performance of duty. AR 27-20, para 11-5i.

## VI. FINDING 4 - REASONABLE OR USEFUL.

A. A claim may be allowed only for the amount and quantity of personal property considered reasonable or useful for the claimant to have used or possessed under the attendant circumstances. AR 27-20, paras 11-6 and 11-11d.; DA Pam 27-162, para 11-6.

B. Types of Property Not Reasonable or Useful.

1. Types of property never deemed reasonable or useful. DA Pam 27-162, para 11-6e(2).

a. Items acquired for resale or for use in a private business.

b. Radar detectors.

c. Enemy property or war trophies.

d. Money in shipment or storage.

e. Property acquired, possessed, or transported in violation of competent law, regulations, or directives.

f. Government property.

2. Types of property deemed not reasonable or useful under the circumstances. DA Pam 27-162, para 11-6e(1).

a. Personal tools and equipment used at the workplace.

(1) Compensable only if the commander authorizes use on a temporary basis.

(2) This policy prevents circumvention of Army supply system.

b. Losses of personal property kept permanently at the workplace.

(1) Workplace is generally not a proper location for storing personal property.

(2) Certain items are compensable, however.

c. Items stored or shipped in a vehicle. There are exceptions for:

(1) Items connected with the use of the vehicle.

(2) Comfort and safety items.

3. Quantities of property not reasonable or useful. DA Pam 27-162, para 11-6e(3).

a. Maximum allowances are in Allowance List - Depreciation Guide (ALDG). DA Pam 27-162, Table 11-11.

b. Property that exceeds a per item or per claim maximum allowance in the ALDG is deemed not reasonable or useful.

c. Waiver of maximum allowances. AR 27-20, para 11-14b.

(1) Heads of Area Claims Offices may waive the maximums for good cause as long as there is clear and convincing evidence that:

(a) The property was not held for commercial purposes;

(b) The property was owned by the claimant;

(c) The property had the value claimed; and

(d) The property was damaged or lost in the manner alleged.

(2) Other requests for waiver must be forwarded to the Commander, USARCS, for determination.

(3) Waivers are usually appropriate in the following situations.

(a) Detrimental reliance by the claimant on a government misrepresentation.

(b) Government fails to fully compensate the claimant for the full salvage value of the item.

(c) Claimant's loss occurred while the claimant was attempting to quell a civil disturbance, alleviate a public disaster, or save a human life or government property.

d. Even if values in ALDG are not exceeded, quantities of property far in excess of what a claimant can use under the attendant circumstances are not reasonable or useful.

(1) This determination should be used sparingly.

(2) In determining whether the quantity possessed was excessive under the circumstances, consider the claimant's living conditions, family size, social obligations, and any particular need to have more than average quantities.

## VII. FINDING 5 - BARS TO COMPENSATION.

A. Negligent Acts. DA Pam 27-162, para 11-6g.

1. A loss that is due, in whole or in part, to the negligence of the claimant or the claimant's spouse, child, house guest, employee, or agent is not compensable.

a. Claims resulting from an agent's negligent or wrongful conduct are barred as long as the conduct occurs within the scope of the agency and reasonably relates to the tasks that the agent was engaged to perform.

b. Claims resulting from the negligent or wrongful conduct of an employee are barred so long as the conduct occurs within the scope of employment.

2. A claimant is expected to exercise the same degree of care that a "reasonable and prudent" person would have exercised under the same circumstances.

3. If the loss would have occurred whether or not the claimant committed the negligent act, the loss did not result from the claimant's negligence.

B. Wrongful Acts. Property acquired, possessed, or transported illegally or in violation of competent regulations is not reasonable or useful, and thus the loss is not compensable regardless of whether the violation was a proximate cause of the loss.

C. Fraud. DA Pam 27-162, para 11-6f.

1. Fraud is an intentional perversion of the truth made in an effort to obtain a more favorable payment on a claim. A misunderstanding or inadvertent falsification is not fraud. In the absence of clear evidence, a claimant will be assumed to be mistaken rather than dishonest.

2. Fraud is most commonly detected by inspecting questionable items and reviewing estimates for alteration. Some indicators of possible fraud include:

a. very recent purchase dates;

b. excessive quantities of items;

c. inflated replacement price;

d. identical purchase dates for numerous items;

e. no substantiation of any or all or the following: purchase, ownership, value, quality, purchase price, replacement cost, extent of damage, or PED.

3. Refer clear and unmistakable cases of fraud to the military police or CID for appropriate criminal investigation. Remember, however, that the result of the criminal investigation is not binding on the claims adjudication process.

4. When fraud is suspected, but not clearly evident seek clarification from the claimant. This affords the claimant the opportunity to resolve misunderstandings and to reaffirm that the information is accurate.

5. When fraud is detected before payment, the entire claim, or only the line items tainted by fraud, may be denied.

6. When fraud is detected after payment, the claim should be readjudicated. If the claimant refuses to repay amounts incorrectly paid, the Defense Finance and Accounting Office will be directed to withhold the money from the claimant's pay and credit it to claims funds.

## VIII. FINDING 6 -INSURANCE.

A. Insurance procedures. AR 27-20, para 11-11f.

B. Claimants with insurance coverage for all or part of the loss must file a claim and settle with their insurers before receiving any Army claims payment. A CJA or claims attorney may pay a claim before settlement for good cause shown (DA Pam 27-162, para. 11-11f).

C. If the claimant refuses to provide the claims office with information about private insurance coverage, the claims judge advocate or claims attorney may assume, in the absence of evidence to the contrary, that the claimant had private insurance covering the entire loss and disapprove the claim.

D. If the claimant fails to provide his or her insurer with timely notice, thus allowing the insurer to deny the claim for failure to file within prescribed time limits, the Army claim will also be denied.

1. Claimants will be presumed to have knowledge of the conditions and terms of their insurance contracts.

2. Exceptions will be granted for good cause.

a. Officially recognized absence for a significant portion of the notice period.

b. Extended hospitalization.

c. Claimant can prove he or she received misinformation about notice requirements from Government personnel.

## IX. ADJUDICATING CLAIMS. AR 27-20, CHAP 11, SECTION II.

A. Replacement. DA Pam 27-162, para 11-14f.

1. A claimant is entitled to the actual value of missing and destroyed items.

2. An item that has sustained damage is considered destroyed if the cost of repairing it exceeds its actual value.

3. Actual value is determined in the following ways:

a. If there is a regular market for used items of that particular type, the loss may be measured by the cost of a similar item of a similar age.

b. The price for a new item is depreciated using the Allowance List-Depreciation Guide (ALDG) to reflect wear and tear on the missing or destroyed item.

c. If no better method is available, the "adjusted dollar value" method may be used to value the claimant's loss.

B. Repair. DA Pam 27-162, para 11-14d.

1. For items that can be economically repaired, the cost of repair or an appropriate loss of value is the measure of the loss.

2. The cost of repair may be:

   a. the actual cost;

   b. reasonable estimated costs; or

   c. agreed cost of repairs (AGC).

3. Loss of value (LOV), rather than cost of repair, should be awarded when an item suffers minor damage not worth repairing.

4. Preexisting damage (PED) to repairable items must be deducted from repair cost.

5. Clothing wrinkled in shipment presents special problems.

6. Claimant has a duty to mitigate damage to wet and mildewed items.

7. Repair cost is always limited by actual value of item.

C. Depreciation. DA Pam 27-162, para 11-14g.

1. The PCA is only intended to compensate claimants for the fair market value of their loss.

   a. Average yearly and flat rates of depreciation have been established and are listed in the ALDG.

   b. The listed depreciation rates may be adjusted based upon the condition of the item.

2. Depreciation is only taken on replacement parts that are normally replaced during the useful life of the item.

3. Depreciation is not taken on antiques, expensive jewelry, pets, solid wood furniture, wedding albums, or tools with a lifetime guarantee.

4. Depreciation generally is not taken during periods of storage.

5. Normally, no depreciation is taken on military uniforms.

D. Sets.

1. Normally, when component parts of a set are missing or destroyed, the claimant is only entitled to the replacement cost of the missing or destroyed components.

2. In some instances, however, a claimant will be entitled to replacement of the entire set or to an additional LOV.

a. If the set is no longer useful for its intended purpose because component parts are missing or destroyed, the claimant may be awarded the replacement cost of the entire set.

b. When missing pieces cannot be matched and there is a measurable decrease in the value of the set, but the set is still useful for its intended purpose, the claimant is awarded the value of the missing pieces plus LOV on the set.

E. Salvage Value. DA Pam 27-162, para 11-14l.

1. If the claimant elects to keep a damaged item, the claims judge advocate will deduct salvage value from the compensation paid.

2. If the claimant turns in the item, no deduction will be made.

3. If the carrier will fully reimburse the Government, the item may be turned over to the carrier.

## X. **SMALL CLAIMS PROCEDURES**. AR 27-20, PARA 11-10b; DA PAM 27-162, PARA 11-10b**.**

A. The personnel claims program is a morale program designed to assist soldiers and civilian employees whose property has been lost or damaged incident to their service. To be effective, claims must be adjudicated fairly and promptly to maintain morale, prevent financial hardship, and ensure the integrity of the program.

B. The small claims procedure applies to claims that do not require extensive investigation and can be settled for less than $1000.

C. Evidentiary requirements are relaxed, with greater emphasis placed on using catalog prices, telephone calls to confirm prices, and agreed cost of repairs and loss of value procedures. Remember, however, that estimates are required for repairs over $100.00 for any individual item.

D. Where local finance procedures permit, small claims should be approved on the spot, and the claimant allowed to handcarry the voucher for immediate cash payment.

## XI. RECONSIDERATION. AR 27-20, PARA 11-20.

A. Action on Reconsideration.

1. The claimant, the claimant's authorized agent or legal representative, or a spouse acting on the claimant's behalf may request reconsideration.

2. Reconsideration relief requested more than 60 days from the date of approval, abandonment, or disapproval will only be granted on the basis of substantial new evidence, fraud, mistake of law, or mathematical miscalculation.

3. Reconsideration without a written request is entirely at the discretion of the claims office.

B. Any approval or settlement authority must act on a written request for reconsideration.

1. The original approval or settlement authority may take action.

2. A successor to the original approval or settlement authority or a higher settlement authority will only modify the original action if it was incorrect or new evidence becomes available.

3. Heads of Area Claims Offices may act upon requests for reconsideration when

a. The amount in dispute does not exceed $1000; and

b. The request raises no new factual or legal issues; or

c. The request is not timely.

4. In other cases, if the settlement authority does not grant all requested relief, the file must still be forwarded to USARCS for final action.

## XII. PAYMENT AUTHORITY. AR 27-20, PARA 11-2.

A. Regardless of the amount claimed, the Commander, USARCS, or a designee, may pay up to the statutory limit of $40,000 and deny claims in any amount. The National Defense Authorization Act for Fiscal Year 1996 allows for payment of claims arising from emergency evacuation or from extraordinary circumstances up to $100,000.

B. An area claims office or a command claims service may pay up to $25,000 and deny claims in any amount.

C. A claims processing office with approval authority may pay up to $10,000 and deny compensation for line items. It may not deny the entire claim, however.

D. A claims processing office without approval authority can neither pay nor deny personnel claims.

## XIII. CARRIER RECOVERY PROGRAM. AR 27-20, CHAP 11, SECTION III; DA PAM 27-162, CHAP 11, SECTION III.

A. The USARCS carrier recovery program pursues affirmative claims against carriers, warehousemen, or other third parties responsible for loss or damage occurring during the storage or transport of household goods and other personal property.

B. Carrier Liability.

1. Normal IRV (Basic Coverage). The Government purchases this at no charge to the soldier.

2. Higher IRV (Option 1). This is depreciated value coverage purchased by the claimant from the carrier through the transportation office.

3. Full Replacement Protection (Option 2). This is undepreciated value coverage purchased by the claimant from the carrier through the transportation office.

4. Proof of carrier liability. AR 27-20, paras. 11-25, 11-26.

a. Prima facie case.

b. Exclusions.

C. Responsibilities of Claims Judge Advocates. AR 27-20, para 11-24.

1. Claims personnel should coordinate with the local transportation office to ensure proper counseling regarding potential claim procedures and conduct outbriefing classes on avoiding damage and substantiating claims.

2. Claims personnel should coordinate with the local contracting officer concerning Direct Procurement Method (DPM) moves and local moves.

3. Claims personnel must obtain from the claimant or from the transportation office the following documents needed to process recovery actions.

a. Copy of the Government bill of lading.

b. Copy of the inventory.

c. DD Form 1840, Joint Statement of Loss or Damage at Delivery.

d. DD Form 1840R, Notice of Loss or Damage.

4. Claims personnel must ensure that DD Form 1844 is properly completed.

5. Claims personnel must ensure that written demands against appropriate third parties are properly prepared and dispatched.

a. DD Form 1840 prepared by third party and three copies given to member at delivery.

b. DD Form 1840R completed by member and dispatched by the claims office within 75 days of delivery.

c. Carrier recovery calculated on DD Form 1844.

d. Demand on carrier (DD Form 1843) properly completed.

e. Recovery packet dispatched.

(1) Served directly on carrier if within installation's recovery authority.

(2) Forwarded to USARCS for centralized recovery if outside authority.

6. Recoveries from third parties.

a. Payment in full.

b. Compromise.

c. Deposit funds in appropriate account within 24 hours.

d. Offset by USARCS.

D. Lost Potential Carrier Recovery (PCR). DA Pam 27-162, para 11-14i.

1. Lost PCR is recovery money the Government is not entitled to collect from a carrier or warehouse firm because the claimant failed to provide timely notice of loss or damage.

2. Claimants are required to list specific loss and damage on DD Form 1840 or DD Form 1840R and turn the form into a claims office within 70 days of delivery. This allows the claims office to provide the carrier or warehouse firm with timely notice of the government's intent to file a recovery action. Late notice to the carrier or warehouse firm will reduce the amount of the government's recovery.

3. Absent good cause, lost PCR is deducted from the amount that would otherwise be payable to the claimant. (See outline section VIII.D.2. above for a description of "good cause").

4. Note that lost PCR is not necessarily a basis for denying a claim. However, lost PCR deductions can result in zero amounts payable.

## XIV. REENGINEERING INITIATIVES UPDATE.

A. Deputy Chief of Staff for Logistics (DCSLOG) Initiative. The concept is for the Army to hire one contractor to provide a total relocation package to soldiers. This will include all aspects of relocation including claims. Household goods claims resulting from the move will be paid on a full replacement cost basis.

1. The contractor (HMS Mobility Services) began a one-year pilot program (with an option for 2 one-year extensions) on 1 July 1997 at Hunter Army Airfield, GA.

2. Notice period – 90 days. Statute of limitations – 9 months.

B. Military Traffic Management Command (MTMC) Initiative. The concept is to hire a number of contractors to provide relocation services for the entire military. This will include all aspects of relocation including claims. Household goods claims resulting from the move will be paid on a full replacement cost basis.

1. The one-year program (with an option for 2 one-year extensions) began in the fall of 1998. The program involves 50% of household goods moves from the states of North Carolina, South Carolina, and Florida.

2. Notice period – 90 days. Statute of limitations – 9 months.

C. For more information *See Reengineering Household Goods Shipments: Personnel Claims Implications*, ARMY LAW., November 1997, at 15.

## XV. CONCLUSION.

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Outline of Instruction

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C. Federal Tort Claims Act, 28 U.S.C. §§ 2671-80.

D. Personnel Claims Act, 31 U.S.C. § 3721.

E. Military Claims Act, 10 U.S.C. § 2733.

F. AR 27-20, Claims, Chapters 7 & 10 (31 December 1997).

G. DA Pam 27-162, Claims, Chapter 7 (1 April 1998).

H. Disaster Claims Handbook (November 1998).

I. JA 422, Operational Law Handbook, Chapters 9 and 32 (page 549).

J. DoD Directive 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (9 June 1990), *as amended by* Memorandum, Office of the General Counsel, Department of Defense, to Director, Joint Staff, subject: Designation of the Department of the Army as Single Service Claims Authority, (22 Sep. 1994), Memorandum, Director, Joint Staff, to Office of the General Counsel, Department of Defense, subject: USEUCOM Request for Change to DoD Directive 5515.8, "Single-Service Assignment of Responsibility for Processing of Claims", (12 Mar. 1996), Memorandum, Office of the General Counsel, Department of Defense, to HQ, USEUCOM/ECDC, subject: USEUCOM Request for Single Service Claims Assignment under DoD Directive 5515.8 (25 Nov. 1996).

K. Agreement between the parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 (NATO SOFA)(Article VIII).

L. Agreement to Supplement the Agreement between the parties to the North Atlantic Treaty regarding the Status of their Forces with respect to foreign forces stationed in the Federal Republic of Germany, with protocol of signature, August 3, 1959, 14 U.S.T. 631, 481 U.N.T.S. 262 (Supplementary Agreement or SA)(Article 41).

## III. CLAIMS LAWS APPLICABLE IN MILITARY OPERATIONS.

A. Federal Tort Claims Act (FTCA). 28 U.S.C. §§ 1346(b), 2402, 2671-80; 28 C.F.R. Part 14; AR 27-20, chapter 4.

1. Provides a limited waiver of sovereign immunity for damage to property, personal injury, or death caused by the negligent or wrongful acts or omissions of U.S. employees acting within the scope of employment.

2. Overseas Exception.

a. The United States has not waived its immunity from suit for claims arising in a "foreign country."

b. A "foreign country" is any land area outside the control of the United States. Smith v. United States, 507 U.S. 197 (1993)(Antarctica); Meredith v. United States, 330 F.2d 9 (9th Cir.), cert. denied, 379 U.S. 867 (1964)(grounds of American embassy abroad); Miller v. United States, 73 F.3d 878 (9th Cir. 1995) (military hospital in Japan); Callas v. United States, 253 F.2d 838 (2d Cir. 1958) cert. denied, 357 U.S. 936 (1958)(U.N. trusteeship); Bird v. United States, 923 F. Supp. 338 (D. Conn. 1996); Kinsley v. United States, 817 F. Supp. 680 (S.D. Ohio, 1993); Pignataro v. United States, 172 F. Supp. 151 (E.D.N.Y. 1959)(air space over foreign countries).

c. The overseas exception does not bar torts occurring on the high seas or in aircraft flying over the high seas. Maritime statutes will usually govern resolution of claims arising in these situations. 46 U.S.C. §§ 741-752 (Suits in Admiralty Act); 46 U.S.C. §§ 781-790 (Public Vessels Act).

d. Exception to the exception. In re Paris Air Crash, 399 F. Supp. 732 (C.D. Calif. 1975)(where negligence occurs in the United States, but the effect occurs in a foreign country, the claim is not barred).

3. Disaster Relief Operations Involving Debris Removal. (Stafford Act, 42 U.S.C. §§ 5121 et. seq.)

a. By administrative agreement, states assume responsibility for processing claims in the aftermath of "major disasters" under 42 U.S.C. § 5173.

b. States indemnify the United States as a condition to receiving federal assistance. 42 U.S.C. § 5173 (b).

c. Applies to debris removal only, but other claims may be barred by the FTCA's discretionary function exception.

B. Personnel Claims Act (PCA). 31 U.S.C. § 3721; AR 27-20, chapter 11.

1. Limited protection to service members and certain civilian employees for loss or damage to tangible personal property that occurs incident to service.

2. Applies worldwide.

3. PCA claims that arise in deployments include loss of equipment and personal items during transportation, certain losses while in garrison quarters, losses suffered in an emergency evacuation, losses due to terrorism directed against the United States, and the loss of clothing and articles being worn while performing military duties.

4. Maintains positive morale.

5. Small claims procedures often apply.

C. Military Claims Act (MCA). 10 U.S.C. § 2733; AR 27-20, chapter 3.

1. A claim for personal injury, death, or damage to or loss of property is payable when:

a. Caused by a negligent or wrongful act or omission of military personnel or DA civilians acting within the scope of employment; or

b. Incident to the noncombat activities of the Department of the Army.

2. Applies worldwide.

a. CONUS tort claims must first be considered under the FTCA.

b. Overseas, the MCA will apply only when the claim cannot be paid under the PCA or the Foreign Claims Act (FCA).

c. Most common applications of the MCA.

(1) Medical malpractice on family members overseas.

(2) Property damage claims by service members not payable under the PCA or FTCA.

3. Not a waiver of sovereign immunity.

4. Applicable law.

a. General principles of law applicable in a majority of American jurisdictions.

b. Contributory negligence. Apply the law of the place of the occurrence, including the law of foreign countries when the claim arises in a foreign country.

D. Foreign Claims Act (FCA). 10 U.S.C. § 2734; AR 27-20, chapter 10.

1. History.

a. Act of 18 April 1918.

b. WWII changes.

c. The Foreign Claims Act comes of age.

2. Purpose.

a. "To promote and to maintain friendly relations through the prompt settlement of meritorious claims." 10 U.S.C. § 2734(a).

b. Claim must be "meritorious." Undue emphasis should not be placed on the promotion and maintenance of friendly relations alone. Claims that are not meritorious will be denied even though payment might promote friendly relations.

3. Scope.

a. Applies only overseas. Claim must arise outside the U.S., its territories, Commonwealths, or possessions.

b. Includes places under the jurisdiction of the United States in a foreign country.

c. Maritime claims.

(1) Incidents occurring within the territorial waters of the United States do not give rise to FCA claims.

(2) Chapter 8, AR 27-20 governs maritime claims. Claims cognizable under this chapter will not be processed under the FCA without the express authorization of the Commander, U.S. Army Claims Service.

4. Proper claimants.

a. Governments of foreign countries and political subdivisions thereof.

b. "Inhabitants" of foreign countries.

(1) Citizenship or legal domicile not necessary.

(2) Mere presence insufficient.

(3) Can include U.S. citizens residing overseas.

c. Corporations.

5. Improper claimants.

a. Enemy or "unfriendly" nationals.

b. Insurers and subrogees.

c. U.S. military personnel, Federal civilian employees, and family members residing overseas primarily because of their own or their sponsor’s duty or employment status.

d. Other residents of the United States; i.e., visitors, tourists, and persons employed overseas.

6. Claims payable.

a. Noncombat activities. This includes personal injury, death, personal property damage, and damage to real property that occurs connection with training, field exercises, or maneuvers or other activities which are distinctly military in nature.

b. Negligent or wrongful acts of U.S. military personnel or civilian employees.

(1) If the civilian employee is a U.S. citizen or foreign national recruited or transferred from a country other than the one in which he or she is employed and where the incident occurred, the negligent or wrongful act need not be within scope of employment.

(2) If the civilian employee is a foreign national recruited in the country in which he or she is employed and where the incident occurred, claim is payable only if the negligent or wrongful act was within scope of employment. Exception for vehicle claims. AR 27-20, para 10-3(a).

(3) Distinction relates back to the purpose of the FCA. Maintaining friendly relations with foreign countries and their inhabitants is not furthered by accepting responsibility for the off-duty torts of employees who are in a foreign country through no act of the United States.

7. Claims excluded. AR 27-20, para 10-4.

a. Claims under status of forces or other international agreements.

b. "Enemy action" - direct and indirect combat activities. United States v. Marks, 187 F.2d 724 (9th Cir. 1951), cert. denied, 342 U.S. 823 (1951).

(1) Includes preparation for, movement to, and return from combat.

(2) Aircraft en route exception.

c. Contracts and domestic obligations.

d. Real estate claims founded upon contract. See AR 405-15.

e. Not in best interests of U.S. or contrary to public policy, general principles of equity, or the basic intent of FCA.

8. Procedures.

a. Presentation of Claim.

(1) "Normally" in writing to U.S. or authorized official.

(2) Within two years of accrual.

(3) Must state:

(a) The time, place, and nature of the incident.

(b) The nature and extent of damage, loss, or injury.

(c) The amount of compensation claimed.

b. Claims Settlement - Foreign Claims Commissions (FCC).

(1) FCA claims are settled and paid by FCCs.

(2) Appointment authority. AR 27-20, para 10-6.

(a) Senior Judge Advocate of a command having a command claims service. May be delegated to commander or chief of the command claims service.

(b) Commander, U.S. Army Claims Service.

(3) Composition. AR 27-20, para 10-7.

(a) One-member FCC. May be a commissioned officer or claims attorney.

(b) Three-member FCC. At least two members must be JAs or claims attorneys.

(4) Investigation.

(a) Normally, the FCC is responsible for the investigation of all claims referred to it.

(b) Can request assistance from units.

(c) AR 27-20, Chapter 2 and local procedures apply.

(5) Applicable law. The law and custom of the country where the incident occurred, including laws and customs pertaining to contributory or comparative negligence and joint tortfeasors.

(6) Payments.

(a) Made in the currency of the country in which the incident occurred or where the claimant resided at the time of the incident.

(b) Punitive damages, interest, court costs, bail, costs of filing a claim, and similar fees are not allowed.

(c) Deduct amounts paid by tortfeasor, other third parties, and insurance companies.

(d) Advance payments up to $10,000 permitted in limited circumstances.

(e) Generally, payments are final and not subject to appeal.

(7) Approval authorities. AR 27-20, para 10-9.

(a) One member FCC.

(i) If JA or claims attorney, may pay up to $15,000 regardless of amount claimed. May also disapprove any claim presented in an amount not over $15,000.

(ii) Other one-member FCCs may pay claims presented in an amount not exceeding $2,500. No denial authority.

(b) Three member FCC.

(i) May disapprove claims presented in any amount.

(ii) May pay claims filed in any amount which, after adjudication, are deemed to be meritorious in an amount not exceeding $50,000.

(c) TJAG, TAJAG, and the Commander, U.S. Army Claims Service.

(i) May disapprove any claim.

(ii) May approve any claim where the amount awarded does not exceed $100,000.

(d) Secretary of the Army, Assistant Secretary of the Army, or designee. Approves all payments in excess of $100,000.

## IV. CLAIMS UNDER STATUS OF FORCES (SOFA) AND OTHER INTERNATIONAL AGREEMENTS.

A. 10 U.S.C. § 2734a.

B. Required Provisions.

1. Is there an agreement?

2. Does it contain claims provisions?

3. Does it provide for cost sharing?

C. Preferred Provisions.

1. Do claims provisions mandate host country adjudication?

2. Is the agreement reciprocal?

D. NATO SOFA Model. Article VIII.

1. Provides for host nation adjudication.

2. NATO SOFA is reciprocal. Guidance on processing claims arising out of the acts or omissions of members of a NATO military force or civilian component present in the United States is found in AR 27-20, chapter 7, section II.

3. Claims between Contracting Parties. Art. VIII, paras. 1-4.

a. Claims for damage to military property.

(1) Wholly waived.

(2) The military property damaged or the military personnel causing the damage must have some relationship with the operation of the Treaty.

(3) NATO connection presumed when military property belonging to a NATO sending state is located within the territory of a NATO receiving state.

b. Claims for damage to nonmilitary property.

(1) Limited waiver for damage to property owned by a Contracting Party but which is not used by that Party's armed services.

(2) Personnel causing the damage must have some relationship with the operation of the Treaty.

(3) Waiver only applies if damage is less than $1,400; liability for greater damages is split in accordance with SOFA formula.

c. Claims for injury to or death of a service member.

(1) Wholly waived.

(2) Injury or death must occur while service member is performing official duties, but such duties need not have any connection with the operation of NATO.

(3) Waiver does not extend to civilian employees.

(4) Waiver extends only to claims between Contracting Parties. It does not affect third party claims under Article VIII.

4. Third Party Scope Claims. Art. VIII, para. 5.

a. Proper claimants include persons and entities that are not Contracting Parties or members of the force or civilian component.

(1) Includes tourists and business travelers from the United States.

(2) Also includes inhabitants of foreign countries.

(3) May include family members of sending state forces.

b. Claim is payable if damage, injury, or death results from an act or omission done by a member of the force or civilian component in the performance of official duties or under circumstances that would make the force otherwise "legally responsible" under the law of the receiving state.

(1) Sending state makes the scope of employment determination.

(2) Normally, the sending state's determination is final. Rare disputes are settled by arbitration.

c. Claims are filed with receiving state authorities. The receiving state must designate offices where claims may be presented. Example: In Germany, claims are filed with the Defense Cost Office (DCO), a subsidiary of the Ministry of Finance.

d. Time limits for filing third party scope claims are often substantially less than the two years allowed under the FCA or MCA. Example: The DCO in Germany requires that a claim be filed within 90 days of the date it accrues.

e. Upon receipt of a claim, the receiving state investigates. The sending state cooperates in the investigation, providing information about the involvement of its forces and issuing a scope of employment certification.

f. Receiving states adjudicate the claim under their domestic law. If deemed meritorious, the receiving state makes the award and pays the claimant.

g. The receiving state reports all payments to the sending state, proposes distribution of the costs incurred, and requests reimbursement. Normally costs are split as follows: 75% sending state; 25% receiving state.

5. Nonscope Claims. Art. VIII, paras. 6-7.

a. Often referred to as *ex gratia* (out of grace) payments. Do not confuse with solatia payments discussed later in the outline.

b. Nonscope claims arise in two situations.

(1) Tortious off-duty conduct by members of the force or civilian component.

(2) Unauthorized use of sending state vehicles.

c. Receiving states accept, investigate, process, and evaluate nonscope claims.

d. After assessing the claim's merits (including the measure of damages, if any), the receiving state forwards the claim with a recommendation to the sending state.

e. The sending state then reviews the claim and the receiving state's recommendation to determine if an *ex gratia* payment will be offered.

(1) In the case of the United States as sending state, nonscope claims are adjudicated by FCCs appointed pursuant to the FCA.

(2) In adjudicating the claim, the sending state is not bound by the advice and recommendation of the receiving state.

(3) If payment is approved, the sending state bears the entire cost.

## V. SINGLE-SERVICE RESPONSIBILITY.

A. Department of Defense Directive 5515.8 (9 June 1990), *as amended by* Memorandum, Office of the General Counsel, Department of Defense, to Director, Joint Staff, subject: Designation of the Department of the Army as Single Service Claims Authority, (22 Sep. 1994); Memorandum, Director, Joint Staff, to Office of the General Counsel, Department of Defense, subject: USEUCOM Request for Change to DoD Directive 5515.8, "Single-Service Assignment of Responsibility for Processing of Claims", (12 Mar. 1996); Memorandum, Office of the General Counsel, Department of Defense, to HQ, USEUCOM/ECDC, subject: USEUCOM Request for Single Service Claims Assignment under DoD Directive 5515.8 (25 Nov. 1996), assigns to each service exclusive responsibility for settling foreign claims in certain countries.

B. Army - Albania, Austria, Belarus, Belgium, Bosnia, Bulgaria, Czech Republic, El Salvador, Estonia, Germany, Grenada, Haiti, Honduras, Hungary, Korea, Latvia, Lithuania, Marshall Islands, Moldova, Poland, Romania, Slovakia, Slovenia, Switzerland, Ukraine, Receiving Office in U.S. for NATO SOFA.

C. Navy - Bahrain, Iceland, Israel, Italy, Portugal.

D. Air Force - Australia, Azores, Canada, Cyprus, Denmark, Egypt, France, Greece, India, Japan, Luxembourg, Morocco, Nepal, Netherlands, Norway, Oman, Pakistan, Saudi Arabia, Spain, Tunisia, Turkey, United Kingdom, CENTCOM, USSOC.

E. Interim single-service claims responsibility. Unified and Specified Commanders may assign interim responsibility in countries where such assignment has not been made under the DoD directive. They must seek immediate confirmation and approval of such assignments from the DoD General Counsel.

## VI. SOLATIA. AR 27-20, PARAS. 10-17 AND 13-13.

A. Definition. Payment (not necessarily in money) to a victim or a victim's family as an expression of sympathy or condolence. Common in certain parts of the Far East and Southwest Asia.

B. Local custom determines when solatia applies and the customary amount for each specific case.

C. Not an admission of liability.

D. Paid from command operating funds, not Claims Expenditure Allowance.

## VII. CONCLUSION.

# APPENDIX A

## SINGLE SERVICE CLAIMS PROCESSING ASSIGNMENTS, CINCUSNAVEUR AOR a/o Jul 99

## EUROPE/LEVANT

| Country | Assignment | Authority |
|---|---|---|
| Albania | Army | Approval, John H. McNeill, 17 April 1996 |
| Armenia | | |
| Austria | Army | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Azerbaijan | | |
| Azores | Air Force | DoD Directive 5518.8 (encl. 1), 9 June 1990 |
| Belarus | Army | Approval, John H. McNeill, 17 April 1996 |
| Belgium | Army | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Bosnia-Herzegovina | Army | Memo, David A. Koplow, 7 July 1999 |
| Bulgaria | Army | Approval, John H. McNeill, 17 April 1996 |
| Canada | Air Force | DoD Directive 5518.8 (encl 1), 9 June 1990 |
| Croatia | Army | Memo, David A. Koplow, 7 July 1999 |
| Cyprus | Air Force | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Czech Republic | Army | Approval, John H. McNeill, 17 April 1996 |
| Denmark | Air Force | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Estonia | Army | Approval, John H. McNeill, 17 April 1996 |
| Finland | | |
| France | Air Force | Memo, William H. Dalton, 25 November 1996 |
| Georgia | | |
| Germany | Army | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Greece | Navy | Memo, John H. McNeill, 01 September 1994 |
| Holy See | | |
| Hungary | Army | Approval, John H. McNeill, 17 April 1996 |
| Iceland | Navy | DoD Directive 5518.8 (encl. 1), 9 June 1990 |
| Iraq | Air Force | Approved, Terrence O'Donnell, 14 June 1991 |
| Ireland | | |
| Israel | Navy | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Italy | Navy | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Latvia | Army | Approval, John H. McNeill, 17 April 1996 |
| Lebanon | | |
| Lithuania | Army | Approval, John H. McNeill, 17 April 1996 |
| Luxembourg | Air Force | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Macedonia | Army | Memo, David A. Koplow, 7 July 1999 |
| Malta | | |
| Moldova | Army | Approval, John H. McNeill, 17 April 1996 |
| Montenegro | Army | Memo, David A. Koplow, 7 July 1999 |
| Netherlands | Army | Memo, John H. McNeill, 01 September 1994 |

| | | |
|---|---|---|
| Norway | Air Force | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Poland | Army | Approval, John H. McNeill, 17 April 1996 |
| Portugal | Navy | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Romania | Army | Approval, John H. McNeill, 17 April 1996 |
| Serbia | Army | Memo, David A. Koplow, 7 July 1999 |
| Slovak Republic | Army | Approval, John H. McNeill, 17 April 1996 |
| Slovenia | Army | Approval, John H. McNeill, 17 April 1996 |
| Spain | Navy | Memo, John H. McNeill, 01 September 1994 |
| Switzerland | Army | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Sweden | | |
| Syria | | |
| Turkey | Air Force | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Ukraine | Army | Approval, John H. McNeill, 17 April 1996 |
| United Arab Emirates | Navy | Approved, John H. McNeill, 6 June 1996 |
| United Kingdom | Air Force | DoD Directive 5515.8 (encl. 1), 9 June 1990 |

## AFRICA

| Country | Assignment | Authority |
|---|---|---|
| Algeria | | |
| Angola | | |
| Benin | | |
| Botswana | | |
| Burundi | | |
| Burkina Faso | | |
| Cameroon | | |
| Cape Verde | | |
| Central African Rep. | | |
| Chad | | |
| Congo | | |
| Cote d'Ivoire | | |
| DROC | | |
| Equitorial Guinea | | |
| Gabon | | |
| Gambia, The | | |
| Ghana | | |
| Guinea | | |
| Guinea-Bissau | | |
| Lesotho | | |
| Liberia | | |
| Libya | | |
| Malawi | | |
| Mali | | |
| Mauritania | | |

| | | |
|---|---|---|
| Morocco | Air Force | DoD Directive 5515.8 (encl. 1), 9 June 1990 |
| Mozambique | | |
| Namibia | | |
| Niger | | |
| Nigeria | | |
| Rwanda | Army | Memo, John H. McNeill, 1 September 1994 |
| Senegal | | |
| Sierra Leone | | |
| South Africa | | |
| Swaziland | | |
| Tanzania | | |
| Togo | | |
| Tunisia | Air Force | Approval, John H. McNeill, 17 April 1996 |
| Uganda | | |
| Zambia | | |
| Zimbabwe | | |

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# APPENDIX B

# PRACTICAL "TIPS" FOR CONDUCTING EFFECTIVE DEPLOYMENT CLAIMS OPERATIONS

## I. PREDEPLOYMENT.

A. Training. Ensure that all parties concerned are properly trained. This should be an ongoing part of your daily mission.

1. Soldiers. Preventing and reporting damage. Soldiers should be aware of equipment operating and handling techniques to help them reduce the damage they may cause. This includes such practical matters as knowing the limitations of their equipment in various environments and climates. Soldiers should also be alerted to the importance of documenting pre-existing damage in their areas of operations.

2. Unit Claims Officers (UCO) and Maneuver Damage Claims Officers (MDCO). Claims personnel should insure that UCOs and MDCOs understand the proper procedures for investigating claims, compiling evidence, and completing reports and forms.

3. Legal NCOs, JAs, and Claims Attorneys.

a. Know and understand the polices and procedures for serving as Foreign Claims NCOICs, FCCs, and staffing Special Claims Processing Offices.

b. Know the environment you are entering. Ensure all claims personnel are properly licensed to drive available vehicles. Determine anticipated force protection requirements and ensure all personnel are weapons qualified (e.g., 9mm, M16, and SAW). Ensure soldiers supporting the claims mission receive combat lifesaver training.

B. Appointment orders for UCOs, MDCOs and FCCs. Units will appoint UCOs and MDCOs. Be ready to assist them with formats for orders. Appointment orders for FCCs will come through SJA channels. Know the procedures and have orders processed in advance of deployment when possible.

C. References. Take your references with you. They are often difficult to acquire on site.

1. International agreements. Obtain copies of pertinent SOFAs and other international agreements. Do they have claims provisions? Do the provisions comply with the International Agreement Claims Act?

2. Single-service responsibility. Who has single service responsibility for the area? If it is another service, do you have copies of their regulations and procedures? Do you know how to apply them? If single-service responsibility has not been designated for that area, obtain interim responsibility.

3. Command Claims Service regulations/policies/directives. Does a Command Claims Service cover the area? If so, coordinate with them for local policies and points of contact.

4. Local law. How does host nation law apply?

D. Packing List.

1. Cameras and lots of film.

2. Necessary forms.

a. DA Form 200 - Transmittal Record

b. DA Form 1208 - Report of Claims Officer

c. DA Form 1666 - Claims Settlement Form

d. DA Form 1667 - Claims Journal

e. DA Form 1668 - Small Claims Certificate

f. DD Form 1131 - Cash Collection Voucher

g. DD Form 1842 - Claim for Loss or Damage to Personal Property Incident to Service

h. DD Form 1844 - Schedule of Property and Claims Analysis Chart

i. SF 95 - Claim for Damage, Injury, or Death

j. SF 1034 - Public Voucher

k. Property receipts for requisitioned property. These receipts are provided to the property owner by the unit requisitioning the property. A copy is also submitted to the claims office for use in investigating claims for use or damage to this property.

3. Laptop computer with claims software. If you bring a digital camera, ensure you have software, disks, and all other necessary equipment.

E. Money.

1. Plan budget management.

2. Watch Claims Expenditure Allowance carefully.

3. Properly monitor deposits for FCA payments. Keep accounts separate.

4. In areas where there is a Command Claims Service, do not stockpile unpaid claims. Forward them for appropriate processing.

5. Class A agents - NOT FCC or claims officer. Make sure a Class A agent is designated to disperse money. The finance office may not provide one.

## II. DEPLOYMENT

A. Coordinate with host nation claims authorities as soon as possible. This relationship will become very important when dealing with issues such as nonscope claims and *ex gratia* payments.

B. Claims office location.

1. Centrally located is best. Try to get the claims office co-located with finance and the CMO office if possible. This will make your job much easier.

2. Tent is fine, but for long term deployments where mobility is not essential attempt to procure something more substantial and permanent.

C. Intake procedures. Coordinate a system to keep track of claims. How will you do intake when there is a language barrier or when the claims forms are in a different language? Should there be different procedures in that case?

D. Publicity. After you have a location, you will need to publicize where you are and what you do. CMO/G5 will help you find a way to do this without disrupting operations.

1. Location, hours of operation, procedures.

2. Coordinate with PAO, CMO, embassy (if available), and units.

E. Translators. You must be able to communicate with local nationals to properly investigate their claims. CMO can be a big help in this arena. Get claims forms printed in the host nation language.

F. Local attorneys. Coordination is important. You may need help with local law and custom.

G. Vehicle support for investigations. Not only will you need vehicles, your personnel must be licensed to drive and trained to maintain them.

H. Control UCOs and MDCOs. These folks are out there with the units. They can do a lot of the investigation for you. If they are only doing intake you may not be making the most effective use of a primary resource.

I. Security. Establish procedures for maintaining the security of your site. You may be holding and dispersing large sums of money.

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# CHAPTER V

# FEDERAL TORT CLAIMS ACT

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## Outline of Instruction

# I. REFERENCES.

A. AR 27-20, Claims (31 December 1997).

B. AR 27-40, Litigation (19 September 1994).

C. DA Pamphlet 27-162, Claims (1 April 1998).

D. Federal Tort Claims Act Handbook (September 1998).

E. JA 241, Federal Tort Claims Act (May 2000).

# II. INTRODUCTION

A. History and Purpose of the FTCA.

1. Before passage of the FTCA in 1946, the United States was immune from suit.

2. Redress for injuries caused by Government employees was available only through private relief bills.

3. The FTCA was enacted to:

a. Provide a remedy for injuries caused by Government negligence; and

b. Relieve Congress of the burden of handling private relief bills.

B. General Features of the FTCA.

1. The FTCA permits recovery for personal injury, death, or property damage caused by Government employees acting within the course and scope of employment. 28 U.S.C. § 1346(b).

2. The law of the state where the act or omission occurred determines the liability of the United States. 28 U.S.C. § 2672.

3. Limited waiver of sovereign immunity.

   a. Claimants must submit an administrative claim to the appropriate Government agency for adjudication before filing suit in Federal court. 28 U.S.C. § 2675(a).

   b. The FTCA has its own statute of limitations.

      (1) The claim must be submitted to the appropriate Government agency within two years of accrual. 28 U.S.C. § 2401(b).

      (2) The claimant must file a complaint in Federal court within six months of the agency's denial of the claim.

   c. Suit cannot be brought for an amount greater than that submitted in the administrative claim unless the claimant provides proof of:

      (1) Newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency; or

      (2) Intervening facts relating to the amount of the claim. 28 U.S.C. § 2675(b).

   d. Plaintiffs may sue for negligence, but not, in most cases, for intentional torts. 28 U.S.C. § 2680.

   e. Congress has precluded the recovery of punitive damages and prejudgment interest. 28 U.S.C. § 2674.

f. Trial is by Federal judge without a jury. 28 U.S.C. § 2402.

g. Venue is appropriate only in the district where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

h. Attorney fees are limited to 20% of an administrative settlement and 25% of a judgment or compromise settlement. 28 U.S.C. § 2678.

## III. FTCA METHOD OF ANALYSIS.

A. Administrative Prerequisites to Suit.

1. Has the Claimant Filed a Proper Administrative Claim?

2. Has the Claimant Complied with the Statute of Limitations?

3. Is the Person Filing a Proper Claimant?

B. FTCA Substantive Analysis.

1. What Law Applies?

2. Does the FTCA Provide a Remedy for the Relief Being Sought?

3. Who Caused the Injury or Damage?

4. Is there a Statutory Bar to Liability?

## IV. ADMINISTRATIVE PREREQUISITES TO SUIT.

A. Has the Claimant Filed a Proper Administrative Claim?

1. Written Notice.

   a. The claimant must make a written demand that provides sufficient notice to the agency to allow it to investigate.

   b. The claimant need not provide all of the information required by agency regulations to satisfy the administrative claim requirement. Kokaras v. United States, 980 F.2d 20 (1st Cir. 1992), *cert. denied*, 510 U.S. 819 (1993)(court's jurisdiction is not affected by regulatory requirements of agency); Adams v. United States, 615 F.2d 284, *reh'g denied*, 622 F.2d 197 (5th Cir. 1980)(same); GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987); Charlton v. United States, 743 F.2d 557 (7th Cir. 1984); Warren v. United States Dep't of Interior Bureau of Land Management, 724 F.2d 776 (9th Cir. 1984); Tucker v. United States Postal Service, 676 F.2d 954 (3d Cir. 1982); Douglas v. United States, 658 F.2d 445 (6th Cir. 1981).

   c. Suit may be brought only on those facts and theories of liability raised by the administrative claim. Bembinista v. United States, 866 F.2d 493 (D.C. Cir. 1989).

2. Demanding a Sum Certain.

   a. The written claim must demand a sum certain in money.

   b. Failure to specify a sum certain is a defect that deprives the court of subject matter jurisdiction over the action. Suarez v. United States, 22 F.3d 1064 (11th Cir. 1994); Kokaras v. United States, 980 F.2d 20 (1st Cir. 1992), *cert. denied*, 501 U. S.819 (1993); Bradley v. United States Veterans' Administration, 951 F.2d 268 (10th Cir. 1991); Burns v. United States, 764 F.2d 722 (9th Cir. 1985).

   c. Claims asking for an approximate number of dollars (e.g., "approximately $1,000,000") have been considered sufficient, but the recovery has been limited to the stated amount. Corte-Real v. United States, 949 F.2d 484 (1st Cir. 1991).

d. Suit cannot be brought for an amount greater than that submitted in the administrative claim unless the claimant provides proof of (1)newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency, or (2)intervening facts relating to the amount of the claim. Low v. United States, 795 F.2d 466 (5th Cir. 1986); O'Rourke v. Eastern Air Lines, 730 F.2d 842 (2d Cir. 1984); Kielwein v. United States, 540 F.2d 676 (4th Cir.), *cert. denied*, 429 U.S. 979 (1976).

3. Signed by the Claimant.

a. The claimant or the claimant's representative must sign the written notice demanding a sum certain.

b. Must the agent provide proof of authority to the agency? Conn v. United States, 867 F.2d 916 (6th Cir. 1989)(No); Department of Justice Regulations, 28 C.F.R. Part 14 (Yes).

c. If a derivative claim is intended to be presented, a separate, signed claim must be received. Manko v. United States, 830 F.2d 831 (8th Cir. 1987); Rucker v. Department of Labor, 798 F.2d 891 (6th Cir. 1986); *Contra*, Avila v. Immigration and Naturalization Service, 731 F.2d 616 (9th Cir. 1984).

d. Similarly, reference in a claim to injuries suffered by other persons does not suffice as a claim on behalf of any person other than the signatory. Montoya v. United States, 841 F.2d 102 (5th Cir. 1988).

4. Submitted to the Appropriate Federal Agency.

a. The written notice demanding a sum certain and signed by the claimant or his authorized representative must be submitted to the appropriate agency.

b. The "appropriate agency" is the Federal agency whose activities gave rise to the claim.

c. If a claim is submitted to the wrong agency, the Attorney General's regulations require the receiving agency to transfer the claim to the appropriate agency and to notify the claimant of the transfer. 28 C.F.R. § 14.2(b)(1)

d. The failure of an agency to "transfer . . . [a claim] forthwith to the appropriate agency" may, in effect, extend the statute of limitations or excuse presentment to the "appropriate agency." Bukala v. United States, 854 F.2d 201 (7th Cir. 1988).

B. Has the Claimant Complied with the Statute of Limitations?

1. The written notice demanding a sum certain signed by the claimant or the claimant's representative must be presented to the appropriate Federal agency within two years of when the claim first accrued.

2. 28 U.S.C. § 2401(b) provides:

"*A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.*"

3. Federal, not state, law determines accrual.

4. When does a claim "accrue"?

a. Normally, in a tort cause of action, accrual occurs at the time of injury, loss, or damage.

b. In medical malpractice cases under the FTCA, however, the Supreme Court has held that a claim accrues when the claimant knew or should have known of the injury and the cause of the injury. United States v. Kubrick, 444 U.S. 111 (1979).

c. The *Kubrick* accrual standard is an objective test. The claim "accrues" and the statute begins to run ". . .when the facts would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury, or (b) to seek professional advice, and then with that advice, to conclude that there was a causal connection between the treatment and injury." MacMillan v. United States, 46 F.3d 377 (5th Cir. 1995); Nemmers v. United States, 870 F.2d 426 (7th Cir. 1989).

d. Under *Kubrick*, the courts differ on what "cause" the plaintiff must know to start the statute of limitations running.

(1) Some courts hold that knowledge of the "physical cause" of the injury is sufficient to start the statute of limitations running. Sexton v. United States, 832 F.2d 629 (D.C. Cir. 1987); Zeleznik v. United States, 770 F.2d 20 (3d Cir.), *cert. denied*, 475 U.S. 1108 (1986).

(2) Other courts have held that the statute of limitations does not begin to run until the plaintiff knows or should know of the Government's role in causing the injury. Drazan v. United States, 762 F.2d 56 (7th Cir. 1985); Gould v. United States Dept. of HHS, 905 F.2d 738 (4th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).

5. Other circumstances that may affect accrual.

a. Tolling the statute of limitations.

(1) Equitable Tolling - Historical Background.

(a) The statute of limitations was considered one of the conditions placed upon the waiver of sovereign immunity.

(b) Equitable considerations, estoppel, and waiver did not generally affect the running of the limitations period.

(c) In 1990, however, the Supreme Court abandoned the jurisdictional rationale supporting statutes of limitation in favor of the United States. Irwin v. Veterans' Administration, 498 U.S. 89 (1990)(the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States)(Title VII case).

(2) Equitable tolling applies in limited circumstances against the United States under the FTCA; SOL is an affirmative defense. DeCasenave v. United States, 991 F.2d 11 (1st Cir. 1993); MacMillan v. United States, 46 F.3d 377 (5th Cir. 1995); Lambert v. United States, 44 F.3d 296 (5th Cir. 1995) (holding that equitable tolling will not apply when the plaintiff has an adequate remedy to avoid the statute of limitations or has failed to act diligently); Muth v. United States, 1 F.3d 246 (4th Cir. 1993); Krueger v. Saiki, 19 F.3d 1285 (8th Cir.), *cert. denied*, 513 U.S. 905 (1994); Schmidt v. United States, 933 F.2d 639 (8th Cir. 1991); Benge v. United States, 17 F.3d 1286 (10th Cir. 1994). *Contra* Bearden v. United States, 988 F.2d 117 (9th Cir. 1993) (unpublished disposition)(time limits in FTCA are jurisdictional).

b. Infancy will not postpone the accrual of a claim. McKewin v. United States, 7 F.3d 224 (4th Cir. 1994)(unpublished disposition); Herrera-Diaz v. United States, 845 F.2d 1534 (9th Cir.), *cert. denied*, 488 U.S. 924 (1988); Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981).

c. Incompetence will not postpone accrual. Barren v. United States, 839 F.2d 987 (3d Cir.), *cert. denied*, 488 U.S. 827 (1988).

d. The Soldiers' and Sailors' Civil Relief Act will toll the claims of servicemen regardless of whether their ability to pursue the claim has been impaired by military service. Mason v. Texaco, Inc., 862 F.2d 242 (10th Cir. 1988) *cert. denied*, 504 U.S. 910 (1992); Miller v. United States, 803 F. Supp. 1120 (E.D. Va. 1992).

6. The second prong of the statute of limitations requires timely filing of a lawsuit after the agency has finally denied the claim.

a. After filing the administrative claim, a claimant cannot file suit until the agency has had the claim for six months. The court lacks subject matter jurisdiction if the complaint is filed within six months of the submission of the claim and before the agency has made a final denial. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b); McNeil v. United States, 508 U.S. 106 (1993).

b. After the agency has had the claim for six months and has failed to settle or deny it, the claimant may deem the claim denied and file suit in Federal court. 28 U.S.C. § 2675(a). The six-month limitation period does not begin to run until the agency has denied the claim, however. Parker v. United States, 935 F.2d 176 (9th Cir. 1991).

c. If the agency notifies the claimant by certified or registered mail of its decision to deny the claim, the claimant must file suit within six months of the date of mailing of the letter, or the action will be forever barred. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b); Lambert v. United States, 44 F.3d 296 (5th Cir. 1995); Parker v. United States, 935 F.2d 176 (9th Cir. 1991).

C. Is the Person Filing a Proper Claimant?

1. Proper Claimants.

a. Claims for personal injury or injury to or loss of property may be presented by the injured person or property owner or their duly authorized agent or legal representative. 28 C.F.R. §§ 14.3(a) and (b).

b. Wrongful death claims may be presented by the executor or administrator of the decedent's estate, or by any other person legally entitled to assert such a claim in accordance with applicable state law. 28 C.F.R. § 14.3(c); Knapp v. United States, 844 F.2d 376 (6th Cir. 1988); Free v. United States, 885 F.2d 840 (11th Cir. 1989).

c. A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly. 28 U.S.C. § 14.3(d).

2. Improper Claimants.

a. Certain categories of claimants are precluded from recovering under the FTCA for injuries sustained under certain circumstances.

b. Federal civilian employees.

(1) The exclusive remedy for Federal civilian employees injured during their employment is the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 - 8193. Blair v. United States, 51 F.3d 279 (9th Cir. 1995)(unpublished disposition); Sheehan v. United States, 896 F.2d 1168 (9th Cir.), *modified*, 917 F.2d 424 (9th Cir. 1990); Heilman v. United States, 731 F.2d 1104 (3d Cir. 1984).

(2) If the claimant is a Federal employee and there is a "substantial question" whether FECA applies, the question must be resolved by the Secretary of Labor before the FTCA claim will be adjudicated. Figueroa v. United States, 7 F.3d 1405 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); Tarver v. United States, 25 F.3d 900 (10th Cir. 1994).

(a) The FTCA statute of limitations is <u>not</u> tolled while the Secretary of Labor considers the FECA question.

(b) Decisions by the Secretary of Labor as to whether FECA covers the alleged injury, or on the amount of compensation, if any, to be awarded, are final. Review of any kind by a court is absolutely barred. 5 U.S.C. § 8128(b). Blair v. United States, 51 F.3d 279 (9th Cir. 1995)(unpublished disposition); Tarver v. United States, 25 F.3d 900 (10th Cir. 1994).

(3) FECA coverage extends to all injuries within the work "premises." Woodruff v. Dep't of Labor, 954 F.2d 634 (11th Cir.), *reh'g denied*, 961 F.2d 224 (1992).

(4) Employees of nonappropriated funds are covered by the Longshoreman's and Harbor Worker's Compensation Act. 33 U.S.C. §§ 901-950, 8171.

c. Servicemembers.

(1) Servicemembers who are injured "incident to service" cannot maintain an action against the United States under the FTCA. Feres v. United States, 340 U.S. 135 (1950).

(2) The rationales for the *Feres* doctrine are as follows:

(a) The relationship between the Government and members of its armed forces is "distinctively Federal in character" and should not be affected by state law;

(b) Congress already provides a system of compensation for injuries and/or death for members of the armed services; and,

(c) There would be an adverse impact upon discipline if soldiers could sue for command decisions made and orders given in the course of duty. U.S. v. Brown, 348 U.S. 110 (1954).

(3) All three rationales need not be presented for *Feres* to apply.

(4) "[W]hether or not the circumstances of a case implicate the rationales for the *Feres* doctrine, the doctrine bars any damage suit against the United States for injuries incurred incident to military service." Verma v. United States, 19 F.3d 646 (D.C. Cir. 1994) (*Feres* bars both personal injury and property damage claims).

(5) Factors for determining "incident to service." Courts typically consider several factors, with no one factor being dispositive.

(a) The first factor considered is the nature of the plaintiff's activity at the time of the injury. If the plaintiff was performing military duties or enjoying a privilege or benefit of military service at the time of the injury, the claim will usually be barred. United States v. Johnson, 481 U.S. 681 (1987); Coltrain v. United States, 999 F.2d 542 (9th Cir. 1993) (unpublished disposition).

(i) An injury to a service member on post or off post but while the service member is engaged in military duty is incident to service and *Feres* barred. Kohn v. United States, 680 F. 2d 922, 925 (2d Cir. 1982).

(ii) Claims for injuries incurred during medical treatment in a military medical treatment facility (MTF) are *Feres* barred. Jones v. U.S. 112 F.3d 299 (7th Cir. 1997) (soldier's claim for improper surgery at Letterman AMC while he was at Olympic tryout is *Feres* barred); Hayes v. United States, 44 F.3d 377 (5th Cir. 1995), *cert. denied*, 516 U.S. 814 (1995) (finding death from medical malpractice during elective surgery is *Feres* barred); Alsip v. Ferrell, 39 F.3d 1191 (10th Cir. 1994) (unreported disposition) (medical treatment in MTF invokes Feres); Coltrain v. United States, 999 F.2d 542 (9th Cir. 1993) (unpublished disposition); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987).

(iii) Claims for injuries incurred while using recreational equipment owned by the Government are usually barred. Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (MWR rental boat a benefit of service); Walls v. United States, 832 F.2d 93 (7th Cir. 1987); *cf*. Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5th Cir. 1994), *aff'd and reh'g denied*, 66 F.3d 323 (1995) (unpublished disposition).

(iv) Claims for injuries incurred during transport as space available passengers are barred. Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

(v) Claims for injuries caused in on post housing are generally barred. *Feres*, 340 U.S. 135 (1950) (soldier's suit for injuries as a result of a barracks fire is not cognizable); Preferred Insurance Co. v. U.S., 222 F. 2d 942 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955) (recovery denied for subrogation claims of insurance companies who paid for damage to mobile homes on military base); *but see* Elliot v. U.S. 13 F.3d 1555 (11th Cir.), *vacated*, 28 F. 3d 1076, *aff'd per curiam*, 37 F.3d 617 (1994) (soldier on leave in on post quarters not *Feres* barred for injuries incurred when heater in quarters malfunctioned).

(b) If the claimant was not engaged in a military activity or enjoying a benefit of service at the time of his or her injury, courts usually consider the following factors together: plaintiff's location and duty status.

(i) Location.

*(a)* If the incident occurs off post while off duty, *Feres* generally will not bar the claim. Brooks v. United States, 337 U.S. 49 (1949) (on leave); Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5th Cir. 1994), *aff'd and reh'g denied*, 66 F.3d 323 (1995) (unpublished disposition); Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (off-duty); Green v. Hall, 8 F.3d 695 (9th Cir. 1993), *cert. denied*, 513 U.S. 809 (1994).

*(b)* If off-duty but on the installation, *Feres* will bar the claim. Warner v. United States, 720 F.2d 837 (5th Cir. 1983) (service member was given the day off and was on personal business on post at the time of the injury); Flowers v. United States, 764 F.2d 759 (11th Cir. 1985); Shaw v. United States, 854 F.2d 360 (10th Cir. 1988); Morey v. United States, 903 F.2d 880 (1st Cir. 1990); McAllister v. United States, 942 F.2d 1473 (9th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992); Thompson v. United States, 8 F.3d 30 (9th Cir.), *cert. denied*, 510 U.S. 1191 (1994) (unpublished disposition).

(ii) Duty status.

*(a)* If plaintiff is off duty (pass) or on chargeable leave, the majority of courts will look at the plaintiff's activity and location at the time of injuries to determine if they are incident to service and therefore *Feres* barred. (*See* analysis under "location" above).

*(b)* A minority view is that *Feres* will not bar the claim if the plaintiff is on chargeable leave (more than merely off duty), regardless of location. Elliott v. United States, 13 F.3d 1555, (11th Cir.), *vacated, reh'g en banc granted*, 28 F.3d 1076, *aff'd per curiam*, 37 F.3d 617 (1994) (on-post); Brooks v. United States, 337 U.S. 49 (1949) (off-post).

(6) If analysis of the three factors would indicate the injuries did not occur "incident to service," but litigating the case would still involve the court in military matters and carry the potential to adversely effect discipline, *Feres* may still bar the claim. United States v. Shearer, 473 U.S. 52 (1985); Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989).

(7) *Feres* bar also extends to:

(a) Commissioned officers of the Public Health Service.

(b) National Guardsmen when engaged in Guard activities.

(c) Third party claims for contribution and indemnity arising out of injuries sustained by a plaintiff whose direct action against the United States is barred by *Feres*.

(d) Foreign military members in the United States for training or service with United States forces.

(e) Service academy cadets.

(8) *Feres* bars not only the direct action by the servicemember, but also any derivative action arising out of the servicemember's injuries. Stephenson v. Stone, 21 F.3d 159 (7th Cir. 1994); Scales v. United States, 685 F.2d 970, *reh'g denied*, 691 F.2d 502 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); Persons v. United States, 925 F.2d 292 (9th Cir. 1991).

(9) *Feres* does not bar an infant plaintiff's suit based upon negligent medical treatment of his then pregnant active duty mother. Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987); Romero v. United States, 954 F.2d 223 (4th Cir. 1992). This is the prevailing view. There are some cases *contra*. Scales v. United States, 685 F.2d 502, *reh'g denied*, 691 F.2d (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

(10) Family members of Servicemembers.

(a) Family members of active duty servicemembers who are personally injured by Government negligence are not barred by *Feres* even if their injuries are sustained while using privileges or benefits available to them because of their sponsors' status. Portis v. United States, 483 F.2d 670 (4th Cir. 1973).

(b) The servicemember can also recover on derivative claims arising out of injuries to dependents. Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981).

(11) Veterans/retirees.

(a) If the tort occurs after discharge, *Feres* will not bar the claim.

(b) The issue is often whether the alleged tort is separate and distinct from any acts occurring before discharge. United States v. Stanley, 483 U.S. 669 (1987) (no post-discharge injury); United States v. Brown, 348 U.S. 110 (1954) (post-discharge injury); M.M.H. v. United States, 966 F.2d 285 (7th Cir. 1992).

# V. THE FTCA SUBSTANTIVE ANALYSIS.

A. Choice of Law - What Law Applies?

1. The FTCA provides that the law of the state where the act or omission occurred determines the liability of the United States. 28 U.S.C. § 1346(b).

2. The "law of the state" is the whole law, including the state's choice of law rules. Richards v. United States, 369 U.S. 1 (1962).

B. The Basis of the Claim - Is There a Remedy for the Relief Being Sought?

1. Cause of Action.

a. The substantive tort law of the state determines whether the plaintiff has a valid cause of action. Henderson v. United States, 846 F.2d 1233 (9th Cir. 1988).

b. If the state law does not permit recovery under the circumstances, the United States will not be liable.

(1) No liability for failure to warn when there is no duty to warn under state law. Cole v. United States, 846 F.2d 1290 (11th Cir.), *cert. denied*, 488 U.S. 966 (1988).

(2) No liability for serving alcohol to soldier when there is no dram shop liability under state law. Corrigan v. United States, 815 F.2d 954 (4th Cir.), *cert. denied*, 484 U.S. 926 (1987).

(3) Proximate cause limitations in state law applicable to FTCA suit. Skipper v. United States, 1 F.3d 349 (5th Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994).

(4) No liability for false arrest unless provided for in state law. Bernard v. United States, 25 F.3d 98 (2d Cir. 1994).

c. The United States may claim the benefit of state limitations on the liability of private parties.

(1) State recreational use statute immunized United States from liability for injuries sustained by recreational user of Federal land. Mansion v. United States, 945 F.2d 1115 (9th Cir. 1991); Hegg v. United States, 817 F.2d 1328 (8th Cir. 1987).

(2) Alaska's Good Samaritan statute immunized the United States from liability from alleged negligence during rescue at sea. Bunting v. United States, 884 F.2d 1143 (9th Cir. 1989).

(3) State limitation on non-economic damages in professional negligence cases applied to the United States. Knowles v. United States, 29 F.3d 1261 (8th Cir. 1994), *remanded*, 91 F.3d 1147 (8th Cir. 1996), *reh'g denied*, 1996 U.S. App. LEXIS 29706; Taylor v. United States, 821 F.2d 1428 (9th Cir.), *cert. denied*, 485 U.S. 992 (1988); Starns v. United States, 923 F.2d 34 (4th Cir.), *cert. denied*, 502 U.S. 809 (1991).

d. The FTCA does not waive sovereign immunity for strict liability. Even if state law would permit recovery under a strict liability theory, the United States is immune. Laird v. Nelms, 406 U.S. 797 (1972).

e. The waiver of sovereign immunity for state negligence actions does not waive the United States' immunity for Federal constitutional torts. Castro v. United States, 775 F.2d 399 (1st Cir. 1985); Boda v. United States, 698 F.2d 1174 (11th Cir. 1983).

2. Relief Sought.

a. Relief is limited to money damages. Equitable relief is not available under the FTCA.

b. Amount of recovery is limited to the amount claimed in the administrative claim unless "the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the Federal agency, or upon allegation and proof of intervening facts relating to the amount of the claim." 28 U.S.C. § 2675(b).

(1) When the new evidence or intervening facts only refine or go to the precision of the plaintiff's prognosis, an increased damage award is not appropriate. Low v. United States, 795 F.2d 466 (5th Cir. 1986).

(2) A reasonably based change in expectation as to the severity and permanence of the injuries will support an award greater than claimed in the administrative claim. Spivey v. United States, 912 F.2d 80 (4th Cir. 1990); Cole v. United States, 861 F.2d 1261 (11th Cir. 1988).

c. Punitive damages are not payable under the FTCA.

C. Status of the Tortfeasor - Who Caused the Injury or Damage?

1. The negligent actor must be a Federal employee acting within the course and scope of Federal employment.

2. Federal law determines whether a given individual is an employee of the United States.

a. The general test used by the courts to determine if an individual is an employee of the Government is the "right to control the details of the day-to-day performance of duty" analysis set forth in Restatement (Second) of Agency § 220 (1958).

b. Examples.

(1) Local Federally funded community action agency is not a Federal enterprise. United States v. Orleans, 425 U.S. 807 (1976).

(2) Local jail contracted to temporarily house Federal prisoners; jail employees were not "Federal employees" under the FTCA. Logue v. United States, 412 U.S. 521 (1973).

(3) Private physicians designated as Aviation Medical Examiners by the Federal Aviation Administration, are not Federal employees. Leone v. United States, 910 F.2d 46 (2d Cir.), *cert. denied*, 499 U.S. 905 (1991).

c. Independent contractors.

(1) Not Federal employees. 28 U.S.C. § 2671. Williams v. United States, 50 F.3d 299 (4th Cir. 1995)(U.S. Government was not liable for actions of contract janitorial service employees in building leased by United States).

(2) Although independent contractors are specifically excluded from the statutory definition of Federal employees, the Government may be liable if the United States has authority "to control the detailed physical performance of the contractor" and supervise its day-to-day operations. Bird v. United States, 949 F.2d 1079 (10th Cir. 1991) (nurse anesthetist hired from placement service to serve in Federal hospital was a Federal employee).

3. The Federal employee must be acting within the course and scope of Federal employment.

a. The applicable state tort law determines whether the employee was acting within the course and scope of Federal employment. Williams v. United States, 350 U.S. 857 (1955); Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995), *rev'ing*, 45 F.3d 598 (2d Cir. 1995).

b. Differences in the laws of the various states will produce different results in factually similar cases.

(1) Violation of base regulations requiring residents to control their dogs was not within the scope of employment; therefore, the United States could not be held liable for a dog bite. Chancellor v. United States, 1 F.3d 438 (6th Cir. 1993); Piper v. United States, 887 F.2d 861 (8th Cir. 1989); Nelson v. United States, 838 F.2d 1280 (D.C. Cir. 1988).

(2) Violation of base regulations requiring residents to control their dogs was within the scope of employment; therefore, the United States could be held liable for a dog bite. Lutz v. United States, 685 F.2d 1178 (9th Cir. 1982).

c. Statutory Immunity for Individuals. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act) amended the FTCA and provides absolute immunity from state and common law torts for Federal employees acting within the scope of employment.

(1) The FTCA is the exclusive remedy for state law torts committed by Federal employees within the course and scope of their employment. Wright v. Park, 5 F.3d 586 (1st Cir. 1993).

(2) The Westfall Act (the Act) applies only to state and common law torts.

(3) Before the Act applies, the U.S. Attorney must certify that the Federal employee was acting within the scope of employment.

(4) After certification, the suit is removed to Federal court, the United States is substituted as the defendant, and the suit becomes an FTCA cause of action against the Government. Dillon v. State of Mississippi Military Dep't, 23 F.3d 915 (5th Cir. 1994).

(5) Attorney General certification/motion to substitute. U.S. Attorney's decision is subject to review. DeMartinez v. Lamagno, 514 U.S. 417 (1995).

D. Is There a Statutory Bar to Liability?

1. Even if the claimant clears all of the foregoing obstacles, the claim may still be barred by one of the 13 exceptions listed in the FTCA. 28 U.S.C. § 2680.

2. Discretionary function. 28 U.S.C. § 2680(a).

a. The statute actually sets forth two separate exceptions under this section.

(1) "Due care". Sovereign immunity is not waived for any claim based upon an act or omission of a Federal employee exercising due care in the execution of a statute or regulation, whether or not the statute or regulation is valid, regardless of employee negligence.

(2) "Discretionary function." Sovereign immunity is not waived for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or employee, whether or not the discretion involved is abused.

b. Provision 1. Due care exclusion of liability applies primarily to Government employees in the execution of statutes or regulations.

(1) If a statute or regulation mandates particular conduct, and the employee follows the mandate, the conduct is deemed in furtherance of U.S. policy and the Government will not be liable. United States v. Gaubert, 499 U.S. 315 (1991), *citing,* Dalehite v. United States, 346 U.S. 15 (1953).

(2) Federal law determines whether the Government employee exercised due care in the execution of the Federal statute or regulation. Hydrogen Technology Corp. v. United States, 831 F.2d 1155 (1st Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988). *Contra* Downs v. United States, 522 F.2d 990 (6th Cir. 1975).

c. Provision 2. Discretionary function two-part test. Before the exception applies:

(1) The act must involve an element of judgment or choice. Berkovitz v. United States, 486 U.S. 531 (1988).

(2) The judgment must be the kind that the discretionary function exception was designed to shield.

(3) The exception applies even when decisions are negligently made or discretion is abused.

3. Intentional torts exception. 28 U.S.C. § 2680(h).

a. The FTCA does not waive sovereign immunity for:

(1) assault and battery;

(2) false arrest;

(3) libel;

(4) slander;

(5) misrepresentation; and

(6) interference with contract rights.

b. Exception to the assault and battery and false arrest exceptions.

(1) FTCA does waive sovereign immunity for assault, battery, and false arrest when committed by Federal law enforcement officers.

(2) “Federal law enforcement officer” is defined as an officer of the United States "who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law."

(a) Military police are Federal law enforcement officers for FTCA purposes. Kennedy v. United States, 585 F. Supp. 1119 (D.S.C. 1984).

(b) Parole officers are not Federal law enforcement officers. Wilson v. United States, 959 F.2d 12 (2d Cir. 1992).

(c) Post Exchange security guards are not Federal law enforcement officers. Solomon v. United States, 559 F.2d 309 (5th Cir. 1977).

c. All intentional torts are not barred as a matter of law.

(1) The intentional tort exception will apply only if the conduct relied on to establish the alleged tort is substantially the same as that required to establish one of the specifically barred torts. Sheehan v. United States, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir. 1990).

(2) Intentional infliction of emotional distress is not barred by the intentional torts exception. Truman v. United States, 26 F.3d 592 (5th Cir. 1994); Santiago-Ramirez v. Secretary of Dep't of Defense, 984 F.2d 16 (1st Cir. 1993); Kohn v. United States, 680 F.2d 922 (2d Cir. 1982); Gross v. United States, 676 F.2d 295 (8th Cir. 1982); Sheehan v. United States, 896 F.2d 1168 (9th Cir. 1990), *modified*, 917 F.2d 424 (9th Cir. 1990).

4. Combatant activities exception. 28 U.S.C. § 2680 (j).

a. The United States is not liable for any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

b. There need be no formal declaration of war for the exception to apply. Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), *cert. denied*; 508 U.S. 960 (1993); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972); Morrison v. United States, 316 F. Supp. 78 (M.D. Ga. 1970).

5. Overseas exception. 28 U.S.C. § 2680 (k).

a. Congress did not want the liability of the United States determined by the laws of a foreign country. Therefore, claimants who have been injured by the acts or omissions of Federal employees in foreign countries have no judicial remedy against the United States.

b. If the injury occurred in a foreign country but the negligent act or omission occurred in the United States, the claim is not barred. In re Paris Air Crash, 399 F. Supp. 732 (C.D. Cal. 1975).

c. If the land in question is outside the U.S. but not subject to the sovereignty of another nation, the claim is still barred. Smith v. United States, 507 U.S. 197 (1993) (Antarctica).

## VI. CONCLUSION.

# CHAPTER W

# AFFIRMATIVE CLAIMS

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Outline of Instruction

# I. REFERENCES.

A. Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653; *implemented by* 28 C.F.R. Part 43.

B. Collection from Third Party Payers, 10 U.S.C. § 1095, *as amended*; *implemented by* 32 C.F.R. Part 220.

C. Federal Claims Collection Act, 31 U.S.C. §§ 3701, 3711, 3717, 3718; *implemented by* 4 C.F.R. §§ 101-105; 32 C.F.R. part 537.

D. Army Regulation 27-20, Claims, chapter 14.

E. Army Regulation 27-40, Litigation, chapter 5.

F. DA Pamphlet 27-162, Claims, chapter 14.

G. Memorandum of Agreement between the OTSG and OTJAG, dated April 1992.

# II. FEDERAL MEDICAL CARE RECOVERY PROGRAM.

A. The federal medical care recovery program provides the government with a means of recovering from tortfeasors and third-party payers the value of federal medical care furnished to eligible beneficiaries (soldiers, family members, and retirees). In certain circumstances, the U.S. may also recover the costs of pay provided to members of the armed forces who are unable to perform their military duties due to the wrongful conduct of a third-party tortfeasor.

B. Installation claims offices and military medical treatment facilities (MTFs) implement the Army's medical care cost recovery program.

1. The medical care cost recovery program at the installation claims office is part of the Affirmative Claims Program. This office also implements property damage recovery.

2. The medical care recovery activity at the MTF is known as the Third Party Collection Program (TPCP) (10 U.S.C. § 1095).

C. Legal Basis of Recovery.

1. Federal Medical Care Recovery Act (FMCRA) 42 U.S.C. § 2651-53.

*"In any case which the United States is authorized or required by law to furnish . . . care, . . .to a person who is injured or suffers a disease, . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have the right to recover from said third person, . . . the reasonable value of the care."*

a. The FMCRA provides recovery when the injury occurred "under circumstances creating tort liability upon some third person."

(1) The law of the state where the injury takes place determines tort liability.

(2) State family immunity laws are procedural and do not negate tort liability.

(3) Government must meet elevated tort liability standards in state "guest statutes." United States v. Neal, 443 F. Supp. 1307 (D. Neb. 1978).

b. Amount recoverable. The government's right is limited to:

(1) Amounts actually paid or reasonably expected to be paid in the future for medical care, and/or the total amount of pay that accrues to the member for the period for which the member is unable to perform duties as a result of the injury.

(2) Reasonable costs of medical care are provided by the Office of Management and Budget as representing the cost of care provided in government medical facilities.

c. Methods of recovery.

(1) Subrogation. The United States is subrogated to any rights or claims held by a person to whom the government has provided medical care against the tortfeasor causing the injury.

(2) Intervention. The United States can intervene in an injured party's tort action against the tortfeasor.

(3) Independent Action. The United States can administratively assert or litigate medical care claims on its own behalf.

(a) U.S. right to recovery exists even if the injured party executes a release agreeing to hold tortfeasor harmless for the injury.

(b) U.S. is not required to notify the tortfeasor or the insurer of its claim, but should promptly notify the injured party.

(4) Item of Special Damages. Injured party's attorney can assert the government's claim as an item of special damages in the injured party's civil lawsuit against the tortfeasor.

d. Statute of limitations.

(1) The federal three-year statute of limitations applies.

(2) Accrual. The claim normally accrues on the first date treatment is provided.

(3) Exclusion. Periods of time during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act under the circumstances" are excluded. 28 U.S.C. § 2416(c).

e. Medical care assertions against Government agencies, soldiers, civilian employees, family members, and retirees.

(1) Federal Agency. U.S. will not assert claim against a department, agency, or instrumentality of the U.S. Government.

(2) Civilian Employee or Soldier. U.S. will not assert claims against civilian employees or soldiers (including reserve component) acting within scope of employment who injure someone entitled to medical care, whether or not the employee or soldier has private insurance. U.S. v. Gilman, 347 U.S. 507 (1954).

(3) Tort Immunity. Interfamilial tort immunity does not necessarily preclude asserting medical care claim based on tort liability theory for medical care furnished to tortfeasor's family members. U.S. v. Moore, 469 F.2d 788 (3d Cir. 1972), *cert. denied*, 411 U.S. 905 (1973); U.S. v. Haynes, 445 F.2d 907 (5th Cir. 1971).

(4) Tortfeasor Outside Scope. If tortfeasor is a soldier, civilian employee, family member, or retiree acting outside scope of employment or with more than mere negligence, the U.S. may assert a medical care claim against tortfeasor's insurer.

(a) If the individual is not covered by insurance, United States Army Claims Service (USARCS) must approve submission of a medical care claim.

(b) Permission to assert a claim is granted if there are aggravating circumstances (i.e. evidence of willful misconduct), and tortfeasor has assets to satisfy claims of both the injured party and the government.

f. Limitations. The FMCRA has limited value as a means of recovery when U.S. must collect from sources other than the tortfeasor and tortfeasor's insurer. This situation usually occurs when:

(1) The tortfeasor has insufficient liability insurance, or no insurance at all;

(2) No third party tort liability for the injury; or,

(3) The accident occurred in a "no-fault" jurisdiction.

2. Recovery Under the Injured Party's Insurance Contract.

a. Limitations. U.S. ability to recover under the injured party's insurance contract is subject to the terms of the policy, state substantive law governing insurance and contracts, and state procedural law on the statute of limitations.

b. U.S. may recover under the following provisions of the victim's insurance contract:

(1) Uninsured/Underinsured Motorist Provision.

(a) Defined. Policyholder's insurance pays for medical expenses sustained in an accident caused by a motorist who has no insurance or has insufficient liability insurance.

(b) Issue: Whether "U.S. government" meets definition of "insured" in the contract to qualify as a third party beneficiary to the contract.

(i) Government is an "insured." Government Employees Insurance Co. v. United States, 376 F.2d 836 (4th Cir. 1967) ("[O]ne entitled to recover from the uninsured third party is in turn entitled to payment under the policy as an insured").

(ii) Government is not an "insured." U.S. v. Allstate Insurance Co., 306 F. Supp. 1214 (N.D. Fla. 1969) (U.S. is barred from recovery if policy expressly denies the government insured status).

(2) Medical Payments Provision.

(a) Medical payments provision obligates insurer to pay for medical expenses "to or for the benefit of the insured" or for the expenses of "any person or organization rendering medical services."

(b) To recover under medical payments provision, U.S. must argue that, by providing medical care to the injured party, it became a "third party beneficiary" to the insurance contract.

(c) State law determines whether U.S. is a third party beneficiary to the contract. U.S. v. United Services Automobile Association, 431 F.2d 735 (5th Cir. 1970) (insurer must pay "any organization rendering the services"); U.S. v. Government Employees Insurance Co., 461 F.2d 58 (4th Cir. 1972) (same); U.S. v. State Farm Mutual Insurance, 455 F.2d 789 (10th Cir. 1972); U.S. v. Metropolitan Life Insurance, 683 F.2d 1250 (9th Cir. 1982) (because policyholder incurred no expense, contract provided them no right to reimbursement - government had no basis for claim as third party beneficiary); U.S. v. Allstate Insurance Co., 910 F.2d 1281 (5th Cir. 1990) (quid pro quo for military policyholders is the reimbursement to the government for medical expenses).

(3) Personal Injury Protection Provision (no-fault automobile insurance).

(a) Although no-fault laws differ in every state, they all seek, to some extent, to modify common-law tort liability.

(b) Limitations under no-fault laws range from threshold requirements for medical expenses to limitations based upon the nature of the injury or the subjective intent of the tortfeasor.

(c) In states enacting no-fault automobile insurance laws, the injured party does not look to the third party tortfeasor for recovery of medical expenses; rather, an injured party must seek reimbursement from their own insurance carrier under the personal injury protection (PIP) provision of their automobile insurance policy.

(d) U.S. is generally unsuccessful in collecting on assertions under a third party beneficiary theory in no-fault states.

(i) General rule, especially in pure no-fault states, is that U.S. is not a third party beneficiary to the contract. Heusle v. National Mutual Insurance Co., 628 F.2d 833 (3d Cir. 1980); U.S. v. Allstate Insurance Co., 573 F. Supp. 142 (W.D. Mich. 1983); U.S. v. Dairyland Insurance Co., 674 F.2d 750 (8th Cir. 1982); U.S. v. Trammel, 899 F.2d 1483 (6th Cir. 1990).

(ii) U.S. is considered a third party beneficiary to the contract in modified no-fault jurisdictions. U.S. v. Leonard, 448 F. Supp. 99 (W.D.N.Y. 1978); U.S. v. Criterion Insurance, 596 P.2d 1203 (Colo. 1979); U.S. v. Allstate Insurance Co., 740 P.2d 550 (Haw. 1987).

3. State Workers' Compensation Programs.

a. Workers' compensation is insurance coverage purchased by employers that pays for work related injuries.

b. Employer is strictly liable for injuries sustained by employees at the workplace.

c. Some states allow U.S. to recover for medical care provided, but injured employee must satisfy certain state law requirements before U.S. asserts its claim.

4. 10 U.S.C. § 1095 - Third-Party Collection Program (TPCP).

a. Statute passed in 1985 and codified at 10 U.S.C. § 1095.

(1) Statute allowed U.S. to collect reasonable costs of inpatient hospital care furnished to dependents and retirees.

(a) Primary purpose was to recover federal medical costs from private health insurance covering dependents of active duty and retirees.

(b) Only covered care provided in or by a military treatment facility (MTF).

(c) Only reasonable inpatient hospital care costs were recoverable.

(d) All collected funds were deposited in the General Treasury.

(2) Results - claims and recoveries were significantly lower than expected.

b. 1989 Amendment to 10 U.S.C. § 1095. Collected funds from third-party payers now deposited directly into the Operation and Maintenance Account (O&M) of the MTF providing the care.

c. 1990 Amendment to 10 U.S.C. § 1095.

(1) Significantly expands DOD authority to collect costs of medical care from third party payers.

(2) Reason for the 1990 amendment:

(a) DOD Inspector General's audit report.

(b) GAO Report - "Military Health Care: Recovery of Medical Care Costs From Liable Third Parties Can Be Improved" (1990). Findings:

(i) Many third-party cases not reported by MTFs.

(ii) Insufficient staffing resulted in limited recoveries.

(iii) State no-fault laws limit recovery.

(3) Key features of the 1990 amendment:

(a) Allows U.S. to collect costs for all health care services provided (i.e., MTF inpatient and outpatient medical care).

(b) Allows U.S. to collect from active duty soldiers', dependents', and retirees' automobile insurers (in no-fault jurisdictions and in liability situations).

(c) Allows U.S. to collect from patient's private health insurer and Medicare supplemental insurer (non-active duty beneficiaries).

(d) Collected funds return to the MTF providing the care.

(e) Limitations:

(i) Only applies to care provided by or in an MTF.

(ii) Only applies to care provided after 5 November 1990.

d. 1993 Amendment to 10 U.S.C. § 1095.

(1) Prohibits considering amounts collected under § 1095 when establishing the MTF's annual operating budget.

(2) Money recovered under § 1095 from any third-party payer or from any other provision of law after 30 Nov 93 is credited to the servicing MTF.

e. 1994 Amendment to 10 U.S.C. § 1095.

(1) Transition to DOD TRICARE Program.

(2) Allows for collection agreements with health maintenance organizations (HMO) that provide health services to covered beneficiaries.

f. 1996 Amendments to 10 U.S.C. § 1095.

(1) Provided authority to implement regulations to assist in collection of information regarding insurance, medical service, or health plans of third-party payers held by covered beneficiaries.

(2) Information collected under this authority is not releasable for any purpose other than to carry out the collection process.

g. Implementing 10 U.S.C. § 1095. A Memorandum of Agreement (MOA) between the Office of the Judge Advocate General (OTJAG) and the Office of the Surgeon General (OTSG) implements the statute.

(1) Responsibilities.

(a) OTSG TPCP Responsibility.

(i) OTSG has staff responsibility for 10 U.S.C. § 1095 medical care recovery claims against health benefits insurers and Medicare supplemental insurance.

(ii) U.S. Army Medical Command (MEDCOM), through its TPCP Implementation Plan, has operational responsibility for 10 U.S.C. § 1095 collections.

(b) OTJAG - Affirmative Claims Program.

(i) OTJAG supervises legal services and support for the medical care recovery program under the FMCRA and under 10 U.S.C. § 1095 (automobile insurance carriers).

(ii) USARCS, through its Affirmative Claims Program, has operational responsibility.

(c) Installation claims offices assert:

(i) Claims for care provided in civilian treatment facilities;

(ii) Claims against tortfeasors and liability insurers under the FMCRA;

(iii) Claims against automobile insurers (no-fault and liability) whether the theory is FMCRA, 10 U.S.C. § 1095, or third party beneficiary; and,

(iv) Claims filed under state workmen's compensation laws.

(d) MTFs assert recovery claims against health benefits insurers and Medicare supplemental insurers.

(2) Interface between MTFs and installation claims offices.

(a) Identify and report potential medical care recovery claims.

(i) MTFs collect insurance information from patients.

(ii) MTFs review emergency room logs, patient records, etc. for potential medical care recovery cases.

(iii) MTFs forward potential medical care claims, not involving recovery from private health insurers or Medicare supplemental insurers, to the installation claims office.

(iv) MTFs flag potential overlap cases (cases with potential recovery from health insurer and automobile insurer) and transfer them to installation claims office for remaining collection.

(v) MTFs forward copies of paid vouchers for military members treated in civilian facilities to installation claims offices.

(b) Medical records, cost computations, and automation.

(i) MTFs submit copies of medical records and costs to the installation claims office.

(ii) MTFs route all requests for medical records to the installation claims office.

(iii) MTFs provide installation claims offices with access to relevant treatment cost information.

(c) Internal controls.

(i) MTFs document all cases transferred to installation claims offices.

(ii) Installation claims offices record all medical care recovery cases received from the MTF and notify the MTF of final disposition.

(iii) Installation claims offices notify the MTFs on a monthly basis of amounts deposited into their O&M accounts.

(3) Funding and administrative support.

(a) Recovered medical care funds returned to the MTF are available to enhance § 1095 collections.

(b) MOA between OTSG and OTJAG contemplates MTFs and installation claims offices will pool resources to further facilitate and enhance § 1095 recoveries. Examples of resource sharing include:

(i) Funding additional positions within the MTF.

(ii) Sharing training costs.

(iii) Funding positions in the installation claims office.

h. Litigation/Policy: Concerns Under 10 U.S.C. § 1095.

(1) USAA v. Perry, 102 F.3d 144 (5th Cir. 1996), reh'g denied, 108 F.3d 335 (5th Cir. 1997) (10 U.S.C. § 1095 allows the U.S. to recover from third-party payers the cost of federal health care services provided to a beneficiary. A "third-party payer" is defined as "an entity that provides an insurance, medical service, or health plan by contract or agreement, including an automobile liability insurance or no-fault insurance carrier." On 17 May 95, a district court held that for purposes of its MEDPAY policies, USAA is not a third-party payer within the meaning of the statute (886 F.Supp. 596 (W.D. Tex. 1995)). The government appealed the court's narrow reading of the statute. The 5th Circuit held that, while the statutory language of § 1095 is ambiguous, DOD's interpretation is entitled to deference).

(2) Impact of DOD TRICARE on ability to collect under 10 U.S.C. § 1095.

(a) TRICARE providers are independent contractors and not facilities of the U.S.

(b) 10 U.S.C. § 1095 only applies to care provided in or by a military health care facility.

D. Procedure for Depositing Money Recovered.

1. The Rule: Deposit all money recovered from health benefit providers and automobile insurers for medical care provided to active duty soldiers, family members, and retirees by or in an MTF after 5 November 1990 with the MTF that provided the treatment. This includes:

a. Money recovered under the FMCRA from automobile liability portion of tortfeasor's policy;

b. Money collected from the injured party's own auto insurance policy (PIP, medical payments, and uninsured/underinsured motorists' coverage).

c. Pursuant to the 30 Nov 93 amendment to § 1095, amounts collected under § 1095 from a third-party payer or under any other provision of law from any other payer for the costs of health care services provided at an MTF are credited to the treating facilities O&M account.

2. Money recovered under the following theories is deposited into the General Treasury:

a. MTF care provided before 5 Nov 90 (for automobile insurance proceeds).

b. Medical care provided at a civilian hospital.

c. Worker's compensation (for medical care provided in an MTF prior to 30 Nov 93).

d. Homeowners' or renters' insurers (for care provided in an MTF prior to 30 Nov 93).

e. Other liability (non-automobile) insurance (for care provided in an MTF prior to 30 Nov 93).

## III. PROPERTY DAMAGE RECOVERY.

A. Background.

B. Federal Claims Collection Act.

1. Determining liability.

a. State law where the damage or loss occurred (including choice of law rules) determines liability.

b. Three year time limitation for filing - 28 U.S.C. §§ 2415-16.

2. Asserting Property Damage Claims.

a. Property damage claims asserted against soldiers or civilian employees.

(1) Report of survey system is the primary mechanism for collecting from a civilian employee or a soldier (including a reserve component soldier) for damage to government property.

(2) The Recovery Judge Advocate (RJA) will not assert a property damage claim against a civilian employee or a soldier (including a reserve component soldier) who was acting within the scope of employment (recovery accomplished under the report of survey system).

(3) RJA may assert a demand against insurer of civilian employee or soldier not acting within the scope of employment, a retiree, or a family member for damage to government property.

(4) If no insurance, U.S. will not assert a claim for property damage recovery (exception: claims against retirees with approval from USARCS).

b. Restoration of the damaged property is often preferable to payment. Before the debtor is released, a technical inspection of the property is conducted to ensure proper restoration.

3. Authority to compromise, or terminate collection actions on property damage claims.

a. Claims asserted for over $100,000 - Department of Justice is approval authority for compromise or termination of collection.

b. Claims asserted for $100,000 or less - USARCS may compromise or terminate collection action.

c. Claims asserted for $40,000 or less - The SJA of a command having a claims service or the chief of a command claims service may compromise or terminate collection action.

d. Claims asserted for $25,000 or less.

(1) Authority to terminate collection on these actions rests with the SJA of a command having a claims service or the chief of a command claims service under paragraph 3c above.

(2) Area claims offices:

(a) May compromise up to $15,000 of the amount asserted.

(b) Area claims offices must seek approval from the Chief, Personnel Claims and Recovery Division, USARCS, to compromise amounts greater than $15,000 but not more than $25,000.

(c) If approval is not granted, the claim must be forwarded to the SJA of a command having a claims service or the chief of a command claims service to compromise amounts over $15,000 of a claim asserted for $25,000 or less.

(3) Claims processing offices with approval authority. May have delegated authority from their area claims office to compromise up to $5,000 of the amount of the claim.

e. Claims asserted for $15,000 or less - Area claims offices may terminate collection action when further collection efforts are not feasible.

f. Claims asserted for $5,000 or less - Claims processing offices may terminate collection action on any claim asserted for $5000 or less when further collection efforts are not feasible if that authority has been delegated from the area claims office.

4. Since Feb 96, money collected from affirmative claims based on property damage goes into O&M funds.

## IV. CONCLUSION.

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## AFFIRMATIVE CLAIMS TEMPLATE FOR MEDICAL CARE RECOVERIES

A. If care provided **before 5 November 1990**, medical costs are recovered under:

1. FMCRA (if there is a third-party tortfeasor)(Note: a "pure" no-fault state statute will generally bar recovery under FMCRA).

2. Injured Party's insurance contract (if no tort liability or tortfeasor has insufficient or no insurance).

   a. Uninsured/underinsured motorist provision of insurance contract (government meets definition of "insured" under the policy).

   b. Medical payments provision (government is a third-party beneficiary under the policy).

   c. Personal injury protection provision (government is a third-party beneficiary under the policy)(Note: tort liability in "modified" v. "pure" no-fault jurisdictions).

3. Workers' compensation (only if injury occurred incident to civilian employment and meets state requirements).

4. Initial version of 10 U.S.C. § 1095 (if dependents/retirees are treated as inpatients in an MTF).

B. If care provided **after 5 November 1990**, medical costs are recovered under:

1. FMCRA (if treatment occurs **in a civilian or military** hospital **and** there is third-party tort liability).

2. 10 U.S.C. § 1095 [as amended on 5 Nov 90] (if inpatient or outpatient treatment occurs **in or purchased by a MTF** and regardless of state no-fault law).

3. Insurance contract (if treatment occurs in a civilian hospital and unable to use FMCRA for any reason (e.g., no insurance or underinsured, state no-fault law, no tortfeasor, etc)).

4. Workers' compensation (if incident to civilian employment and meet state law requirements).

## AFFIRMATIVE CLAIMS TEMPLATE FOR MEDICAL CARE RECOVERIES

## DEPOSITING RECOVERED MONIES

C. Recovery Under **FMCRA**, **CONTRACT**, and **WORKERS' COMPENSATION**.

1. Medical Care Provided Before 30 Nov 93:

   a. All monies recovered for medical care are deposited into the General Treasury (exception: costs of care collected from automobile insurers after 5 Nov 90 goes into the MTF O&M account).

   b. Site/location of where the medical care was provided is not relevant.

2. Medical Care Provided After 30 Nov 93:

   a. If medical care is provided **in or by a MTF**, then recovered monies are deposited with the MTF providing the care and **not** into the General Treasury.

   b. If care is provided **by a civilian source**, then recovered monies are deposited into the General Treasury (pending clarification under DOD TRICARE Program).

3. Wages: Moneys are deposited in the O&M account that services the injured soldier's unit.

D. Recovery Under **10 U.S.C. § 1095**.

1. Recovery statute only applies to care provided to eligible beneficiaries [service members (only for automobile insurance policy collections), dependents, retirees, etc.] **in or by an MTF**.

2. As of October 1989, all recovered health/Medicare insurance proceeds are deposited with the MTF providing the medical care. As of 5 Nov 90, expands to include automobile insurance proceeds.

3. As of 30 Nov 93, for care provided **in or by an MTF**, monies recovered for medical care costs under any legal theory of recovery are not considered in determining the MTF's annual operating budget appropriation.

## 10 U.S.C. § 1095

§ 1095. Health care services incurred on behalf of covered beneficiaries: collection from third-party payers

**(a)(1)** In the case of a person who is a covered beneficiary, the United States shall have the right to collect from a third-party payer the reasonable costs of health care services incurred by the United States on behalf of such person through a facility of the uniformed services to the extent that the person would be eligible to receive reimbursement or indemnification from the third- party payer if the person were to incur such costs on the person's own behalf. If the insurance, medical service, or health plan of that payer includes a requirement for a deductible or copayment by the beneficiary of the plan, then the amount that the United States may collect from the third-party payer is the reasonable cost of the care provided less the appropriate deductible or copayment amount.

**(2)** A covered beneficiary may not be required to pay an additional amount to the United States for health care services by reason of this section.

**(b)** No provision of any insurance, medical service, or health plan contract or agreement having the effect of excluding from coverage or limiting payment of charges for certain care shall operate to prevent collection by the United States under subsection (a) if that care is provided--

**(1)** through a facility of the uniformed services;

**(2)** directly or indirectly by a governmental entity;

**(3)** to an individual who has no obligation to pay for that care or for whom no other person has a legal obligation to pay; or

**(4)** by a provider with which the third party payer has no participation agreement.

**(c)** Under regulations prescribed under subsection (f), records of the facility of the uniformed services that provided health care services to a beneficiary of an insurance, medical service, or health plan of a third-party payer shall be made available for inspection and review by representatives of the payer from which collection by the United States is sought.

**(d)** Notwithstanding subsections (a) and (b) and except as provided in subsection (j), collection may not be made under this section in the case of a plan administered under title XVIII or XIX of the Social Security Act (42 U.S.C. § 1395 et seq.).

**(e)(1)** The United States may institute and prosecute legal proceedings against a third-party payer to enforce a right of the United States under this section.

**(2)** The administering Secretary may compromise, settle, or waive a claim of the United

States under this section.

**(f)** The Secretary of Defense, in consultation with the other administering Secretaries, shall prescribe regulations for the administration of this section. Such regulations shall provide for computation of the reasonable cost of health care services. Computation of such reasonable cost may be based on--

**(1)** per diem rates;

**(2)** all-inclusive per visit rates;

**(3)** diagnosis-related groups; or

**(4)** such other method as may be appropriate.

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

**(2)** Not later than February 15 of each year, the Secretary of Defense shall submit to Congress a report specifying for each facility of the uniformed services the amount credited to the facility under this subsection during the preceding fiscal year.

**(h)** In this section:

**(1)** The term "third-party payer" means an entity that provides an insurance, medical service, or health plan by contract or agreement, including an automobile liability insurance or no fault insurance carrier and a workers' compensation program or plan. Such term also includes entities described in subsection (j) under the terms and to the extent provided in such subsection.

**(2)** The term "insurance, medical service, or health plan" includes a preferred provider organization, an insurance plan described as Medicare supplemental insurance, and a personal injury protection plan or medical payments benefit plan for personal injuries resulting from the operation of a motor vehicle.

**(3)** The term "health care services" includes products provided or purchased through a facility of the uniformed services.

**(i)(1)** In the case of a third-party payer that is an automobile liability insurance or no fault insurance carrier, the right of the United States to collect under this section shall extend to health care services provided to a person entitled to health care under § 1074(a) of this title.

**(2)** In cases in which a tort liability is created upon some third person, collection from a third-party payer that is an automobile liability insurance carrier shall be governed by the

provisions of Public Law 87-693 (42 U.S.C. § 2651 et seq.).

**(j)** The Secretary of Defense may enter into an agreement with any health maintenance organization, competitive medical plan, health care prepayment plan, or other similar plan (pursuant to regulations issued by the Secretary) providing for collection under this section from such organization or plan for services provided to a covered beneficiary who is an enrollee in such organization or plan.

**(k)(1)** To improve the administration of this section and §§ 1079(j)(1) and 1086(d) of this title, the Secretary of Defense, in consultation with the other administering Secretaries, may prescribe regulations providing for the collection of information regarding insurance, medical service, or health plans of third-party payers held by covered beneficiaries.

**(2)** The collection of information under regulations prescribed under paragraph (1) shall be conducted in the same manner as is provided in § 1862(b)(5) of the Social Security Act (42 U.S.C. § 1395y(b)(5)). The Secretary may provide for obtaining from the Commissioner of Social Security employment information comparable to the information provided to the Administrator of the Health Care Financing Administration pursuant to such section. Such regulations may require the mandatory disclosure of Social Security account numbers for all covered beneficiaries.

**(3)** The Secretary may disclose relevant employment information collected under this subsection to fiscal intermediaries or other designated contractors.

**(4)** The Secretary may provide for contacting employers of covered beneficiaries to obtain group health plan information comparable to the information authorized to be obtained under § 1862(b)(5)(C) of the Social Security Act (42 U.S.C. § 1395y(b)(5)(C)). Notwithstanding clause (iii) of such section, clause (ii) of such section regarding the imposition of civil money penalties shall apply to the collection of information under this paragraph.

**(5)** Information obtained under this subsection may not be disclosed for any purpose other than to carry out the purpose of this section and §§ 1079(j)(1) and 1086(d) of this title.

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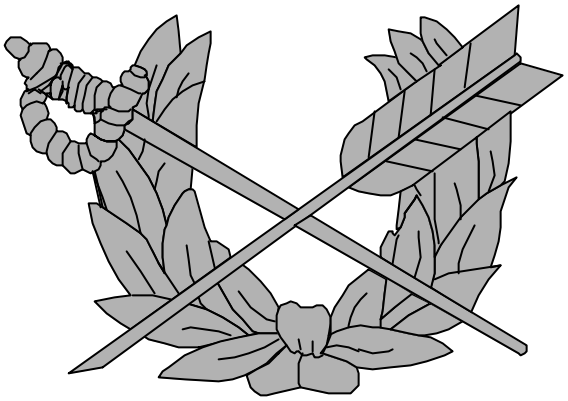
# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

# *BASIC COURSE DESKBOOK*



## Part III
## Practical Exercises

The Judge Advocate General's School
United States Army

MARCH 2001 JA 280

# CHAPTER X

# OFFICER EVALUATION REPORT APPEALS PRACTICAL EXERCISE

1. This chapter introduces the OER Appeal Practical Exercise (PE). All written submissions must comply with Army Regulation 25-50, Preparing and Managing Correspondence.

2. Scenario.

a. You are newly assigned to the Legal Assistance Division of the Staff Judge Advocate's Office, Fort Blank, Virginia. You have been working with a client, CPT J.C. Killy, on his appeal of an OER.

b. In a prior appointment, you generally discussed OER appeals and CPT Killy informed you of the basic facts and circumstances surrounding the OER in issue. The appointment ended with CPT Killy committed to collecting several statements and documents necessary to support his appeal. He said he would make another appointment when the papers were in hand.

c. CPT Killy did return for a second appointment and gave you a copy of his OER, seven memoranda, and two reassignment orders related to his appeal (see enclosures). He now requests your assistance in differentiating and advancing any administrative and substantive errors that exist in his OER. You have agreed to draft a cover memorandum for his appeal that responds to CPT Killy's request for assistance and conforms to applicable regulatory guidance.

3. Assignment.

a. Review the OER that is being appealed, and the supporting documents assembled by CPT Killy, for evidence of errors in the report. Identify errors individually and classify them as either administrative or substantive.

b. Draft a memorandum for CPT Killy's signature that transmits the appeal to the decision authority found in AR 623-105, Officer Evaluation Reporting System, 1 October 1997. Your memorandum should conform to the guidance found in this regulation, specifically in Appendix F, Chapter 6, and Figure 6-4, by describing and differentiating administrative and substantive errors which form the basis for the appeal.

c. In the course of your review, you may identify errors which you believe are insignificant, poorly supported, or which otherwise would not logically support CPT Killy's chances of advancing a successful appeal. Rather than detract from the strength of your cover memorandum, list errors you choose to exclude from your memorandum on a separate sheet of paper and hand them in with your completed memorandum.

d. The due date for your memorandum will be announced during your block of instruction on evaluation report appeals. After turning in your work, you will attend a seminar to discuss this exercise and review a proposed solution. Shortly thereafter, your faculty advisor will schedule a meeting with you to discuss your memorandum and give you an evaluation.

4. The Officer Evaluation Report Practical Exercise is a graded exercise that may form the basis for comments in you Academic Evaluation Report (AER). Specific grading criteria for this practical exercise are in the practical exercise volume of the Administrative and Civil Law Deskbook.

5. This practical exercise is an individual exercise. **You are NOT allowed to collaborate with others**. Please see me if you have any questions.

# OFFICER EVALUATION REPORT

For use of this form, see AR 623-105; the proponent agency is ODCSPER

*SEE PRIVACY ACT STATEMENT ON DA FORM 67-9-1*

## PART I - ADMINISTRATIVE DATA

| a. NAME (Last, First, Middle Initial) | b. SSN | c. RANK | d. DATE OF RANK (Year / Month / Day) | e. BRANCH | f. DESIGNATED SPECIALTIES / PMOS (WO) |
|---|---|---|---|---|---|
| KILLY, J.C. | 182-34-5678 | CPT | 93 / 06 / 01 | TC | |

| g. UNIT, ORG., STATION, ZIP CODE OR APO, MAJOR COMMAND | h. REASON FOR SUBMISSION |
|---|---|
| HHC, 51st Transportation Battalion, Fort Bragg, NC 28307 FORSCOM | 04 Change of Duty |

| i. PERIOD COVERED FROM (Year / Month / Day) | THRU (Year / Month / Day) | j. RATED MONTHS | k. NONRATED CODES | l. NO. OF ENCL | m. RATED OFFICER COPY (Check one and date) | Date | n. PSB INITIAL | o. CMD CODE | p. PSB CODE |
|---|---|---|---|---|---|---|---|---|---|
| 98 / 08 / 30 | 99 / 04 / 18 | 5 | I,Q | | 1. Given to Officer<br>2. Forwarded to Officer | | | | |

## PART II - AUTHENTICATION (Rated officer's signature verifies officer has seen completed OER Parts I-VII and the admin data is correct)

| | SSN | RANK | POSITION | SIGNATURE | DATE |
|---|---|---|---|---|---|
| a. NAME OF RATER (Last, First, MI) KEY, Charlotte R. | 815-61-2191 | MAJ | Bn Executive Officer | | |
| b. NAME OF INTERMEDIATE RATER (Last, First, MI) | | | | | |
| c. NAME OF SENIOR RATER (Last, First, MI) MYERS, Dayton P. | 232-81-8535 | LTC | Bn Commander | | |

| SENIOR RATER'S ORGANIZATION | BRANCH | SENIOR RATER TELEPHONE NUMBER | E-MAIL ADDRESS |
|---|---|---|---|
| 51st Transportation Battalion<br>Fort Bragg, NC 28307 | TC | 910-123-3336 | myerdp@bragg.army.mil |

d. This is a referred report, do you wish to make comments? ☐ Yes, comments are attached ☐ No

e. SIGNATURE OF RATED OFFICER | DATE

## PART III - DUTY DESCRIPTION

a. PRINCIPAL DUTY TITLE: Assistant Battalion S4 | b. POSITION AOC/BR: 88A

c. SIGNIFICANT DUTIES AND RESPONSIBILITIES. REFER TO PART IVa, DA FORM 67-9-1

Coordinates supply and maintenance elements of unit deployments both CONUS and OCONUS. Specifically responsible for defining unit support relationships, developing contingency plans and planning coordination conferences in support of the unit's deployment to OPERATION JOINT GUARD in Bosnia. Performs other duties as assigned.

## PART IV - PERFORMANCE EVALUATION - PROFESSIONALISM (Rater)

**CHARACTER** Disposition of the leader: combination of values, attributes, and skills affecting leader actions

| a. ARMY VALUES (Comments mandatory for all "NO" entries. Use PART Vb.) | Yes | No | | Yes | No |
|---|---|---|---|---|---|
| 1. HONOR: Adherence to the Army's publicly declared code of values | X | | 5. RESPECT: Promotes dignity, consideration, fairness, & EO | X | |
| 2. INTEGRITY: Possesses high personal moral standards; honest in word and | X | | 6. SELFLESS-SERVICE: Places Army priorities before self | | X |
| 3. COURAGE: Manifests physical and moral bravery | X | | 7. DUTY: Fulfills professional, legal, and moral obligations | X | |
| 4. LOYALTY: Bears true faith and allegiance to the U.S. Constitution, the Army, the unit, and the soldier | | | | | |

**b. LEADER ATTRIBUTES / SKILLS / ACTIONS:** First, mark "YES" or "NO" for each block. Second, choose a total of six that best describe the rated officer. Select one from ATTRIBUTES, two from SKILLS (Competence), and three from ACTIONS (LEADERSHIP). Place an "X" in the appropriate numbered box with optional comments in PART Vb. **Comments are mandatory in**

| | | | |
|---|---|---|---|
| **b.1.** *ATTRIBUTES (Select 1)* | 1. **MENTAL** YES / NO | 2. **PHYSICAL** YES / NO | X **EMOTIONAL** YES / NO |
| Fundamental qualities and characteristics | Possesses desire, will, initiative, and discipline | Maintains appropriate level of physical fitness and military bearing | Displays self-control; calm under pressure |
| **b.2** *SKILLS (Competence)* *(Select 2)* | X **CONCEPTUAL** YES / NO | 2. **INTERPERSONAL** YES / NO | 3. **TECHNICAL** YES / NO |
| Skill development is part of self-development; prerequisite to action | Demonstrates sound judgment, critical/creative thinking, moral reasoning | Shows skill with people: coaching, teaching, counseling, motivating and empowering | Possesses the necessary expertise to accomplish all tasks and functions |
| | 4. **TACTICAL** Demonstrates proficiency in required professional knowledge, judgment, and warfighting | | YES / NO |
| **b.3.** *ACTIONS (LEADERSHIP) (Select 3) Major activities leaders perform: influencing, operating, and improving* | | | |
| *INFLUENCING* | 1. **COMMUNICATING** YES / NO | 2. **DECISION-MAKING** YES / NO | 3. **MOTIVATING** YES / NO |
| Method of reaching goals while operating / improving | Displays good oral, written, and listening skills for individuals / groups | Employs sound judgment, logical reasoning and uses resources wisely | Inspires, motivates, and guides others toward mission accomplishment |
| *OPERATING* | X **PLANNING** YES / NO | X **EXECUTING** YES / NO | 6. **ASSESSING** YES / NO |
| Short-term mission accomplishment | Develops detailed, executable plans that are feasible, acceptable, and suitable | Shows tactical proficiency, meets mission standards, and takes care of people/resources | Uses after-action and evaluation tools to facilitate consistent improvement |
| *IMPROVING* | 7. **DEVELOPING** YES / NO | 8. **BUILDING** YES / NO | X **LEARNING** YES / NO |
| Long-term improvement in the Army its people and organizations | Invests adequate time and effort to develop individual subordinates as leaders | Spends time and resources improving teams, groups and units; fosters ethical climate | Seeks self-improvement and organizational growth; envisioning, adapting and leading |

**c. APFT:** PASS **DATE:** FEB 99 **HEIGHT:** 73 **WEIGHT:** 175 YES

**d. JUNIOR OFFICER DEVELOPMENT -** ***MANDATORY YES OR NO ENTRY FOR RATERS OF LTs AND WO1s.***

WERE DEVELOPMENTAL TASKS RECORDED ON DA FORM 67-9-1a AND QUARTERLY FOLLOW-UP COUNSELINGS CONDUCTED? YES / X NO / NA

**DA FORM 67-9, OCT 97** REPLACES DA FORM 67-8, 1 SEP 79, WHICH IS OBSOLETE, 1 OCT 97 USAPA V2.00

NAME KILLY, J.C. SSN 182-34-5678 PERIOD COVERED 980830 - 990418

**PART V - PERFORMANCE AND POTENTIAL EVALUATION (Rater)**

a. EVALUATE THE RATED OFFICER'S PERFORMANCE DURING THE RATING PERIOD AND HIS/HER POTENTIAL FOR PROMOTION

[X] OUTSTANDING PERFORMANCE, MUST PROMOTE [ ] SATISFACTORY PERFORMANCE, PROMOTE [ ] UNSATISFACTORY PERFORMANCE, DO NOT PROMOTE [ ] OTHER *(Explain)*

b. COMMENT ON SPECIFIC ASPECTS OF THE PERFORMANCE AND POTENTIAL FOR PROMOTION. REFER TO PART III, DA FORM 67-9 AND PART IVa, b, AND c DA FORM 67-9-1.

In the relatively short time since his arrival in the 51st Transportation Battalion, CPT Killy has displayed several highly desirable qualities as an officer and organizer. Within this period, CPT Killy took the initiative in developing contingency plans and developing coordination conferences with a very limited amount of guidance. His efforts were creative and resulted in the addition of a local coordination conference at Fort Bragg, and an on-site coordination conference in Hungary for the OPERATION JOINT GUARD planning cycle. These conferences were valuable contributions to deployment preparation and would have been even more effective had CPT Killy not been distracted by his unsuccessful bid to return to competitive skiing. Given the chance to dedicate his full energy to this mission, I am confident that the promise of his initiative would be fulfilled.
IV.a.6. This officer's ability to focus on the mission was impacted by some preoccupation with personal affairs.
IV.b.3.3. This officer was not in a supervisory position.

c. IDENTIFY ANY UNIQUE PROFESSIONAL SKILLS OR AREAS OF EXPERTISE OF VALUE TO THE ARMY THAT THIS OFFICER POSSESSES. FOR ARMY COMPETITIVE CATEGORY CPT THROUGH LTC, ALSO INDICATE A POTENTIAL CAREER FIELD FOR FUTURE SERVICE.

**PART VI - INTERMEDIATE RATER**

**PART VII -SENIOR RATER**

a. EVALUATE THE RATED OFFICER'S PROMOTION POTENTIAL TO THE NEXT HIGHER GRADE

I currently senior 15 officer(s) in this grade

[ ] BEST QUALIFIED [X] FULLY QUALIFIED [ ] DO NOT PROMOTE [ ] OTHER *(Explain below)*

A completed DA Form 67-9-1 was received with this report and considered in my evaluation and review [ ] YES [X] NO *(Explain in c)*

HQDA COMPARISON OF THE SENIOR RATER'S PROFILE AND BOX CHECK AT THE TIME THIS REPORT PROCESSED

**BELOW CENTER OF MASS – RETAIN**

RO: CPT KILLY, J.C. 182345678

SR: LTC MYERS 232818535

DATE: 990425

TOTAL RATINGS: 4

RATINGS THIS OFFICER: 1

c. COMMENT ON PERFORMANCE/POTENTIAL

This officer has demonstrated a lot of initiative in a very short period of time. Some of CPT Killy's ideas will likely be recognized as critical elements of successful exercise planning, particularly for major OCONUS deployments. He is a personable officer who is a catalyst for the inter-unit cooperation that is so critical to operations planning. Although my opportunity to observe this officer has been limited, I believe he has the potential to accept greater levels of responsibility and, with further experience, should be given the opportunity to command.

d. LIST 3 FUTURE ASSIGNMENTS FOR WHICH THIS OFFICER IS BEST SUITED. FOR ARMY COMPETITIVE CATEGORY CPT THROUGH LTC, ALSO INDICATE A POTENTIAL CAREER FIELD FOR FUTURE SERVICE.

Battalion Supply Officer, Assistant Battalion Operations Officer, Battalion Maintenance Officer.

**DA FORM 67-9, OCT 97 (Reverse)** USAPA V2.00

DEPARTMENT OF THE ARMY
Headquarters, 18th Airborne Corps and Fort Bragg
Fort Bragg, North Carolina 28307

ORDERS 10-199 1 April 1999

KILLY, J.C. 182-34-5678 CPT HHC, 51st Trans Bn (RAB2OA), Ft. Bragg, NC 28307

You are reassigned as indicated below. No travel involved.

Assigned to: HHC, 18th Corps (Airborne)(RAC1AO) Ft. Bragg, NC 28307
Reporting Date: 15 Apr 99
Movement Designator Code: MTRA
Additional Instructions: Off assigned for duty as Assistant Movements Officer.
Format: 110

FOR THE COMMANDER:

HORACE G. HUNTER
1LT, AG
Assistant Adjutant General

DISTRIBUTION:
ABCD-RAO-GE (2)
ABCD-LOG (4)
ABCD-HOG (1)
ABCD-MED (4)
Cdr, HHC, 51st Trans (2)
Cdr, HHC, 18th Corps (2)
CPT Killy (10)

DEPARTMENT OF THE ARMY
Headquarters, 18th Airborne Corps and Fort Bragg
Fort Bragg, North Carolina 28307

ORDERS 8-11 3 February1999

MYER, DAYTON P. 232-81-8535 LTC HQ, U.S. Army Special forces Command (ABN)(GRZO), Ft. Bragg, NC 28307

You are reassigned as indicated below. No travel involved.

Assigned to: HHC, 51st Trans Bn, Ft. Bragg, NC 28307
Reporting Date: 16 Feb 99
Movement Designator Code: MRO
Additional Instructions: Off assigned as Battalion Commander.
Format: 101

FOR THE COMMANDER:

GEORGE G. MASON
CPT, AG
Assistant Adjutant General

DISTRIBUTION:
ABCD-RAO-GE (2)
ABCD-LOG (4)
ABCD-HOG (1)
ABCD-MED (4)
Cdr, HHC, 51st Trans (2)
Cdr, HHC, 18th Corps (2)
LTC Myer (10)

DEPARTMENT OF THE ARMY
Headquarters, U.S. Army Garrison (USAG)
Fort Blank, Virginia 22222

ABCD-LOG

MEMORANDUM FOR RECORD

SUBJECT: OER Appeal of CPT Killy, J.C., SSN: 182-34-5678

1. To a significant extent, the circumstances surrounding this OER appeal involve my skiing prowess. Prior to entering the Army I did ski competitively as a junior and again in college in Montana. I was quite successful, but did not get any national exposure and could not afford professional coaching. I continued skiing in my initial assignments in the Army, but did not even dream of skiing competitively again until January 1999 when I met the U.S. Olympic ski team coach, Mr. Tom Saint. The chronology below spells out the exact circumstances surrounding this meeting and my concurrent activities with my unit of assignment during that period, the 51st Transportation Battalion of the 82d Airborne Division.

2. The following is a chronology of the specific events surrounding the reporting period covered by the OER that is the subject of this appeal.

30 Aug 98: Departed Fort Huachuca, Arizona, on PCS to Fort Bragg, North Carolina, with leave and Battalion Maintenance Officer (BMO) Course en route.

1 Sep 98: Reported to Battalion Maintenance Officer Course at Fort Eustis, Virginia, in Temporary Duty Status (TDY) en route to Fort Bragg, North Carolina, for Permanent Change of Station (PCS).

18 Oct 98: Departed Fort Eustis on my PCS leave en route to Fort Bragg, North Carolina.

10 Nov 98: Reported for duty with the 51st Transportation Battalion, 82d Airborne Division, Fort Bragg, North Carolina. Introduced to the XO, my rater, MAJ Charlotte Key, and the Battalion Commander, my senior rater, LTC Holly Bradford.

15 Nov 98: Began inprocessing after meeting with battalion XO who advised that I would be carried reassignable overstrength (excess) pending reassignment of the current battalion maintenance officer (BMO). At that time, I would be assigned for full-time duties as the BMO or assigned to command one of the unit's transportation companies. I volunteered for the latter. In the course of inprocessing appointments with both the XO and the Battalion Commander, I asked about

ABCD-LOG
SUBJECT: OER Appeal of CPT Killy, J.C., SSN: 182-34-5678

scheduling a meeting to discuss objectives and to complete the Officer Evaluation Report Support Form, DA Form 67-8-1, but was told by the XO that time would be made for this in the future.

18 Nov 98: Advised by the XO that the unit had been notified that it would participate in OPERATION JOINT GUARD IN Bosnia beginning in the fall of 1999. I was told that my immediate duties would be to coordinate with supported units to establish times and dates of their departures and to begin developing milestones focused on development of interlocking unit operational plans (OPLANS).

22 Nov 98: Scheduled a planning meeting (on my own initiative but with approval of the XO) with major unit points of contact (POCs) for the first week in January at Fort Bragg. Forwarded invitations and secured meeting rooms and billeting space for attendees.

2 Dec 98
thru
4 Jan 99: On my own initiative, drafted a series of contingency plans (CONPLANS) that addressed differing unit maintenance needs dependent on the status of unit equipment both deployed with the unit and drawn from prepositioned stocks within the European theater. I relied extensively on my prior experience assigned with USAREUR (U.S. Army, Europe) in drafting these plans.

5 Jan 99
thru
8 Jan 99: Coordination conference held at Fort Bragg with representatives of 22 units. This was the first such conference held since OPERATION JOINT GUARD began. Unit representatives agreed to proposed on-site coordination conference to be held in Garmisch, Germany, between CONUS (Continental United States) and USAREUR units on 30 and 31 January 1999.

9 Jan 99
thru
28 Jan 99: Forwarded results of the coordination conference to our USAREUR liaison Area Support Groups (ASGs) and coordinated travel and conference plans for the on-site visit to Germany. Drafted an agenda and prepared read-ahead packets

SUBJECT: OER Appeal of CPT Killy, J.C., SSN: 182-34-5678

outlining foreseeable operational requirements for our supporting units. Configured milestones for predeployment maintenance activities.

28 Jan 99: Traveled to Germany in the company of the unit XO and her assistant, Sergeant First Class (SFC) Allan Hunt. Plans had originally called for the Battalion Commander to come, but she was required to cancel her plans because of commitments from higher headquarters.

29 Jan 99
thru
31 Jan 99: On-site conference held in Von Steuben Hotel in Garmisch. This was the first time that face-to-face coordination on the ground had been conducted between battalion level units preparing to deploy and supporting USAREUR units. Although the primary focus was on maintenance, points of contact for multiple subjects of concern to sending and receiving units were identified and made presentations regarding capabilities and limitations of their areas of operation.

31 Jan 99: The conference was closed after lunch and MAJ Key, SFC Hunt, and I went up to the Zugspitze to celebrate with some skiing. We had never skied together, but each of us professed to have some experience and planned to ski together. As it turned out, SFC Hunt was an average skier, but MAJ Key had trouble standing up on her skis. Efforts to assist were rebuffed and we struggled slowly down the hill. At one point I skied slightly ahead and, when I stopped, was approached by a skier who introduced himself as CW3 Mack Hunan, coach of the USAREUR Ski Team and coordinator for the European Ski Championships. CW3 Hunan asked me about my skiing background, and we discussed the great training opportunities available in the German\Austrian Alps. We obviously hit it off and CW3 Hunan asked if I would like to join him, BG Ott, and Mr. Tom Saint, coach of the U.S. Olympic Team who would be joining him the next day, for some skiing. I told him I would have to get permission from my unit and introduced him to MAJ Key and SFC Hunt who by now had caught up with me. We agreed to meet around dinner in the main lodge. I immediately asked MAJ Key about taking a week of leave to ski with CW3 Hunan, BG Ott, and Mr. Saint, and she orally approved my leave.

1 Feb 99
thru
6 Feb 99: Skied throughout the Austrian Alps with CW3 Hunan, BG Ott, and Mr. Saint. In the course of the week, I ran some informal races with several professional skiers set up by Mr. Saint. I performed well and Mr. Saint asked me if I would like to

ABCD-LOG
SUBJECT: OER Appeal of CPT Killy, J.C., SSN: 182-34-5678

come to a prequalifying session of the U.S. Olympic Team tryouts in March. I made a commitment to get there if my unit would release me.

6 Feb 99 thru 9 Feb 99: On the final day of my leave, I took a hard fall and felt what I thought was a major injury. I was medivaced off the mountain and eventually transferred to the Army Medical Center at Landstuhl. I feared that I would be unable to go to the Olympic tryouts. Doctors fortunately diagnosed a minor muscle pull, and I was released to fly back to Fort Bragg and my unit.

10 Feb 99: Although my leg was still a little tender, I returned to duty. I immediately told MAJ Key about my invitation to the Olympic tryouts in the beginning of March and requested two weeks of leave in writing. She said she would recommend approval of the leave and it was approved. At the same time, I learned that LTC Bradford had left command of the battalion on 30 January 1999, while I was in Germany, and that her successor, LTC Dayton Myers, would assume command on 16 February 1999.

17 Feb 99: Briefed an after-action report I had prepared regarding the on-site conference in Garmisch to the Battalion Staff, including the new Battalion Commander, LTC Myers. LTC Myers issued new guidance focused on revising planning milestones, and I was told to reevaluate some of our CONPLANS with several of the other deploying units. The magnitude of this revised guidance was such that there was enough to keep several people busy for the next several months.

1 Mar 99 thru 13 Mar 99: Arrived in Colorado Springs, Colorado, for the Olympic Ski Team pre-qualifier. I seemed to improve each day and was notified that I had been selected to enter formal qualifications which would begin in week two. As a result, Coach Saint contacted my unit and my status for the second week was changed from leave to permissive temporary duty (PTDY). Orders documenting this change were issued retroactively by my unit.

14 Mar 99: Despite believing that I would be selected for the Olympic team, my chances ended in a fall that tore knee ligaments in my right leg. My leg was placed in a cast at the hospital at Fort Carson, Colorado.

ABCD-LOG
SUBJECT: OER Appeal of CPT Killy, J.C., SSN: 182-34-5678

15 Mar 99:Flew back to Fort Bragg with orders to report to the hospital at Fort Bragg for rehabilitation.

17 Mar 99: Met with physical therapy at Fort Bragg and worked out schedule of therapy which would allow me to return to duty.

18 Mar 99: Returned to limited duty and continued working on guidance given to me by the new commander in February. Despite physical limitations, this was work I would largely be able to accomplish by telephone and with my computer at my desk.

19 Mar 99
thru
13 Apr 99: Continued therapy and duties as assigned. During this period, I was notified that because I continued to be carried excess to the battalion, I had been selected to move across post to the 18th Airborne Corps, which was understrength.

14 Apr 99: Outbriefed MAJ Key and provided her with materials I had developed over the last several months. I again attempted to discuss completion of my DA Form 67-8-1, Officer Evaluation Report Support Form, but was told not to worry about it. I gave her the draft support form I had prepared on my own initiative. I did not retain a copy of the form.

15 Apr 99: Reported for duty at the 18th Airborne Corps.

30 Jun 99: Transferred to Fort Blank, Virginia because my knee injury prevented me from continuing on airborne status.

3. I am currently assigned to the Logistics Division of the U.S. Army Garrison, Fort Blank, Virginia. On 15 July 1999, I was notified of my nonselection for O-4 by the recent Army Competitive Catagory (ACC) selection board. I believe the OER which is the subject of this appeal formed the basis for my nonselection. I never saw the OER until I checked my file when I was nonselected. I signed a bunch of blank OER forms before I left the 51st. The report should be removed from my records, and I should be reconsidered for promotion.

J.C. Killy
CPT, TC
Deputy Chief, Logistics Division

MEMORANDUM FOR RECORD

SUBJECT: J.C. Killy, 182-34-5678

In January and February 1999, I was serving as coach of the U.S. Olympic ski team and was in Garmisch, Germany, with members of the U.S. Ski team. While we were working out, my old friend, Mack Hunan, introduced me to J.C. Killy. Mack had "discovered" J.C. while coordinating a ski race in Garmisch and said I should take a look at J.C. because he thought J.C. was something special. I watched him ski for the next week and J.C. was good! He could really ski and was absolutely fearless. He showed so much ability that I invited him back for the Olympic team tryouts in March. J.C. was thrilled to have the chance but was worried that his boss would not understand.

About two weeks later, in March, I saw J.C. at the tryouts. We were there for several weeks working out several times a day. J.C. said that his boss had seemed supportive of the trip and had approved his leave. He announced he was there to make the team.

I have seen a lot of skiers in my day, but I have never seen any with a single-minded burning desire to win like J.C. He would be the first on the mountain in the morning and the last one off at night. At night all he would talk about was skiing. This complete dedication paid off. He was really coming along and probably would have made the team except he hurt his leg. His loss was a real blow to the team. He was a leader.

An attitude like J.C.'s is not something that an athlete can turn on and turn off. I have no doubt that J.C. applied the same dedication to his job that he applied to making the team. As a matter of fact, I saw J.C. several years later and offered him a chance to be my assistant with the University of Oklahoma ski team. He said he would really like the job but that he was totally committed to his military career.

Tom Saint
Coach, University of Oklahoma Ski Team
GO SOONERS!

MEMORANDUM FOR RECORD

SUBJECT: CPT J. C. Killy, 182-34-5678

In 1999 I was the coach of the USAREUR Ski Team. In January or February, I was the coordinator of the European Ski Championships in Garmisch. I had been coaching skiers for about 10 years, and I could spot a real skier out of a crowd immediately. When I saw J.C. going down that mountain, I said to myself, "Chief, that guy can really ski." So I went over and introduced myself. When I found out he was in the Army, I was thrilled. I thought that with J.C. on the team we would be sure to beat the Air Force for the first time in 10 years. When J.C. told me he was on leave from CONUS, I was crushed because we hit it off really well from the start. He couldn't be on my team, but I still took him under my wing and showed him around the area. What a great kid. We skied and partied and had one hell of a week. I have met a lot of officers over the last 20 years but J.C. was one of the best. He was smart and could really ski.

Before the week was over, I had introduced J.C. to Tom Saint. Tom was the coach of the U.S. Ski Team and we go way back. Tom and I have known each other since we were trying out for the U.S. Ski Team before I came into the Army. Tom went on to be a professional and then the coach of the U.S. Ski Team. I could have gone professional also but I hurt my knee, much like J.C. did. J.C. hurt his leg a little while in Garmisch and had to go to the hospital, but this was nothing like what he did to it later in Colorado when he was trying out for the U.S. team.

J.C. is one of the finest officers I have known. About a month after his injury, after his leg started healing, I talked to the General in USAREUR about getting J.C. assigned to Germany. The Army here could really use leaders like him. I am sure he could have led our team to victory over the Air Force. The General can spot a good man and was ready to get J.C., but when I talked to J.C., he said that he was too busy with the job he had. They don't come any more loyal or dedicated than J.C.

CW3 MACK HUNAN

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DEPARTMENT OF THE ARMY
Headquarters, Forces Command (FORSCOM)
Fort McPherson, Georgia 30330

MEMORANDUM FOR RECORD

SUBJECT: OER Appeal of CPT J.C. Killy (182-34-5678)

1. CPT J.C. Killy worked for me as an assistant movements officer for the 18th Airborne Corps, Fort Bragg, North Carolina. His performance in that capacity was superb. He performed every assigned task in a timely, complete, and professional manner.

2. I have known and had the opportunity to observe CPT Killy since he was assigned to Fort Bragg in November 1998. He was initially assigned as Assistant S-4 for the 51st Transportation Bn, 82d Airborne Division. In that capacity, he was actually excess, but assumed the critical role of movements coordinator for the OPERATION JOINT GUARD advance party for their rotation to Bosnia. As a Corps representative, I attended many of the stateside planning and coordination meetings of that group. Up until the time of the advance party's deployment to Germany, I observed firsthand CPT Killy's many contributions to that immense effort. It was obvious that CPT Killy's presentations to and participation in those meetings were preceded by meticulous preparation, thorough research, and thoughtful analysis of the situation and the mission. He demonstrated a grasp of the complexities of modern logistics that I have observed in few others.

3. CPT Killy did discuss with me the OER that he received from his assignment with the 51st Transportation Bn. It is not at all consistent with the duty performance that I had the occasion to infrequently observe. I know the rating officer, MAJ Key, in this instance from several professional contacts at Fort Bragg. It would be my opinion that her unfavorable rating was borne more out of jealousy than any objective assessment of duty performance or potential. CPT Killy's senior rater changed during the subject rating period. The new senior rater could have had only minimal, at most, contact or opportunity to observe CPT Killy. I doubt that the senior rater had been in that position long enough to render a valid OER. At any rate, I believe that the senior rating must reflect support of the executive officer/rater in the absence of personal contact or observation.

4. It is my opinion that the subject OER does not accurately reflect the contributions made by, or potential possessed by CPT Killy. This report should be removed from CPT Killy's record and his record reconsidered for promotion.

JAMES K. BURLINGTON
COL, GS
Chief, Tactical Transportation Branch

DEPARTMENT OF THE ARMY
Headquarters, 7th Transportation Group
Fort Eustis, Virginia 23604

TRANS-ADJ

MEMORANDUM FOR RECORD

SUBJECT: Supporting Statement for OER Appeal of Captain J.C. Killy, 182-34-5678

1. From January 1998 through June 1999, I served as the S-1 of the 51st Transportation Battalion, 82d Airborne Division, Fort Bragg, North Carolina. In that position, I was able to get to know and work with CPT J.C. Killy. I was also able to observe first-hand the relationship of CPT Killy with his rater.

2. CPT Killy is a conscientious and hard-working officer. He always put work first and accomplished every mission assigned. Despite these admirable qualities and the truly remarkable effort he expended on the job, his rater, MAJ Key, was never satisfied. Always critical, she found fault with the slightest deficiency. She seemed insanely jealous of CPT Killy's pleasant manner, athletic acumen, natural leadership abilities, and general star qualities. This personality conflict escalated relentlessly until a siege-like state existed between the two, with CPT Killy braced for ever increasing and unjustified attacks.

3. I know this treatment caused CPT Killy great pain, for I too have tasted its bitter fruit. MAJ Key sought to crush me with the same maniacal fervor with which she pursued the hapless CPT Killy. Her brutal totalitarian regime was more appropriate to an Ayatollah's fanatical guard than a premier American fighting force like the 51st Transportation Battalion. She refused to recognize my own awesome military qualities and didn't see that I was ready to lead soldiers to glory. Instead, she tried to end my career, an incalculable loss to our great nation. If I do not win an appeal of the OER she gave me and reverse my recent nonselection for promotion, she will have been successful.

JOSEPH P. RAILS
CPT, TC
ADJUTANT

MEMORANDUM FOR RECORD

SUBJECT: Supporting Statement for OER Appeal of J.C. Killy, 182-34-5678

During the last week of January and the first week of February 1999, it was my pleasure to meet CPT J.C. Killy through my friend, Mr. Tom Saint, the coach of the United States ski team.

Tom and I were to meet at Garmisch during that last week of January. Upon my arrival, Tom introduced me to J.C. Despite J.C.'s winning smile and strong handshake, I immediately noticed J.C.'s command presence. Here was a "take-charge" man. After skiing with J.C. for four days over that two-week time frame, I knew my first impressions were correct.

Because of J.C.'s superior instruction, my skiing abilities were vastly improved. I have been skiing for some years now; yet, J.C. improved my skiing more than anyone has ever been able to in such a short period of time. For example, he taught me how to use my edges effectively and efficiently. This alone has made a great difference in my skiing ability. Snow plowing is now a thing of the past. He accomplished all of this with professionalism and tact.

I have been around soldiers for a lot of years. I have participated in athletics with these soldiers on a regular basis over these years. It has been my experience that those who take sports seriously and "play" hard at them will give the same effort to their jobs. Their approach to sports parallels their approach to their jobs. J.C. is highly motivated and responsible on the slopes. I have no doubt J.C. is also highly motivated and responsible on his job.

J.C. takes whatever he does seriously, and he never half-steps. My experience with J.C. has shown me he completes whatever he starts, and he always puts forth his best effort. I know J.C. would never shirk his duties or responsibilities even though skiing is his life.

WILLIAM OTT
MG, U.S. Army Retired

MEMORANDUM FOR RECORD

SUBJECT: OER Appeal of CPT J.C. Killy, 182-34-5678

My name is SFC Allan Hunt. I worked for CPT J.C. Killy for several months as we tried to coordinate for a rotation to OPERATION JOINT GUARD in 1998-99.

CPT Killy did about as good a job as anyone could under the circumstances. I don't think that his boss, MAJ Charlotte Key, liked him at all. I don't think it was fair that she wrote his OER.

I first noticed a personality conflict between CPT Killy and MAJ Key when we were all in Garmisch at an OPERATION JOINT GUARD coordination meeting. We all went skiing while at Garmisch. CPT Killy is a <u>great</u> skier. MAJ Key is pretty good too, but not nearly as good as CPT Killy. Well, CPT Killy met CW3 Hunan up there on the slopes, and CW3 Hunan introduced CPT Killy to MG Ott. I could see that MG Ott was quite taken with CPT Killy's skiing ability. MAJ Key could see that too. She reacted real negatively. In fact, when we (MAJ Key and I) were back in the ski lodge, she remarked kind of sadly that "Too bad we can't all ski like CPT Killy. Then we could form our own ski team, and OPERATION JOINT GUARD might become irrelevant." I took that to mean that CPT Killy had an in with the brass because of his skiing and MAJ Key didn't like that.

After that OPERATION JOINT GUARD trip, MAJ Key was noticeably cool to CPT Killy.

ALLAN HUNT
SFC, U.S. Army

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# CHAPTER Y

## Interviewing and Counseling Practical Exercise

## General Instructions

You will participate in a practical exercise on interviewing and counseling as part of your legal assistance instruction. You will receive a 50-minute introductory class on basic client interviewing and counseling techniques before the exercise block. **Note: The class will be divided into groups for the practical exercise. Read the schedule carefully.**

During the exercise, each student will interview a "client" (played by one of the faculty). You will develop the facts, determine applicable advice and assistance based on the fact situation presented, and counsel the client.

Faculty members will assign Superior, Satisfactory, or Unsatisfactory ratings. If you receive a Superior grade, this may be entered on your student academic evaluation report. **Students receiving an "unsatisfactory" rating may have to repeat the exercise.**

You will be divided into groups for the exercise. I will post your group assignments on the Basic Course bulletin board immediately following your block of instruction on interviewing and counseling techniques. You will also receive a detailed schedule showing where each student should be and what they should be doing during each time period of the exercise. Students will interview their client in the office listed on the schedule, research the problem and develop a strategy at a different location (library, classroom, or conference room), and return to their office to counsel the client. At the conclusion of the interview session and the counseling session, the faculty member will provide you with feedback on your performance.

A military pay chart follows these instructions. You should bring it with you to the exercise. You should also **review your copy of AR 608-99 (Family Support, Child Custody, and Paternity), Chapter 2, prior to the exercise and bring it to your interview**. You may also wish to **review your outline discussing Cooling Off Period for Door-to-Door Sales (JA 265, Consumer Law Guide, Chapter 4), scan AR 27-26, Rules of Professional Conduct for Lawyers, and your Professional Responsibility Outline from the Criminal Law instruction.** You may also want to bring your class outlines from these areas with you to the interview.

**You will not have a great deal of time for research. It is CRITICAL that you familiarize yourself with the subject areas prior to the interview!**

## MONTHLY BASIC PAYTABLE
## EFFECTIVE 1 JULY 2000
**The only rates considered official are in the DFAS computer database and are the ones used for all pay calculations.**

### YEARS OF SERVICE

| PAY GRADE | <2 | Over 2 | Over 3 | Over 4 | Over 6 | Over8 | Over 10 | Over 12 | Over 14 | Over 16 | Over 18 | Over 20 | Over 22 | Over 24 | Over 26 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **COMMISSIONED OFFICERS** | | | | | | | | | | | | | | | |
| O-10 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 10655.00 | 10708.00 | 10850.00 | 10850.00 |
| O-9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 9320.00 | 9454.00 | 9648.00 | 9986.00 |
| O-8 | 6594.00 | 6810.00 | 6953.00 | 6993.00 | 7172.00 | 7472.00 | 7541.00 | 7825.00 | 7906.00 | 8150.00 | 8504.00 | 8830.00 | 9048.00 | 9048.00 | 9048.00 |
| O-7 | 5480.00 | 5852.00 | 5852.00 | 5894.00 | 6115.00 | 6282.00 | 6476.00 | 6669.00 | 6863.00 | 7472.00 | 7985.00 | 7985.00 | 7985.00 | 7985.00 | 8026.00 |
| O-6 | 4061.00 | 4462.00 | 4754.00 | 4754.00 | 4772.00 | 4977.00 | 5004.00 | 5004.00 | 5169.00 | 5791.00 | 6086.00 | 6381.00 | 6549.00 | 6719.00 | 7049.00 |
| O-5 | 3248.00 | 3814.00 | 4078.00 | 4128.00 | 4292.00 | 4292.00 | 4421.00 | 4659.00 | 4972.00 | 5286.00 | 5436.00 | 5584.00 | 5752.00 | 5752.00 | 5752.00 |
| O-4 | 2738.00 | 3334.00 | 3556.00 | 3606.00 | 3812.00 | 3980.00 | 4253.00 | 4464.00 | 4611.00 | 4759.00 | 4809.00 | 4809.00 | 4809.00 | 4809.00 | 4809.00 |
| O-3 | 2544.00 | 2884.00 | 3113.00 | 3365.00 | 3526.00 | 3703.00 | 3850.00 | 4040.00 | 4139.00 | 4139.00 | 4139.00 | 4139.00 | 4139.00 | 4139.00 | 4139.00 |
| O-2 | 2219.00 | 2527.00 | 2911.00 | 3009.00 | 3071.00 | 3071.00 | 3071.00 | 3071.00 | 3071.00 | 3071.00 | 3071.00 | 3071.00 | 3071.00 | 3071.00 | 3071.00 |
| O-1 | 1926.00 | 2005.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 | 2423.00 |
| **COMMISSIONED OFFICERS WITH OVER 4 YEARS ACTIVE DUTY SERVICE AS AN ENLISTED MEMBER OR WARRANT OFFICER** | | | | | | | | | | | | | | | |
| O-3E | 0.00 | 0.00 | 0.00 | 3365.00 | 3526.00 | 3703.00 | 3850.00 | 4040.00 | 4200.00 | 4292.00 | 4417.00 | 4417.00 | 4417.00 | 4417.00 | 4417.00 |
| O-2E | 0.00 | 0.00 | 0.00 | 3009.00 | 3071.00 | 3169.00 | 3334.00 | 3461.00 | 3556.00 | 3556.00 | 3556.00 | 3556.00 | 3556.00 | 3556.00 | 3556.00 |

## MONTHLY BASIC PAYTABLE
## EFFECTIVE 1 JULY 2000
**The only rates considered official are in the DFAS computer database and are the ones used for all pay calculations.**

### YEARS OF SERVICE

| PAY GRADE | <2 | Over 2 | Over 3 | Over 4 | Over 6 | Over8 | Over 10 | Over 12 | Over 14 | Over 16 | Over 18 | Over 20 | Over 22 | Over 24 | Over 26 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| O-1E | 0.00 | 0.00 | 0.00 | 2423.00 | 2588.00 | 2684.00 | 2781.00 | 2878.00 | 3009.00 | 3009.00 | 3009.00 | 3009.00 | 3009.00 | 3009.00 | 3009.00 |
| **WARRANT OFFICERS** | | | | | | | | | | | | | | | |
| W-5 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 4475.00 | 4629.00 | 4783.00 | 4937.00 |
| W-4 | 2592.00 | 2789.00 | 2869.00 | 2948.00 | 3083.00 | 3217.00 | 3353.00 | 3485.00 | 3622.00 | 3754.00 | 3888.00 | 4019.00 | 4156.00 | 4290.00 | 4427.00 |
| W-3 | 2356.00 | 2555.00 | 2555.00 | 2588.00 | 2694.00 | 2815.00 | 2974.00 | 3071.00 | 3177.00 | 3298.00 | 3419.00 | 3539.00 | 3659.00 | 3780.00 | 3901.00 |
| W-2 | 2063.00 | 2233.00 | 2233.00 | 2306.00 | 2423.00 | 2555.00 | 2653.00 | 2750.00 | 2844.00 | 2949.00 | 3056.00 | 3164.00 | 3271.00 | 3378.00 | 3378.00 |
| W-1 | 1719.00 | 1971.00 | 1971.00 | 2136.00 | 2233.00 | 2333.00 | 2433.00 | 2533.00 | 2634.00 | 2735.00 | 2835.00 | 2911.00 | 2911.00 | 2911.00 | 2911.00 |
| **ENLISTED MEMBERS** | | | | | | | | | | | | | | | |
| E-9 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 3015.00 | 3083.00 | 3170.00 | 3272.00 | 3373.00 | 3473.00 | 3609.00 | 3744.00 | 3916.00 |
| E-8 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 2528.00 | 2602.00 | 2670.00 | 2752.00 | 2840.00 | 2933.00 | 3026.00 | 3161.00 | 3296.00 | 3484.00 |
| E-7 | 1766.00 | 1928.00 | 2001.00 | 2073.00 | 2148.00 | 2221.00 | 2294.00 | 2367.00 | 2439.00 | 2514.00 | 2588.00 | 2660.00 | 2788.00 | 2926.00 | 3134.00 |
| E-6 | 1519.00 | 1678.00 | 1753.00 | 1824.00 | 1899.00 | 1973.00 | 2047.00 | 2119.00 | 2192.00 | 2245.00 | 2283.00 | 2283.00 | 2286.00 | 2286.00 | 2286.00 |
| E-5 | 1333.00 | 1494.00 | 1566.00 | 1640.00 | 1715.00 | 1790.00 | 1862.00 | 1936.00 | 1936.00 | 1936.00 | 1936.00 | 1936.00 | 1936.00 | 1936.00 | 1936.00 |
| E-4 | 1243.00 | 1373.00 | 1447.00 | 1520.00 | 1594.00 | 1594.00 | 1594.00 | 1594.00 | 1594.00 | 1594.00 | 1594.00 | 1594.00 | 1594.00 | 1594.00 | 1594.00 |
| E-3 | 1172.00 | 1261.00 | 1334.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 | 1336.00 |

**MONTHLY BASIC PAYTABLE**
**EFFECTIVE 1 JULY 2000**
**The only rates considered official are in the DFAS computer database and are the ones used for all pay calculations.**

**YEARS OF SERVICE**

| PAY GRADE | <2 | Over 2 | Over 3 | Over 4 | Over 6 | Over8 | Over 10 | Over 12 | Over 14 | Over 16 | Over 18 | Over 20 | Over 22 | Over 24 | Over 26 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| E-2 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 | 1127.00 |
| E-1 >4 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 | 1006.00 |
| E-1 <4 | 930.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |

**UNOFFICIAL COPY**

| BASIC ALLOWANCE FOR SUBSISTENCE (BAS) 2000<br>The only rates considered official are in the DFAS computer database and are the ones used for all pay calculations. | | | |
|---|---|---|---|
| | CASH/IN KIND | | |
| **OFFICERS:** | **158.83/MONTH** | | |
| | | | |
| **ENLISTED MEMBERS:** | **E-1<4 MONTHS** | | **ENLISTED** |
| | | | |
| **When on leave or authorized to mess separately:** | **7.00/DAY** | | **7.58/DAY** |
| | | | |
| **When rations in-kind are not available** | **7.89/DAY** | | **8.54/DAY** |
| | | | |
| **When assigned to duty under emergency conditions where no messing facilities of the United States are available:** | **10.46/DAY** | | **11.32/DAY** |
| | | | |
| **When receiving rations in kind - Partial BAS** | **0.85/DAY** | | **0.85/DAY** |
| **COMPENSATION EFFECTIVE: 1 JANUARY 2000** | | | |
| **UNOFFICIAL COPY** | | | |

## BASIC HOUSING ALLOWANCE II (BAH-II) 2000

The only rates considered official are in the DFAS computer database and are the ones used for all pay calculations.

| Pay Grade: | With Dependent | Without Dependent |
|---|---|---|
| O-10 | 1113.60 | 904.80 |
| O-9 | 1113.60 | 904.80 |
| O-8 | 1113.60 | 904.80 |
| O-7 | 1113.60 | 904.80 |
| O-6 | 1002.60 | 830.10 |
| O-5 | 966.60 | 799.50 |
| O-4 | 852.00 | 740.70 |
| O-3 | 704.70 | 594.00 |
| O-2 | 601.80 | 471.00 |
| O-1 | 538.20 | 396.90 |
| O-3E | 757.50 | 641.10 |
| O-2E | 683.40 | 544.80 |
| O-1E | 631.50 | 468.90 |
| W-5 | 822.30 | 752.70 |
| W-4 | 753.90 | 668.40 |
| W-3 | 690.90 | 561.90 |
| W-2 | 635.40 | 498.60 |
| W-1 | 594.60 | 417.90 |
| E-9 | 723.60 | 549.00 |
| E-8 | 667.20 | 504.00 |
| E-7 | 619.50 | 430.5 |
| E-6 | 572.40 | 389.70 |

# CHAPTER Z

# PREFACE

The Estate Planning Document Preparation Practical Exercise is an outgrowth of a practice adopted at the Judge Advocate General's School of providing practical exercises to supplement lectures. The practical exercise allows the student to review client file, apply the law, address specific issues, and prepare legal documents for a "typical" estate planning ***client.*** This is a "'pass/fail" exercise.

The three-hour practical exercise will meet in the Computer Learning Center (CLC).

1. . Before class review the attached information.

2. The first part of the practical exercise will be a lecture on the will drafting computer software program (Drafting Libraries Wills).

3. The second part of the practical will be in class preparation of the documents in this chapter.

4. The third part of the class will be a review of the completed estate planning documents and the proposed solution.

5. Finally, the estate planning documents prepared during this practical exercise will be submitted by 1300 (on your scheduled CLC date). Upon submission of your documents you will receive a "greensheet" with the proposed solutions.

# CLIENT FILE

# SERGEANT FIRST CLASS (SFC) BILLY RAY SHIFFLETT & BRENDA LEE SHIFFLETT

## Background

Sergeant First Class (SFC) (active duty) Billy Ray Shifflett (SSN 111-11-1111) and Brenda Lee Shifflett (SSN 222-22-2222) are married and have three children: Jim Bob, age 22; Fannie, age 16; and Donald Wayne age 10. Billy Ray Shifflett has a child from a prior relationship, Elwood B. Shifflett, age 15, which he has not seen for years. He pays child support pursuant to a court order and an involuntary allotment each month. During the year, the Shifflett family moved from Fort Carson, Colorado, to Fort TJAGSA, pursuant to a permanent change of station (PCS). All of their new legal documents will be executed at Fort TJAGSA, in Albemarle County, Virginia. Although currently assigned to Fort TJAGSA, SFC Shifflett considers Florida his home and domicile. Their new address is 1234 Shiflett Hollow, Ruckersville, Virginia.

## Information from Interview of SFC Shifflett

SFC Shifflett will deploy overseas in the next couple of days. He has completed a will worksheet and submitted it to your Legal Assistance Office (see attached). The will worksheet was completed before SFC Shifflett ever spoke with a Legal Assistance attorney.

***During an interview with SFC Shifflett, you learned the following information:***

SFC Shifflett would like his wife to get as much of his estate upon his death aspossible, and in the event his wife does not survive him his estate should pass to his children.

SFC Shifflett would like to use a Tangible Personal Property Memorandum to dispose of various items of personal property upon his death. He would like the memorandum to be binding on his estate if it is found or located within 90 days of the date of his death.

SFC Shifflett "owns" a Ford pickup truck (VIN: vhjkdjh54673) with a gun rack, and a bumper sticker with disparaging remarks about Chevrolets. The truck is valued at $20,000, and SFC Shifflett currently owes GMAC $25,000 on a loan for the truck. He would like his pickup truck to go to his little brother, Elmer F. Shifflett.

SFC Shifflett would like to make a charitable bequest to the 82d Airborne Fund for Crippled JAG Basic Course Students.

SFC Shifflett wants to make sure his kids do not get their greedy hands on his money before they are thirty years old. He tells you that he wants the money to go into some type of trust for the children, in equal shares. If he has a choice, he would like the money to go into individual trusts for the children instead of one big trust. SFC Shifflett does not want the distribution of the income to the children until they are thirty years old unless it is needed for their health, education, or welfare. SFC Shifflett does not wish to restrict his trustees regarding the type of investments for the trust. While SFC Shifflett wants his assets to be held in trust if the children are under age thirty, he does not want the trust to continue if it becomes economically unfeasible. A friend of his, Hank Hill is a trust officer at the Staubach Bank & Trust, Key West, Florida. Hank told SFC Shifflett that if the trust dips below $50,000 it might not be economically feasible to continue the trust. Hank's word is the gospel to SFC Shifflett. Because his son Jim Bob can be quite devious, SFC Shifflett wants to make sure Jim Bob cannot get rid of Hank as the trustee if he gets the other kids to "gang up" on Hank. In addition, Jim Bob is known to pull some stupid stunts on the Greene County Tractor Pull Professional Tour. SFC Shifflett is concerned Jim Bob could land on his head (again) and become incapacitated (again). He wants to make sure that if Jim Bob becomes incapacitated the trusts he creates can continue for his benefit.

During the interview, you ascertain that if SFC Shifflett's estate ends up owing estate taxes he wants all the beneficiaries to be liable for their portion of the taxes equally. He does not want to require his personal representatives or trustees to have to furnish a bond. However, he does want all fiduciaries to be paid according to normal commission schedules.

SFC Shifflett is adamant about "disinheriting" certain individuals that are listed on his will worksheet.

During the interview, you asked SFC Shifflett about his SGLI. He informed you that it is "up to date" and lists his wife as the beneficiary, and "my children" as the contingent beneficiaries.

## Estate Planning Document Preparation for SFC Shifflett

SFC Shifflett will deploy shortly and needs a will. In addition, SFC Shifflett would like a General Power of Attorney for his wife to handle all of his affairs during his absence. SFC Shifflett completed a detailed will worksheet ("Estate Planning Personal and Financial Questionnaire") a short time ago (attached). All documents will be completed at Ft. TJAGSA using a military notary. ***Prepare the document(s).***

## Information from Interview of Brenda Lee Shifflett

SFC Shifflett has deployed. You receive a telephone call from Brenda Lee Shifflett. She just learned she has a brain tumor from working in the asbestos factory. She is very troubled about her upcoming operation to remove the brain tumor. She is a Virginia domiciliary, but will have surgery at a civilian hospital in Baltimore, Maryland, next week. Brenda Lee does not wish to have artificial life support, nutrition, or hydration provided to her if she is in a persistent vegetative state as a result of the operation. SFC Shifflett is out of the country on temporary duty for the next six months. Brenda Lee does not trust her children on any matters. However, if SFC Shifflett is unavailable, she has confidence in her sister, Loretta Lynn Chifflette' of Possum Holler, West Virginia, and would like her to take charge if something were to happen.

## Estate Planning Document Preparation for Brenda Lee Shifflett

Consider what alternatives am available to Brenda Lee if SFC Shifflett returns from overseas to handle all her affairs in the event she is incapacitated or disabled. In the event SFC Shifflett is unavailable Brenda wants Loretta Lynn Chifflette' to be given authority to handle her property, personal affairs, and children in the event of incapacity or disability. What do you recommend? ***Prepare the document(s) that you recommend.***

What document(s) should Brenda Lee consider executing to fulfill her health cam desires? Brenda Lee is in a hurry to execute her documents, and each will be executed at Ft. TJAGSA using a civilian notary, ***Prepare the document(s) that you recommend.***

# ESTATE PLANNING
# PERSONAL AND FINANCIAL QUESTIONNAIRE

*If you and **you spouse will have** different estate **plans**, then **each** must complete **a separate questionnaire***

**PERSONAL INFORMATION** DATE: _____

1. Marital Status

☑ Married ☐ Single ☐ Widowed ☐ Divorced ☐ Separated or about to divorce

| 2. Your Name (First, Middle, Last) | Soc. Sec. No. | Date of Birth |
|---|---|---|
| Billy Ray Shifflett | 111-11-1111 | Feb 29, 1961 |
| **3. Spouse's Name (First, Middle, Last)** | **Soc. Sec. No.** | **Date of Birth** |
| Brenda Lee Shifflett | | |
| **4. Home Address (Number, Street)** | **City** | **State Zip** |
| 1234 Shifflett Hollow | Ruckersville | VA |
| **5. Mailing Address If Different From Above (Number, Street)** | **City** | **State Zip** |
| | | |
| **6. Home Phone** | **Your Work Phone** | **Spouse's Work Phone** |
| ( ) | ( ) | ( ) |
| **7. Your Command/Employer** | **Your Rank/Grade** | **Your Occupation** |
| | | |
| **8. Spouse's Command/Employer** | **Spouses Rank/Grade** | **Spouse's Occupation** |
| | | |

| Circle or fill in your answers | You | Your Spouse |
|---|---|---|
| 1. Are you a U.S. citizen? | (Yes) No | (Yes) No |
| 2. Do you have a will or trust now? | Yes (No) | Yes (No) |
| 3. Are you expecting to receive property or money from (circle all that apply): If so, approximately how much? | Gift Inheritance Lawsuit - Other $ | Gift Inheritance (Lawsuit - Other) $10,000 |
| 4. How many living children do you have? | 4 | 3 |
| 5. Are all your children legally yours (natural or legally adopted)? | (Yes) No | (Yes) No |
| 6. How many stepchildren do you have? | 0 | 1 |
| 7. In which state do you vote? | FLA. | VA |
| 8. Which state issued your driver's license ? | CO. | VA |
| 9. In which state is your car registered? | VA. | CO. |
| 10. In which state(s) do you own real estate? | Tx, Co, VA | Tx, Co, VA |
| 11. Do you pay state income tax? If yes to which state? | FLA | VA |
| 12. In which state do you plan to retire/live permanently? | FLA | FLA |
| 13. Have you ever lived in a Community Property State? (AZ,CA,ID,LA,NV,NM,(TX),WA,WI & PR) | (Yes) No | (Yes) No |
| 14. Do you have a pre-nuptial or post-nuptial agreement? | Yes (No) | Yes (No) |
| 15. Do you have a divorce decree affecting your pension or other property rights? | Yes (No) | Yes (No) |
| ***If "yes" to questions 2, 14 or 15, you must bring these documents to your appointment*** | | |

**FINANCIAL INFORMATION**

1. Do you own a home or any other real estate? Indicate which is your residence/homestead.

| Description and Location | Titled in whose name Indicate if Joint or Beneficiary and name | Purchase Price | Market Value | Mortgage | Market Value - Mortgage Equity |
|---|---|---|---|---|---|
| House - Killeen, TX | Joint | $60,000 | $62,000 | $50,000 | 12,000 |
| House - Colorado | Joint | $80,000 | $90,000 | $80,000 | 10,000 |
| House - VA | Joint | $100,000 | $100,000 | $100,000 | — |
| | | | | | |
| | | | | Total Net Value | |

2. Do you own any other titled property such as a car, boat, etc.?

| Description | Titled in whose name Indicate if Joint or Beneficiary and name | Market Value | Less Mortgage | Equity |
|---|---|---|---|---|
| Ford Truck | mine | $29,000 | $25000 | |
| Jimmy | Joint | $25,000 | $20,000 | |
| Bass Boat | mine!! | $10,000 | — | |
| | | | | |
| | | | | |
| | | | Total Net Value | |

3. Do you have any checking accounts?

| Name of Bank | Titled in whose name Indicate if Joint or Beneficiary and name | Approx. Balance |
|---|---|---|
| Pentagon Federal Credit Union | Joint | $2,500 |
| Wachovia | Joint | $5,000 |
| | | |
| | Total Value | |

4. Do you have any interest bearing accounts (savings, money market) and/or CD's?

| Name of Bank | Titled in whose name Indicate if Joint or Beneficiary and name | Approx. Balance |
|---|---|---|
| Savings | Joint | $1,500 |
| | | |
| | | |
| | | |
| | | |
| | Total Value | |

5. Do you own any stocks, bonds or mutual funds (including company stock)?

| Number Shares | Name of Security | Titled in Whose Name Indicate if Joint or Beneficiary and name | Purchase Price | Current Value |
|---|---|---|---|---|
| | Military Mutual Fund | Joint | $5,000 | $10,000 |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | Total Value | |

6. Do you have any profit sharing, IRAs or pension plans?

| Description/Location | Beneficiary | Current Value |
|---|---|---|
| IRA - Roth | Spouse | $15,000 |
| | | |
| | | |
| | | |
| | Total Value | |

7. Do you have any life insurance policies and/or annuities?

| Name of Company | Insured | Policy Owner | 1st Beneficiary | 2nd Beneficiary | Death Benefit |
|---|---|---|---|---|---|
| SGLI | me | me | wife | Kids | $200,000 |
| Army Force | me | me | " | " | $200,000 |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | Total Value | |

8. Does anyone owe you money?

| Description | Approx. Value |
|---|---|
| Credit Card | $25,000 |
| | |
| | |
| | |
| Total Net Value | |

9. Do you have any special items of value such as coin collections, antiques, jewelry, etc.?

| Description | Approx. Value |
|---|---|
| Gun Collection | $10,000 |
| Star Wars Collector Cards | $1,000 |
| | |
| | |
| Total Net Value | |

10. What is the approximate total value of all your remaining personal property-whatever you own that has not been included above? (clothes, furniture, etc.) Just estimate ..... $ 20,000

11. 00 you have any debts other than mortgage(s) and loans listed above (credit cards, personal loans, etc.)?

| Description | Amount Owned |
|---|---|
| | |
| | |
| | |
| | |
| Total Debt | |

12. Total value of everything you (and your spouse) own (add totals of line 1 thru line 10 above) ..... $ _____

13. Total amount you (and your spouse) owe (total of line 11 above) $ _____

14. Subtract line 13 from line 12. TOTAL NET ESTATE VALVE

15. Do you have a safe deposit box(es)?



| Location | Titled in whose name |
|---|---|
| | |
| | |
| | |

**MANAGEMENT DECISIONS:** YCJUR ESTATE MANAGEMENT TEAM

1. Personal Representative/Executor: Manages the probate and settlement d your estate. Can be your spouse, adult children, trusted friends, and/or a corporate fiduciary.

| | For You | For Your Spouse |
|---|---|---|
| Name: | Brenda Lee Shaffer | |

2. Successor Personal Representative: Back-up Manager-steps in after your first personal representative dies/resigns; in the case d a living trust at your death or disability. Can be your adult children, trusted friends, and/or a corporate fiduciary.

| | | For You | For Your Spouse |
|---|---|---|---|
| 1st Successor: | Name: | Hank Hill | |
| | Address: | 74 Bob Lilly Ave; Key West, Fla. | |
| 2nd Successor: | Name: | ~~Homer Simpson~~ | |
| | Address: | ~~66 Big Fish; Key West, Fla~~ | |

3. Trustee: Manages the administration and investments in your trust. Should be someone with financial responsibility and experience. If you are creating a trust of which your spouse is to be both the beneficiary and trustee (e.g, a tax saving Credit Shelter Trust (B Trust) you ***should*** also name a co-trustee to make discretionary decisions.

| | For You | For Your Spouse |
|---|---|---|
| Name: | Hank Hill | |

4. Successor Trustee (or Co Trustee): Back-up Manager-Steps in after your first Trustee dies/resigns. Can be your adult children, trusted friends, and/or a corporate fiduciary.

| | | For You | For Your Spouse |
|---|---|---|---|
| 1st Successor: | Name: | Homer Simpson | |
| | Address: | 66 Big Fish; Key West Fla | |
| 2nd Successor: | Name: | | |
| | Address: | | |

You may provide that the Personal Representatives and/or Trustees be insured, or bonded, to protect the beneficiaries:
The Personal Representative should be bonded ☐ Yes ☒ No The Trustee should be bonded ☐ Yes ☒ No

5. Guardians For Minor Children: Responsible adult who will raise your children if something happens to you.

| | | For You | For Your Spouse |
|---|---|---|---|
| #1 Choice: | Name: | Loretta Lynn Chaffin | |
| | Address: | #1 Possum Holler, West VA. | |
| #2 Choice: | Name: | Hank Hill | |
| | Address: | | |
| x3 Choice: | Name: | | |
| | Add-: | | |

**BENEFICIARIES** 

1. Special Gii To Organizations

Do you want to make a gin (cash of a specific item) to a charity, foundation, religious or fraternal organization?

| Name of Organization | Description of Gift | Alternate Beneficiary |
|---|---|---|
| 82nd [illegible] | | |
| Crippled JAG Fund | 10 000 | |
| | | |

2. Special Gii To Individuals

Co you want to give any specific items or cash gifts lo a family member or other individual? (For example: wedding ring to your daughter, gun collection to a son or nephew, etc.)

| Name of Person | Description of Gift or Amount | Alternate Beneficiary |
|---|---|---|
| Elmer Shifflett | my Truck | |
| | | |
| | | |
| | | |

3. Beneficiaries

Who do you want to receive the rest of your estate after these special gifts have been distributed? You can designate a dollar amount or percentage, however the percentages are easier, and must add to 100 per cent.

| Name of Person/Organization | Amount/Percentage | Alternate Beneficiary |
|---|---|---|
| my lovely wife | 100% | Kids |
| | | |
| | | |
| | | |

4. Inheriting Instructions

List your children

| Name | Address | Age | T=This Marriage P= PreviousMarriage | Married? Y or N | Number of Grandchildren |
|---|---|---|---|---|---|
| Jim Bob | my house — sometimes | | T | N | — |
| Fannie | " " | | T | N | — |
| Donald Wayne | " " | | T | N | — |
| | | | | | |

5. Do you want your children to receive their inheritance in installments. at certain ages, or all at once? In what amounts and at what age(s)? Your children's inheritance can be held In bust and managed for them until they are al any age you chose (21, 25, 30, etc) and used for their education and other needs until that time. This method waits until the children are mature enough to handle money.

In trust ~~to~~ . age 30.

6. If a child dies, do you want that child's share to go to that child's children, your grandchildren, (Per Stirpes) ☑ *or do you want that child's share to be divided among only your other living children (Per Capita).* ☐, *nothing to a grandchild whose parent died.*

7. Do you want to ensure that your children from a previous marriage receive a share of your estate? YOU Yes ☐ No ☒ Your spouse Yes ☐ No ☐

6. List Dependents Who Require Special Care

Do you want to provide for "basic" care or luxuries and other extras to supplement government benefits? ☐ Yes ☐ No

Jim Bob is a little nuts, but the Prozac worker wonders!

9. Alternative Beneficiaries

Who *do you want to receive* your estate if you (and your spouse) outlive the beneficiaries you've named above? Future Grandkids

| Name of Person/Organization | Amount/Percentage |
|---|---|
| | |

10. Disinheriting

Are there any relatives that you specifically do not want to receive anything from your estate?

Elwood B. Shifflett — my oldest son & his crazy mother, Minnie Pearl Cabbage.

SPECIAL **INSTRUCTIONS** FOR INCOMPETENCY

1. Keeping/Selling Assets

If necessary to pay for your care, do you want certain assets sold first? Are there potential buyers you want contacted?

2. Medical Care

Do you want to be in ☐ (or avoid ☐ ) a certain hospital/nursing home? _____

| A Living Will makes your wishes known to family and doctors regarding life support and the following decisions in the event you become terminally ill or injured with no hope for recovery. Do you want a *living will*? | [redacted] |
|---|---|

Please answer the following for your Living Will:

| | [redacted] |
|---|---|
| If you have a terminal condition, diagnosed by two (2) doctors, do you want | |
| Your life artificially prolonged by machine? | |
| Nutrition and Hydration (Food and Water) by tube? | |
| Blood Transfusions? | |
| Organ Transplants? | |
| Upon your death, do you wish to donate your organs? | |
| *For transplants* | |
| For science or medical research | |
| Do you wish to die at home rather than in a hospital or nursing home? | |

A ***Durable Power of*** *Attorney For* ***Health Care*** *gives* broader protection. Do you want lo appoint someone (spouse. child, friend) to make health care decisions for you when you are unable to, but not necessarily terminal? If so provide the following:

| | For You | For Your Spouse |
|---|---|---|
| 1st Choice: | Name: _____ | Name: _____ |
| | Address: _____ | Address: _____ |
| 2nd Choice: | Name: _____ | Name: _____ |
| | Address: _____ | Address: _____ |

A ***Durable General Power of Attorney*** appoints an agent that can make any decision and do any act that you can, and it will continue to be in force even after you become incapacitated. It is a very powerful document and should only be granted with great care, and then only to a person that you have the utmost trust in. If you wish a Durable General Power of Attorney provide the following

| | For You | For Your Spouse |
|---|---|---|
| 1st Choice: | Name: my wife | Name: |
| | Address: | Address: |
| 2nd Choice: | Name: Hank Hill | Name: |
| | Address: | Address: |

**SPECIAL INSTRUCTIONS FOR FUNERAL/BURIAL**

1. What type of service do you want, how elaborate, and where? Any special people to contact? Do you want cremation?

I want to be cremated & my ashes taken out to the Gulf on a shrimp boat. After the last haul of the day I want my ashes dumped off the back of the boat, then a Miller Genuine Draft poured on top of me — while there is going on I want a "Pirate Looks at Forty" to be played by Jimmy Buffett himself!!

2. If you have a cemetery lot, where is it located?

Cemetery Name City State

| PAY GRADE: | WITH DEPENDENT | WITHOUT DEPENDENT |
|---|---|---|
| E-5 | 514.80 | 359.40 |
| E-4 | 447.30 | 312.60 |
| E-3 | 416.40 | 306.60 |
| E-2 | 396.90 | 249.00 |
| E-1 | 396.90 | 222.30 |

# CHAPTER AA

# PERSONNEL CLAIMS ACT PROBLEMS

1. SGT Smith arrived at Fort Stewart, Georgia on 1 July 1998. Upon receipt of his household goods later that day, he discovered considerable damage. He remembered something about a claims system and decided that he better file a claim. He jotted down on a piece of scratch paper something about "demanding compensation" and put it in his pants pocket. The next day, he put the pants (and the note) in a box in the attic. On 26 June 2000, SGT Smith remembered he had yet to file his claim. He hastily retrieved his pants from the attic, dug out the note, and delivered it to the claims office. The claims receptionist would not accept the paper. She gave SGT Smith DD Forms 1842 and 1844 and told him she could not accept his claim until the forms were filled out. SGT Smith apologized, left the office, and returned on 10 July 2000 with the forms completed. The claims receptionist rejected the claim because the statute of limitations had run. Is this correct?

2. SGT Jones knew he was going to be on a field training exercise when his household goods arrived, so he left a letter with his wife authorizing her to receive the shipment. He was somewhat hesitant to do this since he was having marital problems at the time. Mrs. Jones received the shipment, noticed some damage, and went to the claims office to file a claim. As she approached SPC Filer, the receptionist in the claims office, Mrs. Jones waived the authorization letter and shouted, "I am here to file a claim for you guys breaking my stuff!" CPT Claims, the claims officer, recognized Mrs. Jones as a legal assistance client (not his) who made it clear to everyone in the waiting room (shared by claims and legal assistance) that she and her husband were separating. Mrs. Jones would like to be paid. Should CPT Claims pay her claim?

3. CPT Frugal enters the claims office. You are fortunate enough to be appointed to handle her claim for damage that occurred during Government shipment of her household goods. She demands compensation for the following:

- Broken oriental vase.

- Damage to the front door of her off-post quarters when the movers hit it while moving the piano.

- The loss of her college diploma. She estimates the sentimental value to be $300 and claims this amount.

- Cost of a rental car for 2 days because the carrier failed to timely deliver her car.

- Cost of several long distance telephone calls to determine the location of her car.

a. Which of the items listed above are compensable under the Personnel Claims Act (PCA)?

b. If the PCA does not apply to some items, is there any other recourse for CPT Frugal?

4. CPT Water lives in on-post quarters at Fort Polk, Louisiana. During a severe thunderstorm, Water's quarters are flooded. Two expensive oriental rugs costing $2000 each are damaged. After doing extensive research, Water determines that the PCA covers his losses. He also reads that he has two years to file a claim. Since he has just been assigned as trial counsel of a busy jurisdiction, he decides to file his claim later, when the pace slows down. After about a year, the pace slows a little. Water remembers that he has to file his claim and does so promptly. In order to estimate the damage, he goes to the basement to inspect the rugs. Because they are still in the original carton, it takes him awhile to get them out. He is surprised they look so bad - he remembers the damage was initially minimal. He estimates they are totaled. He files a claim for $4000.

a. Is Water's loss compensable under the PCA?

b. Should Waters be paid $4000?

5. 1LT Crash was driving home from work late one Friday evening. As he approached the main exit gate of the installation, he noticed that his left headlight seemed a little dim. Seconds later, a deer ran across the path of his car. Although he slammed on the brakes, he could not avoid hitting the deer. He totaled his car. He filed a PCA claim for the damage to his car. The claim was denied. He was surprised because his buddy was paid just last week for a similar incident. How could this happen?

6. 1LT Jogger was training for the upcoming marathon. He knew that in order to do well he would eventually have to be running 70 miles per week. Tonight was his long run - about 12 miles. He left work at 1730, went to his on-post quarters, and changed for his run. He was gone about two hours. He trusted his neighbors, so he did not lock the door to his quarters. He did lock his vehicle. Because he was in such a hurry, he also forgot to take his dry cleaning out of his automobile. When he returned home, he saw that the door to his quarters was ajar. Although there was no sign of forced entry, he noticed that the following items were missing from his quarters and from his automobile:

a. A brand new VCR from his quarters.

b. Six plastic pink flamingos from his front lawn.

c. The dry cleaning (3 suits) from his car.

d. The tape deck from his car; he bolted this into the dash himself.

Jogger files a claim with the claims office. Can he recover for his losses? Address each item individually.

7. 1LT Wise just finished the Basic Course and is about to embark on her first assignment. Because of the superior claims instruction she received while in Charlottesville, she is keenly aware of the problems that can be associated with the shipment of household goods and has decided to take precautions. She knows that when she arrives at Fort Bliss, Texas, she will have to wait for quarters. This means her goods will be in temporary storage until she can move in. She also knows that temporary storage is where most of the damage occurs. Wise has some oriental vases that she dearly loves and would hate to see damaged. Accordingly, she has decided to ship them to El Paso at her own expense and store them in a private storage facility in town (SAFEKEEP). One week after the vases are put in SAFEKEEP, a freak hailstorm hits El Paso and totally destroys the private storage facility. Wise's vases are history. Wise decides to file a claim, confident that the freak hailstorm meets the definition of an "unusual occurrence" and that she will be fully compensated. Will she?

8. CPT Legal bought a new car on 2 April 2000. Since he lives off-post, he decided not to register the vehicle on the installation. Legal works at the legal assistance office on post and parks his new car in the parking lot across the street. This parking lot is designated as the SJA office parking lot. Several days later, Legal leaves the office at 1700 to go home. To his horror, he discovers that someone has broken into his car. He notices extensive damage to the right rear window and the steering column. He feels fortunate, however, that his new car was not stolen. After recovering from the initial shock of this tragedy, he comes to his senses and suddenly remembers that the PCA covers vandalism. The next morning, he files a claim with the claims office for the damage to his car. Will the claim be paid?

9. SGT Deck shipped a card table to his new duty station at Government expense. He bought it 7 years ago. Replacement cost is $100. When he received his shipment, he noticed that the card table was missing. He files a claim under the PCA. How much can he recover?

10. 1LT Rich shipped a solid cherry dining room set (table and six chairs) to her next duty station at Government expense. She purchased the set 8 years ago. Replacement cost is $5500. The moving van carrying her shipment crashed into an oil truck. The accident caused a fire which burned the contents of the moving van. Rich's dining room set was totally destroyed. She files a claim under the PCA for the loss of the dining room set. How much can she recover?

11. Major Squint shipped an expensive microscope to his next duty station at Government expense. He purchased the microscope 2 years ago. Replacement cost is $1000. Tragically, the microscope was damaged in shipment. The repair cost is estimated to be $600. How much can Squint recover?

12. SGT Pyle shipped an expensive set of Sears Craftsman power tools to his next duty station at Government expense. He purchased the tools 5 years ago. A lifetime guarantee was included in the purchase price. Replacement cost is $2500. When the shipment arrived at his next station, the tools were missing. Pyle filed a claim under the PCA for the loss of his power tools. How much can he recover?

13. COL Irate wants to see the SJA. He is upset about how his claim is being handled. He was driving his vehicle on official government business (with written orders) when the car was struck by a hit-and-run driver. His vehicle sustained substantial damage. After some research, he is convinced that he can recover for the damage to his vehicle under the PCA. Upon filing his claim, however, the claims officer, CPT I. Knowit, told COL Irate that he has to file and settle with his private automobile insurance company before receiving any Army claims payment. COL Irate has refused to notify his insurer, claiming that his premiums are already too high because his 17-year old son is on his policy. He is furious, and has accused I. Knowit of failing to pay attention to the superb claims instruction he received as a Basic Course student at The Judge Advocate General's School. Is COL Irate's anger justified? Is CPT I. Knowit an idiot? Is the claims instruction at The Judge Advocate General's School superb? Straighten out this mess for the SJA.

14. 1LT Fisher had an expensive chess set that she shipped to her new duty station at Government expense. She purchased the set 5 years ago. Replacement cost is $1000. After unpacking her household goods, she was dismayed to learn that the chess set had been destroyed. She files a claim under the PCA. How much can she recover?

15. 1LT Tool has a problem. He is a maintenance officer in the 1/15 Field Artillery Battalion and spends his days fixing self-propelled howitzers. His mechanics often spend hours replacing one transmission. The job should only take 45 minutes. The problem is that one of the bolts holding the transmission in place is difficult to reach. Loosening that bolt often takes hours. He knows that if his people were properly trained, they could quickly remove the transmissions with the tools they had. Being the “outstanding” officer that he is, however, 1LT Tool does not want to take the time to train his soldiers. Tool sees an ad in the paper indicating that the HOUSE O’ TOOLS has a special tool on sale that is specifically made for replacing transmissions in Greyhound engines, coincidentally the same engine as a self-propelled howitzer. He purchases the tool, spending $350 of his own money. He knows that he could probably order the same tool from Army supply, but assumes it would take months. The tool works well. Tool's mechanics are able to do three times the work they used to do. One day, Tool is stunned to discover that his miracle tool is missing. He files a claim with the claims office, confident that the loss is "incident to service." Will his claim be paid?

# CHAPTER BB

# PERSONNEL CLAIMS ACT SEMINAR

At the end of the Personnel Claims Act instruction, you will be divided into the following five teams:

Team A: Plays the role of SSG Imelda Shoebox

Team B: Plays the role of Marco Shoebox, estranged husband of SSG Shoebox

Team C: Plays the role of the Claims Judge Advocate at Fort Drum

Team D: Plays the role of the Claims Judge Advocate at Fort Hood

Team E: Plays the role of the Recovery Section of the Fort Drum/Fort Hood claims office

Each team will review the basic scenario below and the information provided in the following team scenarios. Teams C and D will receive additional supporting information at the end of the PCA class. During the seminar, each team will be required to brief the class on the specific issues identified in the assignment portion of their team scenario. The goal is to show you how the personnel claims process works from the time someone files a claim until the claims office processes a recovery action against a carrier.

This is an ungraded exercise. Therefore, you are free to discuss the problem with the classmates on your team. Please do not discuss information in your packets with members of the other teams. If you have any questions, please see MAJ Cook in Room 271C, Administrative and Civil Law Department.

## BASIC SCENARIO

SSG Imelda Shoebox lived in Germany with her husband, Marco Shoebox. The two were having marital difficulties. When SSG Shoebox PCS'ed to CONUS, she went to Fort Hood and her husband went to Leatherton, New York. The household goods shipment was split between the two with part going to Fort Hood and part going to Leatherton. During each shipment, the movers damaged some of the property belonging to SSG and Mr. Shoebox. SSG Shoebox will file her claim at Fort Hood where she is now assigned. Marco Shoebox, having a letter from SSG Shoebox, will file a claim at Fort Drum, which is Army installation closest to where he now lives.

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## SCENARIO FOR TEAM A

## SSG IMELDA SHOEBOX

Below and attached is the information you will need to complete and submit claims forms for SSG Imelda Shoebox (SSN: 123-24-1234).

SSG Imelda Shoebox was born in Bunnlevel, North Carolina, on 1 February 1970. She joined the Army and quickly progressed up to the rank of Staff Sergeant. Being assigned to Germany was her dream assignment, especially when she was permitted to live off-post at 13 Fredrick Strasse, Munich, Germany. Compared to her present house at 101 Very Green Street, Killeen, Texas, the house in Germany was paradise. Her current unit, HHC, 2/13th ADA, Fort Hood, Texas 22309 has left her little time to get adjusted to Killeen.

Hardpack, Inc. packed SSG Shoebox's household goods in Germany on April 4th and 5th. Hardpack picked them up the following day. Hardpack told SSG Shoebox that she would need to keep all the forms from the move, including the Government Bill of Lading that was numbered 45-678. No insurance (personal or military) covered the shipment.

UnpackU delivered SSG Shoebox's household goods at her Killeen home on June 23rd, some three weeks later than expected. SSG Shoebox had to rent furniture to live in her house until her shipment arrived. UnpackU damaged SSG Shoebox's bedroom door by banging the furniture trolley against it. After her cherished household goods were unpacked, SSG Shoebox noticed a damaged TV and a missing tool set. When UnpackU left her house, it did not take the moving boxes and packing material. During the move, the carrier damaged her digital TV by putting a hole in the plastic side. Missing from the shipment was SSG Shoebox's Sears Craftsman Tool set which she bought exclusively for fixing things at work. SSG Shoebox used the tool set for the last three years in Germany fixing her government office equipment. She told UnpackU that she wanted its manager to call her about the damage it caused at home, 254-287-7722 or at work at 254-257-7121 so she could file a claim against UnpackU.

SSG Shoebox was so efficient that she turned in all her claims forms at the same time on 5 September. Attached are the various estimates and costs that SSG Shoebox submitted to substantiate her claim.

### ASSIGNMENT

You are SSG Imelda Shoebox. Based on the information provided, fill out the appropriate claims forms and be prepared to discuss which moving costs are compensable and which are not under the Personnel Claims Act and why.

**Damaged/Missing Items' Information**

**(Team A – SSG Imelda Shoebox)**

| Item | Inventory # | Replacement Cost | Original Cost | Month/Year Purchased | Repair Cost |
|---|---|---|---|---|---|
| Sears Craftsman Tool Set | 103 | $150.00 | $90.00 | 07/93 | |
| Interior Door | | | | | $75.00 |
| Sony Digital TV | 3 | $11,999.99 | $11,999.99 | 01/00 | |

**Other Expenses**

**Furniture rental for three weeks $500.00**

**Long distance phone calls to determine the location of her household goods $30.00**

**The estimate to repair interior door cost $15.00**

**ELECTRONIC/ELECTRICAL REPAIR REPORT**

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# PROOF OF TELEVISION VALUE

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**DD FORM 1840**

**DD FORM 1840R.**

**DD FORM 1842.**

**DD FORM 1842 REVERSE.**

**DD FORM 1844.**

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## SCENARIO FOR TEAM B

## MR. MARCO SHOEBOX

Below and attached is the information you will need to complete and file the claim for Mr. Marco Shoebox (SSN: 243-12-3412).

Marco Shoebox grew increasingly disillusioned at following his wife's career around the world. All he really wanted to do was to serve beer at a German beer hall but he could not stay after she PCS'ed and work legally on the German economy. He, therefore, decided not to go with his wife to Fort Hood. Instead, he went to Leatherton, New York, where a new German theme park was going to open. He told his wife he wanted his things to go with him. SSG Shoebox gladly agreed to send part of her household goods to Leatherton. She was tired of his stein and lederhosen (leather shorts with suspenders worn in Bavaria) collections.

Hardpack, Inc. packed SSG Shoebox's and Marco Shoebox's household goods in Germany on April 4th and 5th. Hardpack picked them up the following day. Hardpack told SSG and Mr. Shoebox that they would need to keep all the forms from the move, including the Government Bill of Lading that was numbered 45-678. No insurance (personal or military) covered the shipment.

SSG Shoebox gave Marco a power-of-attorney to receive his portion of the household goods in Leatherton. She also jotted down a separate note saying that he could file a claim if any of his things were damaged.

Olde Eire Canal Freight delivered Marco's household good shipment some five weeks later than expected on July 7th. Marco did not notice because he was happily living in a small attic above the new German beer hall. This saved on all sorts of costs including telephone calls since his number was the same as the beer hall, 315-772-6584. As soon as his beer steins arrived, Marco sold them to the beer hall to give it a more authentic feel. Unfortunately, some other items were damaged in shipment. A stein and six decorative German plates were broken. An oak end table was scratched. The Dell flat-screen computer monitor was not working. Missing from the shipment were a wooden poker chip set, a wooden backgammon set, a wooden hand-carved chess set and, significantly, his wide screen digital Sony TV. Marco's impressive lederhosen collection suffered mildew damage from being transported in open barges. Marco did not note any damage at the time Olde Eire Canal Freight delivered the household goods. Because he lived above a beer hall and did not want to see his new home trashed, he made sure that the packing materials were taken away by the movers. Attached are the various estimates and costs that Marco Shoebox incurred in his move. Marco was very efficient at getting his estimates and submitted all his claims papers together on July 17th.

## ASSIGNMENT

You are Mr. Marco Shoebox. Based on the information provided, fill out the appropriate claims forms and be prepared to discuss which moving costs are compensable and which are not under the Personnel Claims Act and why.

**Damaged/Missing Items' Information**

**(Team B – Mr. Marco Shoebox)**

| Item | Inventory # | Replacement Cost | Original Cost | Month/Year Purchased | Repair Cost |
|---|---|---|---|---|---|
| 1 German Stein | 3 | $130.00 | $100.00 | 03/95 | |
| 6 Decorative German plates | 10 | $600.00 | $300.00 | 07/98 | |
| 3 German Lederhosen | 1 | | $300.00 | 10/98 | $99.00 |
| Sony Digital TV (missing) | | $11,999.00 | $11,999.00 | 01/00 | |
| Dell Monitor | 26 | | $1,700.00 | 01/99 | $1,200.00 |
| Wooden Poker Chip set | 106 | $150.00 | $50.00 | 01/98 | |
| Wooden Backgammon set | 105 | $300.00 | $100.00 | 01/98 | |
| Hand-carved Wooden Chess set | 31 | $400.00 | $150.00 | 01/98 | |
| 1 Oak End-table | 12 | | $180.00 | 08/95 | $120 |

**Estimate for the repair to Oak end table cost $25.00 from Goodies Furniture Repair**

**Note from SSG Shoebox to Marco Shoebox**

My husband, Marco Shoebox, may file whatever paperwork he needs to get reimbursed for damage done to his stuff in shipment.

DATE 6 April 20XX

_____
SSG Imelda Shoebox

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**ELECTRONIC/ELECTRICAL REPAIR REPORT.**

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**PROOF OF VALUE – TELEVISION.**

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**PROOF OF VALUE – DELL MONITOR.**

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**DD FORM 1840.**

**DD FORM 1840R.**

**DD FORM 1842.**

**DD FORM 1842 REVERSE.**

**DD FORM 1844.**

**DD FORM 1844, PAGE 2.**

## SCENARIO FOR TEAM C

## FORT DRUM CLAIMS OFFICE

You are the claims officer at Fort Drum who has received Mr. Marco Shoebox's claim. You will be provided a copy of the claims packet submitted at the end of the PCA class.

During the adjudication process, a sergeant working in the Fort Hood claims office calls his buddy at your claims office to compare notes on how dull their jobs are. They start talking about different claimants they have seen, including SSG and Mr. Shoebox. They then realize that one of the items (specifically, the digital TV) listed as missing from Marco Shoebox's household goods shipment has been listed as damaged by SSG Shoebox. It looks like claims fraud to the slightly less bored sergeants.

### ASSIGNMENT

1. Review the DD Form 1840 submitted by Mr. Shoebox and identify any errors or missing information. Adjudicate this claim by completing the DD Form 1840 and DD Form 1842 . Be prepared to discuss how you analyzed each item on the DD Form 1844. You will need to use the Allowance List – Depreciation Guide located at Table 11-1 in DA Pam 27-162, Claims, and refer to the specific line items used to analyze the DD Form 1844.

2. Decide how to approach Mr. Shoebox about the potential fraud your NCO discovered when he was talking to his buddy at Fort Hood. Are Article 31 rights appropriate? Should you pay any part or all of Mr. Shoebox's claim?

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## SCENARIO FOR TEAM D

## FORT HOOD CLAIMS OFFICE

You are the claims officer at Fort Hood who has received SSG Imelda Shoebox's claim. You will be provided a copy of the claims packet submitted at the end of the PCA class.

During the adjudication process, a sergeant working in your claims office calls his buddy at the Fort Drum claims office to compare notes on how dull their jobs are. They start talking about different claimants they have seen, including SSG and Mr. Shoebox. They then realize that one of the items (specifically, the digital TV) listed as missing from Marco Shoebox's household goods shipment has been listed as damaged by SSG Shoebox. It looks like claims fraud to the slightly less bored sergeants.

### ASSIGNMENT

1. Review the DD Form 1840 submitted by SSG Shoebox and identify any errors. Adjudicate this claim by completing the DD Form 1840 and DD Form 1842 . Be prepared to discuss how you analyzed each item on the DD Form 1844. You will need to use the Allowance List – Depreciation Guide located at Table 11-1 in DA Pam 27-162, Claims, and refer to the specific line items used to analyze the DD Form 1844.

2. Decide how to approach SSG Shoebox about the potential fraud your NCO discovered when he was talking to his buddy at Fort Drum. Are Article 31 rights appropriate? Should you pay any part or all of SSG Shoebox's claim?

3. SSG Shoebox has told you that the hole in the TV is not repairable and submitted paperwork to support that assertion. The TV itself still works. SSG Shoebox does not however want the digital TV with a big hole in it. What do you tell her to do with it? Can the claims office keep the TV and use it in the waiting room? If so, how?

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## SCENARIO FOR TEAM E

## RECOVERY SECTION OF THE FORT DRUM/FORT HOOD CLAIMS OFFICE

You are in charge of the recovery section of the Fort Drum/Fort Hood Claims office working with the claims judge advocates processing the claims for SSG Shoebox and Mr. Shoebox (Teams C and D).

### ASSIGNMENT

Be prepared to discuss your role as a recovery judge advocate in the processing of these claims. Specifically, be prepared to answer the following questions:

a. When will you first contact the carrier about the claims after receiving the DD Form 1840 and 1840R? How will you make that contact?

b. After you contact the carrier, what rights, if any, does it have?

c. What specific information will you need to collect to process the recovery actions for both of these claims?

d. What is a demand packet? If more than one carrier handled these goods, to whom do you send the demand packet? When should you send the demand packet?

e. If the carrier denies liability for a claim or for some amount of the claim, will the claimant still be able to recover from the U.S. government?

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# CHAPTER CC

## FEDERAL TORT CLAIMS ACT PRACTICAL EXERCISE

1. You are the claims judge advocate in the Office of the Staff Judge Advocate, Ft. Wahoo, Virginia. One of the units your office supports is the Army Recruiting Command in Richmond, Virginia. While examining the pending claims files, you run across the enclosed Standard Form (SF) 95 and allied papers. You alert the Deputy Staff Judge Advocate (DSJA) about the claim. Thereafter, she directs you to analyze the case and brief her on the Army's potential liability**.**

2. **Without researching Virginia law,** identify and be prepared to discuss potential issues raised by this claim. Consider the information you have available and determine what additional facts you must ascertain. The DSJA is going TDY tomorrow afternoon and wants to "wargame" the claim in the morning before she leaves. She will use the FTCA Method of Analysis that you learned in the Judge Advocate Officer Basic Course.

3. Be prepared to argue the legal issues, factual questions, and bottom-line assessment from both the claimant's and the Government's perspectives. You are free to discuss the problem with your classmates and may work together to prepare your arguments.

7 Encls
1. SF95
2. Supplement to SF95
3. DA Form 2173
4. Estimate
5. DA Form 2823 (SFC Bullem)
6. DA Form 2823 (Don Eglei)
7. MFR, Tort Claims Investigative Checklist

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# CLAIM FOR DAMAGE, INJURY, OR DEATH

**INSTRUCTIONS:** Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Army

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*

Stanley Wyne
1651-A Rock Creek Parkway
Fairland, VA 22229

| 3. TYPE OF EMPLOYMENT | 4. DATE OF BIRTH | 5. MARITAL STATUS | 6. DATE AND DAY OF ACCIDENT | 7. TIME *(A.M. OR P.M.)* |
|---|---|---|---|---|
| ☐ MILITARY ☒ CIVILIAN | 29 Sep 56 | M | Friday, 29 Jan 1999 | 7:40 a.m. |

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)*

On the morning of Friday, 29 January 1999, I was riding my bike to the Federal Executive Correspondence Institute, where I work as a GS-12, Senior Grammarian Technician. I had gone off of my normal route to pick up a new punctuation guide my boss wanted, and was therefore a few minutes late for work (I usually start at 7:30 a.m.). As I was gliding westward down a steep hill on Cemetary Road, a car pulled out of a side street directly in front of me. I was traveling perhaps 25 m.p.h. at the time and could have sworn the driver looked directly at me. Because of my speed and the proximity, I was unable to stop, and I hit the right front fender of the car. Apparently I struck either on the car or the pavement, because I lost consciousness. When I regained consciousness, I was in Mother Mary Hospital with a cast on my right hand and bandages all over me. After three days they released me from the hospital, but I have not been able to work because of severe headaches and the cast on my hand. The doctors say I can have the cast taken off in two weeks, but I will need at least three months of physical therapy and may never regain full use of my fingers. I am also taking therapy on my knee and have been unable to bicycle, run, or swim. This break in training will probably make it impossible for me to successfully defend my Mid-Atlantic Ironman Triathalon title in August. Conjugal relations with my wife have suffered in these weeks since I am afraid to go to bed. Whenever I fall asleep, I have a recurring nightmare of hitting that car and (See continuation sheet)

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTEND OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

Pinarello custom 24 speed bicycle - TRASHED - located at the Happy Wheels Bicycle Shop, 3 Rock Creek Center.

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

Broken wrist; concussion; extensive contusions, abrasions, and bruises to the arms, legs and back; sprained right knee.

11. **WITNESSES**

| NAME | ADDRESS *(Number, street, city, State, and Zip Code)* |
|---|---|
| Ralph Hurler | 223 Sickalot Lane, Fairland, VA 22229 |
| Betsy Beyer | 12 Waydown Yonder, Fairland, VA 22229 |

12. *(See instructions on reverse)* **AMOUNT OF CLAIM** *(in dollars)*

| 12a. PROPERTY DAMAGE | 12b. PERSONAL INJURY | 12c. WRONGFUL DEATH | 12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)* |
|---|---|---|---|
| $1,447 | $172,680 | | $174,127 |

**I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM**

| 13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)* | 13b. Phone number of signatory | 14. DATE OF CLAIM |
|---|---|---|
| | 703-673-2865 | April 19, 1999 |

**CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM**

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

**CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS**

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

*Previous editions not usable.*

*STANDARD FORM 95 (Rev. 7-85)*
*PRESCRIBED BY DEPT. OF JUSTICE*
*28 CFR 14.2*

USAPPC V1.00

## PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

## INSTRUCTIONS

**Complete all items - Insert the word NONE where applicable**

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

*(a)* In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extend of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

*(b)* In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

*(c)* In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

*(d)* Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

**Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.**

## INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☒ Yes. If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number? ☐ No

GEICO
47 W. Parkher Hwy.
Fairland, VA 22229
Policy Number 112993 - Only for medical expenses.

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

Yes Deductible

17. If deductible, state amount

$500

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

19. Do you carry public liability and property damage insurance? ☐ Yes. If yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☒ No

SF 95 (Rev. 7-85) BACK
USAPPC V1.00

Supplement to SF 95 of Stanley Wyne dated 19 April 1999

8. (continued) flying up in the air until I disappear. The next thing I see is my broken body lying between the graves in the old cemetery, partially covered with dirt and flowers. It's horrible!!

12. * The amount stated for personal injury includes only pain and suffering and medical bills accumulated to date. I will provide you with medical bills as I receive them and further amend the claim upward or downward as I learn more about the extent of my injuries.

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## STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS

For use of this form, see AR 600-8-1, the proponent agency is DCSPER

| THRU: *(Include ZIP Code)* | TO: *(Include ZIP Code)* | FROM: *(Include ZIP Code)* |
|---|---|---|
| | | |

| 1. NAME OF INDIVIDUAL EXAMINED *(Last, First, and Middle Initial)* | 2. SSN | 3. GRADE |
|---|---|---|
| Wyne, Stanley | 123-45-6789 | GS12 |

| 4. ORGANIZATION AND STATION | 5. ACCIDENT INFORMATION | |
|---|---|---|
| Federal Executive Correspondence Institute | a. DATE: 29 Jan 99 | b. PLACE *(City and State)*: Fairland, VA |

**SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR**

6. INDIVIDUAL WAS ☐ OUT PATIENT ☒ ADMITTED ☐ DEAD ON ARRIVAL

7. NAME OF HOSPITAL OR TREATMENT FACILITY ☒ CIVILIAN ☐ MILITARY

| 8. HOUR AND DATE ADMITTED | 9. HOUR AND DATE EXAMINED |
|---|---|
| 0910 29 Jan 99 | 1440 29 Jan 99 |

10. NATURE AND EXTENT OF ☒ INJURY ☐ DISEASE ☐ RESULTING IN DEATH

contusions/abrasions; head trauma; frac. r. wrist-pos. radial ext. limitations; r. leg hyperexten.-crucial lig. sprain

11. MEDICAL OPINION:

a. INDIVIDUAL ☐ WAS ☒ WAS NOT UNDER THE INFLUENCE OF ☒ ALCOHOL ☒ DRUGS *(Specify)* :

b. INDIVIDUAL ☒ WAS ☐ WAS NOT MENTALLY SOUND *(Attach Psychiatric evaluation if appropriate).*

c. INJURY ☒ IS ☐ IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.

d. INJURY ☐ WAS ☐ WAS NOT INCURRED IN LINE OF DUTY. *BASIS FOR OPINION:*

| 12. THE FOLLOWING DISABILITY MAY RESULT | 13. BLOOD ALCOHOL TEST MADE | 14. NO. OF MG ALCOHOL/100 ML BLOOD |
|---|---|---|
| ☐ TEMPORARY ☒ PERMANENT PARTIAL ☐ PERMANENT TOTAL | ☐ YES ☒ NO | |

15. DETAILS OF ACCIDENT OR HISTORY OF DISEASE *(how, where, when)*

Bicycle Accident

| 16. DATE | 17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR | 18. SIGNATURE |
|---|---|---|
| 29 Jan 99 | I.B. Akwack | |

**SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER**

19 DUTY STATION

☐ PRESENT FOR DUTY ☐ ABSENT WITHOUT AUTHORITY

☐ ABSENT WITH AUTHORITY: ☐ ON PASS ☐ ON LEAVE

| 20. HOUR AND DATE OF ABSENCE | |
|---|---|
| a. FROM | b. TO |
| | |

21. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERRED WITH THE PERFORMANCE OF MILITARY DUTY *(Explain in Item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance)*

☐ YES ☐ NO

22. INDIVIDUAL WAS ON

☐ ACTIVE DUTY ☐ ACTIVE DUTY FOR TRAINING

☐ INACTIVE DUTY TRAINING

| 23. HOUR AND DATE TRAINING | |
|---|---|
| a. BEGAN | b. ENDED |
| | |

24. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING ☐ DIRECTLY TO TRAINING ☐ DIRECTLY FROM TRAINING

| 25. MODE OF TRANSPORTATION | 26. HOUR BEGINNING TRAVEL | 27. DISTANCE INVOLVED | 28. NORMAL TIME FOR TRAVEL |
|---|---|---|---|
| | | | |

29. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE

☐ PRESENT FOR DUTY ☐ ABSENT WITH AUTHORITY ☐ ABSENT WITHOUT AUTHORITY

30. DETAILS OF ACCIDENT - REMARKS *(If additional space is needed, continue on reverse) (Attach inclosures as necessary)*

| 31. FORMAL LINE OF DUTY INVESTIGATION REQUIRED | 32. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY *(Not applicable on deaths)* |
|---|---|
| ☐ YES ☐ NO | ☐ YES ☐ NO |

| 33. DATE | 34. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER | 35. SIGNATURE |
|---|---|---|
| | | |

**DA FORM 2173, OCT 72** **REPLACES DA FORM 2173, 1 JUN 66, WHICH IS OBSOLETE.** USAPPC V2.00

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# HAPPY WHEELS

## Bicycle Shop

3 Rock Creek Center
Fairland, Virginia 22229

REPAIR ESTIMATE

Stanley Wyne 1651-A Rock Creek Parkway, Fairland, VA 673-2865
NAME ADDRESS PHONE #

| ITEM | | COST |
|---|---|---|
| Pinarello 55cm frameset with Campagnolo Record component group; integrated brake/shifter (Ergo); Araya titanium wheels w/3-cross, SS clincher tires. | | $1120.50 |
| Niterider dual headlight system | | $ 245.00 |
| | Subtotal | $1365.50 |
| | Tax | $ 81.50 |
| | Total | **$1447.00** |

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**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| Cemetary Road, Fairland, VA | 29 Jan 99 | 0830 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| Bullem, Ronald E. | 047-62-2662 | E7/AD |

ORGANIZATION OR ADDRESS
2d Regional Recruiting Command, Richmond VA

I, Ronald E. Bullen, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I was in Fairland on a recruiting trip this morning. I finished breakfast at HoJo's and was on my way to my first appointment when this bicycle hit me. I was exiting Graceland Street and turning left on to Cemetary Road. I stopped at the sign and looked both ways, but I didn't even see the bike. The sun was just coming up over the hills and he didn't have a light or anything. I guess I didn't expect a bike to be traveling inthe left hand lane either. I saw him just before he hit the fender. The book he was carrying went flying up and he rolled over the hood. He must have been going about 40 MPH when he hit, so he skidded along the road for quite a ways before he stopped. I called "911" from the Exxon station on the corner and waited for the police and ambulance to arrive. The biker was unconscious when the ambulance arrived. He probably hit his head on the hood--the idiot should have been wearing a helmet. I took the bike to the Joy Ride Bicycle Shop on Lakemore Drive. The mechanic said he thought it could be fixed for $200-$300.

----------END OF STATEMENT----------

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 2 PAGES |
|---|---|---|

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF____ TAKEN AT____ DATED____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE____ OF____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

NOT USED

**AFFIDAVIT**

I, Ronald E. Bullem, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*(Signature of Person Making Statement)*

WITNESSES:

ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 20th day of December, 19 96 at Fairland, VA

*(Signature of Person Administering Oath)*

Always Fair, CPT, JA
*(Typed Name of Person Administering Oath)*

UCMJ
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT



USAPPC V2.00

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| Cemetary Road & Graceland Street, Fairland, VA | 29 Jan 99 | 0930 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| Eglei, Don B. | 477-19-2193 | N/A |

ORGANIZATION OR ADDRESS
Don's Exxon, Cemetary Road, Fairland, VA

I, Don B. Eglei, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

Earlier this morning I was pumpin sum Super at number 3 when I seen this guy come a'flyin down the hill on Cemetary Road. He was holden sumthin in one hand, but he was still holden on. But he sure was movin! I yelled at him to slow down cause theres a kinda bad corner just passed the station there at Graceland, but he acted like he didn't hear me cause he didn't turn or anything--he probably had his walkman turned up too loud to hear me. Well, sure enough a car pulled outta Graceland and the biker tried to swerve left but it was too late as fast a he was goin and he hit the car just in front of the driver's door. The biker went flyin and the driver of the car was sum Army recruiter from Richmond and he called the police and the ambulance. I helped the recruiter load the bike in his car and told him where he could find a bike shop.

----------END OF STATEMENT----------

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 2 PAGES |
|---|---|---|

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF____ TAKEN AT____ DATED____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE____ OF____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

**AFFIDAVIT**

I, _____, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE _____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____
_____
_____
ORGANIZATION OR ADDRESS

_____
_____
_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this _____ day of _____, 19 _____ at _____

_____
*(Signature of Person Administering Oath)*

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

PAGE _____ OF _____ PAGES

USAPPC V2.00

**MEMORANDUM FOR RECORD: Tort Claims Investigative Checklist**

1. Claimant(s)_____

2. Claim Number _____

3. Date of Incident _____

4. Date Claim Filed _____

5. Statute of Limitations Met? _____

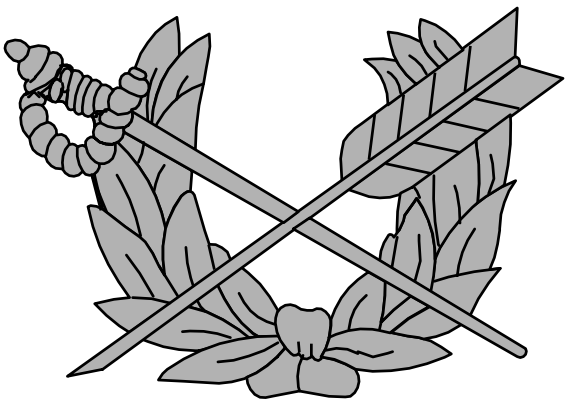
| CHECKLIST | PRESENT IN FILE | | |
|---|---|---|---|
| | YES | NO | COMMENTS |
| SCOPE OF EMPLOYMENT | | | |
| IS CLAIMANT ON ACTIVE DUTY | | | |
| DOES CLAIMANT WORK FOR THE GOVERNMENT | | | |
| MP REPORT | | | |
| CIVILIAN POLICE REPORT | | | |
| REPORT OF SURVEY | | | |
| LOD INVESTIGATION | | | |
| SF 91 OPERATORS REPORT OF ACCIDENT | | | |
| ACCIDENT SCENE DIAGRAM | | | |
| PHOTOGRAPHS | | | |
| SAFETY INVESTIGATION | | | |

| CHECKLIST | PRESENT IN FILE YES | NO | COMMENTS |
|---|---|---|---|
| DA FORM 1208 | | | |
| GOVERNMENT DRIVER INTERVIEW | | | |
| HAVE ALL CLAIMS BEEN FILED | | | |
| ANY SUBROGATION | | | |
| ANY PIP LIEN | | | |
| WITNESS INTERVIEWS | | | |
| CLAIMANT INTERVIEWS | | | |
| ARE MEDICAL RECORDS IN FILE | | | |
| ARE MEDICAL BILLS IN FILE | | | |
| LOST WAGES STATEMENT | | | |
| MEDICAL OPINIONS | | | |
| MEDICAL REPORTS | | | |
| CORRESPONDENCE | | | |
| EXPERT REPORTS | | | |
| LIABILITY DETERMINATION | | | |
| COPY OF CITATIONS | | | |
| AUTOMOBILE DAMAGE ESTIMATES | | | |

COMMENTS TO THE FIELD CLAIMS OFFICE:

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

# *BASIC COURSE DESKBOOK*



## Volume II
## General Administrative Law

The Judge Advocate General's School
United States Army

March 2001 JA 280

**ADMINISTRATIVE AND CIVIL LAW DEPARTMENT**
**BASIC COURSE DESKBOOK**

# GENERAL ADMINISTRATIVE LAW
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## ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## GENERAL ADMINISTRATIVE LAW

The ***General Administrative Law Deskbook*** contains Volume II of the instructional materials for the Administrative and Civil Law Department subjects. Volume I of the materials is in the ***Client Services Deskbook***. Both deskbooks contain Outlines of Instruction that include a table of contents, reference list, an outline of the law applicable to the subject being taught, and, in some cases, appendices that may include additional instructional material, extracts from Army regulations, and illustrative practical exercises.

These materials are general guides for note-taking during class and should serve later as your starting reference for research. The ***General Administrative Law Deskbook*** is divided into five parts. Part I addresses the law of military installations where Judge Advocates generally give legal advice to the command. Part II covers military personnel law where the legal advice usually has a command/soldier interface. Part III addresses those legal topics that affect civilian personnel law. Part IV contains the practical exercises and Part V provides resources you may use to develop general lawyer skills.

## INTRODUCTION TO MILITARY ADMINISTRATIVE LAW

**THE CONCEPT**. Military administrative law is the body of statutes, regulations, and judicial decisions that governs the establishment, functioning, and command of military organizations. Legal questions in military administrative law usually involve interpreting statutes and regulations and rendering advice to commanders and their staff. While the legal advice is not binding, the legal advisor should make clear the statutory, regulatory, or other basis so that the recipient can properly assess the ramifications of a proposed action. The materials in this deskbook may assist you in fulfilling this mission.

**CONSTITUTIONAL AUTHORITY**. The United States Constitution grants fundamental military authority to Congress and the President.[1] All activities of the Army,

[1] The Constitution provides:

> The Congress shall have Power To . . . provide for the common Defense . . .;
> To declare War, . . .;
> To raise and support Armies, . . .; To provide and maintain a Navy;

including regulations, orders, and directives, are founded on this basic authority. Since it is impractical for either Congress or the President to participate in every piece of Army business, the Secretary of Defense, the Secretary of the Army, and subordinate officials generally exercise military authority.

**AUTHORITY OF THE SECRETARY OF THE ARMY**. Because the Constitution vests all military authority in Congress and the President, the Secretary of the Army's authority is derived from them.

> Congress. Congress has conferred a great deal of authority directly on the Secretary, partly by statutes prescribing specific responsibilities but primarily by a general provision granting "the authority necessary to conduct all affairs of the Department of the Army."[2]
>
> President. The President is expressly authorized to designate any executive branch official who is appointed by and with the advice and consent of the Senate to perform any functions vested in him[3] unless delegation is affirmatively prohibited.[4] He also has the inherent right to delegate the performance of unrestricted functions and express

---

> To make Rules for the Government and Regulation of the land and naval Forces;
> To provide for calling forth the Militia . . .;
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, . . .; and
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. [Art I, section 8.]
>
> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . [Art II, section 2.]

[2] 10 U.S.C. § 3013(b).

[3] 3 U.S.C. § 301. This statute requires a formal written authorization published in the Federal Register.

[4] 3 U.S.C. § 302.

> authorization is not required when the act would be presumed in law to be done by authority or direction of the President.[5]

The President has delegated many Presidential functions to the Secretary of Defense or the Secretary of the Army by executive order or otherwise. The Secretary performs other presidential functions without express delegation, either on the theory of an implied delegation of authority or under the alter ego doctrine.[6]

The alter ego doctrine does not require a true delegation of authority and, in fact, allows the Secretary to exercise some Presidential functions which are actually nondelegable. The United States Supreme Court established this doctrine understanding that the President cannot act personally in each of his many official duties.[7] Under the alter ego doctrine, the act of the head of an executive department is presumed in law to be the act of the President.[8]

In performing nondelegable Presidential functions, the Secretary specifies that the action is "by direction of the President." In performing delegable functions, the Secretary takes action in his own right.

**DELEGATION**. The Secretary of Defense may in turn delegate authority to the Secretary of the Army;[9] the Secretary of the Army also delegates a great many of his functions to subordinates.

> Within the Secretariat. The Secretary is expressly authorized to assign appropriate duties to the Under Secretary and to the Assistant Secretaries of the Army.[10]

---

[5] *Id*.

[6] *See* Dunmar v. Ailes, 348 F.2d 51, at 55 (D.C. Cir. 1965).

[7] *See* Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839).

[8] Note that Congress has recognized and avoided limiting the alter ego doctrine. *See* 3 U.S.C. § 302.

[9] *See* 10 U.S.C. § 133(d), 3012.

[10] 10 U.S.C. § 3012(c).

Below the Secretariat. There is no general legislation authorizing the Secretary of the Army to delegate his functions to authorities below the Secretariat, although there are various statutory provisions authorizing delegation in specific instances.[11] Even without statutory authorization, the Secretary may delegate ministerial functions, but not discretionary powers. In discretionary issues, the Secretary may exercise discretion in the form of regulations establishing specific standards. The application of such standards to particular cases is then treated as being ministerial.

## PROMULGATION OF ARMY REGULATIONS

**AUTHORITY.** Some statutes contain specific provisions authorizing the issuance of implementing regulations[12] while others contain general authorization:

- The President may prescribe regulations to carry out his functions, powers, and duties under this title.[13] The President may prescribe regulations for the government of the Army.[14]

- The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.[15]

- The Secretary of the Army may prescribe regulations to carry out his functions, powers, and duties under this title.[16]

---

[11] *E.g.,* 10 U.S.C. § 672 (authority to order Reserves to active duty).

[12] *See, e.g.,* 10 U.S.C. § 3362(g) (Reserve promotions).

[13] 10 U.S.C. § 121.

[14] 10 U.S.C. § 3061.

[15] 5 U.S.C. § 301.

[16] 10 U.S.C. § 3013(g)(3).

Army regulations are issued "by order of the Secretary of the Army," over the signature block of the Chief of Staff of the Army, and authenticated by The Adjutant General. The signature of the Secretary of the Army or his designee is not essential.

**LIMITATIONS.** Because the Constitution expressly gives Congress rule-making power over the entire field of military administration but does not define the rule-making powers of the President as Commander in Chief, the executive branch is limited by any congressional action that has been taken. To the extent Congress has made "Rules for the Government and Regulation of the land and naval forces," the President is precluded from acting. To the extent Congress has not occupied the field, the President can act.

Although Congress may not delegate its power to make a law, it may make a law permitting determination of some fact or state of things upon which action under the law may depend. In this way, Congress, provided it has set a sufficiently definite standard, can confer rule-making power upon the President or other administrative officers. This is not a delegation of legislative power, but the conferring of the power to fill in the details of broad legislative standards. Rule-making power need not be expressly conferred, but may be implied as necessary to accomplish the broad legislative purpose.

## COMMAND AUTHORITY

Congress has authorized the Secretary of the Army to assign, detail, and prescribe the duties of members of the Army.[17] Command is exercised by virtue of the office and special assignment of members of the Army holding military rank who are eligible by law to exercise command.[18] Therefore, civilians and officers who are not eligible by statute may not exercise command.[19] The Secretary of the Army has also established other restrictions on eligibility for command: for example, soldiers who are under arrest, at an installation where not permanently

[17] 10 U.S.C. § 3013(g)(1).

[18] AR 600-20, Army Command Policy, para 1-5.

[19] A chaplain has rank without command. 10 U.S.C. § 3581. An officer in the Medical Department is not generally entitled to exercise command except within the Medical Department. 10 U.S.C. § 750 (1982). Retired officers may not exercise command except when on active duty. 10 U.S.C. § 750.

assigned, or assigned to the General Staff or Department of the Army staff agencies are not eligible for command .[20]

Command is normally connected with seniority in rank. Thus, the senior officer eligible for command is the commander. Rank is the relative position or degree of precedence bestowed on military.[21] The chain of command is the fundamental organizational technique for the exercise of command and is simply the succession of commanders, superior to subordinate. At the head of the chain of command is the President, acting as the Commander in Chief. Staff and administrative officers are not in the chain of command. It is Army policy that each individual in the chain of command is delegated sufficient authority to accomplish his assigned tasks and responsibilities.[22]

The actual scope of command has several sources. Some authority is given commanders by statute,[23] while other command authority is contained in various Army regulations.[24] A commander also has inherent power to issue orders necessary to accomplish the mission or assure the welfare of his troops so long as such orders are lawful.[25] The scope of command authority is also limited to the personnel and the physical facilities which make up a particular command.

With this brief overview of military administrative law, welcome to the Basic Course and the expanding and exciting world of administrative and civil law.

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[20] *See* AR 600-20, paras 2-15, 2-16.

[21] AR 600-20, para 1-6.

[22] AR 600-20, para 2-1b.

[23] *E.g.,* commanders are authorized by statute to administer nonjudicial punishment to members of their commands. 10 U.S.C. § 815.

[24] *E.g.,* commanders are authorized by regulations to take specific actions relating to the elimination of enlisted members. AR 635-200, Enlisted Personnel.

[25] *See* Greer v. Spock, 424 U.S. 828 (1976); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, at 892-3 (1961).

## BIOGRAPHIES

## ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

**LIEUTENANT COLONEL KARL M. GOETZKE**, JA, Professor and Chair, Administrative and Civil Law Department. B.S. (Cum Laude), Trinity University, 1979; J.D., University of Houston, 1982; Field Artillery Officer Basic Course, 1982; 101st Judge Advocate Officer Basic Course, 1983; Combined Arms and Services Staff School, 1989; LL.M., 38th Judge Advocate Officer Graduate Course, 1990; United States Army Command and General Staff Officer Course, 1995. Fire Support Officer, 6/14 Field Artillery, 1st Armored Division, Nürnberg, Germany, 1983; Trial Counsel and Administrative Law Attorney, VII Corps, Augsburg and Stuttgart, Germany, 1983-86; Brigade Judge Advocate, 6th Recruiting Brigade, United States Army Recruiting Command, Fort Baker, California, 1986-89; Administrative Law Attorney, Military Personnel Law Branch, Administrative Law Division, Office of The Judge Advocate General, 1990-94; Deputy Staff Judge Advocate, 1st Armored Division, Bad Kreuznach, Germany, 1995-96; Chief, Criminal Law and Civil-Military Divisions, V Corps, Heidelberg, Germany, 1996-98. Member of the Bars of Texas and the United States Supreme Court.

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# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

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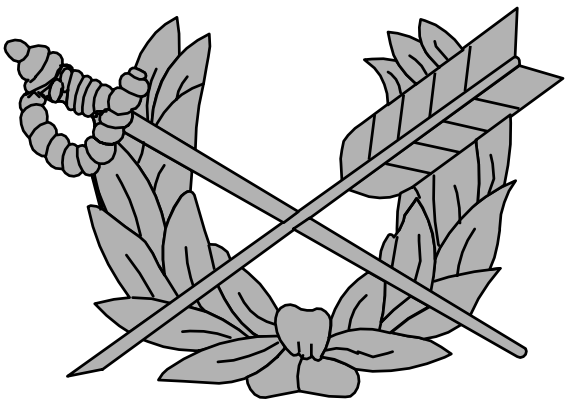

## Part I
## Law of Military Installations

The Judge Advocate General's School
United States Army

March 2001 JA 280

# CHAPTER A

# SOURCES OF COMMAND AUTHORITY & REGULATION OF INSTALLATION SERVICES AND ACTIVITIES


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# OUTLINE OF INSTRUCTION

## I. SOURCES OF COMMAND AUTHORITY

A. Constitution:

1. Article 1, Section 8: "Congress shall have the power to ... declare war ... raise and support Armies ... make rules for the Government and regulation of the Land and Naval forces ...."

2. Article II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States."

B. Statutes, e.g., 10 U.S.C. sections 1071-1104, "under regulations to be prescribed by the Secretary of Defense," active duty military entitled to medical and dental care in any facility of the uniformed services.

C. Regulations: DoD Directives/Instructions; Army Regulations; local regulations.

D. Inherent Authority. Recognized in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)(power of a commander over an installation is "necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand"). See also Greer v. Spock, 424 U.S. 828 (1976)(commander has the "historically unquestioned power" summarily to exclude civilians from the area of his command; "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command").

## II. DELEGATION OF COMMAND AUTHORITY:

"Any duties of an installation commander may be delegated except those which are imposed upon installation commander by law, such as those mentioned in the Uniform Code of Military justice, appropriation acts, other statutory provisions and regulations, or other directives that specifically prohibit delegation." [language from now-rescinded AR 210-10, para 2-5].



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## III. USE OF COMMAND AUTHORITY TO REGULATE:

A. Speech

1. Nature of Forum:

a. Public Forum: Traditionally used for free speech activities, such as public streets and sidewalks. See Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Capitol Square Review & Advisory Board v. Pinette, 115 S.Ct. 2440 (1995)(state owned plaza surrounding Statehouse in Columbus, Ohio). But see U.S. v. Kokinda, 497 U.S. 720 (1990)(sidewalk used solely as a passage for postal patrons not a public sidewalk).

b. "Created" Public Forum: aka "limited" or "designated." Government property set aside for free speech activities. E.g., Lamb"s Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)(school district opened school facilities for use after school hours by community groups for wide variety of social, civic, and recreational purposes); Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995)(university's Student Activities Fund, funded by mandatory student fees, paid for, inter alia, student group publications on student news, information, opinion, entertainment, or academic communications). Intent & extent of use granted is key.

c. Nonpublic Forum. Public property which is not by tradition or designation a forum for public communication may be reserved for its intended purpose so long as "regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) (selective access to school mailboxes did not transform property into public forum). Public access such as at open house is not sufficient to convert a military installation into a public forum in absence of abandonment of military special interest. Factors include mission-focus and political neutrality. Greer v. Spock, supra; Persons for Free Speech at SAC v. U.S., 675 F.2d 1010 (8th Cir. 1982); Brown v. Palmer, 915 F.2d 1435 (10th Cir. 1990); Contra, U.S. v. Albertini, 710 F.2d 1410 (9th Cir. 1983), rev. on other grounds, 472 U.S. 675 (1985).

2. Content-Based Restriction:

a. Public Forum: strict scrutiny (necessary to serve a compelling state interest and narrowly drawn to achieve that end).

b. "Created" Public Forum: same strict scrutiny on viewpoint discrimination; subject matter discrimination is not constitutionally prohibited. Rosenberger, supra (discrimination on subject matter which preserves limited forum purpose is permissible; discrimination because of ideology, opinion, or perspective is impermissible when directed against speech otherwise within limited forum; excluding student publication with religious editorial viewpoint from funding for publication available to other student publications held unconstitutional). Accord Lamb's Chapel v. Center Moriches Union Free School District, supra (prohibiting after hours access to school property to groups with religious viewpoints).

c. Nonpublic Forum: reasonable for forum. Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977)(ban on inmate solicitation to join prison inmate "labor union" and group meetings rationally related to reasonable objectives of prison administration).

3. Unprotected Speech:

a. Fighting Words, i.e., those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971)(simply wearing jacket bearing words "F*** the Draft" may not be constitutionally made a criminal offense); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace;" upheld conviction for calling another "damned racketeer" and "a damned Fascist").

b. Pornography. Roth v. U.S., 354 U.S. 476 (1957)(1st Amendment does not protect obscenity, i.e., material which deals with sex in a manner appealing to prurient interest).

c. Dangerous Speech

(1) Civilian Standard: whether words used under circumstances are such as to create a clear and present danger, Schenck v. U.S., 249 U.S. 47 (1919); clear and present danger means directed to inciting or producing imminent lawless action and likely to do so. Brandenburg v. Ohio, 395 U.S. 444 (1969)(mere abstract teaching of propriety or necessity to resort to force and violence not the same as preparing group for and steeling it to violent action).

(2) Military Standard: speech which undermines the effectiveness of response to command is constitutionally unprotected. Parker v. Levy, 417 U.S. 733, 758 (1974)(different character of the military community and mission requires different application of 1st Amendment protections; "fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it"). Priest v. Secretary of the Navy, 570 F.2d 1013 (D.C. Cir. 1977)(affirmed Vietnam era court-martial conviction of seaman for publishing newsletter for active duty military urging desertion to Canada; 1st Amendment test in military is that words "tended to interfere with responsiveness to command or to present a clear danger to military, loyalty, discipline, or morale").

4. Prior Restraint. DoDD 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces, 1 Oct 1996; AR 600-20, Army Command Policy, 30 Mar 88, para 5-9.

a. Approval in advance to determine whether publication presents clear danger to loyalty, discipline, or morale of military personnel or if distribution would materially interfere with mission is authorized. Prior approval requirement upheld in Greer v. Spock, supra (unsuccessful challenge to regulation prohibiting distribution of political literature on post); Brown v. Glines, 444 U.S. 348 (1980)(unsuccessful challenge to regulation requiring airmen to obtain prior approval from installation commander prior to distributing literature on installation).

b. Limitations: Commander can delay publications; only HQDA can refuse. Cannot pull individual issues of materials distributed through PX or library.

5. Solicitation

a. Charitable. AR 600-29, Fund Raising within the Department of The Army, 20 Mar 92.

(1) Combined Federal Campaign and Army Emergency Relief only on-duty solicitation authorized. CFC selection process upheld. Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788 (1985).

(2) Off-duty local fund raising authorized for MWR activities, on-post private organizations, and other limited fund raising to assist the unfortunate such as veteran organization "poppies" and collection boxes for food or goods.

(3) Religious fund raising only in conjunction with religious services. See AR 165-1.

b. Commercial. AR 210-7, Commercial Solicitation on Army Installations, 22 Apr 86.

(1) No right to solicit; must be authorized. Permits in writing and valid for up to one year.

(2) Door-to-door solicitation prohibited. By appointment only; limited to family quarters or other designated areas.

(3) Highly regulated to maintain discipline, protect property, and safeguard personnel. List of forbidden practices includes mass solicitation, retirees using IDs to get on post to solicit, and distribution of materials to other than the one being solicited.

(4) Insurance solicitation even more regulated. Note prohibition on possessing allotment forms.

(5) Violators can lose solicitation privileges; receive due process through "show cause" hearing

6. Political Activities: AR 600-20; Joint Ethics Regulation, DoD 5500.7-R.

a. Soldiers: Traditional concept is that soldiers do not engage in partisan political activity. Examples: Voting and expressing personal opinion on candidates and issues authorized; distributing partisan political literature is not. See Appendix B, AR 600-20. Prohibitions include no public demonstrations (partisan and nonpartisan) while on duty, in uniform (Locks v. Laird, 300 F.Supp. 915 (D.Colo. 1969)), or in a foreign country (Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir 1977)).

b. Civilians: Hatch Act, 5 U.S.C. Sections 7324-27. No political activity on duty, in office space, while wearing uniform or indicia of government position, or using government vehicle. Political activity means partisan, i.e., representing a party. Less restrictive than AR 600-20 is for soldiers.

7. Recurring Issue: bumper stickers & signs:

a. Small bumper sticker on private vehicle is authorized; large sign or poster is not.

b. Bumper stickers disrespectful to President can be banned. Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995)(order barring civilian from displaying on his truck stickers embarrassing or disparaging to the President not violative of 1st Amendment).

8. Extremist organizations: DoD Dir. 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces. AR 600-20, Command Policy, para. 4-12 (15 July 1999).

a. Participation in extremist organizations or activities is incompatible with military service.

b. Extremism includes advocating racial, gender or ethnic hatred or intolerance; engaging in illegal discrimination based on race, color, gender, religion, or national origin.

c. Punitive prohibitions include: participating in public demonstrations or rallies; fund raising; recruiting; creating or leading; distributing literature presenting a danger to discipline/mission accomplishment; attending meetings under certain circumstances, e.g., in violation of commander's order.

d. Expressly recognizes commander's inherent authority to prohibit activities which will adversely affect good order, discipline, morale within the command.

B. Religion

1. Constitutional test. Lemon v. Kurtzman, 403 U.S. 602 (1977)(three part test: proposed government action must have a secular legislative purpose; have a primary effect that neither advances nor inhibits religion; and not involve excessive government entanglement with religion)

a. Applied:

(1) Religious displays. American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986)(city nativity scene in front of city hall unconstitutional); Jewish War Veterans v. United States, 695 F.Supp. 3 (D.D.C. 1988)(65-ft cross in front of HQ on military installation unconstitutional).

(2) Holiday displays. Lynch v. Donnelly, 465 U.S. 668 (1984)(secular holiday display which included nativity scene not unconstitutional).

(3) Invocations. Lee v. Weisman, 505 U.S. 577 (1992)("nonsectarian" prayer at middle and high school graduation ceremonies impermissible establishment of religion).

(4) Day care. Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995)(Army regulations prohibiting Family Child Care providers from having any religious practices during their day-care program unconstitutional; relationship between Army and provider is solely one of regulator and regulatee and does not create an unconstitutional entanglement).

b. Exceptions

(1) Army Chaplaincy Program constitutional. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

(2) Opening legislative sessions with invocation constitutional. Marsh v. Chambers, 463 U.S. 783 (1983).

2. Statute: 10 U.S.C. section 774, legislatively overruling Goldman v. Weinberger, 475 U.S. 503 (1986)(granting great deference to professional judgment of military authorities on matters of military interest and holding that 1st Amendment did not prohibit AF regulation preventing wearing of yarmulke while on duty and in uniform). Statute provides for wearing of neat and conservative items of religious apparel while in uniform unless wear would interfere with performance of duty.

3. Regulation & Policy. DoDD 1300.17, Accommodation of Religious Practices Within the Military Services, Feb 88; AR 600-20, para 5-6; DA Pam 600-75, Accommodating Religious Practices, 22 Sep 93.

a. Policy is to approve requests for accommodation of religious practices when it will not have an adverse impact on readiness, safety, discipline, etc.

b. Commander responsibility; HQDA board (Committee for Review of Accommodation of Religious Practices in U.S. Army).

c. DA Pam 600-75 states that "Religious practices are not limited to mandatory tenet of a religious faith group. Individual conscience and personal piety may warrant the same degree of consideration as the tenets of a recognized religious group."

d. Specific practices:

(1) Worship: worship requirements that conflict with normal availability for duty will be accommodated unless precluded by military necessity.

(2) Dietary: exception to policy to ration separately and take personal supplemental rations in field/combat environment.

(3) Medical practices: no accommodation in lifethreatening situations; otherwise, medical board will consider request.

(4) Wear and appearance: neat and conservative items of religious apparel may be worn except if it would interfere with performance of duty.

## IV. AUTHORITY OFF THE INSTALLATION: THE ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB). AR 190-24.

A. Mission: to make recommendations on eliminating conditions which affect health, safety, morals, welfare, morale, or discipline.

B. Duties: include taking action on reports of negative conditions, liaison with civil authorities, recommendations to commander.

C. Composition: representatives include law enforcement, legal, health and environment, equal opportunity, and safety.

D. Sanction: may recommend off-limits area, i.e., any vehicle, conveyance, place, structure, building, or area prohibited to military personnel to use, ride, visit, or enter during the off-limits period.

E. Due process provided in form of notice and opportunity to be heard at board.

F. Loss to business from order is not a "taking" for which damages accrue. Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4th Cir. 1946).

G. Enforcement: Violation of off-limits is UCMJ offense.

# CHAPTER B

# STANDARDS OF CONDUCT


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# Outline of Instruction

## I. REFERENCES.

A. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended.

B. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. 2635 (Office of Government Ethics Rules).

C. DOD 5500.7-R, JOINT ETHICS REGULATION (JER), 30 Aug 93. Change 4, effective 6 August 1998. Note: Recent Changes marked with an asterisk (*).

## II. BASIC OBLIGATIONS OF PUBLIC SERVICE UNDER EXECUTIVE ORDER 12674 (also reproduced on the last page of this outline).

1. **Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective or a reasonable person with knowledge of the relevant facts.

## III. JOINT ETHICS REGULATION (JER).

A. Overview. A single, comprehensive regulation covering more than traditional standards of conduct.

B. Applies OGE rules to DoD. Specifically applies many of the OGE rules to enlisted members. Rules printed in ***bold italics*** are general orders--they apply to all military members without further implementation and violations may be punishable as violations of a lawful general order, Article 92, UCMJ.

C. Rescinds Army-specific Standards of Conduct rules once found in AR 600-50, Standards of Conduct. Now all services use the same rules.

D. Key definitions under the JER

1. DOD Employee (JER 1-211). The JER applies the Executive Branch Standards of Conduct rules to "DoD Employees." The definition essentially includes everyone in DoD:

a. Any DOD civilian officer or employee (including special Government employees) of any DOD Component (including any nonappropriated fund activity).

b. Any active duty Regular or Reserve military officer, including warrant officers.

c. Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.

d. Any Reserve or National Guard member on active duty under orders issued pursuant to title 10, United States Code.

e. * Any Reserve or National Guard member while performing official duties or functions under the authority of either title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his Reserve or National Guard of the United States title or position, or any authority derived therefrom. [Changed from a status to an action analysis.]

2. Designated Agency Ethics Official (DAEO) (JER 1-209): A DOD employee who is responsible for the implementation and administration of the component's ethics program.

3. Ethics Counselor (EC) (JER 1-214): A DOD employee appointed in writing to generally assist in implementing and administering the command's or organization's ethics program and to provide ethics advice to DOD employees in accordance with the JER.

a. Communications to an EC are not protected by any attorney-client privilege while communications received in a legal assistance capacity usually are. Attorneys who serve as ECs must advise individuals being counseled as to the status of that privilege prior to any communications.

b. ECs advise and assist on issues, such as:

(1) acceptance of gifts and gratuities;

(2) business visitors (e.g., product demonstrations and capabilities briefings);

(3) ethics training;

(4) participation in or dealings with private and professional associations, such as AUSA;

(5) review of public (SF 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests;

(6) post-Government employment restrictions; and

(7) use of Government resources and time.

c. EC's advice *generally* precludes disciplinary action against an employee who follows EC's advice (5 C.F.R. § 2635.107(b)).

4. Agency Designee (JER 1-202): The first supervisor who is a commissioned military officer or a civilian above GS/GM-11 in the chain of command or supervision of the DOD employee concerned. Except in remote locations, the Agency Designee may act only after consultation with his local Ethics Counselor. For any military officer in grade 0-7 or above who is in command and any civilian Presidential appointee confirmed by the Senate, the Agency Designee is his Ethics Counselor.

## IV. USE OF GOVERNMENT RESOURCES.

A. * Official Use. Punitive provision, restricting use of communication systems (telephones, facsimile machines, electronic mail, internet systems, etc.) for official uses only - with exceptions. (JER 2-301). Official use may include deployed employee's use to enhance MWR. This requires theater commander approval.

B. Permits Agency Designee to authorize personal (non-official) use, only IF:

1. there is no adverse effect on duty performance;

2. the duration and frequency are reasonable (if possible while off duty - during breaks or after normal work hours);

3. a legitimate public interest is served (keeping employees at their desks; education/familiarization with communication systems; enhancing professional skills; job search in response to downsizing);

4. use does not reflect adversely on DOD (no pornography, chain letters, advertising, soliciting, or selling (unless on authorized bulletin boards), etc.);

5. use does not overburden Government communication systems; and

6. use creates no significant additional cost to DOD (no long distance charges to the Government).

C. * Monitoring Use. Employees' use serves as consent to monitoring of any type of use, including incidental and personal uses, whether authorized or not.

D. * Other Use. Agency Designees may permit employees limited use of items, such as typewriters, calculators, libraries, and other similar resources and facilities, if:

1. use does not reflect adversely on duty performance;

2. use is of reasonable duration and made during personal time;

3. use serves a legitimate public interest (supports local charities or community volunteers, enhances professional skills, or job search relative to downsizing, etc.);

4. use does not reflect adversely on DOD; and

5. use creates no significant additional DOD cost.

E. Employee Support. Employees (such as secretaries, clerks, and military aids) may not be used to support the unofficial activity of another DOD employee in support of non-Federal entities. (JER 3-305).

## V. GIFTS, A PRACTICAL APPROACH (JER, CHAPTER 2).

A. Critical Question: Who is giving the gift? Four potential sources for gifts. Each source has its own analysis.

1. Outside Source.

2. Foreign Government.

3. Fellow government employee.

4. Other Sources: friends, family etc.

B. Gifts from Outside Sources (JER, chapter 2).

1. Basic Punitive Prohibition on Gifts From Outside Sources. A soldier shall not **solicit** or accept, directly or indirectly, a gift:

2. from a prohibited source (e.g., someone who has an interest in the performance of official Army missions); or

3. given because of the employee's official position.

C. Gift from Outside Source Analysis, a practical approach:

1. Preliminary Question: Is the item actually a gift? The term "gift" includes almost anything of monetary value, but not these (*exemptions*):

a. Coffee, donuts, and similar modest items of food and refreshments when offered other than as part of a meal;

b. Greeting cards and most plaques, certificates, and trophies;

c. Rewards and prizes in contests open to the public;

d. Commercial discounts available to the general public or to all Government or military personnel;

e. Commercial loans, and pensions and similar benefits;

f. Anything paid for by the Government, secured by the Government under Government contract, or accepted by the Government in accordance with a statute; and

g. Anything for which the employee pays market value.

2. If the item is a gift, does an exception apply? Common ***exceptions*** when an employee may accept:

a. unsolicited gifts with a market value of $20 or less per source, per occasion, so long as the total value of all gifts received from a single source during a year does not exceed $50;

b. gifts based on an outside relationship, such as a family relationship or personal friendship;

c. discounts and similar benefits offered to groups in which membership is not related to Government employment (or "Government discounts" where the same offer is broadly available to the public through similar groups), and certain benefits offered by professional associations or by persons who are not prohibited sources;

d. legitimate awards that are part of a regular and established program of recognition for meritorious public service;

e. gifts resulting from the outside business activities of employees and their spouses;

f. * free attendance (not travel or lodging) paid by the sponsor of a widely-attended gathering, speaking engagement, or other event if the agency determines an interest in the event (attend in personal capacity) [Rule amended: 61 Fed. Reg. 42965 (20 Aug 96) allows payment by other than the sponsor if >100 people attend and the cost is <$250; also allows spouse or other guest to attend];

g. food, refreshments, and entertainment at certain social events extended by persons who are not prohibited sources, where no one is charged a fee to attend the event;

h. unsolicited gifts of free attendance for DOD employees (and spouses) at events sponsored by state or local governments or non-profit, tax exempt civic organizations, where the agency has determined its community relations interests in the event (JER 2-202a); and

i. certain educational scholarships or grants for DOD employees and dependents (JER 2-202b).

3. Would using the exception undermine Government integrity? Even if a gift is covered by one of the exceptions, do not accept it if it will undermine Government integrity.

a. Cannot use official position to solicit a gift or force someone to give a gift.

b. Any gift is illegal if it is in exchange for an official action.

c. Some gifts may be prohibited by other statutes (such as procurement integrity contract laws).

d. Finally, gifts may not be accepted so frequently that anyone would question whether influence is being bought. For example, a Federal building manager cannot accept a free sandwich every week from a lunch counter operating in the building.

D. Handling Improper Gifts (5 C.F.R. § 2635.205). When an employee cannot accept a gift:

1. First and foremost, if possible, refuse the offer of an improper gift. Diplomatically explain that Federal employees may not accept certain gifts.

2. The employee should pay the donor its market value; or

3. If the gift is a tangible item, the employee may instead return the gift.

4. Subject to approval, perishable items may be donated to a charity, shared within the office, or destroyed.

## VI. FOREIGN GIFTS. (U.S. CONST. ART. I, § 9, CL. 8; 5 U.S.C.A. § 7342, AND JER § 2-300.)

A. Gifts from foreign governments.

1. Can accept a "gift of minimal value" (i.e., one having a retail value in the United States not in excess of $260 at the time of acceptance. "Minimal value," based on the Consumer Price Index.)

2. Gifts valued above "minimal value" can only be accepted on behalf of the U.S. Report to and deposit these with Commander, PERSCOM, ATTN: TAPC-PDO-IP, Alexandria, VA, 22332-0474 for disposal, official use, or forwarding to the General Services Administration.

3. * Aggregate the value of gifts from different officials during the same presentation.

4. * Gifts from spouses of foreign officials are deemed gifts from the foreign official.

5. * Gifts to employees' spouses are deemed gifts to the employee.

6. * Gifts received at separate presentations are separate gifts - their values are not aggregated (even if from the same official and on the same day).

7. * When more than one gift is given at a single presentation, the employee may retain only those with an aggregate of less than "minimum value." The remainder (valued over "minimal value") may not be kept by the employee.

B. Gifts to deployed personnel. Apply general gift analysis, unless gift is from a foreign government, then apply those rules.

## VII. GIFTS BETWEEN EMPLOYEES (JER, CHAPTER 2).

A. General Punitive Rules. An employee shall not:

1. give a gift or solicit a contribution for a gift for an official superior (i.e., supervisor or those in supervisory chain); or

2. accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

B. Exceptions.

1. Gifts may be given on an occasional basis, including traditional gift-giving occasions, such as birthdays and holidays.

a. This includes minor contributions of food which will be consumed at the office, meals at someone's home (of a type and value customarily provided to personal friends), and customary gifts, such as a bottle of wine brought when invited to another's home.

b. This also includes infrequent gifts having a value of less than $10 on appropriate occasions, such as Christmas or birthdays. Such gifts may not become "routine."

2. A subordinate may give or donate toward a gift to a superior on special infrequent occasions, such as, marriage PCS, or retirement.

a. Gifts on special infrequent occasions that do not terminate the superior subordinate relationship are limited to $300 in value per gift per donating group (JER 2-203).

(1) Donating group is comprised of all contributors to that group gift.

(2) If one contributor contributes to two donating groups, then value of gifts from groups with a common contributor is aggregated as if from a single donating group--$300 limit applies to total value (JER 2-203a(2)).

b. * Special infrequent occasion gifts that terminate the superior, subordinate relationship (retirement, resignation, transfer) may exceed $300 per donating group if they are appropriate to the occasion and are uniquely linked to the departing employee's position or tour of duty and commemorate the same. (Changed on 2 January 1997.)

c. An employee cannot solicit more than $10 from another employee for a group gift to the contributing employee's superior (JER 2-203b).

d. Solicitations for gifts to a superior must be completely voluntary. Solicited individual may decline to contribute.

**e.** To avoid improper pressure, the collection should be handled by someone junior in the organization.

f. GIFTS SUMMARIZED

| Methodology | Gifts from Outside Sources | Gifts Between Employees |
|---|---|---|
| Prohibited (***Punitive***) | Yes if from prohibited source, or given because of off. psn § 2635.202 | Yes if from subordinate or solicited for superior § 2635.302 |
| A gift? | Nongifts - exemptions (§ 2635.203):<br>1. nonmeal food/refreshments<br>2. cards, plaques<br>3. bank loans<br>4. paid for by Government<br>5. paid market value | |
| Exceptions? | § 2635.204<br>Examples:<br>1. $20/50 rule<br>2. personal relationship<br>3. discounts/benefits<br>4. awards/degrees<br>5. outside bus. relations<br>6. widely attended event<br>7. social invitations<br>8. local Govt/civil events<br>9. scholarships/grants | § 2635.304<br>Two categories:<br>1. occasional basis ( $10 or less; food refreshments; hospitality; leave transfers)<br>2. special infrequent occasions (gift appropriate to occasion - max $300 (unless event terminates superior/subordinate relationship) from single donating group; $10 max on solicitation per person) |
| Limitations | § 2635.202(c)<br>1. no bribes<br>2. no gift solicitations<br>3. reasonable person test<br>4. no statutory violations | § 2635.302(c)<br>1. no coercion<br>2. common member in donating groups |

## VIII. OFFICIAL TRAVEL.

A. Air Travel.

1. First class. On official business, use coach, unless:

   a. No other reasonably available accommodations exist.

   b. Travel by an employee whose physical condition necessitates first-class travel.

   c. Exceptional security circumstances.

2. Report all *purchased* first-class travel to GSA within 60 days of the end of each fiscal year.

3. Premium class (other than first class, such as business class) may be used, **if**:

   a. Regularly scheduled flights along the required route only provide premium-class seats.

   b. No space is available in coach, and travel is urgent and cannot be postponed.

   c. Travel involves an employee with a disability substantiated in writing by competent medical authority. An attendant may accompany him in premium class, if necessary.

   d. Security purposes or exceptional circumstances exist.

   e. Travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate.

   f. Overall savings to the Government would result, such as avoidance of additional subsistence costs, overtime, or lost productive time incurred while waiting for available coach seats.

g. Travel costs are paid by a non-Federal source. Payments from a non-Federal source may not be used for first-class travel, only coach or premium-class.

h. Travel which is in excess of 14 hours and begins/ends in a foreign country is now only authorized premium upgrade in limited circumstances.

B. Payment for ***Official*** Travel Expenses From Non-Federal Sources (31 U.S.C. § 1353; JER 4-101; JFTR, Chapter 7, Part W, §§ U7900-7908; JTR, Chapter 4, Part Q, §§ C4900-4908; HQDA Letter 55-96-1, Subject: Acceptance of Payments From a Non-Federal Source for Official Travel Expenses (30 October 1996); 41 C.F.R. Part 304).

1. Gift requiring approval of normal travel approving official.

2. Unsolicited gift may be accepted under 31 U.S.C. § 1353. Consultation with Ethics Counselor required. Payment may be accepted for travel, subsistence, and related expenses.

3. Deciding official must determine acceptance does not appear to jeopardize integrity of agency. Standard: reasonable person with knowledge of relevant facts. Deciding official considers (31 C.F.R. Part 304):

a. Source of offer/payment;

b. Purpose of meeting or similar function;

c. Identity of other expected participants;

d. Nature and sensitivity of any matter pending at agency affecting the offeror;

e. Significance of traveler's role in any offeror's pending matter; and

f. Monetary value and character of travel benefits offered.

4. After travel, traveler reports acceptance if over $250 through the approval authority and the local Ethics Counselor to DAJA-SC.

5. Payments from a non-Federal source may not be used for first-class travel, only coach or premium class less than first class (JFTR, §§ U7902D, U3125 (7/1/94), JTR; §§ C4902.4, C2205).

## IX. INCIDENTAL TRAVEL BENEFITS (JER, CHAPTER 4, SECTION 2; JFTR §§ U3125 AND U2010; JTR § C2205; AND APRIL 1999 SECARMY TRAVEL POLICY).

A. Federal Government Property. Anything that a DOD employee receives as a result of official travel belongs to the Federal Government unless it falls under a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2).

1. Frequent Traveler Benefits (JER 4-201).

a. Frequent flyer mileage credits earned on official travel belong to the Federal Government and may only be used on subsequent official travel. First consideration must be to offset future official travel. If credits cannot be used to offset future travel, then they may also be used for upgrades (airline, rental car, or hotel).

(1) Frequent flyer benefits may be used for upgrade to premium class or clipper/business class, but *not* to first class.

(2) If there is no premium class, then they may not be used for airline seat upgrades at all.

b. When personal and official miles have been commingled in the same account to the extent that they are indistinguishable, all miles belong to the Government and may only be used for official travel.

2. Awards and prizes (merchandise) from travel services on official travel belong to the Federal Government.

B. Personal Property. Benefits that can't be used for official purposes may be accepted if a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2) applies.

1. On-the-spot upgrades (JER 4-202). May be accepted if they meet the gift exceptions.

a. May accept if generally available to the public, all Federal employees, or all military members.

b. Do not accept if offered because of traveler's rank or official position.

c. Upgrades while traveling in uniform--OK to accept, unless it is given because of your official position, however, Army employees may not travel in premium or higher class in uniform.

2. Cash or credit rebates from personal credit cards used on official travel are not the property of the Federal Government and may be accepted (Comp. Gen. Decision B-236219, Matter: Use of Discover Charge Cards, May 4, 1990).

3. Getting "bumped" on official travel.

a. Benefits, such as free tickets, as a result of being *involuntarily* bumped from an overbooked flight on official travel belong to the Government (traveler remains on Government time).

b. Benefits as a result of *voluntarily* relinquishing a seat on an overbooked flight belong to the traveler and can be used on personal travel. The traveler is on his own time and may not give up the seat if it would interfere with mission accomplishment.

## X. TRANSPORTATION. (SEE SECARMY MEMO, POLICY FOR TRAVEL BY DA OFFICIALS (APRIL 1999).)

A. Home-to-Work Transportation.

1. Generally not available.

a. Designated position exception:

(1) Field work (i.e., duty requires employee to travel to various other duty sites from primary duty location, e.g., recruiter).

(2) Intelligence, counterintelligence, protective services, or criminal law enforcement duties.

b. Statutory exception: special determinations based on clear and present danger, emergency, or compelling operational considerations. (SECARMY approval 15-calendar day periods, 90-calendar day extensions possible.)

2. SECARMY approval (DCSLOG responsibility).

B. Spouse Transportation.

1. General rule: spouses do not accompany soldiers-sponsor on official business at Government expense.

2. Exceptions:

a. Invitational travel orders for "unquestionable official participation" requirement. Spouse must actually participate or presence is deemed in national interest because of diplomatic or public relations. Transportation only (no per diem).

b. "Non spouse" travel where spouse is conferring with DOD officials on DOD matters (e.g., substantive spouse agenda).

3. Nontactical vehicles. Space available with sponsor when vehicle used to transport Army personnel to an official function and the transportation of the spouse does not result in additional expense.

## XI. JER CHANGES NOT COVERED ABOVE.

A. Financial Disclosure Reporting.

1. Threshold Filing Increase. JER 7-300b increases the presumptive threshold for required OGE 450 filing to $2,500 per purchase and $20,000 per year. This conforms the JER to the definition of "micro purchases" in the Federal Acquisition Streamlining Act.

2. * Forms. OGE Form 450 in; SF 450 out. OGE Optional Form 450A, Confidential Certificate of No New Interests, authorized, but must use DoD version of the form and attach copy of last SF 450.

B. * Annual Ethics Training. (JER 11-302)

1. Annual ethics training may now be presented in person by a Qualified Individual or by telecommunications, computer-based methods, or by recorded means prepared by a qualified Individual.

2. If the DAEO determines, SGEs and RC personnel serving on AD less than 30 consecutive days may be trained by "other means."

C. * 18 U.S.C. § 208 Regulations (Conflict of Interest) 5 C.F.R. Part 2640.101 (JER 5-200). Supersedes TAB D of JER superseded.

## XII. CONCLUSION.

# PERSONAL OUTSIDE ACTIVITIES SUPPLEMENT

A. Personal and Financial Conflicts of Interest

1. An employee may not personally and substantially participate in an official capacity in a matter in which he (or certain others) has a financial interest if participation will have a direct and predictable affect on that interest.

2. An employee also may not personally and substantially participate in a matter if it involves a person or entity with whom the employee has a special relationship--called a "covered relationship." This includes a nonfinancial, yet personal, conflict of interest.

3. Personal Financial Interests imputed to you (i.e. you generally may not participate in matters involving these entities):

   a. The interests of a company or business you work at, own as a partner, or serve as an officer (imputed for one year); or a company you own stock in (unless worth less than $5,000).

   b. The interests of your spouse and children.

   c. The interests of "members of your household" or those with whom you have a "close, personal relationship."

   d. The interests of an organization you serve as an officer or director (imputed for one year)

   e. The interests of an organization you "actively participate" in; includes serving as an officer or committee chair or otherwise directing the organization's activities (may include aggressive endorsement). Active participation means more than mere membership.

4. Appearance Problem-Consideration of appearances of a conflict of interest by an employee.

   a. A conflict of interest also occurs where a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter--the mere appearance of a conflict invokes the rules.

   b. Employee may still act on the matter when agency designee issues a written authorization after considering the matter. Obtain Ethics Counsel opinion.

5. Job-Hunting. Prohibitions against working on a matter involving a company with which you are seeking employment.

6. Example. Employee who moonlights as a salesperson at XYZ Computer Store may not be involved personally and substantially in the procurement of computers for the office from XYZ Computers.

7. Example. President of the local AUSA chapter (or unit sub-chapter) may not, in an official capacity, approve a request for use of DoD space by the Association.

B. Private Businesses (JER para. 2-205) (applies on and off duty).

1. **Punitive provision**: DoD employees may not solicit or make any solicited sales to personnel who are junior in rank, grade, or position to them

2. May also not solicit or make solicited sales to the family members of the junior employee.

3. Exception: As long as there is no coercion or intimidation, it is okay to make sales off-duty from an off-post retail establishment or sell or lease your own personal property or real estate.

C. Employment Prohibitions.

1. During Your Federal Service.

a. May not engage in any outside employment if it conflicts with your federal duties.

b. Commands may require pre-approval for outside employment. Filers of financial disclosure forms must obtain prior approval.

c. General Officers may not sit as an officer or director of an outside organization for compensation.

d. May not receive improper supplementation of your federal salary for performing your official duties (18 USC § 209).

2. After Your Federal Service.

a. May not "switch sides" and work for a contractor on the same matter you handled as a DoD employee.

b. DoD personnel involved working with contractors have special rules under the Federal Acquisition Regulation. Contract personnel should consult their Ethics Counselor for post-employment issues.

D. Honoraria and Teaching, Speaking, and Writing.

1. Statutory ban on Honoraria--that is, compensation for a lecture, speech, or writing-- was "effectively eviscerated" by the U.S. Supreme Court. (See JER 3-307c.)

2. Prohibitions remain, however, on "Teaching, Speaking, and Writing."

a. May not receive compensation for teaching, speaking, and writing related to your official duties, i.e., cannot re-package your federal work and profit from it.

b. Does not preclude teaching, speaking, and writing in an inherent area of your expertise based on your education or experience even though it may deal generally with a subject within your official responsibility/

c. May receive compensation for teaching courses at certain educational institutions even if the subject is related to your official duties. Seek ethics counselor advice.

d. May not use your rank or official position to promote your teaching, speaking, and writing. May include it in a title or bio and, if the subject deals with an ongoing agency program or policy, must include a disclaimer.

E. Political Activities (JER 6-300; DoD Directive 1344.10; AR 600-20, para 5-3 and Appendices B & C).

1. Soldiers may not engage in partisan political politics or use your position to solicit votes or contributions.

2. Registering to vote, voting, expressing an opinion, making monetary contributions are generally okay.

F. Gambling (JER 2-302). Punitive Provision.

1. Gambling is prohibited on federally-owned or leased property or anywhere while on duty.

2. Rule allows private wagers in housing areas if based upon a personal relationship if IAW local laws. But: UCMJ may prohibit if a violation of punitive provisions regarding gambling with a subordinate.

# PRINCIPLES OF ETHICAL CONDUCT

**1. Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective or a reasonable person with knowledge of the relevant facts.

# CHAPTER C

## NON-FEDERAL ENTITIES & PRIVATE ORGANIZATIONS


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## Outline of Instruction

# I. REFERENCES.

A. Dep't of Army, Reg. 1-211, Attendance of Military and Civilian Personnel at Private Organization Meetings (10 Mar 1988).

B. Former Dep't of Army, Reg. 210-1, Private Organizations on Department of the Army Installations and Official Participation in Private Organizations (14 Sep. 1990) (Rescinded, use only for general guidance).

C. Dep't of Army, Reg. 360-61, Community Relations (15 Jan 1987).

D. Dep't of Army, Reg. 405-80, Granting Use of Real Estate (10 Oct 1997).

E. Dep't of Army, Reg. 600-29, Fund-Raising Within the Department of the Army (20 March 1992).

F. Dep't of Army, Reg. 725-1, Special Authorization and Procedures for Issues, Sales, and Loans (25 Sep. 1989).

G. Dep't of Defense, Dir. 1015.19, Professional United States Scouting Organization Operations at United States Military Installations Located Overseas (31 Oct. 1990).

H. Dep't of Defense, Instr. 1000.15, Private Organizations on DoD Installations (October 23, 1997).

I. Dep't of Defense, Dir. 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense (January 30, 1997)

J. Dep't of Defense, Dir. 5035.01, Combined Federal Campaign (CFC) Fund-Raising Within the Department of Defense (May 7, 1999).

K. Dep't of Defense, Dir. 5410.18, Community Relations (July 3, 1974).

L. Dep't of Defense, 5500.7-R, Joint Ethics Regulation (Aug. 1993) (w/ Change 4).

M. 10 U.S.C. § 2012 (support to state and civic organizations).

N. 10 U.S.C § 2606 (overseas scouting); 10 U.S.C. §§ 2544, 2545, 2606 (transportation of scouts and scout officials).

O. 10 U.S.C. § 2548 (support of national military associations).

P. Non-Federal Entity under JER para. 1-221: A non-Federal entity is generally a self-sustaining, non-Federal person or organization, established, operated and controlled by any individual(s) acting outside the scope of any official capacity as officers, employees or agents of the Federal Government. A non-Federal entity may operate on DoD installations if approved by the installation commander or higher authority under applicable regulations.

## II. PRIVATE ORGANIZATIONS.

A. Private Organizations under DoDI 1000.15 (basically a subset of NFEs that operate on post).

1. Definition. A self-sustaining, nonfederal entity constituted or established and operated on a DA installation by individuals acting outside any official capacity.

2. POs - Nonfederal Entities. POs are not part of the military organization No official relationship exists between PO activities and official duties and responsibilities of DoD personnel who are PO members or participants.

3. No privileges and immunities.

B. Private Organizations under Army Regulations.

1. * **AR 210-1 rescinded**. A new AR 210-1 is due out in 2000. See ACSIM Memo and Message at the end of this outline. See also Private Organizations Reference Guide distributed separately.

2. Installations must "develop a prescribed plan to administer and execute a local process for approving or disapproving requests from private organizations." Policies must be consistent with JER and DoD Instruction 1000.15, Private Organizations on DoD Installations (23 October 1997).

3. "Informal funds" - Office funds, including coffee, cup and flower, and annual picnic funds. No monetary minimum/maximum. See AR 600-20, para 4-21 (15 July 1999).

## III. OFFICIAL PARTICIPATION (JER CHAPTER 3, SECTION 2).

A. Membership. Liaison where significant and continuing DOD interest served by representation (JER 3-201).

B. Management.

1. * JER 3-202, Management of Non-Federal Entities by DOD employees acting in their official capacities. Implements provisions from the NDAA of 1998 codified in 10 USC 1033, 1589, and 2012.

2. DOD DAEO (General Counsel) authorization required to participate as official military representative in PO management. With authorization, may represent DOD in discussions of mutual interest, participate in determinations and conclusions, and vote on such matters.

3. Sec Army, w/ DOD GC approval, may designate personnel to serve in their official capacities without compensation as an officer, director, or otherwise participate in the management of an NFE designated by DODGC (see below);

4. Personnel may serve only to provide oversight and advice to NFE—not day-to-day operations. Sec Army must delineate specific duties;

5. DOD GC designation of entities:

a. Military Welfare Societies: Army Emergency Relief; Air Force Mutual Aid Society, Inc.; Navy-Marine Corps Relief Society; Coast Guard Mutual Assistance.

b. Other entities which:

(1) regulate service academy athletics, international athletic competitions, and performance, standards, and policies of military health care; or

(2) accredit service academies & other DoD schools.

C. Meeting Attendance. Personnel may attend at Government expense when information gained will "substantially benefit the approving authority's mission" (see AR 1-211, Attendance of Military and Civilian Personnel at Private Organization Meetings (1 Jun 84)). AR 1-211, Table 1:

| ***If the meeting -*** | ***Then the individual may*** |
|---|---|
| Is of direct and substantial benefit to the approving authority and to DOD and Government funds are available | be authorized travel expenses and per diem and permitted to attend in a TDY status. |
| Is of a quasi-official nature and the approving authority will receive some benefit from attendance which is not direct or substantial | be authorized attendance in a permissive TDY status without payment of travel expenses, per diem, or other reimbursable entitlements. |
| Is of marginal or no benefit to the approving authority | be authorized leave and incur all expenses connected with travel. |

D. Endorsement. Punitive prohibition: employees may not use their official capacities, titles, positions, or organization names to suggest official endorsement or preferential treatment of a non-Federal entity, event, product, service, or enterprise. Employees may only use their titles, positions, or organization names to identify themselves relative to performance of official duties. (JER 3-209.)

E. Support.

1. Impartiality required (JER 3-204).

2. JER 3-211 authorizes limited support when commander determines:

a. the support does not interfere with official duties and does not detract from readiness;

b. the private organization is not affiliated with the Combined Federal Campaign (CFC), or approval has been obtained from the CFC Local Federal Coordinating Committee;

c. legitimate DOD interests, such as community relations, are served;

d. the event is appropriate for DOD support;

e. the event is of interest to the civilian or military community as a whole;

f. the DOD organization is willing to provide similar support to other similar events so as to avoid the appearance of unduly favoring one organization over another;

g. there are no statutes or regulations restricting the support; and

h. either no admission fee is charged for the event, no fee is charged for the supported portion, or DOD support is incidental to the event.

F. Fundraising. (JER 3-210 and 211)

1. *** JER 3-211b & 3-300a2:** Clarifies that the commander may designate areas on an installation that are considered to be "outside the federal workplace" for fundraising purposes. Fundraising by CFC entities in those areas is not subject to OPM approval.

2. No official endorsement of PO fundraising or membership drives unless exception exists.

3. * Exceptions: special organizations (e.g., CFC, AER, other organizations composed of DOD employees/dependents when fundraising among their own members for their own benefit when commander approves) This year includes charitable, community, or civic organizations eligible for NG support under 32 USC 508 (JER 3-210).

G. * On-post POs. Installations must establish local policies concerning authorizing PO's to operate on the installation. (AR 210-1 rescinded.)

H. Community Relations Program; AR 360-61; DoD Dir.5410.18.

1. Provide support to public events that will: (1) Increase public awareness of Army missions; (2) Inspire patriotism; (3) Foster good relations; (4) Maintain the Army's reputation; and (5) Support recruiting.

2. Restrictions (AR 360-61, para 2-3).

a. No selective benefit whatsoever.

b. No support to organizations which discriminate.

c. Army support is incidental to the event, except for patriotic programs or celebrations of national holidays, and the event is open to the public.

d. No demeaning work for soldiers (guards, parking lot attendants).

e. No support for clearly commercial events.

f. May not compete w/ resources commercially available, including: Commo equipment, transportation, A/V support, ambulances, PA systems, food handling equipment, bleachers, tents, earth-moving or other construction equipment.

g. May not interfere with the customary or regular employment of civilians in their art, trade, or profession.

3. Relations with Organizations and Associations. AR 360-61, Chapter 5.

a. Follow Ethics rules.

b. Command memberships authorized; appoint a liaison.

4. Band support - Strictly limited so as not to compete w/ civilian musicians.

5. Loan of material and facilities: Non-competition per para 11-4.

## IV. PERSONAL PARTICIPATION (JER, CHAPTER 3, SECTION 3).

A. Membership (JER 3-301). Generally okay.

B. Management (JER 3-301). Okay, unless offered because of official Government position.

C. Endorsement (JER chapter 2, 5 C.F.R. § 2635.702(e)). Generally okay, with caution--personal capacity. (JER 3-300a(1): Colonel Smith, U.S. Army.)

D. Support (JER 3-300c) - community support activities that promote civic awareness (e.g., disaster relief events).

E. Fundraising (JER 3-300a). Okay ***if*** commander authorizes outside Government workplace (e.g., public entrances, in community support facilities, and in personal quarters) and purely in personal capacity (e.g., off duty, not in uniform).

F. Representational Activities. 18 U.S.C. 205 prohibits DOD employees from acting as agent for a PO before the Government.

1. The only permissible contacts on behalf of a PO are those that are "ministerial" in nature: conveying purely factual information; delivering or receiving materials or documents; answering (without advocating for a particular position) requests for information; or signing a document that attests to the existence or non-existence of a given fact (PO rep's attestation that a given signature is valid).

2. * May, however, represent certain non-profit organizations before the Government, (request support for scouts).

# V. FAMILY SUPPORT GROUPS.

A. References.

1. Dep't of Defense, 5500.7-R, Joint Ethics Regulation (Aug. 1993).

2. Dep't of Defense, Instr. 1000.15, Private Organizations on DoD Installations (23 October 1997).

3. Dep't of Defense, Instr. 1342.23, Family Readiness in the National Guard and Reserve Components (September 29, 1994).

4. Dep't of the Army Pamphlet 608-47, A Guide to Establishing Family Support Groups (16 August 1993).

5. Dep't of the Army, Reg. 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (25 Oct 1998) (para 4-11k, volunteers; para 7-40, gratuitous services).

6. Dep't of the Army, Reg 210-1, Private Organizations on Department of the Army Installations and Official Participation in Private Organizations (14 September 1990) (Now Rescinded--may be used as guidance. New Reg due out soon).

7. Dep't of the Army, Reg 608-1, Army Community Service Center (1 October 1999).

8. Dep't of Army 600-20, Army Command Policy (15 July 1999), para 5-10.

9. HQDA Letter 608-98-1, Volunteer Services Pilot Program Expansion Army Wide (10 April 1998; expires April 2000).

10. Ass't Chief of Staff for Installation Management (ACSIM) Note, February 1999.

B. FSGs are a command sponsored official organization composed of military members and volunteers (family members, soldiers, DA civilians) of a unit that provides mutual support, assistance, and communications between family members, commanders, and community resources.

1. They foster an atmosphere of mutual concern among family members and support unit readiness. They are a formalization of activities spouses have been involved in since the beginning of military service.

2. FSGs are an official recognition of -- and support to -- volunteer groups that assist family members and soldiers. They improve quality of life and support the Total Army Family Program. They help family members feel that they are an integral part of the Army family.

C. Official Activities and support.

1. Publication of a newsletter. Newsletters are official and may be printed with APFs provided the newsletter contains official information and is approved by the commander. Commanders should apply the following guidelines when determining if information is official.

a. Information related to unit mission and readiness, including family readiness is official.

b. Information which is educational in nature, designed to promote informed self-reliant service members and families is official.

c. Information regarding service members and families which promotes unit cohesion and helps strengthen the ongoing esprit among families within the command is official.

d. Unofficial information includes births, welcome and farewell messages, and recipes.

e. If the newsletter also contains unofficial information, NAF funds may be used for production and mailing--APF may not be used

f. Official mail. FSGs may use official mail if the document is official, mission related, and approved by the commander.

2. Government facilities, dedicated office space, supplies, desks, computers, copiers, telephones, and other equipment.

3. Use of Military Vehicles. Government vehicles may be used to support FSG activities when the following exists -

   a. The appropriate commander determines that the use of the vehicle is for official purposes, and that failure to provide such support would have an adverse effect on soldier morale.

   b. The driver has a valid and current license to operate the vehicle.

   c. The use of the vehicle can be provided without detriment to the accomplishment of the unit's needs.

4. Training and travel. Commanders may authorize NAFs or APFs to pay for travel and training of volunteers to improve their effectiveness in assigned roles or to enable them to accept increasing challenges.

5. Reimbursement of incidental expenses. Commanders may authorize NAFs or APFs to reimburse FSG leaders and designated volunteers for out-of-pocket costs, such as child care, telephone costs, mileage, and similar expenses.

6. NAF funds are authorized for awards, banquets, mementos for volunteer recognition programs. APF funds are only available for official certificates of recognition.

D. FSGs may be "dual-hatted," to include a FSG auxiliary organization, which may generate its own funds to support FSG activities. Army policy, however, is not to encourage FSG fundraising! See ACSIM Note, February 1999, indicating that Family Support Groups should only organize "auxiliary" organizations as informal funds and not as private organizations. The original purpose of Informal Funds was to serve essentially as a bank account, not a fundraising organization.

E. FSG-Generated Funds.

1. There is no dollar limits to informal funds unless established by the local command.

2. Disposition of FSG generated funds are solely at the discretion of the leadership of the auxiliary PO.

3. When an FSG is fundraising, treat it like a non-federal entity (see attached Information Paper on FSG Fundraising. See also the attached Ethics Advisory from Army Materiel Command).

F. Solicitations of outside sources by FSG members.

1. Military personnel, or their spouses, may not solicit an outside source for a gift because of the service member's official position.

2. May not solicit a prohibited source.

3. May not solicit when to do so is contrary to the installation's Commercial Sponsorship program (AR 215-1, para 7-47).

## VI. CONCLUSION.

DEPARTMENT OF THE ARMY
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT
600 ARMY PENTAGON
WASHINGTON DC 20310-0600

**REPLY TO**
**ATTENTION OF**

CFSC-SP 20 April 1998

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Policy Governing Private Organizations on Army Installations

1. References:

a. Message, 201600Z Apr 98, DAIM-ZA, subject as above (Encl 1).

b. DOD 5500.7-R, Joint Ethics Regulation (JER).

c. DODI 1000.15, Private Organizations on DOD Installations (Encl 2).

d. AR 210-1, Private Organizations on Department of the Army Installations and Official Participation in Private Organizations (Rescinded).

e. Memorandum, Director of Management, 6 January 1995, subject: Private Organizations (Encl 3).

2. Ref 1a announced the revision of DOD policy governing private organizations and the decision to rescind the corresponding Army regulation (ref 1d). The decision to rescind is based on the following objectives:

a. Timely implementation of DOD guidance.

b. Consistent application of the rules.

c. Compliance with DOD policy and public law.

d. Regulatory reduction.

e. Cost savings (developmental staffing, printing, distribution).

3. Inherent in this decision is the delegation of procedural responsibilities. In accordance with references 1b and 1c, commanders will develop a prescribed plan to administer and execute a local process for approving or disapproving requests from private organizations.

4. Until issued separately by the Army, guidelines (Encl 4) will be used for operating informal funds such as office picnic, coffee and flower funds.

5. A recent Inspector General report about relations with private organizations disclosed the continuation of systemic irregularities and improprieties. Recognizing that current practices and relations with private organizations may not comply with either statutory or regulatory requirements, prudent action to review local conditions is needed.

6. At Enclosure 2 is a copy of the revised DOD policy (ref 1c) for distribution to Garrison Commanders and Staff Judge Advocates within your purview. It Is available on-line at http://web7.whs.osd.mil/tet/i10015p.txt. Also, enclosed for dissemination is ref 1e, with its Reference Guide (Encl 3).

7. Point of contact is Margaret McMullen, commercial 703-681-7434 or DSN 761-7434.

*Original Signed*

Encls

DAVID A. WHALEY
Major General, GS
Assistant Chief of Staff
for Installation Management

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TG: 201600Z APR 98 PAGE 01 of 01

Drafter's Name : MARGARET MCMULLEN, PROGRAM ANAL
Office/Phone : CFSC, 681-7434

Releaser's Info : DAVID A. WHALEY, ACSIM, DAIM-,-3233

Action Prec : PRIORITY
Info Prec : PRIORITY
Specat :

From: DA WASHINGTON DC//DAIM-ZA//
To: AIG 7406
AIG 7446
Info: ARSTAF

TEXT FOLLOWS

UNCLAS
PASS TO GARRISON COMMANDERS AND SJA
SUBJECT: POLICY GOVERNING PRIVATE ORGANIZATIONS ON ARMY INSTALLATIONS
A. DOD 5500.7-R, JOINT ETHICS REGULATIONS, AUG 93.
B. DODI 1000.15, PRIVATE ORGANIZATIONS ON DOD INSTALLATIONS, 23 OCT 97. (HTTP://WEB7.WHS.OSD.MIL/TEXT/I100015P.TXT)
C. AR 210-1, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS, 14 SEP 90.
1. REF B, WHICH REVISES POLICY CONTAINED IN REF C, HAS RECENTLY BEEN PUBLISHED. REF C HAS NOT BEEN MODIFIED TO REFLECT THE REVISED GUIDANCE IN REF B.
2. THIS DOES NOT CHANGE THE REQUIREMENT FOR LOCAL APPROVAL BEFORE A PRIVATE ORGANIZATION MAY OPERATE ON AN INSTALLATION. YOU WILL DEVELOP LOCAL PROCEDURES IAW REF A AND B, PENDING DISPOSITION OF REF C.
3. THE JOINT ETHICS REGULATION ISSUED IN 1993 (WITH REVISIONS ONGOING) SUPERSEDES DOD AND COMPONENT REGULATIONS. CONSEQUENTLY, ALL LOGISTICAL SUPPORT TO FUNDRAISING AND OTHER OPPORTUNITIES PROVIDED TO PRIVATE ORGANIZATIONS MUST BE REVIEWED FOR ADHERENCE TO AND CONSISTENCY WITH REF A.
4. RECOGNIZING THAT CURRENT PRACTICES MAY NOT COINCIDE WITH STANDARDS DELINEATED IN REFS A AND B, IT IS IMPORTANT THAT LEADERSHIP REVIEW CONDITIONS AND EMPOWER PERSONNEL TO INSTITUTE CHANGES WHEN WARRANTED IN CONCERT WITH THE ADVICE OF LOCAL ATTORNEYS.
5. POC: MARGARET MCMULLEN DSN 761-7434 OR COMMERICAL 703-681-7434.

**~~Informal Funds~~**

~~Certain unofficial funds may operate on DA installations, provided they do not exceed a net worth of $1,000. (Examples: office coffee, cup and flower, and annual picnic funds.) These informal funds are subject to the following --~~

~~a. Only one individual is to be responsible for fund custody, accounting, and documentation. The fund custodian will administer fund business during off-duty time. This individual will report annually to his or her military rater or civilian supervisor, as appropriate, concerning the fund's existence and purpose, financial status, or upon occurrence or suspicion of irregularities associated with the fund.~~

~~b. Use is limited to expenses consistent with the purpose and function of the fund and is not to be expended in any way that is, or appears to be, improper or contrary to Army interests.~~

~~c. Compliance with DOD 5500.7-R, Joint Ethics Regulation, is observed when participating in an informal fund and when expending informal funds.~~

NOTE: Information on Informal Funds is now found in AR 600-20, para 4-21 (July 1999)

Encl 4

# CHAPTER D

# FREEDOM OF INFORMATION ACT


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## Outline of Instruction

# I. REFERENCES.

A. Primary Sources:

1. Freedom of Information Act, 5 U.S.C. § 552, as amended.

2. Department of Defense Directive No. 5400.7, DOD Freedom of Information Act Program (29 September 1997).

3. Department of Defense Regulation No. 5400.7-R, DOD Freedom of Information Act Program (4 September 1998) (includes 1996 amendments to the Freedom of Information Act).

4. Army Regulation No. 25-55, The Department of the Army Freedom of Information Act Program (14 April 1997) (does not include 1996 amendments to the Freedom of Information Act).

5. Air Force Supplement to DOD 5400.7-R (22 July 1999), *superseding* AF Instruction 37-131 (16 February 1995) [hereafter DOD5400.7-R/AFSUP1].

6. Secretary of the Navy Instruction 5720.42F, Department of the Navy Freedom of Information Act Program (6 January 1999); JAGINST 5720.3 (10 May 1991) (Assigns responsibility within OJAG).

7. Marine Corps Order 5720.63, Publication in the Federal Register, Indexing, and Public Inspection of Marine Corps Directives (22 August 1983) (W/CH1 2 August 1991); Marine Corps Order P5720.56A, Availability to Public of Marine Corps Records (26 February 1985).

B. Secondary Sources:

1. Freedom of Information Act Guide & Privacy Act Overview (May 2000), a biennial Department of Justice publication (available on the World Wide Web at http://www.usdoj.gov/foia -- requires an Acrobat reader) [hereinafter DOJ FOIA Guide].

2. American Civil Liberties Union Foundation, Litigation Under the Federal Freedom of Information Act and Privacy Act (20th ed. 1997), Washington, D.C. 20002.

3. Freedom of Information Case List (September 1998), a biennial Department of Justice publication.

4. FOIA UPDATE, a newsletter issued quarterly by the Justice Department's Office of Information and Privacy (OIP), Suite 570 FLAG, Washington, D.C. 20530.

5. Web Site Resources:

   a. Army FOIA/Privacy Website - <http://www.rmd.belvoir.army.mil/FOIAMain.htm>

   b. Navy FOIA Website – <http://foia.navy.mil/resources.html> (links to FOIA sites of major Navy commands).

   c. Marine Corps FOIA Website – <http://www.hqmc.usmc.mil/foia.usf>

   d. Air Force FOIA Websites –

      (1) <http://www.foia.af.mil/>

      (2) < https://wwwmil.acc.af.mil/ja/foia.htm > – This site provides guidance based on the specific type of record requested. Good starting place, but not the definitive answer in all cases.

## II. INTRODUCTION.

A. History.

B. Key Concepts.

1. Disclosure is the rule, not the exception.

2. The status and purpose of a requester are irrelevant.

3. The government has the burden to justify withholding of information.

4. The requester may seek administrative and judicial relief if access to government information is improperly denied.

## III. RELEASE OF AGENCY RECORDS.

A. Publication. § 552(a)(1) (Requires disclosure of agency procedures, substantive rules, functions, organization and general policy through Federal Register publication).

1. How to obtain information from the agency: DOD Reg. 5400.7-R, AR 25-55, DOD 5400.7-R/AFSUP1, SECNAVINST 5720.42F, and MCO 5720.63.

2. Rules of procedure and how to make submissions to the agency: Federal Acquisition Regulation (FAR), DOD FAR Supp., and Army FAR Supp. (AFARS).

3. Substantive rules of general applicability. NI Industries v. United States, 841 F.2d 1104 (Fed. Cir. 1988); Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982); United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978); Pruner v. Department of the Army, 755 F. Supp. 362 (D. Kan. 1991

B. "Reading Room" Materials. § 552(a)(2) (Requires agency to make "available for public inspection and copying" records of final opinions, agency orders, and frequently requested material.).

1. Final opinions rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals. Vietnam Veterans of America v. Department of the Navy, 876 F.2d 164 (D.C. 1989).

2. Copies of disclosed records, frequently requested under FOIA. Stanley v. Department of Defense, et al., No. 98-CV-4116 (S.D. Ill. June 22, 1999) (military hospital operational manuals are "internal housekeeping rules" as opposed to the kind of material of interest to the general public.)

3. Reading Room records created after 1 November 1996 must be available on an agency's web site.

4. The agency does not need to make available materials "related solely to the [agency's] internal personnel rules and practices." Hamlet v. United States, 63 F.3d 1097 Fed. Cir. 1995), see, DOJ FOIA Guide.

5. Index for Public Inspection.

C. Release Upon Request. § 552(a)(3).

1. Applies to "agency records."

Congress is not an agency for purpose of FOIA. Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990).

a. What is an "agency?" § 552(f). An Agency is a Department of the Executive Branch. Does not include: Congress, Judiciary, Office of the President (including Advisors). Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990) (Congress is not an agency for FOIA); Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 1842 (1997). Dong v. Smithsonian Inst., 125 F.3d 877 (D.C. Cir. 1997) cert. denied, Dong v. Smithsonian Inst., 524 U.S. 922 (1998). (holding that Smithsonian lacks both the "authority" necessary for it to qualify as an "authority of the government of the United States" under § 551(1) and the executive department status necessary under § 552(f)).

b. What is a "record?" - "Readily Retrievable and Reproducible." Examples include: Paper records, photographs, maps and e-mail messages." DOD Reg. 5400.7-R, para. C1.4.3.1; AR 25-55, para. 1-402(a) ("machine readable materials … regardless of physical form"); DOD5400.7-R/AFSUP1, para. SECNAVINST 5720.42F, para. 4b(1); MCO P5720.56A, para. 2001.

c. What is not a "record?" Physical Objects (e.g. structures), Personal Records. DOD Reg. 5400.7-R, para. C1.4.3.2; AR 25-55, para. 1-402(b); DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 4b(2); MCO P5720.56A, para. 2001.

d. An agency must possess and control the record. DOD Reg. 5400.7-R, para. C1.4.3.3; AR 25-55, para. 1-402(c). AFR 12-30, para. 2j; SECNAVINST 5720.42F, para. 5f; MCO P5720.56A, para. 2003. Department of Justice v. Tax Analysts, 492 U.S. 136 (1989).

(1) Other agency records. McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983).

(2) Records generated from sources outside the Government. Records must be either government-owned or subject to substantial government control or use. Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996); Hercules, Inc. v. Marsh, 838 F.2d 1027 (4th Cir. 1988).

(3) Personal records. Documents created or maintained without official requirement for the convenience of the creator as a memory refresher and not shared with others for agency use. DOD Reg. 5400.7-R, para. C1.4.3.2.3; Gran Cent. Partnerships, Inc. v. Cuomo, 166 F.3d 473 (2d Cir. 1999) (holding affidavit by supervisor stating subordinates' handwritten notes were "personal records" was insufficient to prove them to be not "agency records") Bureau of Nat'l Affairs v. United States Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984).

(4) Research Data. Amendment to the Fiscal Year 1999 Omnibus Appropriations Bill required modification of OMB Circular A-110 to allow private parties access to non-profit grantee-held research data through FOIA request (modifying Supreme Court decision in Forsham v. Harris, 445 U.S. 169 (1980)).

2. FOIA does not require agencies to create or retain records. DOD Reg. 5400.7-R, para. C1.4.3.2.3; AR 25-55, para. 1-506; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 5f; MCO P5720.56A, para. 2003.

a. A request for uncompiled data (selective information) is not a request for records. Borom v. Crawford, 651 F.2d 500 (7th Cir. 1981) (affirming summary judgment order denying request for parole data compiled by race when no such compilation existed); Krohn v. DOJ, 628 F.2d 195 (D.C. Cir. 1980).

b. The 1996 amendments to the Freedom of Information Act (the Electronic Freedom of Information Act Amendments, or "EFOIA") require "reasonable efforts" in conducting electronic searches, and give the requester choice of format, where readily reproducible. Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998).

c. DOD components may create a new record when more useful to requester or less burdensome to agency. DOD Reg. 5400.7-R, para. C1.5.7; AR 25-55, para. 1-506; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 5f.

d. Note: while FOIA does not require agencies to create or retain records, the Federal Records Act (now known as the National Archives Act), 44 U.S.C. § 2101 et seq., does require record retention pursuant to National Archives and Records Administration schedules. When this outline was printed, the National Archivist was involved in litigation over his orders concerning the retention/destruction of electronic mail/messages.

D. Other Factors Affecting Release.

1. Rule of Segregability. § 552(b); DOD Reg. 5400.7-R, para. C5.2.4.

a. Must segregate and release portions of agency records not subject to a withholding exemption. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999)(remanded for determination if 10 digit shipping code number could be segregated); Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067 (D.C. Cir. 1993).

b. Nonexempt material is not "reasonably segregable" when efforts to segregate amount to an inordinate burden on the agency. Lead Industries Association v. OSHA, 610 F.2d 70 (2d Cir. 1979).

2. Status and purpose of requester.

a. As a general rule, status and purpose of the requester are not considered by the agency except in deciding procedural matters such as fee issues. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

b. A foreign government is a person under the Act. DOD Reg. 5400.7-R, para. C5.1.3; Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974).

3. Discretionary Release of exempt records -- the "foreseeable harm" standard, or "Reno Rules."

a. DOJ policy: the Attorney General (AG) has stated that the FOIA's "primary object" is to achieve "maximum responsible disclosure of government information." The AG stated "it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." The AG "strongly [encourages] FOIA officers to make 'discretionary disclosures' whenever possible under the Act." The AG does, however, recognize a presumption of "foreseeable harm" attaches to exemptions 1,3,4,6, and 7(C ). When an agency concludes that requested information falls within a "foreseeable harm" exemption, it is not appropriate for discretionary FOIA disclosure. This is because the "foreseeable harm" exemptions correspond to other distinct prohibitions on information disclosure that operate independently of the FOIA. Sources: Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (October 4, 1993); Freedom of Information Act Guide & Privacy Act Overview (May 2000), "Discretionary Disclosure and Waiver"; Attorney General's Memorandum (September 3, 1999) (reiterating Clinton Administration's "openness-in-government" policy).

b. DOD policy: DOD Reg. 5400.7-R para. C1.5.5. DOD policy conforms to DOJ policy and favors release of exempt material unless there is "foreseeable harm to the government." The presumption of "foreseeable harm" includes exemptions 1,3,4,6, 7(C), and 7(F).

c. When a DOD agency determines that requested information clearly falls within exemptions 1,3,4,6,7(C ), and 7(F), it cannot make a discretionary disclosure.

d. Exemptions 4, 6 and 7(C) cannot be asserted when the requester is the submitter of the information. DOD Reg. 5400.7-R para. C1.5.5

E. Reasons For Not Releasing a Record. DOD Reg. 5400.7-R, para. C5.2.2.

1. No responsive records after a “reasonable” search.

2. Record transferred.

3. Agency neither controls nor otherwise possesses record.

4. Insufficient description of record.

5. Failure to comply with agency's procedural requirements.

6. Request is withdrawn.

7. Fee dispute.

8. Duplicate Request.

9. The information is not, definitionally, a "record." Oglesby v. U.S. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

10. The request is denied in whole or part IAW with FOIA.

## IV. NINE EXEMPTIONS PERMIT WITHHOLDING.

### A. Exemption 1: Classified Records.

1. Executive Order (EO) 12,958 (April 17, 1995), 3 C.F.R. § 335 (1996); 50 U.S.C. § 435 (1996); implemented by DOD 5200.1-R, AR 380-5, AFR 205-1, and OPNAVINST 5510.1. Current order superseded EO 12,356 (1982).

   a. Security classifications: Confidential, Secret, Top Secret.

   b. For official use only (FOUO). See DOD Reg. 5400.7-R, C4.1.2; and C4.2.1; AR 25-55, ch. IV; SECNAVINST 5720.42F, para. 10; MCO P5720.63W/CH1, para. 4c. While not an Exemption 1

2. Proper classification.

a. Court conducts "de novo" review of both procedural and substantive propriety of classification. Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980).

b. Court may conduct "in camera" inspection in its sound discretion, although the court should give substantial weight to agency affidavits. Young v. CIA, 972 F.2d 536 (4th Cir. 1993).

c. Courts will give great deference to agency's expertise and judgment on classification. Weatherhead v. United States, 157 F.3d 735 (9th Cir. 1998), cert. granted, 120 S. Ct. 34 (1999), cert. dismissed and vacated, 120 S.Ct. 577 (1999)(Court dismisses for mootness, but vacates 9th Circuit's holding that classification decisions are not given deference unless agency first makes acceptable showing of harm.); Goldberg v. Department of State, 818 F.2d 71 (D.C. Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982).

3. Segregability applies even in Exemption 1 cases. Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

4. Operational Security.

a. Post-request classification is authorized. E.O. 12,958, section 1.8(d), DOD Reg. 5400.7-R, para. C3.2.1.1, No. 1, AR 25-55, para. 5-100c; DOD5400.7-R/AFSUP1, C3.2.1.1.2; SECNAVINST 5720.42F, Enclosure (2), para 1.

b. Compilation/Mosaic Theories of classification (circumstances when apparently harmless items of information, assembled together, reveal classified information). American Friends Serv. Comm. v DOD, 831 F.2d 441 (3d Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982); Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980). Is not limited only to Exemption 1 situations.

c. Previous Release of Classified Records Does Not Prevent Subsequent Withholding of Similar Type of Information. Aftergood v. CIA, 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 15, 1999)(CIA properly withheld it's fiscal year 1999 total budget request because it may damage national security and reveal "intelligence sources and methods" even though it released the previous two years' budgets).

5. Glomar denial/Glomarization (agency refusal to confirm or deny the existence/nonexistence of requested information whenever the fact of its existence/nonexistence is itself classifiable). DOD Reg. 5400.7-R, para. C3.2.1.1.1, Number 1(a); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). Is not limited only to Exemption 1 situations.

**B. Exemption 2: Internal Personnel Rules and Practices.**

1. Trivial matters - "low 2." DOD Reg. 5400.7-R, para. C3.2.1.2.2; Department of the Air Force v. Rose, 425 U.S. 352 (1976); Pruner v. Department of the Army, 755 F.Supp. 362 (D. Kan. 1991).

2. Circumvention of agency regulation - "high 2."

a. Proper: Kaganove v. EPA, 856 F.2d 884 (7th Cir. 1988); Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981)(en banc) (withholding from ex-con who seeks ATF surveillance manuals); DOD Reg. 5400.7-R, para. C3.2.1.2, No. 2;AR 25-55, para. 3-200, No. 2; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, Enclosure (2); MCO P5720.56A, para. 6002, subpara. 2. See also Exemption 7(E), 5 U.S.C. § 552(b)(7)(E).

b. Improper: Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998)(holding that medical malpractice settlement statistics in electronic database were not "internal personnel rules or practices," even though disclosure "would compromise the government's bargaining position.").

## C. Exemption 3: Other Federal Withholding Statutes.

1. FOIA Exemption 3 permits withholding of information prohibited from disclosure by another statute. One of two disjunctive requirements must be met to withhold under this exemption: the withholding statute must either "(A) [require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld." A statute thus falls within the exemption's coverage if it satisfies any one of its disjunctive requirements.

2. Examples of commonly used federal withholding statutes:

   a. 42 U.S.C. § 290dd-3, Confidentiality of patient records in an alcohol and drug treatment program.

   b. 10 U.S.C. § 1102, DOD Medical Quality Assurance Records.

   c. 10 U.S.C. § 2305 and 41 U.S.C. § 253b, prohibiting release of certain contractual proposals.

   d. 10 U.S.C. §130(b), allows withholding of information on personnel of overseas, sensitive, or routinely deployable units.

3. Statutes commonly mistaken for Exemption 3 withholding statutes:

   a. 18 U.S.C. § 1905. The Trade Secrets Act (not an Ex. 3 statute).

   b. 5 U.S.C. § 552a. The Privacy Act (not an Ex. 3 statute).

## D. Exemption 4: Trade Secrets, and Commercial and Financial Records.

FOIA permits withholding records that are “trade secrets and commercial or financial information obtained from a person that are privileged or confidential;”

1. From a person. Generally, all but the Federal Government are "persons" subject to Ex. 4 protection. Nadler v. FDIC, 92 F.3d 93 (2d Cir. 1996); Stone v. Export-Import Bank of United States, 552 F.2d 132 (5th Cir. 1977).

2. Trade Secrets. A narrow definition for purposes of FOIA. Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983).

"[A] secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."

**OR**

3. Commercial or financial information. Nonprofit entities can submit commercial information. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992); American Airlines, Inc. v. National Mediation Bd., 588 F. 2d 863 (2d Cir. 1978).

   a. Privileged information. Rarely used as a basis for withholding. Sharyland Water Supply Corp. v. Black, 755 F.2d 397 (5th Cir.); Indian Law Resource Center v. Department of the Interior, 477 F. Supp. 144 (D.D.C. 1979).

   b. Confidential information. Key definition used as a basis of withholding. Case law has differentiated between "Required" and "Voluntary" submissions of information. Discussed below. DOD 5400.7-R, para. C3.2.1.4, No. 4; AR 25-55, para. 3-200, No. 4; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, Enclosure (2), para. 4; MCO P5720.56A, para. 6002, subpara. 4.

      (1) *REQUIRED* Information. National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

         (a) The National Parks test.

(i) Would disclosure likely "impair ability of agency to obtain necessary information in the future"? See Orion Research Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980).

**OR**

(ii) Would disclosure likely cause "substantial harm to the competitive position of the person from whom the information was obtained"? See Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) (holding no competition for Radford Army Ammunition Plant contract); Gulf & Western Industries Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979).

(b) How does agency determine confidentiality? See EO 12,600 (June 23, 1987) and DOD Reg. 5400.7-R, para. C3.2.1.4.8; AR 25-55, para. 5-207; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 9N(1); MCO P5720.56A, para. 4006, subpara. 8.

(c) Must develop and implement procedures to create a complete “administrative record” that will support the agency’s decision to release the requested information under FOIA. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988) ("Reverse FOIA" case). See Federal Electric Corp. v. Carlucci, 866 F.2d 1530 (D.C. Cir. 1989) (An example of failing to create an Agency Record).

(d) Case law analyses of the "substantial harm to the competitive position of the person from whom the information was obtained."

(i) Cases finding competitive harm: McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999)(holding that release of unit price in rocket contract substantiates substantial competitive harm allowing customers to "ratchet down" prices); Gilmore v. United States Dep't of Energy, No. 95-0285 (N.D. Cal. Mar. 13, 1998); RMS Indus. v. DOD, No. C-92-1545 (N.D. Cal. Nov. 24, 1992): Gulf & Western Indus. v. United States, 615 F.2d 527 (D.C. Cir. 1979); National Parks, supra).

(ii) Cases finding *no* competitive harm: GC Micro Corp. v. DLA, 33 F.3d 1109 (9th Cir. 1994); Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345 (9th Cir. 1990) (reverse FOIA); Hercules, Inc., supra.

(e) FAR, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), now requires disclosure of unit prices, upon request, in government contracts solicited after 1 January 1998. Unit prices (as well as other items in an unsuccessful proposal) of unsuccessful offerors are not releasable. 10 U.S.C. § 2305(g)(2) or 41 U.S.C. § 253b(m)(2).

4. *VOLUNTARILY* Submitted Information. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992).

a. The Critical Mass test.

(1) Was the information provided voluntarily?

Contract bids and proposals are considered "required submissions" and therefore releasability is analyzed under the National Parks analysis. McDonnell Douglas Corp. v. NASA, 981 F.Supp 12 (D.D.C. 1997) (Information provided in response to a Request for Proposals is a required submission); see also DFOISR Memorandum, SUBJECT: FIOA Policy on DOD application of Critical Mass (etc.), 93-CORR-014, 27 July 1993; DFOISR

Memorandum, SUBJECT: Internal Guidance on DOD Application of Critical Mass (etc.), 93-CORR-094, 23 March 1993.

**AND**

(2) Is it the kind of information that the provider would not customarily make available to the public? Animal Legal Defense Fund v. Dep't of the Air Force, 44 F.Supp. 2d 295 (D.D.C. 1999)(holding that the Vaughn declaration regarding the withholding of records about Chimpanzee disposal failed to meet voluntariness test because it did not explain: 1)"commercial" nature of record, 2) that the information was provided voluntarily or 3) that the submitter customarily withholds such information from the public).

5. Determining whether business information is exempt--notice of proposed release to the submitter of information--"Reverse FOIA" (Should you disclose purportedly exempt (b)(4) information?). EO 12,600 (July 23, 1987); DOD Reg. 5400.7-R, para. C3.2.1.4.8 and C5.2.8.; AR 25-55, para. 5-207.

a. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Discretionary release permissible if otherwise "authorized by law."

(1) Reverse FOIA. Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985).

(2) Standard of review of agency action under Administrative Procedure Act (APA)--review on the administrative record using the arbitrary and capricious standard. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988); General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984).

b. Trade Secrets Act. 18 U.S.C. § 1905; CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).

(1) Trade Secrets Act applies broadly to virtually all business information and prohibits agency disclosure except as "authorized by law."

(2) FOIA provides such "authority" to disclose business information only if it is nonexempt. CNA Fin. Corp., supra.

(3) Submitter notice (i.e., notice of proposed release to the submitter of information) for disclosure of contractor's unit price not required because disclosures pursuant to a properly promulgated and statutorily based agency regulation, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), are "authorized by law." Chrysler Corp. v. Brown, 441 U.S. 281, 295-316 (1979).

c. DOD solution. DOD Reg. 5400.7-R, paras. C3.2.1.4 and C5.2.8.1 – C5.2.8.3. (Compare AR 25-55, para. 3-101 (No release absent "compelling public interest")). Remember, DOD presumption of "foreseeable harm" concerns exemptions 1,3,4,6,7(C ), and 7(F). The DOJ presumption of "foreseeable harm" concerns exemptions 1,3,4 6, and 7(C).

## E. Exemption 5: Privileged Memoranda & Internal Agency Communications.

The FOIA permits withholding records that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency;"

1. Purpose.

2. Scope.

a. Deliberative Process Privilege.

(1) Purpose--to encourage open, frank discussions between subordinates and superiors; protect against premature disclosure of proposed policies before they are adopted; and protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for the agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982); Judicial Watch, Inc. v. United States Dep't of Justice, No. 97-2869 (D.D.C. Feb 22, 2000)(deliberative process privilege protects handwritten notes by the Attorney General which reflect distillations of issues that she memorialized for later reference as part of her decision making process.).

(2) "Factual-deliberative" distinction.

(a) Deliberative process privilege does not generally protect purely factual matters. EPA v. Mink, 410 U.S. 73 (1973).

(b) Can withhold facts if they are "inextricably intertwined" with deliberative material. Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980); Jowett, Inc. v. Dep't of Navy, 729 F. Supp. 871 (D.D.C. 1989).

(c) May withhold facts if release would disclose "deliberative process." Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977) (holding that "Exemption five is intended to protect the deliberative process of government and not just deliberative material. . . . In some circumstances . . . the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5).")

(3) "Predecisional v. Postdecisional" distinction.

(a) May withhold predecisional documents. NLRB v. Sears, 421 U.S. 132 (1975); To determine whether a document is "predecisional," ask, "Was it prepared to assist an agency decision maker in arriving at a decision rather than support a decision already made?" Lurie v. Dep't of the Army, 970 F.Supp. 19, 28 (D.D.C. 1997).

(b) Cannot withhold predecisional materials when final decision-maker "expressly adopts or incorporates them by reference." NLRB v. Sears; Swisher v. Department of the Air Force, 660 F.2d 369 (8th Cir. 1981).

(4) Memoranda prepared by outside consultants fall within the privilege. Formaldehyde Inst. v. HHS, 889 F.2d 1118 (D.C. Cir. 1989).

b. Attorney Work-Product Privilege.

(1) Materials "prepared in anticipation of litigation or for trial by or for [a] party or by or for that...party's representative (including the...party's attorney, consultant, ...or agent)." Fed.R.Civ.P. 26(b)(3); FTC v. Grolier, 462 U.S. 19 (1983); Safecard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991).

(2) Courts have recognized that the privilege extends to prepared in anticipation of litigation even when no specific claim is pending. Schiller v. NLRB, 964 F.2d 1205 (D.C Cir. 1992) (holding that documents that provide tips on handling future litigation are covered by the work product privilege).

c. Attorney-Client Privilege. The confidential communications from clients to the counsel made for the purpose of securing legal advice or services; and the communications from attorneys to their clients if the communications rest "on confidential information obtained from the client." In re Sealed Cases, 737 F.2d 94, 98-99 (D.C. Cir. 1984). Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).

d. Trade Secrets Or Commercial Information Privilege. Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979); Morrison-Knudsen Co. v. Department of the Army, 595 F. Supp. 352 (D.D.C. 1984), aff'd 762 F.2d 138 (D.C. Cir. 1985) (table cite).

e. Protection Of Certain Confidential Witness Statements. United States v. Weber Aircraft Corp., 465 U.S. 792 (1984); Ahearn v. Department of the Army, 583 F. Supp. 1123 (D. Mass. 1984).

## F. Exemption 6: Protection of Personal Privacy.

FOIA permits withholding records that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

1. Threshold determination- "personnel and medical files and similar files..." Department of State v. Washington Post Co., 456 U.S. 595 (1986); Department of the Air Force v. Rose, 425 U.S. 352 (1976); New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990).

2. The balancing test. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). See also, Bibles v. Oregon Natural Desert Association, 117 S.Ct. 795 (1997).

   a. Invasion of privacy -- define privacy interest involved.

      (1) Deceased persons have no privacy rights. Na Iwi O Na Kupuna v. Dalton, 894 F.Supp 1397 (D. Hi. 1995) (Reverse FOIA suit).

      (2) Next-of-kin may have, in rare situations, a colorable privacy interest. New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (en banc). But see, Outlaw v. Department of the Army, 815 F.Supp. 505 (D.D.C. 1993).

b. Public interest in disclosure -- the Reporters Committee decision has limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: To "[shed] light on an agency's performance of its statutory duties." Information that does not directly reveal the operations or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve."

3. Application of the balancing test.

a. Articulate the privacy interest involved.

b. Articulate the public interest involved.

c. Strike the balance.

4. Examples. FLRA v. DOD, 114 S.Ct. 1006 (1994) (a leading case delineating the "core interests" of FOIA; thorough balancing of interests analysis); Sheet Metal Workers Int'l Ass'n. v. United States Air Force, 63 F.3d 994 (10th Cir. 1995) (Sheet Metal Workers union engaged in "Davis-Bacon" monitoring--release of payroll records with names and addresses of workers employed on government contracts constitutes a clearly unwarranted invasion of personal privacy); McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) (names of persons exonerated by investigation protected from disclosure); Providence Journal Co. v. Department of the Army, 981 F.2d 552 (1st Cir. 1992) (the higher the rank, the greater the public interest might be in release of agency record concerning disciplinary action); Chin v. Department of the Air Force, No. 97-2176 (W.D. LA June 24, 1999) (deciding two issues: 1) that privacy outweighed the public interest in withholding of identities in general request ro fraternization investigations and 2) that entire investigation can be withheld in request for specific investigation); Mueller v. Department of the Air Force, 63 F. Supp. 2d 738 (E.D. Va. 1999) (denial of request for dismissed non-judicial punishment proceeding documents because public interest was minimal and would shed little light on Air Force's overall conduct).

5. Privacy Glomarization. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Beck v. Department of Justice, 997 F.2d 1489 (D.C. Cir. 1993); DOD Reg. 5400.7-R, para. C3.2.1.6.5.1-2.

## G. Exemption 7: Law Enforcement Records.

1. Records or information compiled for law enforcement purposes.

   a. Only applies to investigations conducted for a law enforcement purpose. Compare Irons v. Bell, 596 F.2d 468 (1st Cir. 1979) with Church of Scientology v. Department of the Army, 611 F.2d 738 (9th Cir. 1980). See AR 25-55, para. 1-407.

   b. Information that was originally compiled for law enforcement purposes, but later summarized in a new document not prepared for law enforcement purposes, is protected under the exemption. Abramson v. FBI, 456 U.S. 615 (1982).

   c. Exemption will protect non-law enforcement records that are "recompiled" for law enforcement purposes. John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).

2. May withhold records under this exemption, but only to the extent disclosure:

   "(A) could reasonably be expected to interfere with enforcement proceedings,

   "(B) would deprive a person of a right to a fair trial or an impartial adjudication,

   "(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

   "(D) could reasonably be expected to disclose the identity of a confidential source. . . in a criminal or national security investigation . . . or information furnished by a confidential source,

"(E) would disclose techniques and procedures or would disclose guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law, or

"(F) could reasonably be expected to endanger the life or physical safety of any person."

3. Glomar Responses are also appropriate to protect privacy under Exemption 7(C). DOD Reg. 5400.7-R, para. C3.2.1.7.1.3.1-3.

4. Exemption 7(C) may protect privacy of the close survivors of the deceased. Accuracy in Media v. National Parks Serv., 194 F.3d 120 (D.C.Cir. 1999)(hodling that autopsy photos could be withheld because of the privacy interests of the spouse, parents, and children of the deceased").

**H. Exemptions 8 (Financial Institutions Information).**

**I. Exemption 9 (Geological and Geophysical Information).**

# V. EXCLUSIONS.

A. Exclusion 1.

1. Investigation or proceedings involving possible violation of criminal law, and

2. Subject unaware of pendency of investigation or proceedings, and

3. Disclosure of existence of records could reasonably be expected to interfere with enforcement proceedings.

B. Exclusion 2.

1. Informant records maintained under informant's name or personal identifier, and

2. Maintained by a criminal law enforcement agency,

3. Unless informant's status as an informant has been officially confirmed.

C. Exclusion 3.

1. Records maintained by FBI, and

2. Pertaining to foreign intelligence or counterintelligence, or international terrorism, and

3. Existence of records is classified.

## VI. RELEASE UPON REQUEST.

A. What Is A Proper Request?

1. Must request an "agency record." DOD Reg. 5400.7-R, para., 1-402; AR 25-55, para. 1-402; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 4b; MCO P5720.56A, para. 2001.

2. Must reasonably describe the record. DOD Reg. 5400.7-R. para., 1-507; AR 25-55, para. 1-507; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, paras. 5e and 9a(2); MCO P5720.56A, paras. 7a(2), 7h(3). See Ruotolo v. Department of Justice, 53 F.3d 4 (2d Cir. 1995); AFGE v. Department of Commerce, 907 F.2d 203 (D.C. Cir. 1990); Mason v. Calloway, 554 F.2d 129 (4th Cir.).

3. Must comply with agency rules.

a. Written request required. DOD Reg. 5400.7-R, para. 1-401 ("written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically.") AR 25-55, paras. 1-401 and 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(1); MCO P5720.56A, paras. 2003 and 4000.

b. Must express willingness to pay fees. DOD Reg. 5400.7-R, paras. 1-401 and 1-503; AR 25-55, paras. 1-401 and 1-503 1-509; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(3); MCO P5720.56A, paras. 2003 and 4000.

c. Must direct request to the proper custodian. DOD Reg. 5400.7-R, 1-503; AR 25-55, para. 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7h(1); MCO P5720.56A, para. 4003, subpara. 4.

d. Must expressly or impliedly invoke FOIA or an implementing regulation. DOD Reg. 5400.7-R, paras. 1-401 and 1-503; AR 25-55, paras. 1-401 and 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(1); MCO P5720.56A, paras. 2003 and 4000.

B. Agency Response Requirements.

1. Statutory time limits. 5 U.S.C. §§ 552(a)(6)(A)(i), (ii); 552(a)(6)(B)(i).

a. Initial agency response - 20 working days.

b. Time period for processing a FOIA request may be extended by 10 working days by written notice to the requester explaining why an extension is needed and stating when a determination will be made on the request.

c. Requester dissatisfied with agency response - shall be advised to file an appeal so that it reaches the agency appellate authority no later than 60 calendar days from the date of receipt of the agency response. DOD Reg. 5400.7-R, para. 5-302; AR 25-55, para. 5-302.

d. Agency response to Appeals - 20 working days.

e. If agency shows failure to meet time limits was result of exceptional circumstances and it is applying due diligence in processing request, then court can allow additional time for administrative processing of request. §552(a)(6)(C). Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

f. An agency's failure to comply with the time limits for either the initial request or the administrative appeal may be treated as a "constructive exhaustion" of administrative remedies, and a requester may immediately seek judicial review. § 552(a)(6). See, Spannaus v. United States Dep't of Justice, 824 F. 2d 52 (D.C. Cir. 1987).

2. Agency must make "reasonable efforts" to locate records and court may require agency to demonstrate adequacy of search Valencia-Lucena v. United States Coast Guard, 180 f.3d 321 (D.C. Cir. 1999) (agency failed to conduct reasonable search for missing pages of ship's logbook); Dayton Newspapers, Inc. v. Department of the Air Force, 35 F.Supp. 2d 1033 (S.D. Ohio 1998)(holding that 51 hours of electronic searching and assembly is "small price to pay); Oglesby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Marks v. United States, 578 F.2d 261 (9th Cir. 1978). But see Ruotolo v. Dep't. of Justice, 53 F.3d 4 (2d Cir. 1995).

3. Agency must **segregate and releas**e nonexempt information. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999)(remanded for determination if 10 digit shipping code number could be segregated); Dynalectron Corp. v. Department of the Air Force, No. 83-3399 (D.D.C. Oct. 30, 1984).

4. Service's release and processing procedures. DOD Reg. 5400.7-R, ch. 5; AR 25-55, ch. V; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 8; MCO P5720.56A, ch. 4.

C. Fees and Fee Waivers. DOD Reg. 5400.7-R, ch. 6.

1. Fee charges are based on status and purpose (motive) of requester - three categories of requesters.

a. First - Most favored category: (1) educational or noncommercial scientific institutions (whose purpose is scholarly or scientific research) or (2) representatives of the news media are charged only for duplication costs after the first 100 pages. National Security Archive v. Dep't of Defense, 880 F.2d 1381 (D.C. Cir. 1989); Stanley v. Department of Defense, et al. No. 98-CV-4117 (S.D. Ill. June 22, 1999).

b. Second - Least favored category: requesters of records for commercial use are charged for search, duplication, and review.

c. Third category: All other requesters are charged for search after the first 2 hours and duplication after the first 100 pages.

2. Fee waiver, unlike the substantive FOIA analysis, is based on status and purpose (motive) of requester.

a. Fee waiver standard. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987) (applying and implicitly approving DOD's regulatory implementation of fee waiver provision).

b. "$15.00 Rule." Automatic waiver applies if costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. When assessable costs for a FOIA request total $15.00 or less, fees hall be waived automatically for all requesters, regardless of category. DOD Reg. 5400.7-R, para. 6-103, AR 25-55, para. 6-103.

c. "$250.00 Rule." When the agency estimates or determines that allowable charges are likely to exceed $250.00, notify the requester and obtain satisfactory assurance of full payment, or for advance payment of up to full amount in the case of requester with no history of payment. DOD Reg. 5400.7-R, para. 6-104b(6). AR 25-55, para. 6-104b(6).

## VII. FOIA LITIGATION.

A. Requester Must Exhaust Administrative Remedies. 5 U.S.C. § 552(a)(6)(C)(i); Ogelsby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

B. Circumstances Authorizing Stays Were Narrowed by E-FOIA Amendments. 5 U.S.C. § 552(a)(6)(ii); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

C. Judicial Review. 5 U.S.C. § 552(a)(4)(B); DOD Reg. 5400.7-R, ch. 5, sec. 4.

1. Scope of review - de novo.

2. In camera inspection is "within the broad discretion of the court." Quinon v. FBI, 86 F.3d 1222 (D.C. Cir. 1996).

3. Vaughn index. A court may order an agency to submit a detailed index of the documents it seeks to withhold and the reasons justifying such withholding. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); Compare, Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991) with Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993).

4. Burden of proof. Burden is on the government to establish that a document is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).

D. Attorney Fees and Costs. § 552(a)(4)(E). Weisberg v. DOJ, 848 F.2d 1265 (D.C. Cir. 1988).

1. Attorney fees are within the discretion of the court when a FOIA plaintiff "substantially prevails." State of Texas v. Interstate Commerce Commission, 935 F.2d 728 (5th Cir. 1991); Education/Instruction, Inc. v. HUD, 649 F.2d 4 (1st Cir. 1981).

2. Four factors that courts will generally consider to determine whether an award of fees and costs is appropriate under FOIA after determining the requester's eligibility:

a. Benefit to the public derived from the case,

b. Commercial benefit to the requester,

c. Nature of requester's interest in the records sought, and

d. Whether the agency's withholding of records had a reasonable basis in law.

Church of Scientology v. USPS, 700 F.2d 486 (9th Cir. 1983); LaSalle Extension University v. FTC, 627 F.2d 481 (D.C. Cir. 1980).

3. Test to determine whether a plaintiff "substantially prevailed" involves showing that prosecution of action was needed and that action had causative effect on delivery of information. DOJ v. Weisberg, 848 F.2d 1265 (D.C. Cir. 1988).

4. Commercial Requesters--those requesters seeking information for commercial gain should be allowed attorney fees only where there is clear and positive benefit to the public and where the agency withheld information without a reasonable basis in law. Tax Analyst v. U.S. Department of Justice, 965 F.2d 1092 (D.C. Cir. 1992); *Cf.* Aviation Data Service v. FAA, 687 F.2d 1319 (10th Cir. 1982).

5. No attorney fees for pro se litigants. Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996).

E. Six year statute of limitations for filing FOIA lawsuits. 28 U.S.C. § 2401; Spannus v. DOJ, 824 F.2d 52 (D.C. Cir. 1987).

## VIII. CONCLUSION.

# CHAPTER E

# THE PRIVACY ACT


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## Outline of Instruction

# I. REFERENCES.

A. Primary.

1. The Privacy Act of 1974, 5 U.S.C. § 552a, as amended.

2. Privacy Act Implementation, Office of Management and Budget, 40 Fed. Reg. 28948 (9 July 1975) as amended 40 Fed. Reg. 56741 (4 December 1975).

3. Dep't of Defense Directive No. 5400.11, Department of Defense Privacy Program (13 December 1999).

4. Dep't of Defense Regulation No. 5400.11-R, Privacy Program (31 August 1983).

5. Army Regulation No. 340-21, The Army Privacy Program (5 July 1985).

6. Dep't of Army Pamphlet 25-51, The Army Privacy Program -- System Notices and Exemption Rules (21 September 1988).

7. Air Force Instruction 33-332, The Air Force Privacy Act Program (12 Oct 1999) *superseding* Air Force Instruction 37-132, The Air Force Privacy Act Program (11 March 1994).

8. Secretary of the Navy Instruction 5211.5D, Personal Privacy and Rights of Individuals Concerning Records Pertaining to Themselves (17 July 1992).

9. Marine Corps Order P5211.2B, The Privacy Act of 1974 (4 September 1997).

B. Secondary.

1. Defense Privacy Office Web Page--to research current Privacy Act System of Records Notices and other Privacy Act guidance and information-- http://www.defenselink.mil/privacy.

2. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1 (18 April 1992).

3. American Civil Liberties Union Foundation, Litigation Under the Federal Freedom of Information Act and Privacy Act (20th ed. 1997), Washington, D.C. 20002.

4. Freedom of Information Act Guide and Privacy Act Overview (May 2000), an biennial Department of Justice publication (available on the World Wide Web at http://www.usdoj.gov/foia -- requires an Acrobat reader).

5. Websites:

a. Army: <www.rmd.belvoir.army.mil/foiamain.htm> (does not contain Army systems notices – for Army systems notices use <www.defenselink.mil/privacy> and follow hyperlinks).

b. Navy: <privacy.navy.mil> (many hyperlinks to specific areas, including both Navy and Marine System Notices).

c. Air Force: < https://aflsa.jag.af.mil> (general site that requires FLITE password – follow hyperlinks to FOIA/Privacy information sites)

## II. INTRODUCTION.

A. History of the Act.

B. Congressional Concerns.

C. Policy Objectives.

1. Restrict Disclosure of Personal Information Maintained by Agencies.

2. Allow Individuals Access to Records about Themselves.

3. Allow Individuals Ability to Amend Records about Themselves.

4. Establish Fair Collection, Maintenance and Dissemination Practices.

## III. SCOPE OF THE ACT.

A. Generally Applicable to Agency Records within a "System of Records." Manuel v. Veterans Administration Hospital, 857 F.2d 1112 (6th Cir. 1988).

B. Key Definitions.

1. Agency.

a. Privacy Act adopts the FOIA definition. § 552a(a)(1).

b. Government contractors and their employees are covered by the civil and criminal penalties of the Act, if provided for by the contract. § 552a(m).

2. "Individual" means a citizen or alien lawfully admitted for permanent residence. § 552a(a)(2).

a. Deceased personnel. Crumpton v. U.S., 843 F. Supp. 751 (D.D.C. 1994), aff'd on other grounds, 59 F. 3d 1400 (D.C. Cir. 1995).

b. Does not include corporations or business enterprises. St. Michael's Convalescent Hospital v. California, 643 F.2d 1369 (9th Cir. 1981).

3. "Maintain" means to maintain, collect, use, or disseminate. § 552a(a)(3).

4. "Record" means any item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name or other identifying characteristic. § 552a(a)(4). See Unt v. Aerospace Corp., 765 F.2d 1440 (9th Cir. 1985); see also Tobey v. NLRB, 40 F.3d 469 (D.C. Cir. 1994).

a. Entrepreneurial information -- Distinction between individuals and sole proprietorships. Sole proprietors are not "individuals" under the Privacy Act. See St. Michaels Convelescent Hosp.v. California, 643 F.2d 1369 (9th Cir. 1981).

b. Personal notes - DOD Reg. 5400.7-R, para. 1-402b(3); AR 25-55, para. 1-402b(4); SECNAVINST 5211.5D, para. 11a(10). See Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 38:

> Personal notes of unit leaders or office supervisors concerning subordinates ordinarily are not records within a system of records governed by the Privacy Act. The Act defines "system of records" as a "group of any records under the control of any agency…from which information is retrieved by the …[individual's] identifying particular…" [citation omitted]…Personal notes that are *merely an extension of the author's memory*, if maintained properly, will not come under the provisions of the Privacy Act or the Freedom of Information Act [citation omitted] (emphasis added)."
>
> To avoid being considered agency records, personal notes must meet certain requirements. *Keeping notes must be at the sole discretion of the author*. Any requirement by superior authority, whether by oral or written directive, regulation or command policy, likely would cause the notes to become official agency records. *Such notes must be restricted to the author's personal use as memory aids*. *Passing them to a successor or showing them to*

*other agency personnel would cause them to become agency records* (emphasis added*)*. Chapman v. National Aeronautics and Space Administration, 682 F.2d 525 (5th Cir. 1982).

Even if personal notes do become agency records, they will not be within a system of records and subject to the Privacy Act unless they are retrieved by the individual's name or other personal particular. Thus if they are filed only under the matter in which the subordinate acted or in a chronological record of office activities, the Privacy Act would not apply to them. However, [they] would be subject to disclosure under the FOIA.

Individuals who maintain personal notes about agency personnel should ensure their notes do not become records within systems of records. Maintaining a system of records without complying with the Privacy Act system notice requirement could subject the individual to criminal charges and a $5,000.00 fine. [citation omitted]. See also Johnston v. Horne, 875 F.2d 1415 (9th Cir. 1989); Kalmin v. Dep't of Navy, 605 F. Supp. 1492 (D.D.C. 1985).

c. May incorporate personal notes into agency records in a timely manner. Compare Chapman v. NASA, 682 F.2d 526 (5th Cir. 1982) with Thompson v. Dep't of Trans., 547 F. Supp. 274 (D. Fla. 1982).

5. A "system of records" is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual. § 552a(a)(5). Manuel v. VA, 857 F.2d 1112 (6th Cir. 1988); Crumpton v. U.S., 843 F. Supp. 751 (D.D.C. 1994), aff'd on other grounds, 59 F. 3d 1400 (D.C. Cir. 1995). Henke v. United States Dep't of Commerce, 83 F.3d 1453 (D.C. Cir. 1996). (holding that the test is whether the information is actually retrieved, not retrievable, by use of the individual's name or identifier). Smith v. Henderson, 1999 U.S. Dist. LEXIS 17575 (N.D. Cal. Oct. 29, 1999) (holding postal supervisor's "never-never drawer" not subject to the Privacy Act).

## IV. PUBLIC NOTICE OF SYSTEMS OF RECORDS. § 552A(E)(4).

A. Publication Requirement (Federal Register and DA Pam 25-51; AF Pam 12-36; MC Bulletin 5211; and OPNAVNOTE 5211.

1. No longer an annual requirement.

2. New or altered system. § 552a(r); AR 340-21, para. 4-6; AFI 33-332. para. 6.2; SECNAVINST 5211.5D, Encl 2.

-- Advance notice to Congress and OMB is required.

B. Content of a system notice. § 552a(e)(4); AR 340-21, para. 4-6a.

## C. Systems Notice Example

**A0027-3 DAJA**
**System name:**
Legal Assistance Files (August 3, 1993, 58 FR 41253).
**System location:**
Army Legal Assistance, Office of the Judge Advocate General, Headquarters, Department of the Army, Washington, DC 20310-2200; Staff Judge Advocate offices at Army commands, installations, and activities. Official mailing addresses are published as an appendix to the Army's compilation of record system notices.
**Categories of individuals covered by the system:**
Active duty or retired military personnel and/or their dependents.
**Categories of records in the system:**
Individual's name, grade/rank, Social Security Number, organization, and details of problem/incident/matter on which legal assistance is sought. Records may be in the form of correspondence, memoranda, opinions of legal assistance officers, and may include interviews, summary of problems considered, advice rendered, referrals made, and documents created as a result of assistance provided.
**Authority for maintenance of the system:**
5 U.S.C. 301, Departmental Regulations.
**Purpose(s):**
To respond to inquiries and settle issues; for management and statistical reports.
**Routine uses of records maintained in the system, including categories of users and the purposes of such uses:**
In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:
Information from this system of records may be disclosed to law students participating in a volunteer legal support program approved by the Judge Advocate General of the Army.
The `Blanket Routine Uses' published at the beginning of the Army's compilation of systems of records notices also apply to this system.
**Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:**
**Storage:**
Paper records in file folders.
**Retrievability:**
By client's surname.
**Safeguards:**
Records are maintained in secured buildings, accessible only to designated authorized personnel who are properly instructed in the permissible use of the information.
**Retention and disposal:**
Destroyed 1 year from the closing date of the case.
**System manager(s) and address:**
Chief, Army Legal Assistance, Office of the Judge Advocate General, HQDA (DAJA-LA), Washington, DC 20310-2200; and the Staff Judge Advocates of organizations listed in the address directory published as an appendix to the Army's compilation of record system notices.
**Notification procedure:**
Individuals seeking to determine if information about themselves is contained in this record system may inquire of the Staff Judge Advocate of the installation or command where legal assistance was sought.
Individual should provide full name, Social Security Number, and any details that will assist in locating the record.
**Record access procedures:**
Individuals seeking access to records about themselves contained in this record system may inquire of the Staff Judge Advocate of the installation or command where legal assistance was sought.
Individual should provide full name, Social Security Number, and any details that will assist in locating the record.
**Contesting record procedures:**
The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340-21; 32 CFR part 505; or may be obtained from the system manager.
**Record source categories:**
From the individual, his/her attorney, Army records and reports.
**Exemptions claimed for the system:** None.

## V. COLLECTION AND MAINTENANCE OF INFORMATION. § 552A(E).

A. **Collect Only Relevant and Necessary Information to Accomplish an Agency Purpose as Defined by Statute or Executive Order**. § 552a(e)(1); AR 340-21, para. 4-1c; AFI 33-332, para. 1.1.3.2; SECNAVINST5211.5D, para. 7(b)

B. **Collect Information to Greatest Extent Practical Directly from the Individual**. §552a(e)(2).

1. Collect from the Subject First when the information sought is "objective and unalterable." Waters v. Thornburgh, 888 F.2d 870 (D.C. Cir. 1989); Dong v. Smithsonian, 943 F. Supp. 69 (D.D.C. 1996), rev'd on other grounds, 125 F.3d 877 (D.C. Cir. 1997) (holding that concerns over Plaintiff's possible reaction to an unpleasant rumor" does not excuse requirement of collection from the individual).

2. Collect from third parties when:.

a. Verifying information (Security or Employment).

b. Seeking Opinion or Evaluation.

c. Unable to Contact Subject.

d. Collecting is Exceptionally Difficult (Unreasonable cost or delay).

e. Consent or Subject Asks for Third Party Collection.

See, AR 340-21, para. 4-1d; AFI 33-332, para. 3.1; SECNAVINST 5211.5D, para. 10(b)

C. **Maintain No Records Regarding How an Individual Exercises First Amendment Rights**. § 552a(e)(7); AR 340-21, para. 4-5; SECNAVINST 5211.5D, para. 7d(1).

1. Exceptions.

a. Authorized by statute. Hass v. United States Air Force, 848 F. Supp. 926 (D. Kan. 1994).

b. Consent of the subject.

c. Pertinent to and within the scope of an authorized law enforcement activity. Compare Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982) with Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982).

2. Applies to All records regardless of where maintained. Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983)(holding that PA prohibition regarding collecting First Amendment information applied even when record not maintained in a system of records).

D. **The Privacy Act Advisement**. § 552a(e)(3); AR 340-21, para. 4-2; AFI 33-332, para. 6.1; SECNAVINST 5211.5D, para. .

1. When required.

a. To individuals. When collecting personal information to be kept in a system of records. AR 340-21, para. 4-2a.

b. To third party sources of information. Saunders v. Schweiker, 508 F. Supp. 305 (W.D.N.Y. 1981).

2. Content.

a. Authority.

b. Principal Purpose.

c. Routine uses.

d. Voluntary or mandatory.

e. Effect of not providing.

3. Location of Advisement. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 18.

E. **Accuracy Requirements**.

1. Maintain records used to make determinations about an individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness in the determination. § 552a(e)(5). Perfect records are not required; reasonableness is the standard. Doe v. United States, 821 F.2d 694 (D.C. Cir. 1987)(en banc); Edison v. Dep't of the Army, 672 F.2d 840 (11th Cir. 1982).

2. Before disseminating the record to a person other than an agency, unless disseminated pursuant to FOIA, the agency will make reasonable efforts to ensure the records are accurate, complete, timely and relevant for agency purposes. 5 U.S.C. § 552a(e)(6).

## VI. ACCESS TO AND AMENDMENT OF RECORDS. § 552A(D).

A. References: §§ 552a(d)(1) and (2); AR 340-21, Ch. 2; SECNAVINST 5211.5D, Ch.. ; AFI 33-332, Ch. 4 (Access) and Ch. 5 (Amendment).

B. Each agency that maintains a system of records **shal**l:

1. Access: "upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made . . . ." § 552a (d)(1)

2. Amendment: "permit the individual to request amendment of a record pertaining to him . . ." § 552a(d)(2).

C. Burdens of Proof.

1. Access. § 552a(g)(3)(A). Burden on agency with de novo review.

2. Amendment. § 552a(d)(2)(B)(i). Burden on plaintiff to prove record not accurate, relevant, timely or complete. Mervin v. FTC, 591 F.2d 821 (D.C. Cir. 1978).

D. Process and Time Limits of an Access or Amendment Request.

1. Access. 10 work days to acknowledge request. Release within 30 workdays. AR 340-21, paras. 2-2 & 2-9 (5 workdays to forward denial recommendation to AARA based on Exemption); AFI 33-332, para. 4.2.3; SECNAVINST 5211.5D, para. 11b(12).

2. Amendment.

a. Custodian/System Manager: 10 workdays to acknowledge, 30 workdays to make final response. § 552a(d); AR 340-21, para. 2-11, AFI 33-332, para. 5.2.3; SECNAVINST 5211.5D, para. 12f.

b. Denial/Refusal Authority

(1) Army - Access and Amendment Refusal Authority (AARA – 17 in Army scheme) AR 340-21, para. 1-7. No specified time limit.

(2) Air Force - Denial Authority, AFI 33-332, para. 5.3. No specified time limit.

(3) Navy/Marines – Denial Authority, SECNAVINST 5211.5D, para. 6(e).

c. Appeal:

(1) Requester – 60 calendar days to appeal. AFI 33-332, para. 5.5; SECNAV 5211.5D, para. 13a(1).

(2) Review Authority:

(a) Army – DA Privacy Review Board w/ OGC concurrence. 30 workdays (30 more for "good cause") AR 340-21, para. 2-11h.

(b) Air Force – Through HQ AFCIC/ITC to SAF/GCA. No time limit to respond. AFI 33-332, para. 5.5.2

(c) Navy/Marine – ASN, NJAG, OGC, OPM. 30 working days to respond. SECNAVINST 5211.5D, para. 13f.

E. Access Issues.

1. Third party information in the subject/requester's file.

a. Definition of a "record." Is the information "about" the requester?

b. If not, see Voelker v. IRS, 646 F.2d 332 (8th Cir. 1981); compare DePlanche v. Califano, 549 F. Supp 685 (W.D. Mich. 1982).

2. Medical records of minors. DOD Reg. 5400.11-R, ch. 3, para. 6e; see also AR 40-66, chapter 2; SECNAVINST 5211.5D, para. 11a(8); AFI 33-332, para. 9.5.

a. The Privacy Act applies to "[citizens] of the United States or [aliens] lawfully admitted for permanent residence." Minors are protected by the Act because minority is not a disqualifier. § 552a(a)(2), see also Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 9.

b. The Privacy Act provides that "the parent of any minor…may act on behalf of the individual." § 552a(h).

c. Stateside.

(1) Definition of minor? State law.

(2) If a minor, may release records to parents unless prohibited by state law. AR 40-66, para. 2-5(a)(1); DA Pam 340-6, No. 27.

(3) Look to the law of the state in which the records are located--the states differ on the question of access to a minor's medical records based, in part, on subject matter (e.g., psychiatric records, treatment records for drug and alcohol abuse, sexual hygiene/reproductive records).

d. Overseas.

(1) Definition of minor? The Army deems the age of majority to be 18 years. DA Pam 340-6, No. 45.

(2) Parental access. Parents have a general right of access to medical records of minors.

(3) Parents may be denied access only if **all** of the following four conditions are met:

(a) Minor was between ages 15 and 17 at the time of treatment.

(b) Treatment sought in program that promised to keep treatment records confidential.

(c) Minor specifically requested confidentiality.

(d) Parent did not have the minor's written authorization or a court order.

3. Access denied under PA, but accessible under FOIA.

a. PA is not a FOIA exemption 3 withholding statute. Provenzano v. DOJ, 717 F.2d 799 (3d Cir. 1983), vacated as moot, 469 U.S. 14 (1984).

b. Clarified by Legislation. CIA Information Act, Pub. L. No. 98-477, § 2(c), 98 Stat. 2211, 2212 (1984) (codified at 5 U.S.C. § 552a(t)(2)).

F. Amendment Issues.

1. No Collateral Attack.

a. Issues already the subject of judicial or quasi-judicial action. Spurge v. Derwinski, 26 F. 3d 8 (2d Cir. 1994).

b. Issues for which adequate judicial review is available. Henderson v. Social Security Administration, 908 F.2d 559 (10th Cir. 1990).

c. Exhaustion of administrative remedies. Cargill v. Marsh, 902 F.2d 1006 (D.C. Cir. 1990)

2. Facts v. Judgment.

a. May only correct facts, not judgments, under the Act. AR 340-21, para. 2-10a; Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 4; Hewitt v. Grabicki, 794 F.2d 1373 (9th Cir. 1986).

b. Can amend judgments only if all underlying facts are discredited. RR v. Dep't of Army, 482 F. Supp. 770 (D.D.C. 1980) (dictum).

## VII. TEN EXEMPTIONS. §§ 552A(J) AND (K).

A. Exemptions Deny a Subject Access to His Own Records.

B. Claiming Exemptions.

1. Exemptions are not automatic.

2. Agencies are not entitled to improperly claimed exemptions. Ryan v. Dep't of Justice, 595 F.2d 954 (4th Cir. 1979).

C. Two General Exemptions. § 552a(j)(1)-(2).

1. What records are exempt?

a. Maintained by the CIA. § 552a (j)(1).

b. Maintained by an agency/component thereof which performs as its principal function any activity pertaining to law enforcement. § 552a (j)(2)

2. According to the Defense Privacy Board, the exemption does not follow the record. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 31. But see Doe v. FBI, 936 F.2d 1346 (D.C. Cir. 1991).

D. Seven Specific Exemptions. § 552a(k)(1)-(7).

1. What records are exempt?

a. Classified information (simply incorporates FOIA exemption 1 protections in the Privacy Act context).

b. Investigatory material compiled for law enforcement purposes not covered by § 552a(j)(2).

c. Protective services to the President.

d. Statistical records.

e. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts or access to classified material. Limited to the protection of a confidential source who provided the information pursuant to an express promise of confidentiality.

(1) Also includes material compiled to determine whether a federal grant will be awarded. Henke v. United States Dep't of Commerce, 83 F.3d 1445 (D.C. Cir. 1996).

(2) Applicable even though the source of the confidential information is known to the requester. Volz v. Dep't of Justice, 619 F.2d 49 (10th Cir.).

f. Testing or examination material used solely to determine individual qualifications for appointment/ promotion in Federal service.

g. Evaluation material used to determine potential for promotion in the armed services. Limited to the protection of a confidential source. May v. Dep't of Air Force, 777 F.2d 1012 (5th Cir. 1985).

E. One Special Exemption. § 552a(d)(5).

1. Information compiled in reasonable anticipation of civil litigation.

2. Self-executing.

3. Applies to administrative proceedings. Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 27.

## VIII. DISCLOSURE OF INFORMATION FROM SYSTEMS OF RECORDS, § 552A(B).

A. Disclosure Prohibited. The "no disclosure without consent" rule:
"No agency shall disclose any record . . . except pursuant to a written request by or with the prior written consent of the individual to whom the records pertains, unless an exception applies."

1. Disclosure must be from a system of records.

a. Pertains to information initially retrieved from a system of records. Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983).

b. Personal opinion or knowledge from memory not from a system of records. Kline v. HHS, 927 F.2d 522 (10th Cir. 1983) (holding that verbal information about employee derived from independent knowledge and not from an agency system of records are not subject to the Privacy Act.).

2. A later release of information previously known does not violate the Privacy Act. Hollis v. Department of the Army, 856 F.2d 1541 (D.C. Cir. 1988). (holding that when a release of servicemember's child care allotments consisted merely of information . . . which the recipient of the release already knew, the Privacy Act is not violated"); FDIC v. Dye, 642 F.2d 833 (5th Cir. 1981). But see Pilon v. Department of Justice, 73 F.3d 1111 (D.C. Cir. 1996) (holding that faxing a PA protected document to a person with familiarity of its existence does not remove it from PA protection).

3. Privacy Act is not limited to extra-judicial disclosures; it applies even where a disclosure to a court during the course of litigation is undertaken. See Laningham v. Navy, 813 F.2d 1236 (D.C. Cir. 1987) (per curium) (holding that Navy did not intentionally and willfully disclose disability board information in civil trial in violation of PA).

B. 12 Exceptions to the "no disclosure without consent" rule permit access to information without prior written consent of the subject of the record. § 552a(b)(1)-(12).

1. Exception 1. Disclosure within the agency (DOD) to those having a need to know the information in performing their duties.

a. Contractors who operate a system of records to accomplish an agency mission are considered part of an agency. See Coakley v. Department of Transportation, No. 93-1420 (D.D.C. Apr. 7, 1994); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 16; But see Taylor v. Orr, (D.D.C. Dec. 5, 1983).

b. Lists of nonparticipants/nonmembers.

(1) Savings bond programs. Parks v. IRS, 618 F.2d 677 (10th Cir. 1980); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 37.

(2) Officers' Clubs.

(3) AUSA.

2. Exception 2. Disclosure required by FOIA.

a. FOIA and Privacy Act interface.

(1) FOIA Exemption 6: Protection of Personal Privacy.

(2) FOIA Exemption 7(C): Records or Information Compiled for Law Enforcement Purpose.

b. The balancing test. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

-- Public Interests in Disclosure v. Invasion of Privacy.

c. Specific applications of the balancing test.

(1) Some information normally is releasable:

(2) Most interests will not outweigh the invasion of personal privacy.

d. No discretionary release.

(1) No agency "discretionary disclosure" of information that is exempt under FOIA and subject to the Privacy Act. DOD v. FLRA, 510 U.S. 487 (1994).

(2) Agency must have an actual FOIA request to rely on exception 2. OMB Memorandum for the Senior Agency Officials for Information Resources Management, SUBJECT: Privacy Act Guidance - Update, dtd 24 May 1985; Compare Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984) with Cochran v. United States, 770 F.2d 949 (11th Cir. 1985).

e. Categorical Balancing Requiring Release. Military personnel information, such as: name, rank, gross salary, duty assignments, duty telephone, etc., may be released. AR 340-21, para. 3-3.

3. Exception 3. Disclosure for routine use.

a. Specific routine uses as listed in systems notices, DA Pam 25-51, AFP 12-36, OPNAVNOTE 5211, MCBUL 5211.
CAUTION: Printed systems notices are often out of date. Use on-line sources for most current systems notices.

b. Compatibility requirement. Disclosure of record must have compatible purpose for which it was collected. § 552a(a)(7). Britt v. Naval Investigative Service, 886 F.2d 544 (3rd Cir. 1989) (holding that transfer of Marine Reservist's military criminal investigation file did not meet PA compatibility requirement); Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989).

c. General/blanket routine uses. AR 340-21, para. 3-2. These include:

(1) To law enforcement agencies when record indicates a violation or potential violation of law.

(2) To other federal agencies on request for hiring, retention, security clearance, or licensing decisions by those agencies.

(3) Congressional inquiries and private relief legislation. Pellerin v. VA, 790 F.2d 1553 (11th Cir. 1986). But see Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989) (disclosure beyond scope of inquiry).

(4) Required by international agreement.

(5) To DOJ for litigation.

(6) Counter-intelligence purposes or enforcing laws which protect the national security.

4. Exception 4. Bureau of Census.

5. Exception 5. Statistical research.

6. Exception 6. National Archives.

7. Exception 7. Law enforcement. Disclosure may be made without the consent of the subject of a record in response to the request of a law enforcement agency. The request must be submitted in writing form the head of the agency.

8. Exception 8. Compelling circumstances affecting health or safety of the individual.

a. Case law emphasizes emergency nature of exception.

b. Disclosure notification must be sent to last known address.

c. Individual about whom records are disclosed need not necessarily be the individual whose health or safety is at peril; e.g., release of records on several individuals in order to identify an individual who was injured in an accident. See OMB's Privacy Act Guidelines, 40 Fed. Reg. 28,955 (1975); DePlanche v. Califano, 549 F. Supp. 685, 693-98 (W.D. Mich. 1982).

9. Exception 9. Congress. Disclosure may be made to "either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee [thereof]."

10. Exception 10. Comptroller General.

11. Exception 11. Pursuant to the order of a court of competent jurisdiction.

12. Exception 12. Credit reporting agencies.

C. Accounting for Disclosure. § 552a(c).

1. Disclosure accounting is required unless the record is disclosed within the agency (exception 1) or pursuant to FOIA (exception 2). AR 340-21, para. 3-4, AFR 12-35, para. 19(d).

2. Accounting must include the date, nature, and purpose of disclosure and the name and address of the recipient.

3. Uses of Disclosure Accounting Record (DA Form 4410-R).

## IX. SOCIAL SECURITY NUMBERS.

A. Section 7(a)(1). (Enacted as part of the Privacy Act, but not codified.). No Federal, State, or Local Governmental Agency can Deny a Right, Privilege or Benefit Because of Refusal to Disclose Social Security Account Number, unless

1. Required by Federal statute, or

2. Disclosure was required under any Federal, state, or local statute or regulation in existence and operating before 1 January 1975 to verify the identity of the individual.

B. Requests by agency for SSN requires informing whether disclosure is mandatory or voluntary, by what statutory authority, and what use will be made of it. Sec. 7(b).

## X. CRIMINAL PENALTIES. § 552A(I).

A. Knowingly/Willfully Making Prohibited Disclosure. See, e.g., United States v. Trabert, 978 F.Supp 1368 (D.Colo. 1997)

B. Willfully Maintaining a System of Records Without Complying with Notice Requirements.

C. Knowingly/Willfully Requesting/Obtaining Information Under False Pretenses.

D. Action is against the individual and not the agency.

## XI. CIVIL REMEDIES.

A. Statutory. § 552a(g).

| **VIOLATION** | **REMEDY** |
|---|---|
| Wrongful refusal to amend. § 552a(g)(1)(A). § 552a(g)(2). | Enjoin/order amendment; attorney fees/costs. |
| Wrongful denial of access. § 552a(g)(1)(B) | Enjoin from withholding; provide in camera inspection; attorney fees/costs. § 552a(g)(3). |
| Failure to maintain accurate, timely, complete, and relevant records resulting in an adverse determination. § 552a(g)(1)(C). | If agency acted in an intentional/willful manner, U.S. is liable for:<br>a) Actual damages but not less than $1,000.<br>b) Attorney fees and costs. § 552a(g)(4). |
| Failure to comply with another provision causing an adverse effect. § 552a(g)(1)(D). | If agency acted in an intentional/willful manner, U.S. liable for:<br>a) Actual damages but not less than $1,000.<br>b) Attorney fees/costs. § 552a(g)(4). |

1. Civil remedies are solely against the agency. Recent case applies Feres Doctrine rationale to servicemember civil suits – barring such suits. Cummings v. Dep't of Navy, 116 F.Supp. 2d 76, 81-84 (D.D.C. 2000)(holding former Navy fighter pilot can not maintain suit against the Navy under privacy Act for wrongful release of her flight school evaluations).

2. Courts are not free to create remedies greater than those granted by the statute. Edison v. Dep't of Army, 672 F.2d 840 (11th Cir. 1982).

3. Intentional/willful refers to the intentional or willful failure to abide by the Act. Andrews v. VA, 838 F.2d 418 (10th Cir. 1988); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987); Albright v. U.S., 732 F.2d 181 (D.C. Cir. 1984).

4. Privacy Act does not mandate agency to create and maintain files, and destruction of an official record does not give right to a Privacy Act cause of action. Tufts v. Dep't of Air Force, 793 F.2d 259 (10th Cir. 1986).

5. Damages. Alexander v. FBI, et al., 193 F.R.D. 1 (D.D.C. March 29, 2000)(compelling further discovery regarding "Filegate" letters in PA suit for damages against the Executive Office of the President); Tripp v. Executive Office Of The President, et al., 104 F. Supp. 2d 30 (D.D.C. June 14, 2000) (denying motion to recuse in PA damages suit against EOP and DoD).

6. Attorney's Fees.

   a. Purpose of granting attorney fees. Anderson v. Dep't of Treasury, 648 F.2d 1 (D.C. Cir. 1979).

   b. Threshold requirement: plaintiff must substantially prevail. Sweatt v. U.S. Navy, 683 F.2d 420 (D.C. Cir. 1982).

   c. Factors considered in granting this discretionary remedy. Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981).

   d. Only permitted for litigation; not administrative actions. Kennedy v. Andrus, 459 F. Supp. 240 (D.D.C. 1978), aff'd, 612 F. 2d 586 (D.C. Cir. 1980)(table cite).

   e. Not paid to a pro se litigant even if plaintiff is an attorney. Manos v. Department of the Air Force, 829 F. Supp. 1191 (N.D. Cal. 1993).

7. Two-year statute of limitations governs Privacy Act actions. § 552a(g)(5). Bower v. Department of Air Force, 875 F.2d 632 (7th Cir. 1989); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987).

B. Constitutional Tort. Perry v. FBI, 759 F.2d 1271 (7th Cir. 1985).

a. The Privacy Act is not intended as an exclusive remedy.

b. Recording and disseminating derogatory information without notice and the opportunity to refute may amount to a violation of due process guaranteed by the Fifth Amendment.

c. Individual defendants are subject to qualified immunity and personal liability. Note that liability is limited by Chappell v. Wallace, 462 U.S. 296 (1983), and Bush v. Lucas, 462 U.S. 367 (1983).

## XII. CONCLUSION.

# CHAPTER F

# COMMAND INVESTIGATIONS UP AR 15-6


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# Outline of Instruction

*I believe that the role of the commander's legal advisor is to ensure that the process of gathering facts, of advising on the correct standards for evaluating those facts, and for ensuring the correct application of those standards, is professionally and thoroughly accomplished. Why is this important? I only state the obvious when I tell this audience that we, as lawyers, are expected to get it right. This does not mean a result that is necessarily immune from public criticism, for such criticism is bound to come from some quarter. It means a result that will withstand critical, objective scrutiny.*

**Ms. Judith Miller, Former General Counsel, U.S. Department of Defense, Federal Bar Association Speech, 8 April 1997**

## I. REFERENCES.

A. AR 15-6, Procedure For Investigating Officers And Boards Of Officers, 11 May 88 (w/ change 1, 30 Sep 96)

B. National Defense Authorization Act for Fiscal Year 1998, Public Law No. 105-85, Section 591, 111 Stat. 1760, (1997), to be codified at 10 U.S.C. Section 1561[Sexual Harassment Investigations and Reports] and AR 600-20, Appendix E (1999). *See* Appendix A.

C. Lieutenant Colonel Annamary Sullivan, *AR 15-6 Developments*, The Army Lawyer, April 1997, at 156.

**II. PURPOSE:** To gather information, make findings of fact, make recommendations and report them to the appointing authority.

**III. APPLICABILITY:** Boards appointed under a specific regulation or directive (e.g., AR 635-200) may direct use of AR 15-6 procedures. In case of conflicting provisions, other regulations overrule AR 15-6. Even when not specifically applicable, AR 15-6 may be used as guide but provisions not binding.

## IV. TYPES: FORMAL OR INFORMAL.

A. Formal: Investigative procedure imposing a high level of procedural safeguards

1. When used (para.1-4-b):

a. Expressly required by other regulation/directive (para 1-4b(3)).

b. Whenever appointing authority determines that factors such as complexity and need to provide hearing warrant more comprehensive procedures.

2. Procedures:

a. Allows for designation of "respondent," a person with a direct interest on the hearing.

b. Extensive due process rights: include president with voting members, recorder, notice to respondent with right to counsel, challenges for cause, entitlement to be present at all open sessions, put on evidence, cross-examine witnesses, make argument.

Example: An administrative separation board conducted UP AR 635-200 is also a formal AR 15-6.

3. Rules of evidence: Any relevant and material evidence admissible with some limitations (i.e. polygraph tests and privileges under the MCM) (para.3-6). Legal Advisor or President (if no legal advisor) rules on admissibility.

B. Informal: simpler, more expeditious procedure

1. Results of an investigation may still be useable against individuals. Para 1-6: "The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual." Para 1-4b(2): Even if the purpose of the investigation is to inquire into the conduct or performance of a particular individual, formal procedures not mandatory unless required by other regulations or by higher authority.

2. Procedures:

a. Typically one IO (an investigation); may have more than one IO (a board) and still be informal.

b. Proceedings not open; statements taken at informal sessions. May use whatever method is most efficient and effective for acquiring information.

c. No right to counsel unless required by Art 31(b), UCMJ; to cross-examine, etc.

d. Fact finder(s) may consider anything relevant and material, except specific evidence listed in para 3-6c).

e. No witness will be compelled to incriminate himself. May be necessary to advise of rights. If witness invokes right to remain silent, no adverse inference can be drawn.

f. Cannot use informal procedures if respondent designated.

3. Privacy Act notice must be given if report to be filed under witness' name or other personal identifier.

4. Special Rules: Sex Harassment Investigations. [*See* Appendix A].

a. Commence investigation within 72 hours of complaint.

b. Complete investigation within 14 days after the date it is commenced.

## V. APPOINTING AN INFORMAL 15-6.

A. Authority: Includes a commander at any level or a principal staff officer or supervisor in grade of major or above or GS-14 agency head or division chief.

B. Method:

1. May be oral but not recommended; written memorandum of appointment preferred. Should specify purpose and scope of investigation and nature of findings and recommendations required.

2. Practical: If appropriate, appointment should identify individuals involved by name. This does not make such a person a "respondent."

## VI. REQUIREMENTS FOR APPOINTMENT AS INFORMAL IO. (PARA. 2-1 (C))

A. Commissioned or Warrant Officer or GS-13+, senior to individual whose conduct is under investigation;

B. Commander must hand-pick based on education, training, experience, length of service & temperament.

C. IO must consult with OSJA before beginning informal investigation to obtain legal guidance. OTJAG has prepared Investigation Guide for Informal Investigations (enclosure)

## VII. FINDINGS AND RECOMMENDATIONS.

A. Findings:

1. Clear concise statement of fact readily deduced from evidence in record. Includes negative findings. Should not exceed scope of appointment.

2. Unless other regulation directs differently, standard is preponderance of evidence: more likely than not; greater weight of evidence than supports a contrary conclusion. Weight not determined by number of witnesses but by considering all evidence and factors such as demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, other indications.

B. Recommendations: Must be consistent with findings. Can be negative, e.g., no further action taken.

## VIII. ACTION ON REPORT OF INVESTIGATION BY APPOINTING AUTHORITY.

A. May return for additional investigation.

B. May consider all relevant information, even information not considered by IO. Such consideration of additional information may require notice to individual. *See* para 1-8, AR 15-6.

C. Unless otherwise provided by another directive, appointing authority is not bound by findings or recommendations; may take action either more or less favorable than the IO recommends.

D. Adverse Administrative Action: Investigation reports may be used as basis for adverse administrative action. If so, command must take the following steps to afford due process:

1. Notify subject in writing of proposed adverse action and provide a copy, unless previously provided, of findings and recommendations on which action is based;

2. Provide reasonable opportunity to reply in writing and submit rebuttal;

3. Consider rebuttal before taking action.

4. Referral requirement does not apply when other regulations or directives provide procedural safeguards.

E. Legal review required if findings & recommendations may result in adverse administrative action or will be relied upon by higher headquarters, or where incident under investigation has resulted in death or serious bodily injury.

## IX. JA ROLES.

A. Advisor to Investigating Officer

1. At Start: Assist in Developing Investigative Plan. OTJAG Guidebook (Appendix B)

2. Consultation During Investigation. Sensitivity to Rights Warnings.

3. At Conclusion: Assist in Drafting Findings & Recommendations

B. Legal Review.

1. Required for serious or complex matters, such as incident resulting in death or serious bodily injury, where findings and recommendations may result in adverse administrative action, or where investigation will be relied upon in actions by higher HQs.

2. Review should address:

a. Whether proceedings comply with legal requirements;

b. Effect of any errors:

(1) Harmless: no material adverse effect on anyone's substantial rights;

(2) Appointing errors (May be ratified by appropriate official);

(3) Substantial errors: have a material adverse effect on substantial rights. May be waived by failure to object.

c. Whether sufficient evidence supports the findings (standard is preponderance);

d. Whether the recommendations are consistent with the findings.

# APPENDIX A

# Pub. L. 105-85, Section 591 [10 U.S.C. Section 1561]

# Sex Harassment Investigations

## SEC. 591. SEXUAL HARASSMENT INVESTIGATIONS AND REPORTS.

(a) INVESTIGATIONS- (1) Part II of subtitle A of title 10, United States Code, is amended by inserting after chapter 79 the following new chapter:

## *`CHAPTER 80--MISCELLANEOUS INVESTIGATION REQUIREMENTS AND OTHER DUTIES*

`Sec.
`1561. Complaints of sexual harassment: investigation by commanding officers.

### `Sec. 1561. Complaints of sexual harassment: investigation by commanding officers

`(a) ACTION ON COMPLAINTS ALLEGING SEXUAL HARASSMENT- A commanding officer or officer in charge of a unit, vessel, facility, or area of the Army, Navy, Air Force, or Marine Corps who receives from a member of the command or a civilian employee under the supervision of the officer a complaint alleging sexual harassment by a member of the armed forces or a civilian employee of the Department of Defense shall carry out an investigation of the matter in accordance with this section.

`(b) COMMENCEMENT OF INVESTIGATION- To the extent practicable, a commanding officer or officer in charge receiving such a complaint shall, within 72 hours after receipt of the complaint--

`(1) forward the complaint or a detailed description of the allegation to the next superior officer in the chain of command who is authorized to convene a general court-martial;

`(2) commence, or cause the commencement of, an investigation of the complaint; and

`(3) advise the complainant of the commencement of the investigation.

`(c) DURATION OF INVESTIGATION- To the extent practicable, a commanding officer or officer in charge receiving such a complaint shall ensure that the investigation of the complaint is completed not later than 14 days after the date on which the investigation is commenced.

`(d) REPORT ON INVESTIGATION- To the extent practicable, a commanding officer or officer in charge receiving such a complaint shall--

`(1) submit a final report on the results of the investigation, including any action taken as a result of the investigation, to the next superior officer referred to in subsection (b)(1) within 20 days after the date on which the investigation is commenced; or

`(2) submit a report on the progress made in completing the investigation to the next superior officer referred to in subsection (b)(1) within 20 days after the date on which the investigation is commenced and every 14 days thereafter until the investigation is completed and, upon completion of the investigation, then submit a final report on the results of the investigation, including any action taken as a result of the investigation, to that next superior officer.

`(e) SEXUAL HARASSMENT DEFINED- In this section, the term `sexual harassment' means any of the following:

`(1) Conduct (constituting a form of sex discrimination) that--

`(A) involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when--

`(i) submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;

`(ii) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

`(iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment; and

`(B) is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.

`(2) Any use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the Department of Defense.

`(3) Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature in the workplace by any member of the armed forces or civilian employee of the Department of Defense.'.

(2) The tables of chapters at the beginning of subtitle A, and at the beginning of part II of subtitle A, of such title are amended by inserting after the item relating to chapter 79 the following new item:

**1561'.**

(b) REPORTS- (1) Not later than January 1 of each of 1998 and 1999, each officer receiving a complaint forwarded in accordance with section 1561(b) of title 10, United States Code, as added by subsection (a), during the preceding year shall submit to the Secretary of the military department concerned a report on all such complaints and the investigations of such complaints (including the results of the investigations, in cases of investigations completed during such preceding year).

(2)(A) Not later than March 1 of each of 1998 and 1999, each Secretary receiving a report under paragraph (1) for a year shall submit to the Secretary of Defense a report on all such reports so received.

(B) Not later than April 1 following receipt of a report for a year under subparagraph (A), the Secretary of Defense shall transmit to Congress all such reports received for the year under subparagraph (A) together with the Secretary's assessment of each such report.

**APPENDIX B**

# ARMY REGULATION 15-6

# INVESTIGATION GUIDE

# FOR

# INFORMAL INVESTIGATIONS

**JANUARY, 1997**

## INTRODUCTION

**1. PURPOSE**:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. This guide includes the changes implemented by Change 1 to AR 15-6. Many of those changes are significant; consequently, the information in the guide based on the changes is italicized.

**2. DUTIES OF AN INVESTIGATING OFFICER:** The primary duties of an investigating officer are:

a. to ascertain and consider the evidence on all sides of an issue,

b. to be thorough and impartial,

c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and

d. to report the findings and recommendations to the appointing authority.

**3. AUTHORITY**:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that usually have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is designated.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as reports of survey and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6 or these procedures, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contains time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, *or DA civilian employees paid under the General Schedule, Level 13 (GS 13), or above* may be investigating officers. The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, *the appointing authority should select the best qualified person for the duty based on their education, training, experience, length of service, and temperament.*

## PRELIMINARY MATTERS

**1. Appointing authority.**

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations:

- any general court-martial convening authority, including those who have such authority for administrative purposes only,

- any general officer,

- a commander at any level,

- a principal staff officer or supervisor in the grade of major or above,

- any state adjutant general, and

- *a DA civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.*

b. *Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of $1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.*

**2. Appointment procedures.** Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

**3. Obtaining assistance.** The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: *Complex and sensitive cases include those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.*

**4. Administrative matters.** As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file.

**5. Concurrent investigations.** *An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency to avoid duplication of effort wherever possible.* If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer. Additionally, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct.

## CONDUCTING THE INVESTIGATION

**1. Developing an investigative plan.**

a. The investigating officer's primary duty is to gather evidence, and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of (1) an understanding of the facts required to reach a conclusion, and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

**2. Obtaining documentary and physical evidence.**

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. The report of investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

**3. Obtaining witness testimony.**

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

b. Witness statements should be taken on DA Form 2823. Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.)

d. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the local Labor Counselor. Commanders and supervisors, however, have the authority to order military personnel and to direct Federal employees to appear and testify. Civilian witnesses who are not Federal employees may agree to appear, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained and only after coordinating with the legal advisor or appointing authority.

**4. Rights Advisement.**

a. All soldiers suspected of criminal misconduct must first be advised of their rights. DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a Report of Survey, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

**5. Scheduling witness interviews.** The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

- When planning who to interview, work from the center of the issue outward. Identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interviews of key witnesses to be as complete as possible, avoiding the "backtracking" described above.

- Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant to the inquiry.

- Any information that is relevant should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

- It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

- At some point, there will be no more witnesses available with relevant and useful information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

**6. Conducting witness interviews.** Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:

- Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

- Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

- Focus on relevant information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and useful to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

- Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

- Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.

**7. Rules of Evidence**: Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

- The information must be relevant and material to the matter or matters under investigation.

- Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

- The result of polygraph examinations may be used only with the subject's permission.

- Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

- "Off-the-record" statements are not acceptable.

- An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

**8. Standard of Proof.** Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

## CONCLUDING THE INVESTIGATION

**1. Preparing Findings and Recommendations.** After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

- Facts: To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.

- Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that will become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

- Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

**2. Preparing the Submission to the Appointing Authority.** After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet in the following order:

- appointing order,

- initial information collected,

- rights warning statements,

- chronology, and

- exhibits (with an index).

**3. LEGAL REVIEW**:

a. AR 15-6 does not require that all informal investigations receive legal review. *The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters.* Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

- whether the investigation complies with requirements in the appointing order and other legal requirements,

- the effects of any errors in the investigation,

- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and

- whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

## CHECKLIST FOR INVESTIGATING OFFICERS

**1. Preliminary Matters:**

a. Has the appointing authority appointed an appropriate investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

**2. Investigative Plan.**

a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?

b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?

c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

**3. Conducting the Investigation.**

a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?

b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

**4. Preparing Findings and Recommendations.**

a. Is the evidence assembled in a logical and coherent fashion?

b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?

d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?

e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

**5. Final Action.**

a. Was an appropriate legal review conducted?

b. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?

c. Have the necessary taskers been prepared to implement the recommendations?

# CHAPTER G

# REPORTS OF SURVEY


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# Outline of Instruction

## I. REFERENCES.

A. AR 735-5, Policies and Procedures for Property Accountability, 31 January 1998.

B. DA Pam 735-5, Survey Officer's Guide, 1 March 1997.

C. AR 600-4, Remission of Indebtedness for Enlisted Members, 1 April 1998.

D. AR 37-1, Army Accounting and Fund Control, 30 Apr 91.

E. DA Pam 710-5, Unit Commander's Supply Handbook, 15 April 1987.

## II. INTRODUCTION/PURPOSES OF THE REPORT OF SURVEY SYSTEM.

A. Applicability.

1. Active Component.

2. Reserves and National Guard.

3. DA Civilian Employees.

B. Purposes (AR 735-5, para. 13-1).

1. Documents circumstances of loss, damage or destruction of Government property.

2. Serves as voucher for adjusting property books.

3. Documents charge of or relief from financial liability.

## III. ALTERNATIVES TO REPORTS OF SURVEY .

A. Statement of Charges/Cash Collection Voucher (AR 735-5, para. 12-2) when liability is admitted and the charge does not exceed one month's base pay. (These two functions have been combined in the DD Form 362)

B. Cash sales of hand tools and organizational clothing and individual equipment (AR 735-5, para. 12-2b).

C. Unit level commanders may adjust losses of durable hand tools up to $100 per incident, when no negligence or misconduct is involved (AR 735-5, para. 14-25).

D. Abandonment order (AR 735-5, para. 14-23) are used in combat, contingency operations, large scale field exercises simulating combat, military advisory activities, or to meet other military requirements.

E. Recovery of property unlawfully held by civilians? Authorized (AR 735-5, para. 14-11) -- show proof it is U.S. property and **do not** breach the peace.

F. Use AR 15-6 investigations and other collateral investigations as substitutes for the report of survey investigation (AR 735-5, para. 13-24).

G. Short Survey (AR 735-5, paras. 13-21 and 13-22). An **approving authority** may find an individual liable or not liable financially for damage to government property based on the evidence available without appointing a survey officer. The approving authority then assumes the survey officer's duties with respect to computing the charges and notifying the respondent.

## IV. THE REPORT OF SURVEY SYSTEM (AR 735-5, CH. 13 AND 14).

A. Initiating the Report of Survey.

1. Active Army commanders will initiate the report of survey within 15 calendar days of discovering the loss or damage (USAR guideline is 75 days, ARNG guideline is 45 days). [AR 735-5, para. 13-7].

2. The goal? A thorough investigation.

3. A report of survey or AR 15-6 investigation **MUST** be initiated (AR 735-5, para. 13-2) when:

   a. An individual refuses to admit liability and negligence or misconduct is suspected.

   b. A higher authority or other DA regulation directs a report of survey.

   c. A sensitive item is lost or destroyed.

   d. Property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.

   e. The amount of loss or damage exceeds an individual's monthly base pay, **even** if liability is admitted.

   f. Damage to government quarter's or furnishings exceeds one month's base pay.

   g. The loss involves certain bulk petroleum products.

4. In the Active Army, reports of survey will normally be processed within 75 days (USAR guidelines provide 240 days, ARNG guidelines provide 150 days) [AR 735-5, para. 13-5].

B. Appointing Authority (AR 735-5, para. 13-16).

1. The appointing authority appoints report of survey investigating officers, and reviews all reports of survey initiated within his or her command or authority.

2. Generally, a lieutenant colonel (05) commander is both appointing and approval authority.

3. When approving authority is retained at the colonel (06) level or above, the approving authority may designate a lieutenant colonel (05) (or major in a lieutenant colonel billet) or DOD civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above as appointing authority.

C. Approving Authority (AR 735-5, para. 13-16).

1. The approving authority is normally a battalion (05) or brigade (06) commander, but may be any commander, chief of a HQDA staff agency, director of a MACOM staff office, chief of a separate MACOM activity in the grade of O-5 or higher, or a DA civilian employee in a supervisory position in the grade of GS-14 or above.

   a. Does not have to be a court-martial convening authority.

   b. Takes final action by authority of the Secretary of the Army.

2. Regardless of who initiates the report of survey, it is processed through the chain of command of the individual responsible for the property at the time of the incident, provided the individual is subject to AR 735-5. (AR 735-5, para. 13-4).

D. Survey Officer Qualifications (AR 735-5, para. 13-26).

1. The survey officer will be senior to the person subject to possible financial liability, “except when impractical due to military exigencies.”

2. The survey officer can be an Army commissioned officer; warrant officer; or enlisted soldier in the rank of Sergeant First Class (E-7),or higher; a civilian employee GS-07 or above; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint commands or activities, any DOD commissioned or warrant officer or non-commissioned officer E-7 or above assigned to the activity or command can be the survey officer.

3. Consult AR 600-8-14, table 8-6 for the grade equivalency between military personnel and civilians employees.

4. Survey officer's primary duty? The investigation.

5. The surveying officer **should** get a briefing from a judge advocate.

## V. VALUING THE LOSS.

A. Types of Loss.

1. Loss. There are two types of losses which can result in financial liability:

a. Actual loss. Physical loss, damage or destruction of the property.

b. Loss of accountability. Due to loss circumstances, it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property.

2. The **actual value** at the time of the loss is the **preferred method** of valuing the loss. (AR 735-5, App. B, para. B-2a).

a. Determine the item's condition item at the time of the loss or damage.

b. Determine a price value for similar property in similar condition sold in the commercial market within the last 6 months.

3. Depreciation.

a. **Least** preferred method of determining the loss to the government (AR 735-5, App. B, para. B-8).

b. Compute charges according to AR 735-5, App. B, para B-2b.

4. Limits on financial liability (AR 735-5, para. 13-39).

a. **General rule:** An individual will not be charged more than one month's base pay.

(1) Charge is based upon the soldier's base pay **at the time of the loss**.

(2) For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

(3) For civilian employees it is 1/12 of their annual salary.

b. **Exceptions** to the general rule. There are times when personnel are liable for the **full amount of the loss**. (AR 735-5, para. 13-39a)

(1) Any soldier is liable for the full loss to the Government (less depreciation) when they lose, damage, or destroy personal arms or equipment.

(2) Any person is liable for the full loss of public funds.

(3) Accountable officers will be liable for the full amount of the loss.

(4) Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings, or equipment as a result of gross negligence or willful misconduct of the responsible individual, his guests, dependents, or pets.

5. Collective Financial Liability: Two or more persons may be held liable for the same loss.

(1) There is no comparative negligence.

(2) Financial loss is apportioned according to AR 735-5, Table 12-4.

(3) DO NOT use Table 12-4 if one of the collective liability respondents is not federally employed (AR 735-5, para. 13-39d).

(a) Take the total number of respondents divide the total amount of the loss. This is the amount each respondent is liable for -- subject to a one month's base pay cap for soldiers and civilian employees.

B. Involuntary Withholding of Current Pay.

1. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. § 1007.

2. Involuntary withholding for civilian employees. 5 U.S.C. § 5512, AR 37-1, Chapter 15.

3. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).

4. No involuntary withholding for the loss of MFO property.

## VI. IMPOSING LIABILITY.

A. Responsibility For Property (AR 735-5, paras. 2-8 & 13-28)

1. Command Responsibility.

a. The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command.

b. Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at <u>any</u> level.

2. Supervisory Responsibility.

a. The obligation of a supervisor for the proper use, care, and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and not contingent upon signed receipts or responsibility statements.

b. If supervisory responsibility is involved, also consider the following factors.

(1) The nature and complexity of the activity and how it affected the ability to maintain close supervision.

(2) The adequacy of supervisory measures used to monitor the activity of subordinates.

(3) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

3. Direct Responsibility.

a. The obligation to ensure the proper use, care, custody, and safekeeping of all government property for which the person has receipted.

b. Direct responsibility is closely related to custodial responsibility (discussed below).

4. Custodial Responsibility.

a. An individual's obligation regarding property in storage awaiting issue or turn-in to exercise reasonable and prudent actions to properly care for and ensure property custody and safekeeping of the property.

b. Who has custodial responsibility? A supply sergeant, supply custodian, supply clerk, or warehouse person who is rated by and answerable directly to the accountable officer or the individual having direct responsibility for the property.

c. Responsibilities include:

(1) Ensuring the security of all property stored within the supply room and storage annexes belonging to the supply room or SSA is adequate.

(2) Observing subordinates to ensure they properly care for and safeguard property.

(3) Enforcing security, safety and accounting requirements.

(4) If unable to enforce any of these, reporting the problems to their immediate supervisor.

5. Personal Responsibility.

a. An individual's obligation to properly use, care, and keep safe government property in their possession, with or without a receipt.

B. Negligence (AR 735-5, para. 13-28 b and see App. C, para. C-10).

1. Simple negligence -- the failure to act as a reasonably prudent person would have acted under similar circumstances.

a. Remember, a reasonably prudent person is an average person, not a perfect person. Also consider:

(1) What could be expected of the person considering their age, experience, and special qualifications.

(2) The type of responsibility involved.

(3) The type and nature of the property. More complex or sensitive property normally requires a greater degree of care.

**b. Examples of simple negligence.**

(1) Failure to do required maintenance checks.

(2) Leaving weapon leaning against a tree while attending to other duties.

(3) Driving too fast for road or weather conditions.

(4) Failing to maintain proper hand receipts.

2. Gross negligence - an extreme departure from the course of action expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.

a. Reckless, deliberate, or wanton -

(1) These elements can be express or implied.

(2) Does not include thoughtlessness, inadvertence, or errors in judgment.

b. Foreseeable consequences.

(1) Does not require actual knowledge of actual results.

(2) Does not need to foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.

**c. Examples of gross negligence.**

(1) Soldier drives a vehicle at a speed in excess of 40 mph of the posted speed limit. Intentionally tries to make a sharp curve without slowing down.

(2) Soldier lives in family quarters and has a child who likes to play with matches. Soldier leaves matches out where child can reach them.

3. Willful misconduct - any intentional or unlawful act.

a. Willfulness can be express or implied.

b. Includes violations of law and regulations such as theft and misappropriation of government property.

c. A violation of law or regulation is not negligence per se.

**d. Examples of willful misconduct.**

(1) Soldier throws a tear gas grenade into the mess tent to let the cooks know what he thought about breakfast, and as a result, the tent burns to the ground.

(2) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joy ride around post results in damage to several buildings.

C. Proximate cause - the cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary moving cause, or the predominant cause, from which the injury follows as a natural, direct, and immediate consequence, and without which it would not have occurred.

1. The damage arises out of the original act of negligence or misconduct.

2. A continual flow or occurrence of events from the negligent act or misconduct.

3. Use common sense.

**4. Examples of proximate cause.**

a. Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. Proximate cause is the soldier's failure to stop and look.

b. Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.

5. Independent intervening cause - an act which interrupts the original flow of events or consequences of the original negligence. It may include an act of God, criminal misconduct, or negligence.

## VII. RIGHTS OF THE RESPONDENT (AR 735-5, PARA. 13-40).

A. General Information.

1. Respondent = person recommended for financial liability.

2. The report of survey form (DA Form 4697) contains a rights notice.

B. Rights (AR 735-5, paras. 13-32 and 13-40 and figure 13-12).

1. An opportunity to examine the report of investigation.

2. Submit statements for consideration. Time limits for submitting rebuttal statements (AR 735-5, para. 13-33):

a. 7 calendar days -- when survey and investigation are hand delivered to the respondent.

b. 15 calendar days -- when respondent is unavailable but in the same country and the survey and investigation are mailed.

c. 30 calendar days -- when respondent is unavailable and in a different country and the survey and investigation are mailed.

3. Explanation of the consequences of a finding of gross negligence for a survey involving government quarters, furnishings and equipment.

4. Right to assistance of a JAG officer.

5. Right to request reconsideration.

6. Right to a hearing (for DOD civilians only – hearing is before finance, not commander).

## VIII. DUTIES OF THE APPROVING AUTHORITY.

A. Before the approving authority takes action, the survey is reviewed by a judge advocate as to the adequacy of the evidence and propriety of the findings and recommendations. (AR 735-5, para. 13-36).

B. The approving authority is not bound by the survey officer's, or judge advocate's recommendations.

1. If the approving authority decides to assess financial liability contrary to the recommendations of the survey officer or judge advocate the decision and the rationale must be in writing.

2. If considering new evidence, the approving authority must notify the individual of that fact and provide an opportunity to rebut.

3. The approving authority must ensure that the individual was advised of rights.

4. Initiate collection action by sending documentation to the servicing finance office.

5. The approving authority may request that a charge be prorated beyond 2 months (and up to 12 months).

## IX. RELIEF FROM REPORTS OF SURVEY.

A. Appeals (AR 735-5, paras. 13-42, 13-48 & 13-49).

1. **Appeal authority** is the next higher commander above the approving authority (normally the brigade commander).

2. Respondent has 30 days from date of notification to appeal unless he or she shows good cause for extension.

3. Two step process:

a. Submit request for reconsideration to approval authority.

b. Approving authority forwards to appeal authority as an appeal.

4. If the approving authority denies reconsideration the following actions are required before forwarding to the appeal authority:

a. Prepare a memorandum giving the basis for denying the requested relief.

b. The approving authority must personally sign the denial.

5. The appeal authority must get an independent legal review before acting on the appeal.

6. Action by the appeal authority is final.

B. Reopening Reports of Survey (AR 735-5, para. 13-46).

1. Not an appeal.

2. Authority to reopen rests with the approval authority.

3. May occur:

a. As part of an appeal of the assessment of financial liability.

b. When a response is submitted to the surveying officer from the person charged subsequent to the approving authority having assessed liability.

c. When a subordinate headquarters recommends reopening based upon new evidence.

d. When the property is recovered.

e. When the approving authority becomes aware that an injustice has occurred.

C. Remission of Indebtedness (AR 735-5; AR 600-4).

1. Enlisted soldiers only.

2. Only to avoid extreme hardship.

3. Only unpaid portions can be remitted. Suspend collection action long enough for the soldier to submit his request for remission of the debt.

4. Must request reconsideration before submitting request for remission of indebtedness.

D. Army Board for the Correction of Military Records (ABCMR) (AR 15-185).

E. Civilian employees may avail themselves of the grievance/arbitration procedures.

## X. JUDGE ADVOCATE'S ROLE.

A. For the Approving Authority (AR 735-5, para. 13-36).

1. Before approving authority takes action, a judge advocate must review the survey and investigation for legal sufficiency.

2. The approving authority is not bound by the survey officer's or the judge advocate's recommendations.

B. For the Appeal Authority (AR 735-5, para. 13-49b).

1. Before appeal authority takes action on an appeal, a judge advocate must review it.

2. Judge advocate must be different than the one who reviewed the survey and investigation for the approval authority.

C. For the Respondent (AR 27-3, para. 3-6 g(4)(b)).

1. Legal Assistance office required to provide assistance on rebuttal to report of survey.

2. Civilians not otherwise entitled to legal assistance receive assistance for report of survey purposes.

## XI. CONCLUSION.

# CHAPTER H

# LINE OF DUTY INVESTIGATIONS

# AND DETERMINATIONS

## Outline of Instruction

**I. REFERENCES.**

A. 10 USC §§ 972, 1201-1207 and 1219.

B. 38 USC §§ 101 and 105.

C. AR 600-8-1, Army Casualty and Memorial Affairs, Chapters 37-41 (18 Sept 1986).

**II. INTRODUCTION/PURPOSE.**

**III. LINE OF DUTY DETERMINATIONS.**

A. Two step process:

1. Status: where was the soldier supposed or authorized to be?

2. Conduct: was the soldier's misconduct the cause of the injury, illness, or disease?

B. Result:

1. In Line of Duty (ILD).

2. Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM).

3. Not in Line of Duty-Due to Own Misconduct (NLD-DOM).

C. Examples:

2. **In Line of Duty**. Soldier is injured in car crash. Crash is caused by another driver's negligence. Soldier is considered to be in the line of duty.

3. **Not in Line of Duty Not Due to Own Misconduct**: Soldier is AWOL, but otherwise doing nothing wrong. While walking down the street, soldier is hit by a car that jumps the curve and seriously injured. Soldier is considered to be not in the line of duty, bot due to own misconduct.

4. **Not in Line of Duty Due to Own Misconduct**:Soldier gets drunk at a party and attempts to drive home but is involved in an accident on the way. Soldier is considered to be not in the line of duty due to own misconduct.

## IV. IMPACT OF DETERMINATIONS.

A. In Line of Duty (ILD)-Soldier may be entitled to:

1. Army Disability Retirement or Separation Compensation.

2. VA Compensation and Hospitalization Benefits.

3. Incapacitation Pay (ARNG/USAR).

B. Not in Line of Duty - Not Due to Own Misconduct (NLD-NDOM) and Due to Own Misconduct (NLD-DOM):

1. If on active duty, soldier is denied disability retirement or separation compensation.

2. If disabled after leaving AD, soldier may be denied VA disability or hospitalization benefits.

3. May be denied civil service preference.

4. ARNG/USAR soldiers may be denied incapacitation pay.

C. Not in Line of Duty-Due to Own Misconduct (NLD-DOM):

1. Days lost > 1 added to service obligation.

2. Days lost > 1 may be excluded from computations for pay and allowances.

3. May result in loss of pay where disease (not injury) immediately follows intemperate use of drugs (includes alcohol).

## V. PROCEDURES.

A. Soldier is presumed ILD **UNLESS:**

1. **substantial** evidence ("evidence that is of greater weight than supports any different conclusion") shows otherwise.

2. Always look at specific rules of Appendix F.

B. Informal Investigation **by the Unit Commander** when:

1. No misconduct is suspected.

2. No negligence is suspected.

3. Formal investigation is not required.

4. **KEY:** Informal investigation can **only** result in a ILD determination.

C. Formal Investigation by an Appointed Investigating Officer (IO) [AR 15-6] when:

1. Unusual or doubtful circumstances exist.

2. Injury or death involving alcohol or drug abuse.

3. Self-inflicted injuries or suicide.

4. Injury or death incurred while AWOL.

5. Training death of a USAR/ARNG soldier.

6. Injury or death occurring while en route to final acceptance in the Army.

7. When USAR/ARNG soldier serving active duty tour of 30 days or less is disabled by disease.

8. Whenever there is an unfavorable finding of alcohol or drug abuse.

9. Death cases: Do investigation but make no LOD determination Veteran's Administration will make LD determination.

## VI. DUE PROCESS.

A. Soldier not required to make a statement against interest.

B. If soldier is not informed of right not to make statement, or is forced to make statement, it cannot be used in making the LOD determination (10 USC § 1219).

C. Soldier gets notice of potential adverse finding and opportunity to respond.

D. Soldier is notified of Approval Authority's decision.

E. Appellate Rights.

## VII. JUDGE ADVOCATE CONSIDERATIONS.

A. Advising the IO.

B. Understanding the Burdens.

1. "Greater weight than supports any different conclusion".

2. Balancing the ILD presumption with specific rules.

C. Legal Review on Behalf of the Command.

1. Have requirements been complied with?

2. Is there error?

3. Are findings supported by substantial evidence?

4. Are potential claims involved?

D. The Legal Assistance Perspective.

## VIII. CONCLUSION.

# CHAPTER I

# NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES


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# Outline of Instruction

## I. REFERENCES.

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B. AR 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (25 October 1998) (effective 25 November 1998).

C. AR 60-10/AFR 147-7, Army and Air Force Exchange Service General Policies (17 June 1988); AR 60-20/AFR 147-14, Army and Air Force Exchange Service Operating Policies (15 December 1992).

## II. INTRODUCTION.

Service MWR Headquarters:

Army Community and Family Support Center (CFSC) (trol.redstone.army.mil/mwr/)

Navy Morale, Welfare, and Recreation Division (www.mwr.navy.mil)

Air Force Services Agency (www-r.afsv.af.mil)

Marine Corps Community Service (MCCS) (www.usmc-mccs.org)

## III. NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIS)-- OPERATIONS AND FUNDING.

A. Definition: A DoD organizational entity which performs an essential government function. It provides morale, welfare, and recreational programs for military personnel and civilians. As a fiscal entity, it maintains custody and control over nonappropriated funds. It is not incorporated under the laws of any state and enjoys the legal status of an instrumentality of the United States. AR 215-1, Glossary.

B. First U.S. Military NAFI - 1775.

C. Objectives of the MWR Program. DODI 1015.10, para. D1; See also AR 215-1, paras. 1-7 through 1-9.

1. Maintain a high level of esprit de corps.

2. Maintain physical and mental well-being.

3. Encourage the constructive use of time.

4. Aid in recruitment and retention.

5. Assist in the adjustment to military life.

6. Provide a community support environment.

7. Create a self-sustaining military community.

8. Reinforce unit cohesion.

9. Increase combat readiness.

D. Congressional Interest in NAFIs.

1. Initially, reaction to business and private concerns over PX and MWR activities.

2. Two congressional committees—the primary committee is the MWR Panel of the Readiness Subcommittee of the House Armed Services Committee.

a. Broad interests—construction, financing, and services.

b. NAFIs should operate like a business.

E. Command Responsibilities for NAFI Operations. AR 215-1, ch. 2.

1. Secretary of the Army has overall responsibility. AR 215-1, para. 2-1.

2. Assistant Chief of Staff for Installation Management (ACSIM) is proponent and focal point for all MWRs and NAFIs. AR 215-1, para 2-1c.

3. U.S. Army Community and Family Support Center (USACFSC). AR 215-1, para. 2-5.

   a. Recommends to the ACSIM Army policy.

   b. Reviews the MWR program and establish business strategies. Provides management and technical assistance.

   c. Reviews and approves request for establishment of all Army NAFIs.

   d. Develops financial management practices for the management of MWR and NAF resources.

   e. Administers Armed Forces Recreation Centers (AFRCs) and the Army Recreation Machine Program (ARMP).

4. Major Army Commands (MACOMs). AR 215-1, para. 2-3.

   a. Provide oversight and ensure APF and NAF funds are properly used.

   b. Allocate APF based upon installation needs and the five-year plan priorities.

   c. Conduct MACOM-level MWR events.

5. Installation Commanders. Operate MWR programs, the IMWRF, and local NAFIs. AR 215-1, para. 2-4.

F. Funding of NAFIs.

1. APF support for MWR personnel, operations, supplies, and other expenses. See DODI 1015.10, encl. 6, and AR 215-1, ch. 4 & App D.

2. Nonappropriated funds--those generated by NAFI activities.

3. Construction funding. AR 215-1, ch. 10 (Sec. II) and App. E.

   a. Army Morale, Welfare, and Recreation Fund (AMWRF) for NAF construction. AR 215-1, para. 10-8.

      (1) Funded by AAFES revenues, monthly capital reinvestment assessment of all NAFI income, and interest. DODI 1015.10, para. D8; AR 215-1, para. 11-8.

      (2) Pays most of major construction costs.

      (3) Installation funds design cost (includes furniture, fixtures, and equipment), opening costs, all environmental costs, and project validation costs (market analysis). AR 215-1, para. 10-8.

   b. Market analysis required. AR 215-1, para. 10-2.

   c. Public-Private Ventures. . DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare and Recreation (MWR) Category C Revenue-Generating Activities (June 17, 1998); AR 215-1,para. 10-12

      (1) In order to meet MWR requirements, installations may identify activities that are unavailable through normal funding sources and that may be met by the private sector. The Army leases the land for a facility, and the contractor builds the activity and operates it, with the IMWRF receiving a percentage of profits.

      (2) Requires approval/coordination w/ CFSC and an extensive local survey prior to approval. Congress notified by DoD

4. Organization of NAFIs. See DODI 1015.10, para. D3 and encl. 4; AR 215-1, para. 4-1.

a. Category A: Mission-Sustaining Activities. AR 215-1, paras. 4-1a, 11-4a(1).

(1) Essential to sustaining readiness and have little or no capacity to generate NAF income.

(2) Supported with APF--up to 100%; DoD minimum is 85%.

(3) NAF funding only allowed for:

(a) Specific expenses for which APFs are not authorized, or

(b) When use is not otherwise prohibited and it is certified in writing that APF is not available.

(4) Category A activities are:

- Armed Forces Professional Entertainment Program Overseas.
- Gymnasium/Physical Fitness/Aquatic Training.
- Libraries.
- Parks and Picnic Areas.
- Recreation Centers/Rooms.
- Shipboard/Isolated/Deployed/Free Admission Motion Pictures.
- Sports/Athletics (Self-Directed, Unit Level, Intramural).
- Unit Level Programs and Activities.

b. Category B: Community Support Activities.

(1) Satisfies the basic needs of soldiers and their families. Makes installations temporary home towns. Different than category A because of their ability to generate some income. AR 215-1, para. 4-1b.

(2) Requires substantial APF support. DoD target is at least 65% APF. AR 215-1, para 11-4a(2).

(3) Category B activities are:

- Arts and Crafts Skill Development.
- Bowling Centers (less than 13 lanes).
- Automotive Crafts Skill Development.
- Child Development Services.
- Entertainment (Music and Theater).
- Information, Ticketing, and Registration Services.
- Outdoor Recreation.
- Recreational Swimming Pools.
- Sports Programs (above the intramural level).
- Youth Services.
- Stars and Stripes.Category C: Revenue-Generating Activities. AR 215-1, para. 4-1c.

(1) Has less impact on readiness and provides recreational opportunities.

(2) Has ability to generate income to cover <u>most</u> operating expenses. Only indirect APF support.

(3) At remote sites (see AR 215-1, table 4-1, for listings), these may receive APF on the same basis as category B. AR 215-1, para. 4-4.

(4) Examples include:

- Aero Clubs.
- Amusement Machine Locations and Centers.
- Armed Services Exchange and Related Activities.
- Armed Forces Recreation Centers.
- Audio/Photo and Retail Sales (Overseas)
- Bingo.
- Bowling Centers (over 12 lanes).
- Temporary Guest Facilities, Cabins, Cottages, Cabanas, Recreational Guest Houses.
- Food Beverage, and Entertainment Operations.
- Golf Courses.
- Military Clubs.
- Others.

d. Supplemental Missions. AR 215-1, paras. 4-7 and 4-8.

(1) Established to support a mission activity of the Army.

(2) Income and funding maintained at a level to "break even."

(3) Examples include:

- Army Community Services.
- Veterinary Services.
- Supplemental Field Ration Dining Facility Funds.
- NAF Billeting.
- Fisher House Funds.
- Military Historical Museums.
- USMA NAFIs.
- School Lunch Funds.
- Vehicle Registration Fund.
- Disciplinary Barracks Funds.

5. Installation Morale, Welfare, and Recreation Fund (IMWRF), the "One Fund." AR 215-1, para. 4-6.

a. Goals.

(1) Designed to make NAFIs operate in a more businesslike fashion.

(2) Designed to help NAFIs better meet the needs of the military community.

b. Operation of IMWRF.

(1) Central control under the installation commander.

(2) Fund manager for IMWRF will be the Director for Community Activities (DCA). AR 215-1, para. 11-2b.

(a) Responsible for overall fiscal operation.

(b) Responsible for establishing sound management functions.

(3) NAFI councils are required (except for DA or MACOM administered NAFIs). Councils will be governing (directing and supervising the fund manager) or nongoverning (advisory only). AR 215-1, paras. 5-8 - 5-10.

(a) Members will be full-time DoD civilians and active duty military. AR 215-1, para. 5-9.

(b) Made up of fund manager (nonvoting) and at least four other (voting) members. AR 215-1, para. 5-9.

c. DoD MWR Utilization, Support, and Accountability (AR 215-1, para. 4-3). Implements DoD policy found in Ass't Sec Def (Force Management Policy) Memo, 23 July 1997, DoD Morale, Welfare, and Recreation Utilization, Support, and Accountability (DoD MWR USA) Practice.

(1) Designed to foster efficiency in the use of appropriated and nonappropriated funds.

(2) Allows the use of NAF contracting and personnel procedures to meet an APF MWR need. APF must then reimburse the IMWRF for the expenses.

(3) Must have a Memorandum of Agreement in place.

(4) Not available for installations participating in the Uniform Resource Demonstration Funding Project (White Sands and Ft. Campbell).

d. Unit Funds. AR 215-1,para 5-11c clarifies proper expenditures of unit funds, including "unit activity" funds established by MACOMs.

(1) Funds must be used for the collective benefit of all unit members for off-duty recreational purposes authorized by AR 215-1.

(2) All members must have the opportunity to participate.

(3) Activities must relate to the morale, welfare, and recreation needs of the unit members. Family members and guests may attend at the discretion of unit members.

6. Solicited Commercial Sponsorship. DODI 1015.10, encl. 9; AR 215-1, para. 7-47. Allowed for MWR activities, Army Family Team Building, and Army Family Action Plan only.

a. Advertising, publicity, or other promotional consideration must be commensurate with the level of sponsorship offered.

b. Solicitation must be competitive and sponsorship award must be based upon the best value received and the appropriateness of the sponsor. No favored treatment allowed for sponsors and no penalties for nonsponsors.

c. All agreements must receive legal review (personnel involved in APF contracting may not be directly or indirectly involved in the solicitation).

d. All public recognition of sponsors must have disclaimers, i.e., "sponsorship does not imply endorsement."

e. Contents of all proposed public recognition must be reviewed to ensure compliance with DoD Directives.

f. May not solicit alcohol or tobacco manufacturers but may accept unsolicited offers.

g. Sponsorship agreement must be in writing and for one year or less (extensions OK, up to five years). Also must include certification that no sponsorship costs will be charged to the Federal Government.

h. Open house programs are public affairs office events (not MWR). PAO must approve MWR events during open houses.

7. Gifts. NAFIs can accept conditional or unconditional gifts from individuals or private organizations. AR 215-1, para. 7-39.

a. Acceptance of the gift must be in the Army's best interest.

b. Gifts may not be requested, and donors receive no preferential treatment.

c. Fund managers may accept gifts of up to $5,000 when delegated authority by local commander.

d. Local commanders may accept gifts of up to $25,000.

e. MACOM commander may accept gifts up to $50,000 in value.

f. CFSC may accept gifts valued up to $200,000.

g. Secretary of the Army may accept gifts valued over $200,000.

G. Patronage.

1. Equal access for Reservists for Category C activities. AR 215-1, para. 6-2a (implementing 10 USC 1065).

a. Gives Ready and Selected Reserve members same priority as active duty members for Category C activities.

b. Gives Gray area retirees (retired reservists under 60) same priority as regular Army retirees for Category C activities.

c. Changes not applicable to Category A and B activities.

d. Family members have same priority as their sponsor.

2. State and local government use. AR 215-1, para. 6-2h(3).

a. May use Category A or B activities when the facilities have excess capacity when the use is at no additional cost to the Army.

b. Must establish a Memorandum of Understanding.

3. Routine use of MWR activities by members of on-post private organizations is prohibited unless the member otherwise qualifies. AR 215-1, para. 6-2i.

4. Allows ASA (M&RA) to approve a waiver to allow the general public to patronize Category C activities when the facility is under-utilized and the local community agrees (except for bingo).

H. Prohibited Uses of NAFIs. AR 215-1, para. 4-12.

1. Use must withstand public scrutiny test.

2. Donations to private organizations.

3. Charitable contributions or assistance in collection of charitable donations.

4. Change of command, retirement ceremonies, funerals, or other personal-type events for selected individuals.

5. Items authorized to be funded with APFs.

a. Under some circumstances, NAFs may be used for MWR activities if APFs are not available.

b. Requires written authorization that authorized APFs cannot satisfy the requirements.

c. Consider fiscal limitations set out in Congressional appropriations and authorizations.

6. Spending must be connected to command morale and welfare.

I. APF Contracting with NAF Activities (Overturning the Mattress Decision, 58 Comp. Gen. 94, Nov. 21, 1978). AR 215-1, para. 7-34 (implements 10 USC 2482a);

1. Authorizes APF activities to contract w/ a NAFI for purchases up to $2,500 using micropurchase procedures (rotating sources) with the IMPAC card

2. Authorizes APF activities to contract w/ a NAFI for purchases exceeding $2,500 when justified as a sole-source contract using APF procedures.

3. Must be for goods or services "integral to the ongoing functions performed by the NAFI in support of the NAFI mission."

4. Overseas, APF activities may contract with the PX for purchases up to $50,000 (implements 10 USC § 2424).

## IV. LIABILITY OF NAFIS.

A. NAFIs as Federal Instrumentalities (Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942)). AR 215-1, para. 3-1.

B. Tax Liability AR 215-1, ch. 3, sec. III and para. 3-1b(2).

1. Federal. Alcohol wholesale & retail taxes. AR 215-1, paras. 3-10 and 3-12.

2. State and local. AR 215-1, paras. 3-13 and 3-14.

a. Waiver of immunity. 4 U.S.C. § 104.

b. Legal versus economic incidence of tax. AR 215-1, para. 3-13a.

C. Tort Liability. AR 215-1, para. 3-1.

1. Suits by NAFI employees. Exclusive remedy is under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901.

2. Suits by third parties. Federal Torts Claims Act. AR 215-1, Ch. 14.

D. Contract Liability. AR 215-4.

1. NAFIs have sovereign immunity from suit, but administrative remedies exist. Borden v. United States, 116 F. Supp. 873 (Ct. Cl. 1953).

2. Waiver of sovereign immunity for suit against the Exchange Service. Tucker Act, 28 U.S.C. § 1346.

E. Concessionaires status. They are private businesses and not instrumentalities of the United States. They are not entitled to any of the privileges and immunities of the Federal Government. AR 215-1, para. 3-2.

## V. NAFI EMPLOYEES.

A. References.

1. DoD 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities (Dec. 1988); DoD 1401.1-M-1, Job Grading System Manual for Nonappropriated Fund Instrumentalities (Oct. 1980).

2. DODI 1015.10, para. D12.

3. AR 215-1, ch. 9 and App. D; AR 215-3.

B. Generally, NAFI employees are civilians. AR 215-3, para. 1-5.

C. Military.

1. Enlisted soldiers may be employed if off duty and if no interference with duty. AR 215-3, para. 2-16a.

2. Officers may provide off-duty service on a fee basis. AR 215-3, para. 2-16b.

D. NAFI employment must comply with the applicable federal labor laws, but NAFI employees do not fall under OPM or the Federal Employment Compensation Act.

## VI. CLUBS. AR 215-1, para. 8-17b.

A. Financial Status. Clubs must operate without a loss, or MACOM Commander must explain to MWR BOD why club should not close.

B. Army Theme Restaurants.

C. Membership.

1. Voluntary membership. AR 215-1, para. 8-17b(3); AR 600-20, para. 4-11.

a. Can't require reasons for ending or declining club membership.

b. Can't engage in any practice that involves or implies coercion, influence, or reprisal in the conduct of membership campaigns.

(1) No repeated orientations, meetings, or similar counseling of persons who have chosen not to join.

(2) No use of membership statistics in support of supervisory influence.

c. Encouraging membership.

(1) Sponsoring membership drives.

(2) Giving information to potential members, i.e., when they in-process.

(3) Structuring and running club activities based on the desires and support of patrons.

(4) Letter from commander encouraging club membership—must not use improper pressure.

2. Nonmember use of the club. AR 215-1, para. 8-17b(7).

a. Personnel in a transient or TDY status for less than 30 days. AR 215-1, para. 8-17b(7)(a)2.

b. To attend special functions. AR 215-1, para. 8-17b(7).

c. Bona fide guest of a member. AR 215-1, para. 8-17b(7)(a)1.

d. Others.

e. Nonmembers may be charged a different price than members.

## VII. UNAUTHORIZED/RESTRICTED ACTIVITIES. DODI 1015.10, PARA. D10; AR 215-1, PARA. 8-35.

A. Lotteries or sale of lottery tickets.

B. Pull-tab bingo.

C. Sale of chit books related to the sale of alcohol.

D. Nude dancing. AR 215-1, para. 8-12.

E. Awarding alcohol as a prize. AR 215-1, para. 7-14(e).

F. Pornography Sales.

1. Military Honor and Decency Act of 1996 (10 USC § 2489a), implemented by DoDI 4105.7, Sale or Rental of Sexually Explicit Material on DoD Property (June 29, 1998). Prohibits sale or rental of sexually explicit material on "property under the jurisdiction of DoD" (DoD resale activities).

    a. Includes DeCA, AAFES, NEX, MCX and U.S. Navy Ships Stores.

    b. Does not include entities that are not instrumentalities of the U.S.

    c. Other MWR activities covered? Not by the letter of the law.

    d. Covers audio and video recordings and periodicals with visual depictions produced in any medium.

2. Suit brought to enjoin enforcement by DoD.

a. General Media Communications, Inc. v. Cohen, 952 F.Supp. 1072 (20 February 1997, U.S. District Court, Southern District of New York). Court ruled the statute unconstitutional and issued permanent injunction prohibiting DoD from implementing the Act.

b. GMC v. Cohen, 131 F.3d 273 (21 November 1997, U.S. Court of Appeals, 2d Circuit). Court overturned the lower court's holding, finding the Act constitutional and within Congress' authority.

c. GMC v. Cohen, 118 S.Ct. 2367 (June 26, 1998). Supreme Court denied certiorari.

3. Current status.

a. Act is implemented within DoD.

b. DoD Resale Activities Board of Review - reviewed hundreds of periodicals --most were found violative.

c. Another lawsuit pending in San Fransisco.

G. Gambling is generally prohibited. See DoD Directive 5500.7-R, Joint Ethics Regulation § 2-302.

1. Monte Carlo or Las Vegas Events. DODI 1015.10, para. D11. AR 215-1, para. 8-8.

a. Must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

b. Must use chits or play money. Can't use winnings to buy resale items, food, beverages, pay club bill, or exchange for cash.

c. MWR--four per year (overseas may be more); PO--one per year.

d. CONUS use of slot machines or roulette wheels is prohibited.

e. Can’t advertise via U.S. Postal Service.

2. "Grey Area Gambling Devices." Defined at AR 215-1, para 8-35g. Implements 15 USC 1171.

a. Gambling Device vs. Amusement machine.

b. Game of chance vs. Game of Skill.

3. Bingo. DODI 1015.10, para. D 11a(2); AR 215-1, para. 8-6.

a. Must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

b. On exclusive jurisdiction areas, the NAFI need not pay state or local fees or taxes, or obtain of a bingo permit. Concurrent jurisdiction: state may regulate and charge for permits. AR 215-1, para. 3-13d.

c. Can’t advertise via U.S. Postal Service.

d. Participation limited to authorized patrons and bona fide guests. Effective 4 Jan 1999, may not open bingo to general civilian populace, and contractor-operated bingo is prohibited. (Memo from ASA (M&RA) to Cdr, USACFSC, subject Bingo Activities in Army Morale, Welfare, and Recreation (MWR) Programs--Action Memorandum, dated Nov. 5, 1998.)

4. Raffles. DODI 1015.10, para. D11a(3); AR 215-1, para. 8-19.

a. Lotteries are prohibited.

b. Raffles may be conducted to raise funds for MWR activities.

(1) Raffle proposal must receive a legal review;

(2) The Installation Commander must give his written approval of the raffle in advance;

(3) The raffle tickets must specify the maximum number of tickets that may be sold; and

(4) The IMWRF's total annual prizes may not exceed a retail value of $20,000. $15,000 is maximum retail value for any one prize. (MACOM may grant exception.)

(5) Raffles must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

(6) Can't advertise raffles via U.S. Postal Service.

## VIII. MWR ACTIVITIES AND ALCOHOL. DODI 1015.1, App. 12; AR 215-1, Ch. 7, Sec. II.

A. Age Restrictions on Sale of Alcohol. AR 215-1, para. 7-7.

1. At locations outside U.S., 18 years is minimum age for the purchase of alcohol products in the overseas Military Retail System. Look at treaties and local situation for higher minimum age. AR 215-1, para. 7-7b.

2. In U.S., no one under 21 will be employed to dispense, sell, or handle alcohol unless permitted by the state. AR 215-1, para. 7-7a.

B. In U.S., drinking age will be the same as the state where the installation is located. Exceptions to drinking age restrictions possible.

1. At remote installations where POVs are not available, all alcoholic beverages may be sold. AR 215-1, para. 7-7c(1).

2. If installation is located within 50 miles or 1-hour driving time from a state or international border with a lower drinking age. Sole consideration is the motor vehicle safety of the community. AR 215-1, para. 7-7c(2).

3. Special occasions under controlled conditions in order to foster camaraderie and friendship in a military environment. Must be approved by a general officer. AR 215-1, para. 7-7c(3).

4. Exceptions only apply to soldiers. AR 215-1, para. 7-7e.

5. State law does not affect "nonalcoholic" drinks (containing less than one-half of one percent alcohol), even if the state classifies them as alcoholic. AR 215-1, para. 7-7d.

C. Off Post. No activity may provide alcohol for off-post catered functions. Outside U.S., MACOMs will determine. AR 215-1, para. 7-10c.

D. Purchase of Alcohol. AR 215-1, para. 7-12.

1. In U.S., distilled spirits may be purchased from any source. Malt beverage and wine must be purchased in state. Exception: In Alaska and Hawaii, all alcohol purchases must be made within the state. AR 215-1, para. 7-12b.

2. Outside U.S., MACOMs decide policy consistent with treaties and agreements. AR 215-1, para. 7-12a.

3. As instrumentalities of the United States, NAF are exempt from state and local taxes. AR 215-1, paras. 3-1b(2) and 3-13. But they must pay federal wholesaler or retailer taxes. AR 215-1, para. 3-10.

## IX. CONCLUSION.

INFORMATION PAPER

CFSC-JA
18 August 1998

SUBJECT: Transitional Compensation

1. Purpose. To provide information concerning transitional compensation for abused dependents.

2. Discussion.

a. In May 1995, DODI 1342.24, Subject: Transitional Compensation for Abused Dependents, was published, implementing 10 U.S.C. 1059, relating to transitional compensation to dependents of members separated for dependent abuse.

b. DODI 1342.24, applies to dependents of members of the Armed Forces who have been on active duty for more than 30 days and who on or after November 30, 1993, have been separated from active duty under a court-martial sentence resulting from a dependent-abuse offense; or administratively separated from active duty if the basis for separation includes a dependent-abuse offense.

c. Compensation is made at the same rate as for Dependency and Indemnity Compensation (38 U.S.C. 1311(a)(1)), and payments range from 12 to 36 months depending on the member's ETS date at the time of the court-martial or administrative separation.

d. DODI 1342.24 contains provisions for the amount, commence-ment and duration of payments, recipients of payments, and provisions for cessation of payments, to include remarriage by the spouse, cohabitation with the member, and active participation by the spouse in the conduct constituting the abuse. It also provides for commissary and exchange benefits and medical benefits.

e. It is important that this information be supplied to the field so that dependents of members who are court-martialed or separated for dependent-abuse offenses are aware of their right to these entitlements.

O'Malley A. Pitcher/DSN 761-7460

# CHAPTER J

# DEFENSIVE FEDERAL LITIGATION

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# Outline of Instruction

## I. REFERENCES.

A. Army Regulation 27-40, Litigation (19 September 1994).

B. 28 U.S.C.A. §§ 501-519 (West 1999) (defining the Department of Justice responsibilities).

C. 28 C.F.R. § 15.3 & § 50.15 (DOJ rules related to individual representation).

D. Claims Judge Advocate Litigation Handbook, Tort Branch, Army Litigation Division (5th Ed. 2000).

E. Federal Civil Judicial Procedure and Rules (West 2000).

## II. INTRODUCTION.

A. Military decision, programs, and policies are subject to judicial review by the federal courts.

B. The unique character of the military influences the scope of review.

> "We know that from top to bottom of the Army the complaint is often made . . . that there is objectionable handling of men. But judges are not given the task of running the Army. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be not to intervene in judicial matters."
>
> Orloff v. Willoughby, 345 U.S. 83, 93 (1953)

C. Judicial deference today.

## III. THE DEPARTMENT OF JUSTICE

A. Representation of the interests of the United States. 28 U.S.C. §§ 516 - 519.

B. Relationship with Department of the Army.

## IV. ARMY LITIGATION OPERATIONS

A. The Army Litigation Division.

B. The Army Contract Appeals Division.

C. The Army Environmental Law Division.

D. The Army Procurement Fraud Division.

E. The Army Intellectual Property Law & Regulatory Law Division.

F. SJA Offices

1. Service of Process. AR 27-40, Chapter 2.

2. Subpoenas. AR 27-40, para. 7-7.

3. Witness Requests. AR 27-40, para. 7-8.

4. Jury Duty. AR 27-40, para. 10-1.

5. Reporting Requirements. AR 27-40, para. 3-8.

6. Litigation Reports. AR 27-40, para. 3-9, See Section VIII below.

## V. TYPES OF SUITS FILED AGAINST THE ARMY AND ARMY OFFICIALS.

A. Subject-matter of Litigation (illustrative, not exclusive):

1. Enlistments, inductions, activations.

2. Discharges.

3. Transfers and assignments.

4. Promotions.

5. Personnel policies.

6. Military programs.

7. Civilian personnel actions.

8. Installations management decisions.

9. Environmental compliance and remediation.

10. Bankruptcy (as a creditor).

11. Personal injury, death, or property damage caused by the negligence of Federal employees.

12. Civil challenges to courts-martial convictions (habeus actions, corrections of military records).

13. Contract disputes.

14. Freedom of Information and Privacy Act.

15. Federal and state administrative regulatory activities.

B. Types of Relief Sought.

1. Damages (money).

2. Injunction/mandamus.

3. Declaratory judgment.

4. Habeas corpus.

## VI. SYSTEMATIC ANALYSIS OF LEGAL ISSUES IN SUITS AGAINST THE ARMY.

A. The arguments.

1. Sovereign immunity.

2. Federal jurisdiction.

3. Justiciability (remedy).

4. Exhaustion of administrative remedies.

5. Immunities or Judicial bars.

6. Reviewability or scope of review.

7. Trial on the merits.

## VII. SUITS AGAINST OFFICERS IN THEIR INDIVIDUAL CAPACITY.

A. Where is the Suit Defended.

1. Federal court.

2. State court.

B. Who Will Provide Representation.

1. Role of the Department of Justice (DOJ).

2. Role of the installation Staff Judge Advocate.

a) Request the local U.S. Attorney to provide temporarily representation when "time for response is limited." Army Reg. 27-40, Legal Services: Litigation, para. 3-2a(2) [hereinafter AR 27-40].

b) Referring the request for representation to Litigation Division, OTJAG. AR 27-40, para. 3-2a(3).

C. DOJ Representation Criteria 28 C.F.R. § 15.3 & § 50.15.

1. Current or former employee of the federal government.

2. Acting within the course and scope of employment.

3. Not in connection with a federal criminal proceeding or agency disciplinary matter.

4. Best interests of the United States.

5. Who Is Liable for an Adverse Judgment?

a) Judgments against individual federal employees and the United States are paid by the United States.

b) Judgments against individual federal employees are the responsibility of the employee.

D. Immunities.

1. Statutory immunity and judicial bar for **common law torts**.

a) Federal Employees Liability Reform and Tort Compensation Act, (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679) (The Westfall Act). Federal employees, including members of the Armed Forces, who are sued for state law torts committed within the scope of their employment. United States v. Smith, 499 U.S. 160 (1991); Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994).

(1) Certification.

(2) Motion to substitute.

(3) Reviewability. Guiterrez de Martinez, et al v. Lamango, 115 S.Ct. 2227 (1995).

b) Military medical or dental personnel performing medical, dental, or other health-related functions within the scope of their employment. 10 U.S.C. § 1089 (The Gonzalez Act).

c) Lawyers or members of legal staffs rendering legal advice within the scope of their employment. 10 U.S.C. § 1054.

d) Judicial bar applicable in suits filed by another servicemember when claim arises "incident to service." Feres v. United States, 340 U.S. 135 (1950).

2. Judicially-created immunity for **constitutional torts**.

a) General rule: You get only a "qualified immunity" from suit. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

--Test for qualified immunity: Did the individual defendant's actions violate a clearly established constitutional right of which a reasonable person would have known?

b) Exceptions: You are absolutely immune when:

(1) Your actions were quasi-judicial or quasi-prosecutorial in character. Butz v. Economou, 438 U.S. 486 (1978).

(2) The suit is filed by another servicemember alleging a constitutional claim arising "incident to service." Chappell v. Wallace, 462 U.S. 486 (1983).

(3) The suit is filed by a Federal civilian employee on a claim that is covered by the Civil Service System. Bush v. Lucas, 462 U.S. 367 (1983).

## VIII. LITIGATION REPORTS

A. References.

1. Army Regulation 27-40, Litigation (19 SEP 94), Chap. 3.

2. Claims Judge Advocate Litigation Handbook, Tort Branch, Army Litigation Division (5th Ed. 2000).

3. Federal Civil Judicial Procedure and Rules (West 2000).

B. Elements of a litigation report.

1. **Statement of Facts**. This is the most important part of a Litigation Report. The type of suit (e.g. FTCA, Labor, FOIA) will dictate the facts that should be emphasized. But in every case, a complete, accurate and documented set of facts should be the first priority.

a) Documentation. All factual statements should be followed by a reference to a specific Exhibit or Tab, and page number (or line number if helpful) in the Lit. Report. All witness statements or supporting documents must be attached as an Exhibit or Tab. *Example: Plaintiff's claim is for the loss of consortium of her husband. (Exhibit 4, pg. 2).*

b) Personal History. Include a detailed personal history of the Plaintiff. The history may include, but is not limited to: military service, employment, military/civilian education, family, earning/tax history, medical history.

c) Factual History. A detailed description of the facts that relate to the plaintiff's cause of action. All referenced with specific supporting exhibits.

d) Procedural History. A detailed description of the progression of pre-litigation actions, including pre-litigation claims or administrative actions, pre-litigation negotiations or settlement offers. Also helpful to include dates for responsive pleading, discovery or motions.

e) Chronology. A succinct time line of the events leading to suit. The Chronology can be included as an Exhibit. *Example:*

10 JAN 98 - Plaintiff Smith filed Informal EEO Complaint (Exhibit G)
16 JUL 98 - Plaintiff Smith filed Formal Complaint (Exhibit K)
14 DEC 00 - Suit filed in Western Dist. of Kentucky (Exhibit J)
30 DEC 00 - Complaint Served on U.S. Attorney (Exhibit L)

f) Use plain language. Avoid or explain military, medical or other jargon.

**2. Set-off or Counterclaim.** Identify all potential setoffs or counterclaims and the supporting facts and/or law.

3. Responses to Pleadings.

a) Draft Answer to the Complaint. Each allegation should be specifically addressed. Answers may be qualified.

b) Affirmative Defenses. Identify potential affirmative defenses. Remember some defenses may be waived if not raised in the initial response.

4. Memorandum of Law.

a) Brief Statement of Legal Issues and Potential Defenses.

b) Military Unique Issues. (e.g. *Feres* Doctrine, Exhaustion of Administrative Remedies)

c) Jurisdiction Unique Issues. (e.g. State Tort Damages Caps, seat belt statutes, scope of employment definitions)

d) Analysis. Apply the facts to the law and make recommendations as to course of conduct.

e) Format Unimportant. (Lawyer to lawyer memo, not being submitted for law review publication.)

f) Coordinate with military litigation attorney. Often military litigating attorney will already understand law and save you time researching this area.

**5. Potential Witness Information.** The second most important part of the Litigation Report. The witness list should include:

a) Full Name

b) Rank/Status

c) SSN

d) Work Addresses and telephone number.

e) Home address and telephone number.

f) E-mail addresses.

g) PCS/ETS or Departure from employment date.

h) Forwarding addresses.

i) Brief summary of the witnesses' testimony (FRCP 26(a)).

j) Expert Witnesses. Include Bio or Curriculum Vitae (CV) as an exhibit to the Lit. Report.

k) Witness List Example:

**John Joe Doe**, M.D., Major, US Army, Medical Corps, Gen. Surgery,
SSN: 123-45-6780, PCS – July 01.
Work Address: Womack Army Medical Center (WAMC), Fort Bragg, North Carolina 28310;
Work phone (910) 123-1234;
Home address: 1234 Army Drive, Fayetteville, NC 28311;
Home phone: (910) 123-6789;
E-mail Address: john.doe@WAMC.army.mil;
Testimony: Dr. Doe is expected to testify concerning the treatment provided to Dead Husband on October 1997.

**6. Exhibits.** Attach all relevant documents as exhibits.

a) Index of Exhibits.

b) Witness Interview Summaries.

c) Relevant Documents (paginated)

d) Photographs.

e) Chronologies.

f) Draft Discovery. (Interrogatories, Requests for Admissions)

g) Draft Motions.

h) Prior Correspondence with Plaintiff.

i) Pre-litigation reports of investigations or administrative proceedings. (e.g. MSPB or EEOC Briefs).

j) Potential Expert Witnesses.

7. Distribution.

a) AR 27-40 Requirements:

(1) Original and 1 copy to responsible HQDA litigating division.

(2) One copy to U.S. Attorney's Office.

(3) Electronic Courtesy Copy to Litigation Division.

b) Common Sense.

(1) Coordinate with HQDA litigating division prior to sending.

(2) Keep office copy until suit is resolved.

C. General guidance.

1. Assume all actions will require a Litigation Report to be prepared. The suspense for a Lit. Report can often be short. Organize and document accordingly.

2. Coordinate with the military litigation attorney as soon as a litigation report is requested.

3. Coordination with the Assistant U.S. Attorney should be in conjunction with proper litigation attorney. While DOJ may not need/want a Lit. Report, the Army requires it.

4. The 80% solution on-time is better than the 100% solution late.

5. Focus on collecting, documenting, and preserving the facts. Remain Objective.

## IX. CONCLUSION.

**APPENDIX A**

# Litigation Report Checklist

References: AR 27-40, Para. 3-9; Individual litigation attorneys

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**1. Statement of Facts**

____ Complete Statement of Facts.
- All facts pertaining to claims raised in the judicial complaint.
- All facts pertaining to potential defenses to claims in judicial complaint.
- Dates for all complaints and responsive actions.

____ All Facts Supported by Documents/Statements.
- All supporting documents and statements are attached and tabbed.
- Statement of facts references all supporting tabbed evidence.

**2. Setoff or Counterclaim**

____ Discuss any prior settlements or settlement offers.

____ Discuss any possible counterclaim, i.e. fraud.

**3. Responses to Pleadings**

____ Prepare a Draft Answer to the Judicial Complaint.
- Respond to each and every fact asserted.
- Deny what is false.
- Admit what is true.
- If neither, deny as presented and aver or explain our position.
  - < Explains tangential facts not contained in litigation report.
  - < Factual supplement to the litigation report.

**4. Memorandum of Law**

____ Prepare Brief Statement of the Legal Issues and Potential Defenses.
- Format not important.
- View it as a lawyer to lawyer memo highlighting the legal issues.
- Do not worry about legal citations.
- Do not let this requirement delay the litigation report.

**5. Potential Witness Information**

____ Complete List of Potential Witnesses

- Collect SSN if possible.
- Work address and phone number.
- Home address and phone number if available.
- E-Mail Address.
- PCS/ETS Date.
- Forwarding Address.
- Brief statement of witness relevance and to what they can attest.

**6. Exhibits**

____ Copy of all relevant documents attached and tabbed.

____ Index/List of tabs and exhibits included.

**7. Distribution**

____ One Copy to the Litigation Attorney at Litigation Division.

____ One Copy to the Assistant U.S. Attorney Assigned to the Case.

____ Computer Disk of Litigation Report included in Copy to Litigation Division.

____ Retain Copy.

# CHAPTER K

# INTRODUCTION TO ENVIRONMENTAL LAW

***"The Army will be a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission."***
**-Vision**

## I. INTRODUCTION.

A. Goals of class

B. Test Information

## II. REFERENCES: (SEE JA 234, ENVIRONMENTAL LAW DESKBOOK: ON CD-ROM)

## III. DEVELOPMENT OF ENVIRONMENTAL LAW.

A. Mankind and the Environment.

1. Conquer nature.

2. Exploit resources.

3. Solution to pollution.

B. Industrial Activities Control vs. Natural Resources

1. Command & Control vs. Protection & Management

2. Enforcement vs. Collaboration

C. The U.S. Solution.

1. Media specific regulation; i.e., air, water, etc.

2. Scientific.

3. Regulatory.

4. Balance economy with environment.

5. Federal/state relations.

D. Procedures.

1. Statute.

2. Rule making.

3. Public participation.

4. Citizen suits.

## IV. DEVELOPMENT OF ARMY ENVIRONMENTAL LAW.

A. Early Years.

B. Rocky Mountain Arsenal.

C. Chemical Weapons Demilitarization Efforts.

1. Program Manager for Chemical Demilitarization (early 1970s).

2. U.S. Army Toxic and Hazardous Materials Agency.

3. Preliminary assessments.

4. Installation Restoration Program.

D. Environmental Litigation.

1. Rocky Mountain Arsenal.

2. Twin Cities Army Ammunition Plant.

3. Aberdeen Prosecutions.

## V. ENVIRONMENTAL LAW AND FEDERAL FACILITIES.

A. Basic Principles.

1. Increasing state authority over federal activities.

2. Sovereign immunity has largely been eliminated. The goal is to have federal facilities treated like any other part of the regulated community (**see the tables at the end of this outline for statute specific information.)**.

3. Traditional legal defenses are generally not available; strict liability is the guiding principle.

4. No automatic National Defense exemptions. Exemptions are available, but they usually require a Presidential or Secretary of Defense finding of necessity.

B. Environmental Trends.

1. Cleaning the environment at any cost *versus* as clean an environment as we can get for a reasonable cost.

2. Increasing enforcement actions targeting individuals rather than corporations.

3. Increasing federal facility compliance.

C. Compliance with U.S. Environmental Laws Overseas.

1. With the exception of NEPA's application to Antarctica, there is no direct application of U.S. laws to overseas operations. DOD has, however, decided to apply many U.S. standards via **DoD Instruction 4715.5**, Management of Environmental Compliance at Overseas Installations, 22 Apr 96 (replaces DoD Directive 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, 20 Sep 91).

a. Applies to all DOD components including the Unified Combatant Commands.

b. Explicitly does not apply to:

(1) The operations of U.S. military vessels or aircraft;

(2) Off-installation operational and training deployments; or

(3) The investigation or execution of remedial or cleanup actions necessary to correct environmental problems arising from past DOD activities.

2. DOD establishes an overseas "baseline" document. The baseline will consist of standards applicable to similar operations conducted in the U.S.

a. Once developed, the baseline will be compared with existing host nation law to develop country-specific environmental standards (i.e., Final Governing Standards (FGS)).

b. After consultation with the U.S. Diplomatic Mission in the host country, the "Executive Agent" will determine whether to apply baseline standards or host nation standards. Ordinarily, the Executive Agent uses the most protective standard to establish the FGS.

3. Waivers from applicable standards can be obtained from the Executive Agent where "compliance with the standards at particular installations or facilities would seriously impair their actions, adversely affect relations with the host nation or would require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or . . . realignment . . .." Consultation with the Diplomatic Mission must occur before compliance with a host nation standard is waived.

D. Impacts of Noncompliance.

1. Administrative orders

a. Massachusetts Military Reservation (MMR) example: 4AOs (first three under the Safe Drinking Water Act (SDWA), fourth issued under RCRA)

b. Volunteer Army Ammunition Plant (VAAP): Order issued under RCRA § 3008(h) on 19 January 2001.

2. Citizen suits.

a. Most environmental statutes contain citizen suit provisions that permit individuals or groups to enforce them by suing the United States and other parties as private attorney generals.

(1) Generally, plaintiffs must give prospective defendants 60 days notice prior to filing suit.

(2) Successful citizen suits may recover litigation costs and expert witness/attorney fees awards.

(3) Citizen suit plaintiff must demonstrate standing, but requirements are relatively minimal.

b. Citizen suit provisions are found in the following major environmental statutes:

(1) **ESA**, § 11, 16 U.S.C. § 1540(g);

(2) **CERCLA**, § 310, 42 U.S.C. § 9659;

(3) **RCRA**, § 7002, 42 U.S.C. § 6972;

(4) **CAA**, § 304, 42 U.S.C. § 7604;

(5) **CWA**, § 505, 33 U.S.C. § 1365; and

(6) **NEPA**. NEPA itself does not provide for citizen suits; however, citizen suits for violations of NEPA may be made pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). Reviewing courts will hold unlawful agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Oregon Natural Resources Council v. Marsh, 490 U.S. 332 (1989).

3. Monetary costs - restoration.

a. Cleanup costs are expensive— Approximately $1.3 billion budgeted for DOD during FY01, of which the Army received approximately $390 million for the remediation active sites and $231.5 million for formerly used defense sites (FUDS).

b. GAO estimated (August 1996) is that it will cost nearly $11 billion to clean up environmental contamination at BRAC sites alone. This FY (01) Congress appropriated $281 million to the Army to deal with BRAC environmental restoration requirements.

4. Monetary costs - fines and penalties.

a. The command may be required to pay fines and penalties to state agencies or EPA.

(1) Passage of the Federal Facilities Compliance Act (FFCA), Public Law 102-386, dramatically increased the number of fines and penalties paid to the states. Note, the FFCA only waived the sovereign immunity provisions of RCRA.

(2) Fines and penalties generally must be paid with OMA funds.

b. EPA penalty guidelines.

(1) Gravity-based component:

(a) Extent of deviation from the regulatory requirement; and

(b) Potential for harm to human health or the environment or to the regulatory process. PLUS

(2) Multi-day component. PLUS or MINUS

(3) Adjustment factors.

(4) Business penalties--***hot issue*** **(Ft. Wainwright case)**

(a) EPA is starting to apply them to the Army

(b) The Army & DOD do not believe this is appropriate

(c) Congress is developing an interest

5. Personal liability.

a. The Department of Justice (DOJ) is actively pursuing enforcement of environmental laws through criminal prosecution. Focus has shifted from corporate to individual liability.

b. Basis for supervisory responsibility.

(1) Knowledge of the violation.

(a) Actual knowledge, or

(b) "Constructive knowledge": should have known but failed or refused to find out. PLUS

(2) Authority and responsibility to take corrective action.

c. Issues.

(1) Who represents the federal official?

(a) Federal prosecution: the official must provide his or her own legal defense at his or her own expense.

(b) State prosecution: representation by DOJ is possible, depending on the facts of the case.

(2) Is there any attorney-client privilege between the SJA and the federal official on environmental matters? (Note, however, that the initial communication between a service member and a legal assistance or trial defense service attorney is privileged; but further representation is not available).

(a) As to federal prosecutions: NO!

(b) As to state prosecutions: maybe.

(3) Is there any official immunity?

(a) Federal prosecution: no.

(b) State prosecution: maybe, if:

(i) Acting in good faith compliance with federal law; and

(ii) State law unduly interferes with federal function.

6. Public relations.

a. People care about pollution.

b. An opportunity, as well as a challenge. Good compliance and public relations programs can enhance the command's image and may also positively influence regulators.

c. Failure to gain public confidence may result in denial of access to needed resources.

# CHAPTER L

# FEDERAL-STATE RELATIONS ON AND OFF MILITARY INSTALLATIONS AND FEDERAL AUTHORITY OVER LAND

*". . . [L]and spreadin' out so far and wide--keep Manhattan, just give me that countryside."*

Eddie Albert, Theme from "Green Acres"


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# Outline of Instruction

## I. EXERCISING FEDERAL AUTHORITY INCIDENT TO LEGISLATIVE JURISDICTION.

A. Definition. Art. I, § 8, cl. 17.

The Congress shall have power . . . to exercise exclusive Legislation in all cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the Government . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dockyards, and other needful Buildings . . . .

B. Concept of Legislative Jurisdiction.

a. The concept is liberally construed with experience.

b. "[P]urchased" means obtained.

c. "[P]laces" means any property occupied by the federal government.

2. Exclusive legislative jurisdiction: displaces state jurisdiction. The government has received all the authority of the state to legislate with no reservation by the state. These areas are often referred to as "enclaves."

3. Concurrent jurisdiction: both state and federal governments may exercise full legislative jurisdiction.

4. Partial jurisdiction: the state has reserved some but not all legislative jurisdiction. Examples:

a. State reserves power to tax but cedes all other powers.

b. State cedes only criminal jurisdiction, reserving all other powers.

Example: Virginia has reserved the power to exclusively license and regulate, or to prohibit, the sale of intoxicating liquors on any lands the United States acquires.

Example: A Minnesota statute states, "the jurisdiction of the United States over any land or other property within this state now owned or hereafter acquired for national purposes is concurrent with and subject to the jurisdiction and right of the state . . . to punish offenses against its laws committed therein."

5. Proprietorial or proprietary interest - United States only occupies the property. TJAGSA, leased government housing.

C. Acquisition of Legislative Jurisdiction.

1. Purchase and consent.

2. Cession.

3. Reservation.

D. Policy to Acquire Only Proprietorial Interest in Land and Not Any Degree of Legislative Jurisdiction Except Under Exceptional Circumstances. Army Reg. 405-20, Federal Legislative Jurisdiction (1 Aug. 1973).

1. Acceptance of legislative jurisdiction by the United States.

2. Acceptance of jurisdiction presumed as to all lands over which jurisdiction was ceded before 1940. Silas Mason Co. v. Tax Commission, 302 U.S. 186 (1937); Fort Leavenworth Railroad v. Lowe, 114 U.S. 525 (1885).

3. Affirmative acceptance of jurisdiction required for cessions of jurisdiction **after 1940**. 40 U.S.C. § 255.

[T]he head or other authorized officer of any department . . . may . . . accept or secure from the State . . . consent to or cession of such jurisdiction, exclusive or partial . . . and indicate acceptance . . . by filing a notice . . . with the Governor . . . or in such other manner as may be prescribed by the laws of the State. . . .

4. Look to the date when jurisdiction offered to determine which rule applies. Adams v. United States, 319 U.S. 312 (1943); United States ex rel. Greer v. Pate, 393 F.2d 44 (7th Cir.), cert. denied, 393 U.S. 890 (1968); Markham v. United States, 215 F.2d 56 (4th Cir. 1954), cert. denied, 348 U.S. 939 (1955). Examples:

   a. Land purchased **before 1940** with **consent of the state legislature**: jurisdiction flowed to U.S. at time of sale; acceptance presumed.

   b. Land purchased **before 1940** and state **cedes jurisdiction before 1940:** acceptance presumed.

   c. Land purchased **after 1940** with **consent of the state legislature:** jurisdiction can transfer at time of sale, but U.S. must affirmatively accept.

   d. Land purchased **before 1940** and state **cedes jurisdiction after 1940:** U.S. must affirmatively accept.

5. State may place procedural conditions on federal acquisition of jurisdiction.

E. State Reservations of Authority.

F. Disposal of Legislative Jurisdiction.

1. Reverter clause in original consent or cession may operate. Palmer v. Barrett, 162 U.S. 399 (1896). But see, Arlington Hotel v. Fant, 278 U.S. 439 (1929).

2. Government may abandon federal interest in land or may cease to use it for federal purposes.

3. Dispose of jurisdiction in the same way it was accepted—secretarial notification or compliance with state law. 10 U.S.C. § 2683 (1982).

4. Can states resist retrocession?

## II. SOURCES OF CIVIL LAW ON EXCLUSIVE JURISDICTION INSTALLATIONS.

A. No Congressional Action - or - Mooove That Train.

1. State law existing at the time exclusive legislative jurisdiction was obtained remains effective.

a. Laws intended for protection of private rights continue when sovereigns change. Chicago, Rock Island & Pacific Ry. v. McGlinn, 114 U.S. 542 (1885).

b. Rule taken from international law.

c. Subsequently enacted state laws do not apply. Arlington Hotel v. Fant, 278 U.S. 439 (1929).

d. State law which survives becomes federal law. Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959).

2. Displacing or altering law acquired under McGlinn.

a. Contrary federal law or policy displaces federal law obtained from state law. Lord v. Local Union No. 2088, 646 F.2d 1057 (5th Cir. 1981), cert. denied, 458 U.S. 1106 (1982).

b. "Direct action of the new government" includes action of the Executive as well as of the Congress. Anderson v. Chicago and Northwestern R.R., 102 Neb. 578, 168 N.W. 196 (1918).

3. Problems applying the McGlinn Doctrine.

a. Finding old law is difficult.

b. New developments in the law may be preferable to older, now generally, obsolescent laws. Example: Murray v. Joe Gerrick Co., 291 U.S. 315 (1934).

c. Different rules of law may apply to different parts of the same installation where acquired at different times. Board of Supervisors of Fairfax County v. United States, 408 F. Supp. 556 (E.D. Va. 1976).

B. Congressional Action to Adopt or Extend State Civil Laws.

1. Current wrongful death and personal injury state laws apply as federal law. 16 U.S.C. § 457. Murray v. Joe Gerrick Co., 291 U.S. 315 (1934); Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981); Quadrini v. Sikorsky Aircraft Division, 425 F. Supp. 81 (D. Conn. 1977), modified in, 505 F. Supp. 1049 (D. Conn. 1981).

2. State fish and game laws. 16 U.S.C. § 670a; 10 U.S.C. § 2671; AR 200-3, Natural Resources - Land, Forest, and Wildlife Management (28 Feb 95.)

3. State worker's compensation laws apply directly: contractors must pay worker's compensation contributions. 40 U.S.C. § 290.

4. State unemployment compensation laws apply directly: employers must comply and state can enforce on the installation. 26 U.S.C. § 3305.

5. State quarantine and health laws. 42 U.S.C. § 97.

6. State and local taxes.

a. Sales, use, and income taxes levied on persons and nonfederal entities on the installation. 4 U.S.C. §§ 105-107 (Buck Act).

(1) Soldiers' and Sailors' Civil Relief Act may shield members of the Armed Forces from taxes allowed by Buck Act.

(2) Does not authorize taxation of the United States or its instrumentalities.

(3) Label the state puts on the tax is not necessarily determinative. United States v. City and County of Denver, 573 F. Supp. 686 (D. Colo. 1983).

b. Gasoline taxes on sales of motor vehicle fuel to private persons. 4 U.S.C. § 104 (Hayden-Cartwright Act).

c. Private leasehold interests on federal property. 10 U.S.C. § 2667e.

d. Where the legal incidence of a tax falls on the United States, the Supremacy Clause preempts. McColluch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Distinguish "legal" incidence from "economic" incidence. United States v. Michigan, 851 F.2d 803 (6th Cir. 1988); United States v. Montgomery County, Maryland, 761 F.2d 998 (4th Cir. 1985).

## III. OPERATION OF THE SUPREMACY CLAUSE TO PREEMPT STATE LAW. U.S. CONST. ART. VI, CL. 2. [NOTE THAT THIS IS AN INDEPENDENT BASIS - SEPARATE FROM ART. I, § 8, CL. 17 - TO APPLY FEDERAL LAW INSTEAD OF THE STATE LAW.]

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

A. Federal Statutes Preempt State Statutes.

1. Occupation of the field: is compliance with both federal and state law impossible, is national uniformity required, or is the federal scheme pervasive? Silkwood v. Kerr-McGee, 464 U.S. 238 (1984).

2. Conflict preemption: does state law present an obstacle to accomplishing and executing the purposes and objectives of Congress? Kleppe v. New Mexico, 426 U.S. 529 (1976).

B. Federal Regulations Preempt State Law. City of New York v. F.C.C., 108 S. Ct. 1637 (1988); Fidelity Federal Savings and Loan Association v. De La Cuesta, 458 U.S. 141 (1982).

1. Express congressional authorization not necessary.

2. Agency does not have to choose option which does not conflict with state.

If [an agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. United States v. Shimmer, 367 U.S. 374, 383 (1961).

C. Federal Policies Preempt State and Local Law. United States v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986).

D. State Cannot Interfere With the Federal Function. Fort Leavenworth Railroad v. Lowe, 114 U.S. 525 (1885); DAJA-AL 1983/1782 (17 May 1983); DAJA-AL 1982/3084 (7 December 1982).

The United States . . . retained . . . only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the General Government, that part . . . actually used for a fort or military post was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. Fort Leavenworth v. Lowe, 114 U.S. at 527.

1. Activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides "clear and unambiguous" authorization for the regulation. Goodyear Atomic Corp. v. Miller, 108 S.Ct. 1704, 1709 (1988).

2. Supremacy principle extends to local government regulation of installation and requires detailed analysis of specific federal statute. Compare United States v. Town of Windsor, 765 F.2d 16 (2d Cir. 1985) (invalidating local building permit ordinances applied to federal contractors) with Parola v. Weinberger, 848 F.2d 956 (9th Cir. 1988) (Resource Conservation and Recovery Act required federal installations to comply with local ordinance governing garbage collection).

## IV. EXERCISE OF STATE AUTHORITY ON EXCLUSIVE JURISDICTION INSTALLATIONS.

A. Keeping the State Out—Traditional View: Enclave is a Federal Island—A State Within a State.

1. Liquor shipped to an exclusive federal enclave is never "within" the surrounding state. Collins v. Yosemite Park Co., 304 U.S. 518 (1938).

2. Enclave residents are not residents of the surrounding state.

B. Allowing the State In -- Alternate View: Where There is No Interference With the Federal Interest, the Fiction of a State Within a State Will Be Ignored.

1. The basic rule—where there is no friction, avoid the fiction. Howard v. Commissioners of Louisville, 344 U.S. 624 (1953)

2. The exception—it is the potential for friction rather than the existence of friction that controls. United States v. McGee, 714 F.2d 607 (6th Cir. 1983).

The Court does not doubt that the City . . . would willingly agree at this time to noninterference with the function of the . . . base. But what one board of city commissioners can agree to, another board of city commissioners can reverse. It is this aspect of annexation that is most troubling.

C. Areas of Conflict—

1. Taxing and Regulating Alcohol.

a. Courts continue to adhere to the "state within a state" view. United States v. Texas, 695 F.2d 136 (5th Cir.), cert. denied, 464 U.S. 933 (1983); United States v. South Carolina, 578 F. Supp. 549 (D.S.C. 1983).

b. Malt beverages and wine must be purchased from in-state distributors; liquor generally must be purchased from most competitive source, wherever located. 10 U.S.C. § 2488(a); See also AR 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities, para 7-12 (29 Sep 1995).

c. U.S. Supreme Court decision upholds state's authority to impose labeling and reporting requirements on out-of-state liquor wholesalers who do business with United States. North Dakota v. United States, 110 S.Ct. 1986 (1990).

2. Voting Rights. Evans v. Cornman, 398 U.S. 419 (1970).

3. Annexation. United States v. McGee, 714 F.2d 607 (6th Cir. 1983); United States v. City of Leavenworth, 443 F. Supp. 274 (D. Kan. 1977); AR 405-25, Annexation. GENERAL RULE: Do not oppose annexation unless it would not be in the federal government's best interest, or it is opposed by another local jurisdiction—DOD Dir. 4165.6, Real Property Acquisition, Management, and Disposal, para. F.2.g. (Sep. 1, 1992); AR 405-25, Annexation (25 Sep. 1973).

4. Education. Impact Aid Controversy. (Laws rewritten in 1996-97) United States v. Onslow County Bd. of Educ., 728 F.2d 628 (4th Cir. 1984).

a. Financial assistance to Local Educational Agencies.

(1) Per capita aid. 20 U.S.C. §§ 7701-7714, as amended by Pub. L. No. 105-18, §§ 60004-60007, 111 Stat. 158 (1997).

(2) School construction in areas affected by federal activities. 20 U.S.C. §§ 7708-09

b. United States v. Onslow County Board of Education, 728 F.2d 628 (4th Cir. 1984).

(1) Application for and receipt of payments created a contractual obligation.

(2) Tuition charge obviously takes the place of state revenues to support education; because it is a tax, the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. § 581, preempts the tuition charge.

(3) The tuition charge is unlawful because it burdens the relationship with the federal government.

5. Spouse and Child Welfare Services.

a. Problems raised by exclusive jurisdiction. In Re Terry Y., 161 Cal. Rptr. 452, 101 Cal. App. 3d 178 (Ct. App. 1980); State in Interest of D.B.S., 349 A.2d 105 (N.J. Super. Ct. 1975).

**b.** Domestic Relations Restraining Orders. Applying Howard and Cornman, the Supreme Judicial Court of Massachusetts upheld a lower court's authority to issue a restraining order enforceable on Fort Devens, an exclusive federal jurisdiction. The court concluded that the order did not interfere with the federal function and was, therefore, lawfully effective. Cobb v. Cobb, 406 Mass. 21, 545 N.E.2d 1161 (1989).

c. Current Policy. Invite state authorities onto the installation. DOD Dir. 6400.1, Family Advocacy Program (June 23, 1992); AR 608-18, paras 2-10, 2-11, The Army Family Advocacy Program (1 Sep 1995) (Note: App. D also defines legislative jurisdiction.); SECNAVINST 1752.3, DON Policy—Family Advocacy Program; MCO 1752.3A, MC Family Advocacy Program. Memorandums of Understanding with local agencies. DAJA-AL 1983/1468 (28 January 1983). AR 608-18, The Army Family Advocacy Program (1 Sep. 1995), App. C.

## V. FEDERAL-STATE RELATIONS OFF THE INSTALLATION—MILITARY SUPPORT TO LOCAL COMMUNITIES.

A. Service of State Civil Process. AR 27-40, Litigation, para. 2-3 (19 Sep 1994).

1. Service of process on concurrent jurisdiction, proprietorial interest installations, and exclusive federal jurisdictions where the state has the right to serve process.

a. Commanders will inform persons to be served who may decline to voluntarily accept process.

b. When service is declined, state law for service will be followed.

(1) Service on the installation is subject to reasonable limitations.

(2) Service includes levy on personal property.

2. Service of process on exclusive jurisdiction installations where there has been no reservation of right to serve process.

a. Commanders will inform persons to be served who may decline to voluntarily accept process.

b. If the person to be served declines service, process server should be advised that federal legislative jurisdiction precludes service of process.

B. Service by Members of the Armed Forces on State and Local Juries.

1. Permitted where it does not interfere with their military duties. 10 U.S.C. § 982; DOD Dir. 5525.8; Army Reg. 27-40, Litigation, ch. 10 (19 Sep 1994).

2. Exemptions: general officers, commanders, soldiers stationed OCONUS and in certain other U.S. possessions, trainees, and soldiers assigned to "forces engaged in operations." SPCMCA must approve.

3. Exemption for others if SPCMCA determines that jury duty:

a. unreasonably interferes with performance of the soldier's military duties, OR

b. adversely affects readiness of the soldier's unit.

C. Disaster Relief (AR 500-60).

1. Provide where directed by higher authority, or

2. When a serious emergency requires an immediate response to save life or lessen major property damage.

D. Other Emergency Programs.

1. Military Assistance to Safety and Traffic (MAST) (AR 500-4).

2. Fire Protection Assistance (AR 420-90).

3. Search and Rescue Operations (SAR) (AR 500-2).

E. **Innovative Readiness Training (IRT) -** 10 U.S.C. § 2012; DoD Dir. 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense (Jan. 30, 1997)

1. Formerly known as the Army's Domestic Action Program under AR 28-19 (now rescinded).

2. Defines IRT as off-post military training, conducted in U.S., its territories or possessions, and Puerto Rico, which assists civilian efforts to address civic and community needs.

3. Requirements:

a. Must fulfill valid training (MOS) requirements.

b. Must avoid competition with commercial sources.

c. Examples include: constructing rural roads and runways; transporting medical supplies in underserved areas; providing medical/dental services to underserved areas.

F. Community Relations Program (AR 360-61).

1. Provide support to activities that will . . .

a. Increase public awareness of Army missions.

b. Inspire patriotism.

c. Foster good relations.

d. Support recruiting.

2. Concerns.

a. No selective benefit.

b. No demeaning work for soldiers.

c. Noncompetition.

d. Participation should be incidental, except for patriotic programs or celebrations of national holidays.

## VI. EXERCISING FEDERAL AUTHORITY THROUGH THE PROPERTY CLAUSE.

A. Definitions. Art. IV, § 3, cl. 2.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

B. The Property Clause is broadly construed and affects not only the land itself but also activities on the land. Kleppe v. New Mexico, 426 U.S. 529 (1976).

1. The Property Clause power is independent from exercise of legislative jurisdiction.

2. The Property Clause power is "complete."

C. The Property Clause power allows regulation of activities on adjoining lands.

1. United States v. Alford, 274 U.S. 264 (1927). (Congress may prohibit and criminalize building fires on private land near publicly-owned forests.)

2. Camfield v. United States, 167 U.S. 518 (1897). (Congress may prohibit erection of fences on private land where effect is to impede access to public lands.)

3. United States v. Arbo, 691 F.2d 862 (9th Cir. 1982). (Federal officials may properly conduct compliance inspections of private mining claims on state land adjacent to federal property.)

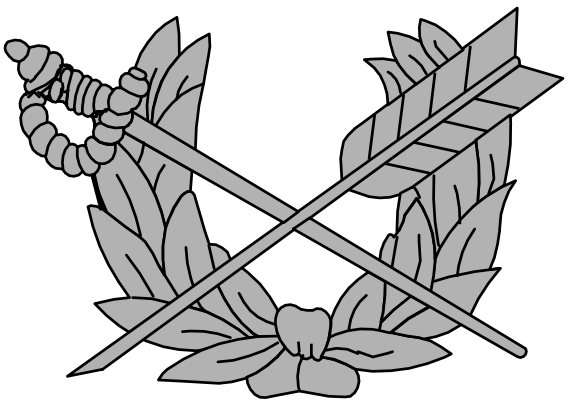
4. United States v. Brown, 552 F.2d 817 (8th Cir.), cert. denied, 413 U.S. 949 (1977). (Federal government may regulate hunting on non-federal waters in order to protect wildlife and visitors on adjacent federal lands.)

5. United States v. Moore, 640 F. Supp. 164 (S.D. W. Va. 1986) (Federal officials may prevent state from spraying for insects on state land adjacent to federal park.)

## VII. CONCLUSION.

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

# *BASIC COURSE DESKBOOK*



## Part II
## Military Personnel Law

The Judge Advocate General's School
United States Army

March 2001 JA 280

# CHAPTER M

# EQUAL OPPORTUNITY

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## Outline of Instruction

## I. REFERENCES. SEE APPENDIX A.

## II. INTRODUCTION.

A. Equal Opportunity (EO) ensures "fair treatment for all persons based solely on merit, fitness, and capability in support of readiness." ARMY REG. (AR) 600-20, PERSONNEL--GENERAL: ARMY COMMAND POLICY, para 6-1(15 July 99).

B. Policy.

> *"The U.S. Army will provide equal opportunity and treatment for military personnel, family members and DA civilians without regard to race, color, gender, religion, or national origin and provide an environment free of sexual harassment. This policy:*
>
> *"Applies both on and off post, during duty and nonduty hours.*
>
> *"Applies to working, living, and recreational environments (including both on- and off-post housing)."*
>
> AR 600-20, para 6-3a (15 July 99)

C. The Army approaches EO from a soldier readiness point of view:

> *"To accomplish any mission, leaders must ensure that their units are properly trained and that their soldiers, their equipment, and they, themselves, are in the proper state of readiness at all times. Soldiers must be committed to accomplishing the mission through unit cohesion developed as a result of a healthy leadership climate. Leaders at all levels promote individual readiness by developing competence and confidence in their subordinates.* ***A leadership climate in which all soldiers perceive that they are treated with fairness, justice, and equity is crucial to the development of this confidence.****"*
>
> DA PAM 600-26, PERSONNEL--GENERAL: DEPARTMENT OF THE ARMY AFFIRMATIVE ACTION PLAN, para 1-4b (23 May 1990) (emphasis added).

## III. THE ARMY'S EQUAL OPPORTUNITY PROGRAM.

A. Who. Applies to soldiers, Department of the Army civilians, and family members.

B. What. "Soldiers are not accessed, classified, trained, assigned, promoted, or otherwise managed on the basis of race, color, religion, gender, or national origin." AR 600-20, para 6-3b. Two exceptions:

1. Assignment and use of women soldiers.

2. Support for established equal opportunity goals.

C. When. Applies both on and off duty.

D. Where. Applies both on and off post.

E. How. Designed to work through the chain of command, as a command function. "Alternative agencies" serve as a safety valve for the chain of command, or when the chain of command is the problem; *see infra*.

F. Why. Maximize human potential and ensure fair treatment to all persons based solely on merit, fitness, and capability, which support readiness. AR 600-20, para 6-1a.

## IV. RELATION TO OTHER POLICIES, PROGRAMS, AND UNITS OF INSTRUCTION.

A. Although the Army's EO policy applies to soldiers, civilian employees, and family members, recognize that civilian employees enjoy additional protections.

1. Title VII of the Civil Rights Act of 1964, as amended (codified at 42 U.S.C. § 2000e *et seq.*), implemented in the Army's Equal Employment Opportunity Program. *See* AR 690-600.

2. DA civilian employees who are covered by a collective bargaining agreement (CBA) may enjoy additional protections under the CBA.

B. A service member's failure to comply with the Army's EO policy may also be misconduct under the UCMJ.

C. Other programs and agencies directly or indirectly support the EO program.

1. Armed Forces Disciplinary Control Board. AR 190-24, Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement Services (30 Jun 93).

2. Housing referral program. AR 210-50, Housing Management (24 Apr 90).

3. Other "alternative agencies"; *see infra*.

4. Defense Equal Opportunity Management Institute, Patrick AFB, FL. http://www.pafb.af.mil/deomi/deomi.htm. Purpose: enhance combat readiness by fostering positive human relations throughout the diverse armed forces. Mission: serve as the center of excellence for equal opportunity and human relations and to translate increased awareness of issues into improved leadership.

D. Assignment policy for women.

1. The Army's EO program is independent of the Army's assignment policy for women soldiers. The Army's policy on assignment of women soldiers implements the DoD Direct Ground Combat (DGC) rule.

a. Qualified women are eligible for all assignments except to units below brigade level whose primary mission is engaging the enemy on the ground with individual or crew served weapons while being exposed to hostile fire and a high probability of direct physical contact with the hostile force's personnel.

b. Permits exclusion of women from special operations units, long range reconnaissance units, and units that physically collocate and remain with closed units.

c. *See* Secretary of Defense memo, 13 Jan 94, subject: Direct Ground Combat Definition and Assignment Rule. *See also* AR 600-13, Army Policy for the Assignment of Female Soldiers.

## V. STAFFING. AR 600-20, Chapter 6.

A. Equal Opportunity **Advisor**.

1. Role. Understanding and articulating EO policy; recognizing and assessing indicators of discrimination; recommending remedies; collecting, organizing, and interpreting demographic data; EO training; complaint processing. EOAs may conduct inquiries in accordance with the commander's guidance.

2. Assigned to installations, organizations, and agencies that are brigade-level or equivalent and higher commands. Primary, full-time duty. Has direct access to commander. Commander must be EO Advisor's rater or senior rater.

3. Trained at DEOMI in 18-week course.

4. Where assigned.

a. Brigade-level and higher units; installations to 10,000 soldiers; base support battalions: SFC (E-7) or higher.

b. Installations over 10,000 soldiers, and area support groups: MSG (E-8) and SFC.

c. MACOM: LTC/MAJ, SGM, & MSG.

5. EOA provide assistance to investigating officers conducting EO complaint investigations. AR 600-20, Appendix E-6(d).

B. Equal Opportunity **Representative**.

1. Role. Assist commanders at the battalion level and below in carrying out the EO program in their units. *May not* conduct investigations.

2. Assigned to battalion and company size organizations. Not a full time duty. Regulation suggests assigning SSG or SFC.

## VI. EO COMPLAINT PROCESSING.

A. AR 600-20, Appendix E.

B. Applies to soldiers, DA civilian employees, and family members (but DA civilian employees will generally use more specific means; *see* para V A 1 *supra*).

C. Informal Complaint. AR 600-20, Appendix E-1(a).

1. Any complaint that the soldier, employee, or family member does not wish to file in writing.

2. Not subject to time suspense or reporting.

3. Attempted resolution at the lowest possible level.

D. Formal Complaint. AR 600-20, Appendix E-1(b).

1. Filed by submitting a sworn statement on DA Form 7279-R.

a. Basis of complaint.

b. Dates, parties, witnesses.

c. Requested remedy.

2. Timely submission required (w/in 60 calendar days of the incident). Processed through chain of command or alternative agency.

a. Reporting complaint to chain of command "strongly encouraged."

b. "Alternative agencies" when complainant perceives chain of command as the problem:

(1) Higher echelons of chain of command.

(2) EO advisor.

(3) Inspector General. Investigation governed by AR 20-1, not AR 600-20. DA Form 7279-R not used. Confidentiality policy.

(4) Chaplain.

(5) Provost Marshall, Criminal Investigation Command.

(6) Medical agencies.

(7) Staff Judge Advocate.

(8) Housing referral office.

3. The EO complaint process, in itself, provides no promises of confidentiality. Note, however, that other regulations may provide confidentiality to complainants (e.g., Inspector General, Staff Judge Advocate).

4. Actions by "alternative agencies." Appendix E-2.

a. Talk with the complainant; gather as much information as possible; tell complainant what role (if any) that agency will have in resolving the complaint.

b. Annotate DA Form 7279-R.

c. If resolution is beyond agency's charter, refer complainant to appropriate agency or commander, with complainant's consent.

d. Most "alternative agencies" do not have an independent investigatory charter. Exceptions: Inspector General; higher commanders in the chain of command.

5. Investigation. *Commander* will either conduct an investigation personally or immediately appoint an investigating officer according to the provisions of AR 15-6, Appendix E-4(b).

a. Referral to battalion/brigade *commander* for appointment of investigating officer under AR 15-6.

b. Fourteen days (3 weekend drill periods) to complete the investigation. Possible extension of 30 days (2 weekend drill periods).

6. Feedback. Written feedback within 14 days (3 weekend drill periods) after acknowledgment of complaint.

a. Summary of investigative results.

b. Remedial actions taken.

c. Copy provided to complainant.

7. Appeal by complainant in writing to the next higher commander, up to GCMCA.

a. Within 7 days following notification of results of investigation and acknowledgment of actions taken by the command to resolve the complaint.

b. Options outside the EO system.

8. Follow up. Thirty to forty-five days after final decision on the complaint, Equal Opportunity Advisor conducts an assessment on **all** EO complaints, substantiated and unsubstantiated, to determine effectiveness of any corrective action taken and to detect reprisal. Not recorded on DA Form 7279-R.

9. File maintained for two years.

10. Complaints against promotable colonels, active or retired GOs, IGs, members of the SES or Executive Schedule employees forwarded to Investigations Division, US Army Inspector General Agency, ATTN: SAIG-IN, Pentagon, Washington DC 20310-1700 "by rapid but confidential means within 5 calendar days of receipt." AR 600-20, Appendix E-2d.

## VII. SANCTIONS.

A. Soldiers. (AR 600-20, Appendix E-7(a)(1)).

1. Administrative action.

2. Action under the Uniform Code of Military Justice (UCMJ).

B. Civilian employees.

1. May be subjected to administrative discipline in accordance with the current Army Table of Penalties (AR 690-700, chap 751, Table 1-1).

2. No requirement for victims to file EEO complaints. A victim may seek redress or not, as he or she sees fit, but the right of the service to discipline employees who harass or discriminate is not affected in either event. Hostetter v. United States, 739 F.2d 983 (4th Cir. 1984).

## VIII. OFF-POST ACTIVITIES.

A. In the United States.

1. Establishments open to the general public.

a. Title II of Civil Rights Act of 1964, 42 U.S.C. §§ 2000a - 2000a-6: Public Accommodations.

b. Command enforcement: off-limits sanction. AR 600-20, para 6-7; AR 190-24, para 2-6.

2. Private establishments. AR 600-20, para 6-7c.

a. General rule: A commander may not apply off-limits sanctions to a bona fide private establishment, club, activity, or organization.

b. Exception: A private entity may be placed off limits if the following conditions are met:

(1) Open to soldiers in general or soldiers who meet specific criteria (*e.g.*, E-5 and above) but discriminate on the basis of race, color, religion, gender, or national origin against other soldiers who otherwise meet criteria.

(2) It is not primarily political or religious in nature.

(3) Commander, in consultation with SJA and other staff officers, determines facts support allegations of discrimination. Must give entity an opportunity to respond.

(4) Commander must make reasonable efforts to bring about the voluntary termination of discriminatory practices.

(5) Commander determines that continued discrimination will undermine morale, discipline, or loyalty of soldiers.

B. Overseas. AR 600-20, para 6-7a.

1. Title II does not apply.

2. Commander's options:

a. Off-limits sanction.

b. Local law.

C. Off-post housing policy. Designed to eliminate discrimination in housing on the basis of race, color, religion, gender, national origin, age, physical disability, or familial status.

1. General.

a. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C. §§ 3601-3631.

b. Command enforcement: restrictive sanctions. AR 210-50, Chap 6.

2. Enforcement. Installation Housing Referral Office (HRO) responsibility. *See* AR 210-50. HRO, like any other staff agency, may turn to SJA for advice and assistance.

## IX. CONCLUSION.

*Appendix A*

# REFERENCES

## I. FEDERAL.

A. U.S. Constitution.

1. 5th Amendment.

a) Due process clause: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

b) Equal protection component of due process. Bolling v. Sharpe, 347 U.S. 497 (1954).

2. 13th Amendment.

a) "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

b) Applicable to private conduct; prohibits slavery and the "badges and incidents of slavery." Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

3. 14th Amendment.

a) Equal protection clause: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

b) Does not reach Federal action or purely private action; State action required. District of Columbia v. Carter, 409 U.S. 418 (1973); Loving v. Virginia, 388 U.S. 1 (1967).

B. Statutes.

1. Civil Rights Acts of 1866 and 1871.

a) 42 U.S.C. § 1981 -- racial discrimination. Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987). *See also* §101, Civil Rights Act of 1991, Pub. L. No. 102-166, amending 42 U.S.C. § 1981.

b) 42 U.S.C. § 1982 -- racial discrimination in the acquisition, holding, and sale of real and personal property. Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

c) 42 U.S.C. § 1983 -- violations of federal rights under color of state law. District of Columbia v. Carter, 409 U.S. 418 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

d) 42 U.S.C. § 1985(3) -- conspiracies to deprive persons of their civil rights. United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983).

2. Civil Rights Act of 1964.

a) Title II -- public accommodations. 42 U.S.C. §§ 2000a - 2000a-6.

b) Title VI -- federally-assisted housing. 42 U.S.C. § 2000d.

c) Title VII -- Federal employment. 42 U.S.C. § 2000e-16. Applied to federal civilian employees by the Equal Opportunity Act of 1972. Not applicable to uniformed members of the armed forces.

3. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C. §§ 3601-3631.

4. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C.A. § 1981a (West 1994)).

## II. DEPARTMENT OF DEFENSE.

A. DoD Dir 1350.2, Department of Defense Military Equal Opportunity Program (Dec. 23, 1988).

B. Dod Dir 1350.3, Affirmative Action Planning and Assessment Process (Feb 29, 1988).

C. DoD Inst 1100.16, Equal Opportunity in Off-Base Housing (Jun. 2, 1977).

D. Department of Defense Human Goals Charter.

## III. ARMY.

A. AR 190-24, Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement Services (30 Jun 93).

B. AR 210-50, Housing Management (24 Apr 1990).

C. AR 600-20, Army Command Policy (15 July 1999).

# CHAPTER N

# ARMY PERSONNEL SYSTEM AND OFFICER PERSONNEL LAW

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## Outline of Instruction

# I. REFERENCES.

A. Title 10, United States Code.

B. National Defense Authorization Act, Fiscal Year 1995, Pub. L. No. 103-337.

C. National Defense Authorization Act, Fiscal Year 1996, Pub. L. No. 104-106.

D. National Defense Authorization Act, Fiscal Year 1997, Pub. L. No. 104-194.

E. National Defense Authorization Act, Fiscal Year 1998, Pub. L. No. 105-85.

F. DOD Instruction 1332.29, Eligibility of Regular and Reserve Personnel for Separation Pay.

G. DOD Directive 1332.30, Separation of Regular and Reserve Commissioned Officers.

H. DOD Instruction 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers.

I. AR 15-80, Army Grade Determination Review Board.

J. AR 600-8-24, Officer Transfers and Discharges.

K. AR 600-8-29, Officer Promotions.

# II. INTRODUCTION.

A. The Department of Defense (DOD) (10 U.S.C. § 111).

1. An executive department of the United States which includes the Joint Chiefs of Staff, the Defense Agencies, the Military Departments (Army, Navy, Air Force), and the unified and specified combatant commands.

2. The Secretary of Defense has authority, direction, and control over the Department of Defense and is the principal assistant to the President in all matters relating to the Department.

B. The Joint Chiefs of Staff (JCS) (10 U.S.C. §§ 151-155).

1. Consists of the Chairman, Vice Chairman, the Chiefs of Staff of the Army and Air Force, the Chief of Naval Operations, and the Commandant of the Marine Corps.

2. The Chairman of the Joint Chiefs of Staff is the principal military advisor to the President, the National Security Council, and the Secretary of Defense.

a. The Chairman of the Joint Chiefs of Staff is responsible for a variety of functions including strategic direction, strategic planning, contingency planning and preparedness, advice on requirements, programs and budget, and doctrine, training, and education.

b. In carrying out his functions, duties, and responsibilities, the Chairman shall consult with and seek the advice of the other members of the Joint Chiefs of Staff and the commanders of the unified and specified commands.

C. The Combatant Commands (10 U.S.C. §§ 161-168).

1. Established by the President, through the Secretary of Defense, to perform military missions.

2. May be unified or specified.

a. Unified combatant commands are military commands that have broad, continuing missions and are composed of forces from two or more military departments (e.g. CENTCOM, EUCOM, PACOM).

b. Specified combatant commands are military commands that also have broad, continuing missions but are normally composed of forces from a single military department.

3. Chain of Command.

a. Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs from the President to the Secretary of Defense and from the Secretary of Defense to the commander of the combatant command.

b. The commander of a combatant command performs his duties under the authority, direction, and control of the Secretary of Defense and is directly responsible to the Secretary for the preparedness of the command to carry out missions assigned to the command.

c. The Chairman of the Joint Chiefs of Staff does not have **command** authority over the combatant commands. He serves as a channel of communication between the National Command Authority (i.e., the President and Secretary of Defense) and the combatant commanders. He also acts as a spokesman for the commanders of the combatant commands, especially on the operational requirements of their commands.

D. The Department of the Army (DA) (10 U.S.C. §§ 3001-3081).

1. The Department of the Army is separately organized under the Secretary of the Army. It operates under the authority, direction, and control of the Secretary of Defense.

2. The Army includes combat and service forces, and organic aviation and water transports. It is organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land.

E. The Other Services.

1. The Department of the Navy (10 U.S.C. §§ 5001-5150).

a. Includes Headquarters, Marine Corps.

b. May also include the Coast Guard in certain situations.

2. The Department of the Air Force (10 U.S.C. §§ 8011-8081).

## III. COMPOSITION OF THE ARMY.

A. "The Army consists of: the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, the Army Reserve, and all persons appointed or enlisted in, or conscripted into, the Army without component." (10 U.S.C. § 3062).

B. Regular Army (RA) (10 U.S.C. § 3075). All soldiers who serve continuously on active duty and all RA retirees.

C. The Reserve Components (10 U.S.C. § 10101).

1. Army National Guard of the United States (10 U.S.C. § 10105). The Army National Guard of the United States consists of federally recognized units and organizations of the Army National Guard.

2. Army National Guard in the Service of the United States (10 U.S.C. § 10106).

3. Army Reserve (10 U.S.C. § 10104). All members of the Reserve of the Army who are not members of the Army National Guard of the United States.

D. Elements of the Army Reserve (10 U.S.C. § 10141). See Appendix.

1. Ready Reserve (10 U.S.C. §§ 10142-10150).

2. Standby Reserve (10 U.S.C. §§ 10151-10153).

3. Retired Reserve (10 U.S.C. § 10154).

E. Missions.

1. Regular Army.

2. Army Reserve.

3. Army National Guard.

## IV. OFFICER STATUS.

A. Appointment.

1. Proper authority makes appointment.

a. For Other Than Regular Army (OTRA) officers below the rank of lieutenant colonel(LTC): President.

b. For OTRA officers in the rank of LTC and above and for RA Officers: President/Senate.

c. For Warrant Officers: Secretary of the Army for warrant officers (WO1); President for chief warrant officers (CW2-CW5).

2. Tender of appointment to individual.

3. Acceptance by individual. There is a statutory presumption of acceptance unless the appointment is expressly declined.

B. Commissioned Officer v. Warrant Officer.

# V. KEY CONCEPTS.

A. Status of the officer determines the amount of due process available to the officer in separation actions.

B. Regular Army (RA) v. Other Than Regular Army (OTRA).

1. Regular Army Officer: An officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in the **standing Army**.

2. Other Than Regular Army Officer: An officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in a **Reserve Component of the Army**.

3. After 30 September 1996, no person may receive an original appointment as a commissioned officer in the Regular Army (Navy, Air Force, or Marine Corps) until that person has completed one year of service on active duty as a commissioned officer of a reserve component. 10 U.S.C. § 532 (e).

C. Probationary v. Nonprobationary.

1. Probationary Officer.

a. A commissioned officer (RA or OTRA) with less than 5 years of active commissioned or commissioned service.

b. As of 1 October 1996, **all** newly commissioned officers are probationary for 5 years.

c. OTRA officers serving in an active status before 1 October 1996, who were probationary prior to that date, are probationary commissioned officers for a period of 3 years from the date of their appointment as an OTRA officer.

2. Nonprobationary Officer. An officer other than a probationary commissioned officer. Receives significant due process in transfer and discharge actions.

## VI. THE ACTIVE DUTY PROMOTION SYSTEM FOR ARMY OFFICERS.

A. Active Duty List (ADL).

1. All officers on active duty regardless of component.

2. Centralized, with minor exceptions.

3. Competitive category.

4. Special Branches - Medical Professionals, Chaplains, and Judge Advocates.

B. Zones of Consideration.

1. Promotion Zone.

2. Below the Zone.

3. Above the Zone.

C. Basic Promotion Policies.

1. When an officer on active duty is promoted, that officer is promoted in his or her component.

2. Minimum time in grade requirements for promotion.

The Defense Officer Personnel Management Act (DOPMA) establishes minimum time in grade (TIG) requirements (18 months to 1LT; 2 years to

captain (CPT); 3 years to major (MAJ) through LTC; 1 year to colonel (COL) and brigadier general (BG)).

3. Selection criteria.

a. "Up or Out" system retained.

b. Failure to be selected for promotion to LTC, MAJ, CPT, CW5, CW4, and CW3.

(1) Officers on the active duty list (ADL) who are twice nonselected for promotion will be separated not later than the first day of the seventh calendar month beginning after the month in which the Secretary of the Army approves the report of the board which considered them for the second time.

(2) Alternatives include resignation, selective continuation, and retirement.

c. ADL officers not recommended for promotion to CW2 or 1LT will be separated NLT 90 days after the Promotion Review Authority approves their nonrecommendation.

D. Other Than Regular Army (OTRA) Judge Advocate Officer Career Status Procedures. See JAGC Personnel Policies, reprinted in the JAGC Personnel and Activity Directory.

1. **STEP 1.** Obligated Volunteer (OBV) - OTRA officers may apply for Conditional Voluntary Indefinite (CVI) status after completion of two years on active duty as a judge advocate (JA) officer. Officers not selected for CVI status will be released from active duty (REFRAD) at the end of their service obligation.

2. **STEP 2.** CVI status officers will be considered for Voluntary Indefinite (VI) status upon the completion of five years on active duty as a JA. Officers not selected will be REFRAD 180 days following nonselection or at the end of their service obligation, whichever is later.

3. **STEP 3.** VI officers will be integrated into the Regular Army (RA) upon promotion to major.

## VII. SEPARATION PAY FOR INVOLUNTARY SEPARATIONS (DOD INSTRUCTION 1332.29, PARA C).

A. Basic eligibility requirements.

1. Six years active duty.

2. Honorable service.

3. Involuntary separation.

4. Written agreement to serve in Ready Reserve for at least 3 years.

B. Full Separation Pay.

1. Officers who are involuntarily separated for the following reasons may receive full separation pay.

a. Fully qualified but denied continuation on AD.

b. Fully qualified but being separated under reduction in force (RIF).

2. Computation.

a. $30,000 ceiling eliminated.

b. Formula: 10% of annual base pay times the number of years service.

c. Example. CPT with 8 years service.

(.10 x (12 x 3363.60 (monthly base pay))) x 8 (years in service) = $32,290.56

C. Half Separation Pay. Officers who are involuntarily separated for cause **may** receive half separation pay.

1. Homosexuality.

2. Drug or alcohol abuse rehabilitation failure.

3. For the convenience of the government.

4. Security.

D. Officers involuntarily separated due to substandard performance or misconduct do not receive separation pay.

## VIII. SPECIAL SEPARATION BENEFIT (SSB) (10 U.S.C. § 1174A) AND VOLUNTARY SEPARATION INCENTIVE (VSI) (10 U.S.C. § 1175).

A. Eligibility for SSB and VSI.

1. Between 6 and 20 years of service.

2. Five years of continuous Active Duty or full time Guard duty immediately preceding the date of separation.

3. Not eligible for retired pay.

4. RA or reserve officer on ADL.

5. Agreement to serve in the Reserves.

6. ***Other requirements established by the Secretary***.

B. Special Separation Benefit (SSB) 10 U.S.C. § 1174a.

1. One time lump sum.

2. Formula: 15% of annual base pay times the number of years service.

3. Example: CPT with 8 years service.

(.15 x (12 x 3652.20 (last month base pay))) x 8 (years in service) = $52,591.68.

C. Voluntary Separation Incentive (VSI) 10 U.S.C. § 1175.

1. Annual payments for twice the number of years of active duty.

2. Formula: 2.5% of annual base pay times the number of years service paid annually for twice the number of years in service.

3. Example: CPT with 8 years in service.

(.025 x (12 x 3652.20 (last month's base pay))) x 8 (years in service) = $8,765.28 x 16 (twice the number of years service = $140,244.48 paid at a rate of $8,765.28 annually for 16 years.

D. Limitations on SSB/VSI.

1. Acceptance of DOD civilian position within 180 days results in loss of SSB/VSI.

2. Disability/retired pay set-off. 10 U.S.C. § 1174 (h).

3. Subject to the availability of appropriations.

4. Temporary drawdown programs. Expire 30 September 2001, unless extended by Congress.

## IX. SELECTIVE CONTINUATION ON ACTIVE DUTY (10 U.S.C. § 637).

A. Applies to RA and OTRA officers.

The Secretary of the Army may (based on the needs of the service for specific skills) convene selective continuation boards to retain twice nonselected officers on active duty (CPTs until 20 years time in service (TIS); MAJs until 24 years TIS)(unless promoted).

B. Section 638a Modification to Selective Continuation Rules.

1. Effective 1 October 1990 to 30 September 2001.

2. Secretary of the Army may shorten continuation periods.

C. Status of Selective Continuation.

## X. SELECTIVE EARLY RETIREMENT (SERB) (AR 600-8-24, CHAP 6, PARA 6-30).

A. 10 U.S.C. § 638 provides authority for the Secretary of the Army to convene boards to select officers for retirement before their mandatory retirement date.

B. 10 U.S.C. § 638a modifies the rules during drawdown.

1. COL with 4 years TIG (2 years during drawdown).

2. LTC twice nonselected for promotion to COL (once during drawdown).

3. Drawdown officers below COL who are not promotable and retirement eligible or within 2 years of eligibility.

4. Board may select no more than 30% of officers.

## XI. VOLUNTARY EARLY RETIREMENT (106 STAT 2315).

A. Temporary drawdown program available until 30 September 2001.

B. Authorizes retired pay for selected soldiers with between 15-20 years of service.

1. Secretary of the Army determines who is eligible.

2. Retired pay reduced 1% for each year less than 20.

3. SSB/VSI recipients may convert to early retirement program. Retirement pay set-off by amounts received under SSB/VSI.

## XII. RETIRED GRADE (10 U.S.C. § 1370).

A. Minimum Time in Grade Requirements (Voluntary Retirements).

1. Six months for MAJ and below.

2. Three years for LTC through major general (MG). The President may waive this requirement in individual cases involving extreme hardship or exceptional or unusual circumstances.

3. Secretary of the Army may reduce TIG requirement to 2 years for LTC and COL. (Drawdown tool that expires 30 September 1999, unless extended.)

B. Secretary of the Army makes satisfactory grade determination.

## XIII. RETIRED PAY (10 U.S.C. § 1401-1412).

A. Member before 8 September 1980: Multiplier times years in service times high month's pay.

B. Member on or after 8 September 1980: Multiplier times years in service times high three year average of base pay.

C. Retired pay multiplier (10 U.S.C. § 1409).

1. Member before 1 August 1986: Multiplier equals 22 percent per year. For a twenty year retirement, officer will receive 50%.

2. Member on or after 1 August 1986: Multiplier equals 22 percent per year minus 1 percent for each year of service less than 30. For a twenty year retirement, officer will receive 40%. **NOTE**: As a result of the FY 2000 Defense Authorization Act, members who entered the service after July 31, 1986, will be given a choice of retirement plans at their 15th year of service. There are two options:

a. Take the pre-1986 retirement system (High-Three Year Average System) or

b. Elect the post-1986 retirement system (Military Retirement Reform Act (MRRA) of 1986, commonly referred to as REDUX) and take a $30,000 career retention bonus.

3. Retired pay readjusted to the higher level at age 62.

## XIV. RECOUPMENT (10 U.S.C. § 2005).

A. Policy. Individuals who participate in certain advanced education programs and fail to complete their educational requirements or military service obligations are subject to recoupment.

B. Procedures.

1. Defense Finance and Accounting Service (DFAS) procedure initiated by the officer's local commander.

2. Recoupment must be accomplished prior to separation.

# XV. OFFICER TRANSFERS AND DISCHARGES.

A. Controlling Regulation.

1. AR 600-8-24. Effective 1 November 1995.

2. Replaced AR 635-100 and AR 635-120. Actions initiated under the old regulations are to be completed under the old regulations, however.

B. AR 600-8-24 breaks officer transfers and discharges into six areas:

1. Voluntary Release From Active Duty (REFRAD) - Chapter 2, Paragraphs 2-5 through 2-20.

2. Involuntary REFRAD - Chapter 2, Paragraphs 2-21 through 2-42.

3. Resignations - Chapter 3.

4. Eliminations - Chapter 4.

5. Miscellaneous Types of Separations - Chapter 5.

6. Retirements - Chapter 6.

C. Purposes of Officer Transfers and Discharges.

1. Provide a way to terminate service prior to the terms of the original contract.

2. Provide authority to transfer officers from one component to another.

3. Provide authority to discharge officers from all military obligations.

4. Support the Army's personnel life-cycle function of transition.

D. Other Considerations.

1. Counseling.

a. Required for commissioned officers with less than 10 years active federal commissioned service.

b. Triggered when such officers submit a request for voluntary REFRAD or an unqualified resignation.

c. Counseling is by the first colonel in the officer's chain of command or supervision. Chaplains, judge advocates, and medical officers will be counseled by a senior officer of their branch in the chain of technical supervision or as specifically designated by their branch.

d. Counseling must include the following:

(1) Advice concerning the opportunities available in the military.

(2) A discussion of the officer's previously achieved investment in the Army.

(3) A determination as to whether the officer has satisfied all applicable service obligations.

(4) A determination that the officer is not under investigation or charges, awaiting the results of trial, or being considered for administrative elimination.

(5) A determination that the officer is not AWOL, in the confinement of civil authorities, suffering from a severe mental disease or defect, or in default in respect to public property or public funds.

(6) Advice encouraging a RA officer to accept an appointment in the U.S. Army Reserve. RC officers will be encouraged to retain their commissioned status in the U.S. Army Reserve.

(7) The addresses of agencies that can provide the officer with information about U.S. Army Reserve career opportunities. See Table 1-1.

2. Involuntary Separation of Officers with Access to Sensitive Programs. Paragraph 1-18.

a. Coordination with supporting security officials required. Separation will not occur unless the security official concurs with the action.

b. Applies to officers in the following categories:

(1) Knowledge of sensitive compartmented information (SCI).

(2) Nuclear Weapon Personnel Reliability Program assignment.

(3) Knowledge of Single Integrated Operational Plan—Extremely Sensitive Information (SIOP-ESI).

(4) Special Access Program (SAP) knowledge.

(5) Presidential Support assignment.

3. Separation in a Foreign Country. Paragraph 1-28.

a. Normally, officers are not separated in OCONUS (Outside the Continental United States) commands. They are returned to the United States and processed for final separation at CONUS-based separation/transfer points.

b. Exceptions.

(1) Officer requests separation in a foreign country and the government concerned consents.

(a) The officer must obtain all necessary documents for his or her lawful presence in the foreign country prior to separation.

(b) The officer's major command (MACOM) may disapprove the request for overseas separation.

(2) Officers confined in a foreign penal institution pursuant to the sentence of a foreign court.

(a) DA must approve separation during confinement.

(b) Foreign authorities must take final action on the case before separation.

(c) The foreign government concerned must consent to the officer's separation in its territory.

4. Referral for Physical Disability Evaluation. Paragraph 1-23.

a. Triggered when it is determined that an officer being processed for REFRAD, separation, retirement, or elimination has a medical impairment that does not meet medical retention standards.

b. Officers under investigation for an offense chargeable under the Uniform Code of Military Justice (UCMJ) that could result in dismissal or punitive discharge may not be referred for or continue disability processing unless –

(1) The investigation ends without charges.

(2) The commander exercising court-martial jurisdiction dismisses charges.

(3) The commander exercising court-martial jurisdiction refers the charge(s) for trial to a court-martial that cannot adjudge a dismissal or punitive discharge.

c. Officers pending certain involuntary REFRADs or involuntary elimination under chapter 4, AR 600-8-24, or who request resignation for the good of the service or separation, resignation or

retirement in lieu of elimination, will be processed under both AR 600-8-24 and the medical/physical evaluation board system.

(1) If the physical disability evaluation results in a finding of physical fitness, the Army Physical Disability Agency will approve the findings for the Secretary of the Army and forward them for processing with the AR 600-8-24 action.

(2) If the physical disability evaluation results in a finding of physical unfitness, both actions will be forwarded to the Secretary of the Army for determination of appropriate disposition.

d. When an officer is processed for separation or retirement for reasons other than those indicated above, physical disability processing takes precedence.

E. REFRAD. Chapter 2.

1. Applies to OTRA officers only.

2. Transfer from Active Duty status rather than discharge. Can be voluntary or involuntary.

3. Approval Authority.

a. Separation Approval Authorities (SAA).

(1) Limited approval authority at installation level.

(a) General officers in command of Army Medical Centers.

(b) Commanders of units and installations having general court-martial authority.

(c) Commanders of:

(i) Personnel centers

(ii) Training centers.

(iii) OCONUS replacement depots.

(iv) All active Army installations authorized 4,000 or more Active Duty military personnel.

(2) No denial authority.

b. Approval Authority varies with type of REFRAD.

4. Voluntary REFRAD.

a. Paragraphs 2-5 through 2-20.

b. Examples.

(1) Personal Reasons. Paragraphs 2-5 and 2-6.

(2) Hardship. Paragraphs 2-9 and 2-10.

(a) Exists when in circumstances not involving death or disability of a member of the soldier's (or spouse's) immediate family, separation will materially affect the care or support of the family by alleviating undue and genuine hardship.

(b) Officer must clearly establish:

(i) The hardship is permanent and did not exist prior to entry on Active Duty.

(ii) If the hardship existed prior to entry on Active Duty, the condition has since intensified and can only be alleviated by separating from Active Duty.

(iii) Upon REFRAD, the officer will be able to eliminate or materially alleviate the condition.

(3) Pregnancy. Paragraphs 2-13 and 2-14.

(a) Counseling by immediate commander required. Purpose of counseling is to provide information concerning the officer's rights, entitlements, and responsibilities with respect to continued Active Duty or separation.

(b) Officers commissioned through funded programs will not be released until completion of their service obligations. When extenuating circumstances exist, officers may request a hardship separation.

(c) If before the REFRAD is accomplished a medical officer determines that the pregnancy has terminated for any reason, the authority for separation no longer exists.

(4) School. Paragraphs 2-15 and 2-16.

(a) An officer who is serving the initial tour of Active Duty and who is not mission essential may request REFRAD to attend a recognized institution of higher learning.

(b) Officers commissioned through funded programs will not be released until completion of their service obligations.

5. Involuntary REFRAD.

a. Paragraphs 2-21 through 2-42.

b. Examples.

(1) Declination of RA Integration. Paragraphs 2-21 and 2-22.

(a) An OTRA officer who was selected for but declined RA integration will be released from Active Duty.

(b) Applies to officers who entered Active Duty after enactment of the Defense Officer Personnel Management Act (DOPMA); i.e., on or after 15 September 1981.

(c) Officers will be released only after all service obligations have been fulfilled.

(d) Otherwise, release is effective not later than 90 days after the officer signs the declination statement.

(2) Maximum Age or Service. Paragraphs 2-23 through 2-26.

(a) Age.

(i) Major general or brigadier general promotable – 62.

(ii) Any other commissioned officer – 60. If within 2 years of active federal service retirement eligibility, may be retained on Active Duty until eligible for retirement.

(iii) Warrant officers without commission – 62.

(iv) Reserve commissioned warrants – 60.

(v) Certain medical officers – 68 (with the officer's consent).

(b) Service.

(i) Generally, Reserve commissioned officers will be released from Active Duty after completing 20 years of active Federal service.

(ii) Exceptions:

*(a)* Staff College Level School or Senior Service College: retained on Active Duty until completing 2 years of Active Duty following graduation.

*(b)* Command Selection: retained on Active Duty up to 90 calendar days after completing assignment to the designated command position.

*(c)* Lieutenant Colonel: 28 years.

*(d)* Colonel: after 5 years in grade or 30 years, whichever is later.

*(e)* Brigadier General: after 5 years in grade or 30 years, whichever is later.

*(f)* Major General: after 5 years in grade or 35 years, whichever is later.

(3) Nonselect for Voluntary Indefinite (VI) or Active Guard or Reserve (AGR) Continuation. Paragraphs 2-27 and 2-28.

(4) REFRAD by the Department of the Army Active Duty Board (DAADB). Paragraphs 2-31 and 2-32.

(a) 10 U.S.C. § 14902: Service Secretaries shall prescribe, by regulation, procedures for the review at any time of the record of any Reserve officer to determine whether that officer should be required, because of substandard performance, misconduct, moral or professional dereliction, or national security concerns, to show cause for retention in an active status.

(b) The Department of the Army Active Duty Board (DAADB) is the Army's tool for ensuring that only Reserve Component officers who consistently maintain high standards of performance, efficiency, morality, and professionalism are permitted to serve on Active Duty.

(i) Initiated locally or at department headquarters level.

(ii) Bases for REFRAD similar to bases for administrative elimination: substandard performance, misconduct, moral or professional dereliction, and national security reasons.

(iii) Minimal due process. Officer is notified and given an opportunity to respond/rebut. The board reviews the record and the officer's response/rebuttal and makes a recommendation regarding retention or release.

(iv) The initiating commander can close the case and stop the REFRAD action upon considering the officer's response/rebuttal.

(5) Civil Conviction. Paragraphs 2-33 and 2-34.

(a) An officer found convicted of a criminal offense or who enters a plea of no contest to a criminal offense in any federal or state court may be released from Active Duty immediately when the offense:

(i) Is one punishable by a maximum penalty of death or confinement for more than 1 year under the UCMJ. When the offense is not listed or is not closely related to an offense listed in the UCMJ, the maximum punishment authorized by the United States Code or the District of Columbia Code, whichever is less, applies.

(ii) Involves moral turpitude, regardless of the sentence received or maximum punishment permissible under any code.

(b) Officer is notified and allowed an opportunity to respond only. The case is not referred to a board.

(6) Officer Basic Course (OBC) Failure. Paragraphs 2-37 and 2-38.

(a) Release from Active Duty and discharge from Reserve commission.

(b) Bases.

(i) Misconduct.

(ii) Moral or professional dereliction.

(iii) Academic or leadership deficiencies.

(iv) Resigning from the course.

(c) Officers are entitled to a faculty board since potential for losing commission exists. Enhanced due process warranted since action can involve more than a loss of Active Duty status. Officers may waive the board and accept the decision of the approval authority with respect to their release/discharge.

F. Resignations. Chapter 3.

1. Unqualified. Paragraphs 3-5 and 3-6.

a. Any officer on Active Duty for more than 90 calendar days may tender an unqualified resignation, unless:

(1) Action is pending that could result in resignation for the good of the Service;

(2) The officer is under a suspension of favorable action;

(3) The officer is pending investigation;

(4) The officer is under charges; or

(5) Any other unfavorable or derogatory action is pending.

b. Normally, resignations will not be accepted unless, on the requested date of separation, the officer has completed his or her applicable service obligation.

2. Failure to Meet Medical Fitness Standards When Appointed. Paragraphs 3-9 and 3-10.

3. Pregnancy. Paragraphs 3-11 and 3-12.

a. Counseling required. Purpose is to provide information concerning rights, entitlements, and responsibilities with respect to continued Active Duty or separation.

b. Normally, an officer will not tender a resignation for pregnancy until she has completed her initial service obligation incurred from the funded program, if any, under which she was commissioned. Exception: when extenuating circumstances exist, the officer may accept an indefinite appointment in the Reserves in order to complete the service obligation.

4. Resignations for the Good of the Service.

a. In Lieu of General Court-Martial. Paragraphs 3-13 and 3-14.

(1) An officer may submit a resignation for the good of the service in lieu of general court-martial when:

(a) Court-martial charges have been preferred against the officer with a view toward trial by general court-martial.

(b) The officer is under a suspended sentence of dismissal.

(2) Tender of the resignation does not preclude or suspend court-martial proceedings. The convening authority may not take action on findings and sentence until DA acts on the resignation request, however.

(3) Officers normally receive a characterization of service of Under Other Than Honorable Conditions.

(4) Regardless of the characterization of service received, an officer who resigns for the good of the service in lieu of general court-martial is barred (with minor exceptions) from receiving Veteran's Affairs benefits.

b. Homosexual Conduct. Paragraphs 3-15 and 3-16.

(1) Officers can tender resignations for the good of the service due to homosexual conduct prior to general court-martial charges being preferred or administrative elimination proceedings being initiated.

(2) An officer is not precluded or suspended from disciplinary proceedings by submitting a resignation for the good of the service due to homosexual conduct.

(3) Officers normally receive a characterization of service of Under Other Than Honorable Conditions.

(4) Regardless of the characterization of service received, an officer who resigns for the good of the service due to homosexual conduct is barred (with minor exceptions) from receiving Veteran's Affairs benefits.

G. Eliminations. Chapter 4.

1. Privilege of Service.

a. Individuals are permitted to serve as commissioned officers in the military service because of the special trust and confidence the President and the United States have placed in their patriotism, valor, fidelity and competence.

b. Commissioned officers are expected to display responsibility commensurate to that special trust and confidence and to act with the highest integrity at all times.

c. It is DOD policy to separate those officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence expected of them.

d. See National Defense Authorization Act, Fiscal Year 1998, for requirement of "exemplary conduct" by commanding officers (and others in authority).

(1) All commanding officers (and others in authority) are required:

(a) To show in themselves a good example of virtue, honor, patriotism, and subordination;

(b) To be vigilant in inspecting the conduct of all persons who are placed under their command;

(c) To guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and

(d) To take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

(2) Issues.

(a) How broad is this provision?

(b) How does this provision affect a commander's authority and discretion in disciplining members of the command?

(c) Does a commander's failure to satisfy the requirement for "exemplary conduct" form a basis for administrative elimination? Does such failure constitute substandard performance or professional dereliction?

2. Substandard Performance. Paragraph 4-2a.

a. Failure to keep pace with contemporaries.

b. Apathy, defective attitudes.

c. Failure of a course at a service school for academic reasons.

d. PT or weight failure.

e. HIV Positive within 180 of entering Active Duty.

3. Misconduct, Moral or Professional Dereliction, or in the Interests of National Security. Paragraph 4-2b.

a. Discreditable or intentional failure to meet personal financial obligations.

b. Mismanagement of personal affairs.

c. Intentional omission or misstatement of fact in official statements or records.

d. Acts of personal misconduct (including acts committed while in a drunken or drug intoxicated state).

e. Intentional neglect or failure to perform duties.

f. Conduct unbecoming.

g. Drug dependent or misconduct involving drugs. (Note: elimination action must be initiated.)

h. Loss of professional qualifications.

4. Derogatory Information. Paragraph 4-2c.

a. Required record review.

b. Triggered by:

(1) Punishment under Article 15, UCMJ.

(2) Conviction by court-martial.

(3) Denial of security clearance.

(4) Relief for cause OER.

(5) OMPF-filed administrative reprimand.

(6) Failure of a course at a service school.

c. Must review officer's overall record for consideration of terminating his or her appointment.

5. Homosexual Conduct. Paragraphs 4-2b(6), 4-22, and 4-23.

6. Procedural Issues.

a. Initiated by DA or General Officer Show Cause Authority (GOSCA).

b. Administrative "Double Jeopardy".

(1) Officers will not be considered for involuntary administrative elimination because of conduct that has been the subject of judicial proceedings that resulted in an acquittal.

(2) Generally, no officer will be considered for involuntary administrative elimination because of conduct that has been the subject of administrative elimination proceedings that resulted in a final determination that the officer should be retained. Exceptions:

(a) New evidence.

(b) Fraud.

(c) Subsequent conduct.

(i) Substandard Performance: Must wait one year if required to show cause for retention for the same reason(s).

(ii) Misconduct, Moral or Professional Dereliction, Homosexual Conduct, or in the Interest of National Security: May again be required to show cause at any time.

c. Notification and Rebuttal.

(1) Notified by initiating authority.

(2) Notice must identify the reason(s) for elimination.

(a) May be combined.

(b) If combined, separate findings are required for each separation basis identified.

(3) Notice also offers the officer the following options.

(a) Resignation in Lieu of Elimination (Regulatory).

(b) Request for Discharge (RA) (10 U.S.C. § 1186).

(c) Retirement in Lieu of Elimination (if eligible) (10 U.S.C. § 1186).

(4) Officer, whether probationary or nonprobationary, entitled to submit a written response or rebuttal to the headquarters initiating the action. Decision to retain at any point stops action.

d. Characterization of Service.

(1) Honorable, General, or Under Other Than Honorable Conditions.

(2) Normally based on a pattern of behavior and duty performance rather than an isolated incident.

(3) If the **sole** reason for elimination is substandard performance, the officer is entitled to an Honorable discharge.

e. Probationary officer.

(1) Notification.

(2) Rebuttal to headquarters that initiated action.

(3) Action by Secretary of the Army.

(4) Probationary officer not entitled to board unless Under Other Than Honorable discharge is recommended.

(5) If officer loses probationary status during processing, must process as nonprobationary.

f. Nonprobationary officer.

(1) Notification.

(2) Rebuttal to headquarters that initiated action.

(3) Referral to Board of Inquiry.

(4) Board of Review.

(5) Action by Secretary of the Army.

g. Referral to Board of Inquiry.

(1) Full due process.

(2) Composition.

(a) At least three voting officers.

(i) On Active Duty List or Reserve Active Status List.

(ii) Same military service as respondent.

(iii) Colonel or above, senior in grade and rank to the respondent.

(b) Others: Legal advisor, recorder, and respondent's counsel. All nonvoting members.

(3) Determinations.

(a) Case decided only on the evidence received or developed during open hearings.

(b) Voting conducted in closed session with only voting members in attendance.

(c) All findings and recommendations shall be determined by majority vote.

(d) If Board of Inquiry determines that retention is warranted, the case is closed.

(e) If Board of Inquiry determines that retention is not warranted, case goes to a Board of Review.

h. Board of Review.

(1) Convened at DA level.

(2) Limited due process.

(3) Composition. Same as Board of Inquiry.

(4) Recommends either retention or elimination.

(a) If retention warranted, case closed.

(b) If elimination warranted, case forwarded to Service Secretary with recommendation for final action.

H. Miscellaneous Separations. Chapter 5.

1. Lack of Jurisdiction - court orders release from Active Duty.

2. Chaplain Loses Professional Qualifications - if no elimination under Chapter 4 (see above).

3. Officers Twice Nonselected for Promotion - unless selective continuation, over 18 years of service, or retirement.

4. Nonselection for Field Promotion – second lieutenant and warrant officer (WO1); field promotion; lieutenant colonel commander; appeal to general officer.

5. Conviction by Foreign Tribunal - sentence is 6 months or more.

6. Dropped From the Rolls – Active Duty or retired when confined, absent without leave (AWOL), or loses retired pay.

7. Dismissed by General Court-Martial - after appellate review is complete.

I. Retirement. Chapter 6.

1. Voluntary Retirement (VR) – General Court-Martial Convening Authority (GCMCA) approval.

2. VR in Lieu of Mandatory - i.e., pending REFRAD, elimination, or nonselection.

3. Retirement in lieu of elimination, in cases involving misconduct or moral or professional dereliction, **requires** referral to Army Grade Determination Board.

4. Retirement in Lieu of PCS - at least 19 years, 6 months time in service; must submit within 30 days of notice of PCS.

5. Mandatory Retirement - maximum age or service.

6. Selective Early Retirement - based on selection by SERB.

## XVI. COMMANDER'S RESPONSIBILITIES.

A. Documentation.

B. Take the Proper Action. In determining what action to take when faced with officer misconduct or poor performance, the commander should decide:

1. Should the officer be retained on active duty?

2. Should the officer be eligible for reappointment or recall to active duty at some later time?

3. Should the officer lose his or her commission?

## XVII. CONCLUSION.

# CHAPTER O

# ARMY ADVERSE ADMINISTRATIVE ACTIONS


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THE JUDGE ADVOCATE GENERAL'S SCHOOL
ADMINISTRATIVE AND CIVIL LAW DEPARTMENT
15 FEBRUARY 2001

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## Outline of Instruction

# I. INTRODUCTION.

Commanders have a spectrum of administrative military personnel actions which they can use to motivate, improve, and rehabilitate soldiers whose performance is unsatisfactory or who exhibit other problems which interfere with duty performance or the unit's mission. If soldiers fail to respond to motivation and rehabilitation, other administrative tools are available which commanders can use to take appropriate remedial or adverse action, or to separate soldiers from the Army.

This outline reviews the twelve administrative actions short of administrative separation which you can expect to see most often. Each section lists the appropriate references. Page 3-40 contains a consolidated list of references. Appendix A is a chart which lists these actions in a tabular form. Enlisted separations are addressed in the next chapter.

This outline should be supplemented by reference to the applicable regulation, to appropriate local regulations and policies, and any guidance from senior commanders.

# II. DUE PROCESS OF LAW - THE STARTING POINT.

A. The Constitution.

1. Bill of Rights (e.g., Fourth, Fifth, and Sixth Amendments) generally inapplicable to military administrative proceedings.

2. When challenged in court on alleged denial of constitutional due process (fifth amendment), military position is "there is no constitutional life, liberty, or property interest affected by our administrative actions."

B. Our Regulations.

1. Must follow procedures in regulations -they are more than "guidelines." Although federal district courts are very hesitant to second guess armed forces on substance of decisions, they will grant relief if we fail to follow our own regulations.

2. "Minimum" due process: notice of allegations and an opportunity to be heard.

## III. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS).

A. Purpose.

1. A suspension of favorable personnel actions (or "flag") is an administrative hold placed on a soldier which prevents most favorable personnel actions (promotion, awards, school attendance, payment of reenlistment bonuses, etc.) while the soldier's chain of command completes an investigation, determines whether or what adverse action to take against the soldier, and completes the adverse action.

2. A flag itself is not an adverse action, because it can be removed as easily as it can be initiated. But since it prevents virtually all favorable action on a soldier, it can have a very adverse effect on the soldier's career.

3. Properly administered, a flag has two (previously three) components:

a. A SIDPERS (Standard Installation/Division Personnel System) transaction which codes a soldier's records in the Army's automated personnel database and prevents favorable personnel transactions.

b. [Marking and physically segregating the soldier's Military Personnel Records Jacket (MPRJ) at the military personnel records center, to alert personnel clerks that the soldier was flagged, thus preventing manual favorable personnel transactions at the personnel service company. The elimination of the MPRJ will remove this safeguard and put more emphasis on unit-level management of personnel actions.]

c. Battalion S1 (or equivalent) unit management of the flagging system, to keep unit leadership and unit personnel clerks aware of the flag, and lift it when appropriate.

B. Reference. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS), 30 Oct 87. I01, Apr 94.

C. Procedure.

1. Any commander (or general officer staff head) directs the flag.

2. Battalion S1 prepares DA Form 268, Report to Suspend Favorable Personnel Action (FLAG), and submits SIDPERS transaction.

3. Unit notifies soldier.

4. Flags prevent:

a. Regular ("non-transferable") flags. Appointment, reappointment, reenlistment, extension, entry on active duty or active duty for training, reassignment, promotion or reevaluation for promotion, awards and decorations, attendance at civil or military schools, unqualified resignation or discharge, retirement, advance or excess leave, payment of enlistment or selective reenlistment bonus, assumption of command, family member travel to an overseas command and command sponsorship of family members overseas when sponsor is overseas.

b. APFT (Army Physical Fitness Test) failure ("transferable") flags. Promotion, reenlistment, and extension.

c. Weight control ("transferable") flags. Attendance at schools, promotions, assumption of command, awards and decorations, and reenlistment or extension. Message, DAPC-MSP, 011500Z MAR 88, subject: Suspension of Favorable Personnel Actions (FLAGS) - FLAG Conversion Message Number 3.

5. Unit or battalion manages SIDPERS C95 report, which lists all flagged soldiers.

6. Lift flag when appropriate.

D. Approval Authority. Any commander or general officer staff head.

E. Appeal. None.

F. Records. DA Form 268 maintained only so long as soldier is flagged. No permanent record of flag itself, although there may well be a permanent record of the underlying adverse action which required the flag.

## IV. EXTRA TRAINING.

A. Purpose. An effective, nonpunitive corrective measure.

B. Reference. AR 600-20, para 4-6b.

C. Procedure. No formal procedure.

1. Any leader may order a soldier to train to overcome a deficiency.

a. Must be directly related to the deficiency.

b. Must be aimed at improving the soldier's performance.

2. Not punishment; must stop when deficiency is overcome.

D. Approval Authority. Any commander. An "inherent power[] of command." May be delegated.

E. Appeal. No specific procedure.

F. Records. None; *however*. . .

1. "Deficiencies *satisfactorily corrected* by means of training and instruction will be not noted in the official records of the soldier concerned." AR 600-20, para 4-6b(2) (emphasis added).

2. If the problem merits it, consider documenting with a counseling with a view towards separation. Destroy the counseling if the problem truly is cured; otherwise, proceed to separation.

## V. REVOCATION OF PASS PRIVILEGES.

A. Purpose. Commanders should grant passes (defined as short, nonchargeable, authorized absences from post or place of duty during normal off-duty hours) to those soldiers whose performance of duty and conduct merits approval. If a soldier's performance of duty and conduct do not merit approval, do not approve a pass.

B. Reference. AR 600-8-10, chap 5, section XIV.

C. Procedure. No formal procedure. Regular passes usually do not require a DA Form 31 (although one may be used). If a soldier's pass privileges are revoked, the soldier's immediate commander or his or her representative should inform the soldier in writing. If DA Form 31 is used for regular passes, indicate disapproval on the form.

D. Approval Authority. Any commander.

E. Appeal. No special procedures.

F. Records. None required. Consider documenting with a counseling with a view towards separation.

## VI. COUNSELING WITH A VIEW TOWARDS SEPARATION.

A. Purpose. An administrative prerequisite to many administrative separations, counseling with a view towards separation serves as a "final warning" to a soldier to improve performance or face discharge. It also is an attempt by the Army to protect its investment in the soldier's recruiting and training costs. *Compare with* general counseling (AR 600-20, para 2-1e) (basic leadership tool used to assist soldiers in professional growth; not necessarily adverse).

B. Reference. AR 635-200, para 1-18.

C. Procedure.

1. ***May*** be used at any time. At least one recorded counseling is ***required*** as a prerequisite for these grounds for discharge under AR 635-200:

a. Involuntary separation due to parenthood, para 5-8.

b. Personality disorder, para 5-13.

c. Entry level performance and conduct, chap 11.

d. Unsatisfactory performance, chap 13.

e. Minor disciplinary infractions or a pattern of misconduct, para 14-12a and 14-12b.

2. Any responsible person will advise the soldier of:

   a. The reason for counseling.

   b. The fact that separation may be initiated if behavior continues.

   c. The type of discharge that could result from possible separation.

   d. The effect of each type.

D. Give the soldier a reasonable opportunity to overcome the deficiencies.

E. Approval Authority. None. Counseling may be conducted by "a responsible person." AR 635-200, para 1-18b.

F. Appeal. None.

G. Records.

1. To be used as a prerequisite for separation, each counseling session must be recorded in writing.

2. DA Form 4856 (General Counseling Form) normally should be used for this purpose.

3. Filed in unit personnel files - not in MPRJ (Military Personnel Records Jacket) or OMPF (Official Military Personnel File). No permanent, long-term record, unless incorporated into separation action. Maintain until soldier departs unit; destroy one year later IAW MARKS.

4. Commander's Notebook. Beware of Freedom of Information Act access. Generally, no right to access under FOIA if:

   a. Prepared voluntarily.

   b. Used only as a memory aid by preparer.

5. Article 15 (DA Form 2627) does not satisfy requirement in and of itself. Solution: have legal clerk/legal center prepare DA Form 4856 to accompany each Art 15.

## VII. REHABILITATIVE TRANSFER.

A. Purpose. A soldier must be recycled or reassigned to a new unit at least once before separation action can be initiated under AR 635-200:

   1. Involuntary separation due to parenthood, para 5-8.

   2. Personality disorder, para 5-13.

   3. Entry level performance and conduct, chap 11.

   4. Unsatisfactory performance, chap 13.

   5. Minor disciplinary infractions or a pattern of misconduct, para 14-12a and 14-12b.

B. References.

   1. AR 635-200, para 1-18c.

2. Message, Headquarters, Dep't of Army, DAPE-MPE, subject: Attrition of First-Term Enlisted Soldiers (121752Z Dec 96) (ALARACT 119/96).

3. Message, Headquarters, Dep't of Army, DAPE-MPE, subject: Attrition of First-Term Enlisted Soldiers--Supplemental Guidance (151717Z Jan 97) (ALARACT 011/97).

C. Procedure.

1. Period required.

a. Soldiers in replacement stream: recycle between training companies where feasible; if not, between training platoons.

b. Soldiers in regular units: reassign between battalion-size units at least once, with a minimum of two months in each unit, where possible. PCS possible only for SPC/CPL & below, w/ less than 2 years TIS, & no family members.

2. Very limited. The company-level commander requests the transfer, and the request is processed through command channels to the approval authority. No due process rights for the soldier.

3. A soldier usually cannot be reassigned to a different installation on a rehabilitative transfer. *See* AR 635-200, para 1-18c(3).

D. Approval Authority.

1. Not specified in AR 635-200, para 1-18. Logically, first commander with authority over the gaining and losing unit.

2. May waive requirement for rehabilitative transfer.

a. Routine, common practice in many units. ("The exception that swallows the rule.")

b. ***Waiver now extremely limited in Chap 11 and Chap 13 cases***. *See* DA Messages cited above. **Represents significant change from common past practice for many units.**

c. Document why you are doing it. Make sure there is something in the file to *support* your *conclusion* that transfer would:

(1) "Create serious disciplinary problems or a hazard to the military mission or to the soldier, or

(2) "Be inappropriate because the soldier is resisting rehabilitation attempts, or

(3) "Rehabilitation would not be in the best interest of the Army as it would not produce a quality soldier."

E. Appeal. No specific provisions.

F. Records. No specific provisions. In practice, losing unit should document reasons for rehabilitation with counseling with a view towards separation, and maintain those records for one year after soldier's departure (*i.e.*, transfer to gaining unit if needed to support a separation action).

## VIII. ADMINISTRATIVE REPRIMAND, CENSURE, OR ADMONITION.

A. Purpose.

1. Documents misconduct or poor performance in official files.

2. Leadership tool.

3. Be wary of information originating *solely* from intelligence and personnel security files: this information requires special handling (*See,* e.g., AR 600-37, para. 4-6; AR 380-67, ch. 8).

B. References.

1. AR 600-37.

2. AR 25-400-2, The Modern Army Recordkeeping System (MARKS), para B-80 and Table B-91, 26 Feb 93 (regarding MARKS number 640a).

C. The terms defined.

1. "Reprimand. To reprove severely; to censure formally, especially with authority. . . . . A public and formal censure or severe reproof, administered to a person in fault by his superior officer or by a body or organization to which he belongs." Black's Law Dictionary 1170 (5th ed. 1979).

2. "Censure. . . . . An official reprimand or condemnation." Id. at 203.

3. "Admonish. To caution or advise. To counsel against wrong practices, or to warn against danger of an offense." Id. at 45.

4. What's the practical difference? Don't use *censure*; it's ambiguous. Use *reprimand* instead if you wish to reprove someone for something they have done. Use *admonish* if the person's wrongdoing is not clear, but you wish to make a record of warning the person to avoid or desist from certain behavior. The same rules (AR 600-37) apply to the filing of all three actions.

D. Procedure.

1. Drafting and initiating the letter.

a. For enlisted soldiers. Initiated by the person's immediate commander, any higher commander in the chain of command, a supervisor, school commandant, general officer, or GCMCA.

b. For officers. As above, less "supervisor," plus any rating official.

2. Contents.

a. Reason for reprimand.

b. The statement that the reprimand was imposed as an administrative measure and not as punishment under Article 15. AR 27-10, para 3-3.

c. If the reprimand is intended for filing in the OMPF, either the reprimand or the document referring the reprimand should indicate where the drafter desires to file the reprimand.

COMPANY A
16TH SIGNAL BATTALION, 29TH SIGNAL GROUP
FORT ARLINGTON, VIRGINIA 11111

ABCD-EF-B 6 June 1996

MEMORANDUM FOR PV2 Kathleen B. Nash, Company A, 16th Signal Battalion, 29th Signal Group, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. On 22, 24, 26, and 31 May 1996, you were absent without authority from your appointed place of duty. You failed to report to the unit supply room at Company A, 16th Signal Battalion, 29th Signal Group, at the appointed time, 0800, to begin your duties on those dates. Further you were formally counseled on a number of prior occasions and orally admonished for similar offenses. You are hereby reprimanded for your conduct on 22, 24, 26, and 31 May.

2. You are expected to be at your appointed place of duty at the appointed time unless excused by proper authority. Your persistent tardiness will not be tolerated in this unit.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, article 15.

4. I intend to file this written reprimand in your unit personnel file. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. Your response should be by endorsement to this reprimand. I will withhold my decision on imposing and filing this reprimand until I receive and consider your response.

HARD CHARGER
Captain, SC
Commanding

***Figure 3***

3. Notice and rebuttal by the soldier. Paras 3-2 & 3-6.

   a. Notice (a copy of the reprimand & subsequent information): ***Note:*** Recent Gonzalez case and Army Times coverage.

   b. Rebuttal (by endorsement).

   c. No right to counsel, but local legal assistance and Trial Defense Services will often try to see soldiers, time permitting.

E. Appeal.

1. Local filing. No formal appeal process.

2. OMPF filing. Appealed to DA Suitability Evaluation Board (DASEB).

   a. Removal. Grounds: document is untrue or unjust. Normally, consideration of these appeals is restricted to SSG and above.

   b. Transfer from P-fiche to R-fiche. Grounds: untrue, unjust, or that the reprimand has served its intended purpose. Again, appeals normally restricted to SSG and above. If basis is that reprimand has served its intended purpose, soldier must wait at least one year since imposition of the reprimand and have received at least one OER or NCOER.

F. Records. Memorandum maintained in local unit files until 12 months after a soldier's departure, or permanently on the OMPF.

# IX. LOCALLY IMPOSED (OR "FIELD") BAR TO REENLISTMENT.

A. Purpose.

1. Only soldiers of high moral character, personal competence, and demonstrated adaptability to the requirement of the professional soldier's moral code will be reenlisted in the Active Army. Soldiers who cannot, or do not, measure up to such standards ... will be barred from further service .... AR 601-280, para 8-2a.

2. A potentially rehabilitative tool: puts pressure on soldier to shape up; sets up soldiers who fail to do so for separation.

3. Discretionary grounds for bar to reenlistment. Para 8-4d. Tardiness, loss of clothing or equipment, substandard personal appearance or hygiene, indebtedness, nonjudicial punishment, traffic violations, inability to follow orders, apathy, cannot adapt to military life, failure to manage personal affairs, behavior which brings discredit upon the unit or Army, failure to pass APFT or weapons qualification, noncompetitive for promotion. AR 601-280, para 8-4d lists 28 reasons; the list is not exclusive.

4. Mandatory grounds for bar to reenlistment. AR 601-280, para 8-4c.

a. Single soldier and in-service couples with dependent family members when soldier has been counseled IAW AR 600-20, chap 5, and does not have an approved family member care plan on file w/in 2 months.

b. Single soldiers and in-service couples with dependent family members w/ instructions of overseas assignment, if unable to provide the name of a guardian who will care for their family members in CONUS in the event of evacuation from overseas.

c. Weight control failures.

5. Commander's option: bar from reenlistment, or proceed directly to separation action.

   a. Soldiers who fail two consecutive APFTs (or commander may proceed with separation immediately).

   b. Soldiers who are removed for cause from an NCOES course (or commander may proceed with separation immediately).

B. Reference. AR 601-280, chap 8 (29 Sep 95) (note date of "stand-alone" edition; edition in Enlisted Ranks Personnel Update 16 is obsolete).

C. Procedure. Para 8-5.

1. Initiating the bar.

   a. Any commander in soldier's chain of command may initiate.

   b. Bars are usually not appropriate during a soldier's first 90 days or last 30 days in a unit. If circumstances warrant, soldier may be barred, but the certificate should explain the timing.

   c. Use DA Form 4126-R.

2. Notice and rebuttal by the soldier.

   a. If soldier requests, allow seven days for comment.

   b. Rebuttal attached to DA Form, 4126-R.

   c. No right to counsel. TDS or legal assistance will generally try to see soldier.

3. Initiating commander attaches soldier's rebuttal (if any) and forwards through chain of command to approval authority. Personal action by each commander or acting commander required. Any commander may disapprove.

4. Restrictions.

   a. May not approve bar after soldier separates from active duty.

   b. May not enter bar in soldier's records after soldier separates from active duty.

   c. May not retain soldier involuntarily past ETS in order to approve bar.

5. Company level commander informs/ "counsels" soldier if bar approved using back side of DA Form 4126-R, Bar Certificate.

6. Periodic review by the unit commander.

   a. At least once every 3 months after date of approval, and 30 days before the soldier's PCS or ETS.

   b. [After first review, must advise soldier of option of voluntary separation under AR 635-200, para 16-5. This provision has been suspended indefinitely by DA.]

   c. Must lift bar or initiate separation (AR 635-200, chap 13, for underlying grounds) after second review.

7. [Option of requesting voluntary separation. AR 635-200, para 16-5, and AR 601-280, para 8-5f. *This provision of the regulation has been suspended indefinitely by DA*.]

   a. [Approval is at discretion of first LTC-level commander.]

b. [A soldier separated under these provisions will receive an honorable discharge, but no separation pay.]

D. Approval Authority. Depends upon soldier's active Federal service (AFS) on date of bar initiation (note change from previous practice, when AFS at ETS controlled).

1. Less than ten years AFS on date bar was initiated: LTC commander or SPCMCA.

2. Ten years or more AFS on date bar was initiated: general officer in command or GCMCA .

3. Commander who initiates bar cannot approve bar.

4. If bar initiated above company level, approval authority must be GCMCA, GO in command, or HQDA.

E. Appeal.

1. Soldier has seven days to submit appeal.

2. If otherwise qualified, soldier will not be involuntarily separated while appeal is pending.

3. Appellate authority. Depends upon soldier's active Federal service (AFS) on date of bar initiation and approval authority.

a. Less than 10 years AFS on date bar was initiated: general officer in command or GCMCA .

b. 10 years or more AFS on date bar was initiated, or bar approved by GCMCA/GO in command: HQDA.

c. Bar approved by PERSCOM: no appeal.

F. Records. DA Form 4126-R (still) filed permanently in MPRJ. Approved bar annotated on soldier's DA Form 2-1.

## X. THE QUALITATIVE MANAGEMENT PROGRAM (OR "QMP") BAR TO REENLISTMENT.

A. Purpose. Eliminate unproductive and nonprogressive soldiers. Not intended to be rehabilitative; in reality a fast track to separation.

B. **New Authority**: **AR 635-200, Ch. 19**. Old Authority: AR 601-280, chap 10. (Proponency and guidance for QMP has moved to AR 635-200.)

C. Procedure.

1. Files of all soldiers Staff Sergeant (E-6) or higher in grade (with at least 8 years TIS) reviewed annually by DA promotion boards. Boards select soldiers for QMP.

2. Notification packet mailed from DA to installation or overseas command, who forwards packet to first LTC (or higher) commander in soldier's chain of command. Packet contains:

a. Instruction letter to commander.

b. Instruction letter to soldier.

c. Document(s) which triggered bar.

d. Soldier's statement of option.

e. Commander must serve packet on soldier within two days.

3. Soldier and commander have seven days from date of receipt to elect one of five options:

   a. Appeal.

   b. Do nothing. Will face separation.

   c. Request immediate discharge under AR 635-200, para 16-5. Rarely a wise choice because soldier loses all separation pay.

   d. Retire, if retirement eligible.

   e. Extend to retirement eligibility, if memorandum date is between 17 years, 9 months AFS and 20 years AFS.

D. Approval Authority. DA. Action has already been approved when it is received in the field. Soldier's action is just a statement of option, and perhaps an appeal.

E. Appeal.

1. Grounds.

   a. Material error in file. "An error is considered reasonable when there is a reasonable chance that had the error not existed, the soldier might not have been selected for the QMP."

   b. Improved duty performance.

2. Must be submitted to chain of command w/in 45 days of date of memorandum.

3. Must arrive at USAEREC w/in *60 days* of date received by soldier, or appeal decision will automatically be converted to Option 2 (do nothing; get separated).

4. Considerations on appeal. Appeals, particularly those submitted on the basis of improved duty performance, without strong, personal chain of command support are rarely successful. [Remember, the board which selected the soldier for DA QMP bar had the soldier's subsequent NCOERs and AERs before them.]

F. Records. Maintained by DA as part of OMPF.

## XI. THE ARMY WEIGHT CONTROL PROGRAM.

A. Purpose. To ensure that all soldiers:

1. Are able to meet the physical demands of their duties under combat conditions.

2. Present a trim military appearance at all times.

B. Reference.

1. AR 600-9, The Army Weight Control Program, 1 Sep 86 (as published in All Ranks Personnel Update 15, 1 Oct 90). I01, 4 Mar 94 (exp 4 Mar 96). New version of AR 600-9 pending. Expected publication was Summer 1995; now may be fall 2001.

2. National Academy of Sciences Institute of Medicine, Body Composition and Physical Performance: Applications for the Military Services (Bernadette M. Marriott and Judith Grumstrup-Scott eds., 1992) (study commissioned by the US Army Medical Research and Development Command which criticizes the Army's weight control program).

C. Procedure.

1. Commanders and supervisors will monitor soldiers to ensure that they maintain proper weight. At minimum, soldiers will be weighed when they take the APFT or at least every 6 months. Commander may direct weight check if soldier presents an unmilitary appearance.

2. Soldiers exceeding the screening table weight will be tested for body fat (tape measure).

3. Overweight personnel will be flagged IAW AR 600-8-2.

a. Are nonpromotable.

b. Will not be assigned to command positions.

c. Will not be authorized to attend professional military schooling. All soldiers scheduled to attend professional military schooling will be screened before departure. If the soldier exceeds the screening table weight, he will not be allowed to depart unless his commander determines that he meets body fat composition standards. Soldiers arriving overweight at any DA select school or those who PCS to a professional military school will be processed for disenrollment.

d. Will not be allowed to reenlistment or extend unless:

(1) The GCMCA approves an extension of a soldier who either has a temporary medical condition that precludes weight loss or is pregnant and otherwise qualified for reenlistment.

(2) The GCMCA approves an extension of a soldier who has completed a minimum of 18 years active federal service. Application for retirement will be submitted at the time the extension is approved.

4. Will be enrolled in a weight control program.

a. Overweight soldiers who fail to make satisfactory progress within 6 months will either be processed for a bar to reenlistment or will have separation proceedings initiated against them. Satisfactory progress is 3-8 pounds per month. Commander must notify the soldier in writing that separation is being considered and consider the soldier's response. If response is not satisfactory, initiate separation. Separation is effected UP AR 635-200, chap 18. Results in an honorable discharge.

b. Overweight soldiers who successfully complete a weight control program, but within 12 months after removal from the program again exceed body fat standards, will be processed for separation.

c. Overweight soldiers who successfully complete a weight control program, but after the 12th month but before the 36th month exceed body fat standards will be given 90 days to achieve standards. Failure to achieve standards makes soldier subject to separation.

D. Approval Authority.

1. Authority to place a soldier in the weight control program: company-level commander.

2. Separation authority for active-component enlisted soldiers.

a. LTC-level commander if soldier has less than six years active and reserve service (notification procedure used).

b. SPCMCA if soldier has six or more years service (administrative board procedure used).

E. Appeal. No specific procedure.

F. Records.

1. Upon removal from weight control program, records will be maintained in unit (Bn S1/PAC) files for 36 months or until the soldier's PCS.

2. Upon transfer from one unit to another, the losing commander will forward a memorandum to the gaining commander indicating the status of the soldier's participation in a weight control program, and forward any records.

3. When soldier successfully completes AWCP, completion date will be entered in SIDPERS and the soldier's name and completion date will continue to print out on the unit's C95 (FLAG) roster for 36 months.

## XII. DRUNK OR DRUGGED DRIVING - ADMINISTRATIVE SANCTIONS.

A. Purpose. Drunk driving (including drugged driving) administrative sanctions operate in concert with the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) to prevent alcohol and drug abuse, identify abusers, rehabilitate those abusers who warrant retention, and separate those who do not.

B. Reference.

1. AR 190-5 (paragraph citations in this section are to AR 190-5).

2. AR 600-85.

C. Procedures.

1. Withdrawal of driving privileges. Para 2-5.

a. **Suspension** is immediate pending resolution of drunk driving charges brought in the following circumstances:

(1) Refusal to take or complete a lawfully requested chemical test to determine contents of blood for alcohol or other drugs.

(2) Operating a motor vehicle with a blood alcohol content (BAC) of 0.10% by volume or higher or in violation of the law of the jurisdiction that is being assimilated on the installation.

(3) Operating a motor vehicle with a BAC of at least 0.05% by volume but less than 0.10% blood alcohol by volume in violation of the law of the jurisdiction in which the vehicle is being operated, if the jurisdiction imposes a suspension solely on the basis of the BAC.

(4) On an arrest report or other official documentation of the circumstances of an apprehension for intoxicated driving.

b. **Limited hearing**. Para 2-6. A person whose driving privileges are suspended has ten days in which to request a hearing. If requested, must be conducted by the installation commander or delegate within ten days. A decision must issue within ten duty days of the hearing. Issues addressed:

(1) Did the law enforcement official have reasonable grounds to believe person was DWI or in actual physical control of motor vehicle while under the influence of alcohol or other drugs?

(2) Was the apprehension or citation lawful?

(3) Was the person lawfully requested to submit to a test for alcohol or other drug content of blood, breath, or urine and was he informed of the consequences of refusal to take or fail to complete such test?

(4) Did the person refuse to submit to the test for alcohol or other drug content of blood, breath, or urine; fail to complete the test; or complete the test and the result was .10% or higher BAC, or showed results indicating the presence of other drugs for an on-post apprehension or in violation of state laws for an off-post apprehension?

(5) Was the testing method used valid and reliable and were the results accurately evaluated?

c. **Revocation** for period of one year. Para 2-5.

(1) Lawfully apprehended for DWI and refused to submit to or to complete a test to measure the alcohol content in the blood, or detect the presence of any other drug.

(2) Conviction, NJP, or military or civilian administrative action resulted in suspension or revocation of a driver's license for DWI.

(3) Compute from date of original suspension, exclusive of periods when full driving privileges restored pending resolution of charges.

d. **Restricted privileges**. Para 2-11.

(1) May be requested at any time.

(2) GCMCA acts on all DWI/DUI requests for restricted privileges.

2. Referral to ADAPCP. Para 2-9.

a. Mandatory (within 10 days).

b. Enrollment is discretionary.

3. General Officer Written Reprimand. Para 2-7. (See Figure 5, p. 3-31).

a. Mandatory. Must be issued to active duty Army commissioned and warrant officers and NCOs, including corporals.

b. General officer will sign.

c. Based on:

(1) Conviction of intoxicated driving or driving under the influence of alcohol or other drugs, on or off the installation.

(2) Refusal to take or failure to complete a lawfully requested test to measure alcohol or drug content of the blood, breath, or urine, on or off the installation, when there is reasonable belief of driving under the influence of alcohol or drugs.

(3) Driving or being in physical control of a motor vehicle on post when the blood alcohol content is 0.10% or higher, irrespective of other charges, or off post when the blood alcohol content is in violation of state laws, irrespective of other charges.

(4) Driving or being in physical control of a motor vehicle, either on or off the installation, when lawfully requested chemical tests reflect the presence of illegal drugs.

d. Filing is IAW AR 600-37.

(1) Decide to not file.

(2) Unit Personnel File.

(3) OMPF.

4. Consider other administrative actions. Para 2-7c.

a. Administrative reduction per AR 600-200.

b. Bar to reenlistment per AR 601-280.

c. Administrative discharge per AR 635-200. AR 600-85, para 1-11c provides that soldiers involved in instances of DWI must be considered for separation.

Department of the Army
52d Infantry Division (Mechanized) and Fort Arlington
Fort Arlington, Virginia 11111-1111

ABCD-EF-G 15 June 1996

MEMORANDUM FOR 1LT Gideon Pillow, Company A, 2d Battalion, 11th Infantry,
Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. On 1 June 1996 you were apprehended at approximately 2200 while driving your privately owned vehicle on Fort Arlington. The arresting officer cited you for driving under the influence of intoxicating liquor. Subsequently, on 3 June 1996, you were convicted of that offense after a trial on the merits in the Federal Magistrate's Court on Fort Arlington. I hereby reprimand you for your conduct.

2. Your conduct on 1 June 1996 demonstrates a serious disregard for your own safety and that of others. It raises grave doubts as to whether you can perform your duties. Your lack of judgment in this incident calls into question whether you deserve the special trust and confidence that the President of the United States has reposed in you as a commissioned officer. I charge you to conduct yourself in a manner that is worthy of an officer in the United States Army.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.

4. I intend to file this written reprimand in your Official Military Personnel File. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. Your response, if any, should be by endorsement to this reprimand. I will withhold my decision on imposing and filing this reprimand until I receive and consider any response you may make.

RICHARD J. HALFTRACK
Major General, USA
Commanding

*Figure 5*

# XIII. REMOVAL FROM PROMOTION LIST.

A. Purpose. To take administrative action against those soldiers who have been selected for promotion, but whose conduct or duty performance no longer merits promotion. Recall that soldiers may be selected for promotion some months before they are actually promoted. Such soldiers are said to be "on the list." (The informal practice has evolved of writing such "promotable" soldiers' ranks with "(P)" after the rank designation, such as "SGT(P) Chen" or "LTC(P) Vasquez." For the Army policy on use of "(P)", *see* AR 25-50, para 7-5*c*(2).)

B. Reference. AR 600-8-19, para 3-28 (Local promotion list) and para 4-18 (Centralized promotion list).

C. Procedure.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). (Unit commander promotes without referral to promotion board.) Unit commander may decide not to promote.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6). (Local board considers soldiers for promotion to SGT and SSG. Field grade commander of unit authorized LTC commander approves the list.)

a. Soldiers will be informed in writing of proposed removal. However, immediate removal from the promotion list without further due process is required under certain circumstances listed in para 3-28b, including (among others):

(1) Failure to Qualify for MOS-required Security Clearance.

(2) Local Bar to Reenlistment (if appeals exhausted).

(3) Reduction in Grade.

(4) Weight Control Failure.

(5) Release from Active Duty.

(6) Dropped From Rolls.

b. A removal board will be convened if immediate removal is not justified under para 3-28b.

(1) AR 15-6 procedures do not apply.

(2) Recorder will give at least 15 days written notice to soldier.

(3) Soldier may be present and recorder will arrange for presence of reasonably available requested witnesses.

(4) Recorder will provide statements of witnesses who cannot attend the board.

(5) Soldier may:

(a) Appear personally or decline to appear.

(b) Challenge members for cause.

(c) Question witnesses.

(d) Remain silent, make a sworn or unsworn statement, submit to examination by the board.

(6) The board will:

(a) Fully and impartially evaluate the case.

(b) Make a recommendation.

(c) Prepare a written report and submit it to the approval authority.

(7) The promotion authority will approve or disapprove the board's action and notify the soldier of his decision.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). (Soldiers selected for promotion by DA-level board.)

a. Commanders may recommend removal from a DA list. Removal may be based on substandard duty performance or misconduct. "Removal based on minor or isolated incident(s) of conduct may be unfair to the soldier." (IO1, Apr 94)

b. If nonpromotable due to being overweight and:

(1) Soldier fails to make satisfactory progress after six months; or

(2) After 12 months in a weight control program the soldier still exceeds body fat standards;

The commander must submit a recommendation for removal.

c. Removal without referral to the soldier (para 4-18a(1)). Commanders will notify Cdr, PERSCOM, by message for immediate removal of any soldier who has been:

(1) Reduced.

(2) Discharged.

(3) Dropped from the rolls.

(4) Approved for retirement (I01, Apr 94).

(5) Barred from reenlistment due to signing a declination of continued service statement, AWOL, local bar, or court-martial during current enlistment (I01, Apr 94).

(6) (See other factual situations listed in para 4-18(a)(1)).

d. Other cases. If the reason for removal is not listed in para 4-18a(1), the recommendation for removal must be referred to the soldier and the soldier must be given 15 days to submit matters in rebuttal. A soldier who declines to submit rebuttal must do so in writing.

(1) Upon initiation, must impose flag.

(2) Forward recommendation and soldier's rebuttal through GCMCA. May be disapproved at any level.

(3) DA makes final decision.

D. Approval Authority.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4): unit commander.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6): field grade commander of unit authorized LTC commander.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9): DA.

E. Appeal. No specific procedure.

F. Records.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). No records required. If reasons warrant, consider documenting with a counseling with a view towards separation.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6). DA Form 4187, removal board report, and DA Form 3355 filed in unit (bn) functional files for two years.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). Maintained at DA.

# XIV. ADMINISTRATIVE REDUCTION FOR CIVIL CONVICTION OR INEFFICIENCY.

A. Purpose.

1. Civil conviction. A soldier convicted by a civil court (domestic or foreign) or adjudged a juvenile offender by a civil court (domestic or foreign) will be reduced or considered for reduction. AR 600-8-19, para 6-3a.

2. Inefficiency. Inefficiency is a demonstration of characteristics that shows that the person cannot perform duties and responsibilities of the grade and MOS. Inefficiency may also include an act or conduct that clearly shows that the soldier lacks those abilities and qualities normally required and expected of an individual of that grade and experience. Commanders may consider misconduct, including conviction by a civil court, as bearing on efficiency. A soldier may be reduced under this authority for long-standing unpaid personal debts that he or she has not made a reasonable effort to pay. AR 600-8-19, para 6-5.

B. Reference. AR 600-8-19, chap 6.

C. Authority to Reduce.

1. PV2, PFC, and SPC/CPL - Company, troop, battery, and separate detachment commanders.

2. SGT and SSG - Field grade commander of any organization authorized a LTC or higher grade commander.

3. SFC, MSG/1SG, and SGM/CSM - Commanders of organizations authorized a COL or higher grade commander.

D. Procedure.

1. Civil Court Conviction (domestic or foreign, or adjudication as a juvenile offender). AR 600-8-19, table 6-1, at pp. 57-58.

a. Will be reduced to PVT, E-1, if sentence includes death or confinement for one year or more (not suspended). Board action not required.

b. Will be considered for reduction (one or more grades) if sentenced to confinement for more than 30 days but less than one year (not suspended) or confinement for one year or more (suspended). Board action required for SGT or above.

c. May be considered for reduction - all other offenses. Board action required for SGT or above.

2. Inefficiency. Para 6-4.

a. Cannot perform duties and responsibilities of the grade and MOS. Inefficiency includes long standing unpaid debts that the soldier has not made a reasonable effort to pay.

b. Document inefficiency. Should establish a pattern of inefficiency rather than identify a specific incident. A single act of misconduct is <u>not</u> a sufficient basis for reduction for inefficiency.

c. Soldier must have been in unit at least 90 days.

d. May reduce only one grade.

3. Soldier gets notice and opportunity to respond.

a. SPC/CPL and below - no board.

b. SGT and above - reduction board is usually required (exceptions noted above). Board appearance may be declined in writing, which will be considered acceptance of the reduction board's action.

4. Reduction Boards. Para 6-6.

a. Must have both officers and enlisted members.

b. At least three voting members.

c. Members impartial.

d. Recorder without vote appointed.

e. Board has officer or enlisted soldier or both of same sex as soldier being considered for reduction.

f. For inefficiency cases only, one board member will be familiar with soldier's MOS or field of specialization.

g. If soldier is minority and requests minority member on board, generally must provide minority member.

E. Appeal.

1. SSG and below - next higher authority.

2. SFC and above - next higher authority who is a general officer.

F. Records. Filed in OMPF.

# XV. CONSOLIDATED LIST OF REFERENCES.

A. AR 190-5, Motor Vehicle Traffic Supervision.

B. AR 350-15, The Army Physical Fitness Program.

C. AR 380-67, Personnel Security Program.

D. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS).

E. AR 600-8-10, Leaves and Passes.

F. AR 600-8-19, Enlisted Promotions and Reductions.

G. AR 600-9, The Army Weight Control Program.

H. AR 600-20, Army Command Policy and Procedures.

I. AR 600-37, Unfavorable Information.

J. AR 601-280, Total Army Retention Program, w/ IO3 (November 1993).

K. AR 635-200, Personnel Separations - Enlisted Personnel.

## ARMY ADVERSE ADMINISTRATIVE ACTIONS

| | SUSPENSION OF FAVORABLE PERSONNEL ACTION | EXTRA TRAINING | REVOCATION OF PASS PRIVILEGES | COUNSELING WITH A VIEW TOWARDS SEPARATION | REHABILITATIVE TRANSFER |
|---|---|---|---|---|---|
| **Grounds for Action** | Other adverse action contemplated or investigation pending | Soldier deficient in any aspect of duty or conduct | Soldier deficient in any aspect of duty or conduct | Cdr contemplates separation for parenthood (5-8), personality disorder (5-13), entry level perf (ch 11), unsat perf (ch 13), or misconduct (ch 14) | |
| **Ultimate Result** | Many favorable personnel actions barred temporarily | Soldier corrects the problem | Soldier not permitted to leave post or place of duty during normal off-duty hours | Soldier on notice that continued poor performance may lead to separation, and consequences | Soldier gets a fresh start in a new unit |
| **Regulation** | AR 600-8-2 (30 Oct 87) | AR 600-20, para 4-6b (30 Mar 88) | AR 600-8-10, para 5-28 (1 Jul 94) | AR 635-200, para 1-18 (17 Sep 90) | |
| **Who Initiates** | Commander or GO staff head | Any leader | Any leader | "Any responsible person" | Commander |
| **Board hearing** | No | No | No | No | No |
| **Entitled to Counsel** | No (but see AR 27-3, para 3-6g(4)(i)) | No | No | No | No |
| **SJA Review** | No | No | No | No | No |
| **Approval Authority** | Cdr or GO staff head | "[I]nherent power[] of command." | Unit Commander | None | Commander w/ auth over losing and gaining unit |
| **Appeal Authority** | No formal appeal | No formal appeal | No formal appeal | No formal appeal | No formal appeal |

## ARMY ADVERSE ADMINISTRATIVE ACTIONS

| | ADMINISTRATIVE REPRIMAND | LOCAL (OR FIELD) BAR TO REENLISTMENT | DA OR QMP BAR TO REENLISTMENT | DRUNK DRIVING SANCTIONS |
|---|---|---|---|---|
| **Grounds for Action** | Misconduct or unsatisfactory performance | Untrainable, unsuitable, PT failure, NCOES RFC, weight control failure; [no family care plan or no guardian, if applic.] | Moral or ethical problems; declining performance; no potential for continued service | Refusal to test; BAC > .10% (or between .05% and .10% depending on local law); or any official report of DWI |
| **Ultimate Result** | Written reprimand may be filed in soldier's permanent records | Soldier can't reenlist, and may face separation action in six months | Soldier will be separated in 90 days, unless appeal successful | Privilege to drive on post or in overseas command suspended or revoked |
| **Regulation** | AR 600-37, chap 3 (19 Dec 86) | AR 601-280, chap 8 (29 Sep 95) | AR 635-200, ch. 19 (1 Jan. 01) | AR 190-5, chap 2 |
| **Who Initiates** | Cdr, supervisor (enl) or rater (off), school cmdt, GO or GCMCA | Any commander | SSG & +: all records reviewed automatically by HQDA promo. boards | Installation commander or designee not assigned to law enf duties |
| **Board hearing** | No | No | Record review; see above | W/in 10 days, on request |
| **Entitled to Counsel** | No (but see AR 27-3, para 3-6g(4)(j)) | No (but see AR 27-3, para 3-6g(4)(f)) | No (but see AR 27-3, para 3-6g(4)(f)) | No (but see AR 27-3, para 3-6g(4)(w)) |
| **SJA Review** | No | No | No | No |
| **Approval Authority** | OMPF: GO or GCMCA | <10 yrs svc: LTC cdr; 10-18, >20: GO or GCMCA; 18-20: DA | HQDA promotion selection board | Installation commander |
| **Appeal Authority** | OMPF: DASEB | <10 yrs svc: GO or GCMCA; all others: DA | Commander, US Army Enlisted Records Center | GCMCA may grant restricted privileges |

## ARMY ADVERSE ADMINISTRATIVE ACTIONS

| | REMOVAL FROM SGT OR SSG PROMOTION LIST | REMOVAL FROM SFC, MSG, OR SGM PROM LIST | REMOVAL FROM OFFICER PROMOTION LIST | REDUCTION FOR INEFFICIENCY (ENLISTED) | REDUCTION FOR CIVL CONVICTION (ENLISTED) |
|---|---|---|---|---|---|
| **Grounds for Action** | Poor duty perf, Art. 15 punishment; pending OTH discharge; 16 other grounds | Substandard duty performance; 10 other grounds | Referred OER or AER, Art. 15, OMPF reprimand; weight control failure; other derogatory info | Unable to perform duties & responsibilities required of rank and MOS | Any civilian conviction. Mandatory if confined for 1 yr or more (unsuspended) |
| **Ultimate Result** | Soldier is removed from promotion standing list | | | Soldier is reduced one rank | Soldier is reduced one or more ranks |
| **Regulation** | AR 600-8-19, chap 3 (1 Nov 91) | AR 600-8-19, chap 4 (1 Nov 91) | 10 U.S.C. § 629(a); AR 600-8-29 (30 Nov 94) | AR 600-8-19, chap 6 (1 Nov 91) | |
| **Who Initiates** | Any commander | Any commander | Any commander | Any commander | Any commander |
| **Board hearing** | Yes (not full AR 15-6 board) | No | DA Promotion Review Board considers paper case | Yes, if soldier is SGT or above, unless reduction is for unsuspended sentence of confinement for one year or more | |
| **Entitled to Counsel** | No | No | No | Yes (provided by Trial Defense Service) | |
| **SJA Review** | No | No | No | No | No |
| **Approval Authority** | LTC-level commander | DA Standby Advisory Board | The Secretary of the Army | PV2-CPL: company level commander<br>SGT-SSG: field grade commander<br>SFC-CSM: COL or higher commander | |
| **Appeal Authority** | No formal appeal | No formal appeal | No formal appeal | Next higher cdr for SSG & below<br>First GO for SFC & above | |

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**UNITED STATES ARMY**
**THE CHIEF OF STAFF**

**06 DEC 1996**

To the Chain of Command:

As the leaders of America's Army, we share a responsibility to recruit, train, and retain the best soldiers in the world. We attract young people from all walks of life and mold them into outstanding soldiers. Our Army is a modern success story--yet, we have our challenges.

The attrition rate of first-term soldiers from active duty is unacceptably high. We lose 15 of every 100 soldiers by 6 months of service and 37 of every 100 before their first ETS. This attrition rate is well above our experience of the late 1980s. However, we have recruited the highest quality in our Army's history. If the 90,000 soldiers entering the Army this year attrite at the current rates, 33,000 will depart before their normal ETS. High attrition causes unit readiness to suffer and consumes dollars that can be better spent on other vital programs. I need your help.

I am not asking you to retain bad soldiers -- far from it; we must do nothing to de-emphasize the importance of quality. It is fundamental to current and future success. Army leaders at all levels must encourage good soldiers to stay in the Army, and to rehabilitate those who may falter but who have the potential to serve honorably and well. While the screening process will never be flawless, almost every soldier we enlist has the moral, physical, and mental prerequisites for service. Our challenge is to motivate, train, and lead them -- to turn them into soldiers.

I fully realize that all leaders want their soldiers to be successful. However, I ask that you reexamine your procedures to ensure we are doing everything possible to help conserve our most precious resource -- our credentials -- our quality soldiers.

*Dennis J. Reimer*

Dennis J. Reimer
General, United States Army
Chief of Staff

**DEPARTMENT OF THE ARMY**
**OFFICE OF THE DEPUTY CHIEF OF STAFF FOR PERSONNEL**
**WASHINGTON, DC 20310-0300**

MEMORANDUM FOR ALL MACOM DCSPERs 12 DEC 1996

SUBJECT: First Term Attrition Reduction Goals

1. The CSA memorandum to all Army leaders dated 6 December 1996 emphasizes the need to reduce attrition while maintaining a quality force. Current attrition rates average 15 percent in the training base and an additional 22 percent after training before the end of three years for each annual accession cohort. These rates present our Army with some difficult challenges. The costs and recruiting efforts are tough to manage. I ask for your support as we work together to reduce attrition.

2. During the drawdown years a number of policy changes were implemented in the interest of minimizing the need for involuntary loss programs. As the enlisted force has reached its steady state manning level, it is time to review policies designed to facilitate the drawdown with a view toward revisions that support sustainment of our current force levels. Our FY97 recruiting mission is 89,700 and the mission will remain in the mid-eighty thousand range; therefore, we must now focus on replacing each loss or reduce attrition.

3. The areas which contribute the greatest number of losses are voluntary separations under a local bar to reenlistment, separation for unsatisfactory performance, and weight control standards. Recent policy changes to some separation procedures have been distributed to the field. I ask that you ensure widest dissemination of these policy changes to ensure their early, favorable impact on attrition.

4. Finally, these policy changes represent a change in focus, but no reduction in standards. The changes in policy are designed to provide the latitude for leaders to make a difference and motivate soldiers to succeed. I know that you will use these policy changes to maintain our quality force while addressing the issue of enlisted attrition.

*F.E. Vollrath*

F.E. VOLLRATH
Lieutenant General, GS
Deputy Chief of Staff
for Personnel

ROUTINE
R 121752Z DEC 96
FM DA WASHINGTON DC//DAPE-MPE//
TO ALARACT

UNCLAS ALARACT 119/96
SUBJECT: ATTRITION OF FIRST TERM ENLISTED SOLDIERS
A. CSA MEMORANDUM TO CHAIN OF COMMAND, 6 DEC 96
B. AR 601-280, ARMY RETENTION PROGRAM
C. AR 635-200, ENLISTED SEPARATIONS
1. THIS MESSAGE REINFORCES CSA GUIDANCE IN REFERENCE A BY ANNOUNCING EXCEPTIONS TO PUBLISHED ENLISTED RETENTION/SEPARATION POLICY DESIGNED TO ASSIST IN REDUCING ATTRITION OF SOLDIERS SERVING THEIR INITIAL ENLISTMENT.
2. FOLLOWING EXCEPTIONS TO POLICIES PUBLISHED IN REFERENCES B AND C ARE ANNOUNCED:
A. INVOLUNTARY SEPARATION UNDER AR 635-200 FOR ENTRY LEVEL PERFORMANCE AND CONDUCT (CHAPTER 11) AND UNSATISFACTORY PERFORMANCE (CHAPTER 13). AUTHORITY TO APPROVE SEPARATION (PARAGRAPH 1-21) IS WITHDRAWN FROM COMMANDERS OF UNITS AUTHORIZED THE RANK OF LIEUTENANT COLONEL AS COMMANDER IS ELEVATED TO THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY (SPCMCA). THE SPCMCA WILL ACT AS SEPARATION AUTHORITY FOR ALL CHAPTER 11 AND 13 PROCEEDINGS, UNLESS SUCH AUTHORITY IS WITHHELD BY A HIGHER SEPARATION AUTHORITY. IN ADDITION, THE PROVISION FOR WAIVER OF THE REHABILITATIVE TRANSFER REQUIREMENT (PARAGRAPH 1-18D) NO LONGER APPLIES TO CHAPTER 11 AND 13 CASES. THE INTENT OF THESE EXCEPTIONS TO POLICY IS TO STRESS THE NEED FOR COMMANDERS TO MAKE MAXIMUM USE OF COUNSELING, RETRAINING, AND REHABILITATION--AS DELINEATED IN PARAGRAPHS 1-1C(3), 1-17, AND 1-18 OF AR 635-200--BEFORE DETERMINING THAT A SOLDIER SHOULD BE SEPARATED.
B. VOLUNTARY SEPARATION OF SOLDIERS DENIED REENLISTMENT (PARAGRAPH 8-5I(6), AR 601-280, AND PARAGRAPH 16-5B, AR 635-200). FIRST-TERM SOLDIERS AGAINST WHOM A FIELD COMMANDER'S BAR TO REENLISTMENT HAS BEEN IMPOSED ARE NOT ELIGIBLE FOR VOLUNTARY EARLY SEPARATION ON GROUNDS OF INABILITY TO OVERCOME THE BAR. THE VOLUNTARY SEPARATION PROVISION IS LIMITED TO LOCALLY BARRED SOLDIERS SERVING ON A SECOND OR SUBSEQUENT ENLISTMENT. THE PURPOSE OF THIS EXCEPTION TO POLICY IS TO EMPHASIZE THAT LOCAL BAR TO REENLISTMENT IS INTENDED AS A PROBATIONARY DEVICE AND REHABILITATIVE TOOL, RATHER THAN A QUICK MEANS OF EARLY SEPARATION.
3. THE FOREGOING EXCEPTIONS TO POLICY ARE EFFECTIVE FOR SEPARATION ACTIONS INITIATED UNDER CHAPTER 11, CHAPTER 13, AND PARAGRAPH 16-5B, AR 635-200, AFTER RECEIPT OF THIS MESSAGE. SEPARATION ACTIONS INITIATED PRIOR TO RECEIPT OF THIS MESSAGE MAY BE PROCESSED TO COMPLETION UNDER THE PUBLISHED POLICIES, WITHOUT REGARD FOR THE EXCEPTIONS.
4. EXPIRATION DATE OF THIS MESSAGE CANNOT BE DETERMINED. BT

ROUTINE
R 151717Z JAN 97
FM DA WASHINGTON DC//DAPE-MPE//
TO ALARACT

UNCLAS ALARACT 011/97
SUBJECT: ATTRITION OF FIRST-TERM ENLISTED SOLDIERS - - SUPPLEMENTAL GUIDANCE
A. ALARACT MESSAGE 119/96, HQDA (DAPE-MPE), 121752Z DEC 96, SUBJECT: ATTRITION OF FIRST-TERM ENLISTED SOLDIERS
B. AR 635-200
1. THIS MESSAGE PROVIDES FURTHER GUIDANCE TO SUPPLEMENT EXCEPTIONS TO PUBLISHED RETENTION/SEPARATION POLICIES ANNOUNCED BY REFERENCE A. THE INTENT CONTINUES TO BE REINFORCEMENT OF CSA'S 6 DECEMBER 1996 MEMORANDUM TO THE CHAIN OF COMMAND ON REDUCING ATTRITION OF SOLDIERS SERVING THEIR INITIAL ENLISTMENTS.
2. THE PREVIOUS EXCEPTION TO POLICY WHICH ELEVATED SEPARATION AUTHORITY FROM COMMANDERS OF UNITS AUTHORIZED THE RANK OF LIEUTENANT COLONEL (LTC) TO THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY (SPCMCA) IS RESCINDED. LTC COMMANDERS MAY CONTINUE TO ACT AS SEPARATION AUTHORITY IN PROCEEDINGS CONDUCTED UNDER AR 635-200, CHAPTER 11 (ENTRY LEVEL PERFORMANCE AND CONDUCT) AND CHAPTER 13 (UNSATISFACTORY PERFORMANCE), UNLESS SUCH AUTHORITY IS WITHHELD BY THE SPCMCA OR HIGHER COMMANDER.
3. RESCISSION OF THE PROVISION FOR WAIVER OF REHABILITATIVE TRANSFER REMAINS IN FORCE FOR MOST CHAPTER 11 AND 13 CASES, BUT MUST BE TEMPERED BY COMMON SENSE AND SOUND JUDGMENT. THE INTENT IS TO GIVE A FRESH START TO SOLDIERS WHO FALTER BUT HAVE THE POTENTIAL TO SUCCEED. HOWEVER, THERE ARE CIRCUMSTANCES IN WHICH A REHABILITATIVE TRANSFER WILL SERVE NO USEFUL PURPOSE, AND THE SEPARATION AUTHORITY MAY WAIVE THE TRANSFER. SUCH CIRCUMSTANCES INCLUDE TWO CONSECUTIVE FAILURES OF THE ARMY PHYSICAL FITNESS TEST; PREGNANCY WHILE IN ENTRY LEVEL STATUS; HIGHLY DISRUPTIVE OR POTENTIALLY SUICIDAL SOLDIERS, PARTICULARLY THOSE IN RECEPTION BATTALIONS; AND SOLDIERS ASSIGNED TO SMALL INSTALLATIONS OR AT REMOTE LOCATIONS.
4. THE PROVISION LIMITING VOLUNTARY SEPARATION ON GROUNDS OF INABILITY TO OVERCOME A FIELD COMMANDER'S BAR TO REENLISTMENT TO SOLDIERS SERVING SECOND OR SUBSEQUENT ENLISTMENTS REMAINS AS SPECIFIED IN REFERENCE A.
5. EXPIRATION DATE OF THIS MESSAGE CANNOT BE DETERMINED. BT

ROUTINE
R 071620Z APR 97
FM DA WASHINGTON DC//DAPE-MPE//
TO ALARACT

UNCLAS ALARACT 035/97
SUBJECT: INDEFINITE SUSPENSION OF ENLISTED SEPARATION PROGRAM
1. IN ORDER TO REDUCE ATTRITION, CONSERVE SOLDIER RESOURCES, AND MAINTAIN ARMY END STRENGTH, THE PROVISION FOR REGULAR ARMY SOLDIERS WITH A LOCAL BAR TO REENLISTMENT TO REQUEST VOLUNTARY SEPARATION ON GROUNDS OF PERCEIVED INABILITY TO OVERCOME THE BAR IS SUSPENDED INDEFINITELY. THIS APPLIES TO ALL SOLDIERS, WHETHER SERVING INITIAL OR SUBSEQUENT ENLISTMENTS.
2. PERTINENT REGULATORY PROVISIONS ARE 601-280, PARAGRAPH 8-5F, AND AR 635-200, PARAGRAPH 16-5B. LOCALLY BARRED SOLDIERS APPROVED FOR SEPARATION UNDER THE PROVISION OF AR 635-200, PARAGRAPH 16-5B, PRIOR TO RECEIPT OF THIS MESSAGE MAY SEPARATE AS SCHEDULED. HOWEVER, NO NEW REQUESTS FOR SEPARATION WILL BE APPROVED.
3. EXPIRATION DATE OF THIS MESSAGE CANNOT BE DETERMINED. BT

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# CHAPTER P

MILITARY PERSONNEL LAW

# ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM


I. REFERENCES....1

II. INTRODUCTION. ....2

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X. CIVILIAN DRUG TESTING. ....14

XI. CONCLUSION. ....16


## I. REFERENCES.

A. AR 215-1, Morale, Welfare, and Recreation: Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities, 29 September 1995.

B. AR 600-85, Alcohol and Drug Abuse Prevention and Control Program, 21 October 1988 (Change 3, 26 March 1999).

C. AR 635-200, Personnel Separations: Enlisted Personnel, 1 December 1988 (C15, 26 June 1996) (Basic regulation reprinted in Enlisted Ranks Personnel Update 16, 10 October 1990), AR 600-8-24, Officer Transfers and Discharges, 21 July 1995.




LTC KARL M. GOETZKE

9 February 2001

D. Executive Order 12564, Federal Drug-free Workplace Program; DoD Directive 1010.9, Civilian Employee Drug Abuse Testing Program (23 August 1988)

## II. INTRODUCTION.

A. The Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) represents a tension between two policies: ***rehabilitation*** of soldiers with a genuine substance abuse problem, and ***readiness***, i.e. the military's necessary intolerance of the adverse impact of drug abuse (including alcohol abuse) on mission.

B. You'll see this tension reflected in:

1. ADAPCP policies and regulations, including the limited use policy.

2. Military Rule of Evidence 313.

3. Separation procedures.

C. JA's role. Why should you be concerned about ADAPCP?

1. Personally subject to the policies.

2. Supervisor of others (military and civilian) subject to the policies.

3. Legal advisor to commanders, administrative separation boards.

4. Trial counsel, government representative before boards.

5. Advocate for soldiers (legal assistance, Trial Defense Service).

D. Definitions.

1. Alcohol Abuse. Any irresponsible use of an alcoholic beverage which leads to misconduct, unacceptable social behavior, or impairment of an individual's performance of duty, physical or mental health, financial responsibility, or personal relationships. AR 600-85, Glossary, at 107.

2. Drug Abuse. The illegal, wrongful, or improper use of any narcotic substance or its derivative, cannabis or its derivative, other controlled substances or dangerous drugs. This includes the improper use of drugs prescribed by a physician. AR 600-85, Glossary, at 108.

## III. ARMY POLICIES.

A. *Alcohol and drug abuse are incompatible with military service. Soldiers identified as alcohol and illegal drug abusers who, in the opinion of their commanders warrant retention, will be afforded the opportunity for rehabilitation. Those soldiers identified as alcohol abusers who do not warrant retention will be considered for separation from the military by their unit commander.*

AR 600-85, para 1-9a

B. *Soldiers who are involved in serious instances of alcohol related misconduct will be considered for separation. Repetitive instances of drunk on duty or instances of operating a motor vehicle while drunk are examples of such misconduct.*

AR 600-85, para 1-11c (I03, 1 Oct 93)

C. *Any soldier involved with the illicit trafficking, distributing, or selling of drugs will be processed for administrative separation for misconduct and, as appropriate, for disciplinary action under the UCMJ. Initiation of separation action is not required in those instances where charges have been referred to a court-martial empowered to adjudge a punitive discharge.*

AR 600-85, para 1-11b(1) (I03, 1 Oct 93)

D. *Officers and noncommissioned officers (sergeant [E-5] and above) who are identified as illegal drug abusers will be processed for separation. Enlisted personnel who have 3 or more years of military service (Active or Reserve component) and who are identified as illegal drug abusers will also be processed for separation. Enlisted personnel with fewer than 3 years of service who have been identified in two separate instances of drug abuse will be processed for separation.*

AR 600-85, para 1-11b(3) (I03, 1 Oct 93)

## IV. PROGRAM OBJECTIVES.

A. AR 600-85, para 1-8, details the primary and secondary objectives of the Army's ADAPCP.

B. ***Prevent*** alcohol and other drug abuse.

C. ***Identify*** alcohol and other drug abusers as early as possible.

D. Restore both military and civilian employee alcohol and other drug abusers to effective duty (***rehabilitate***), or identify rehabilitation failures for separation from government service.

E. Provide for program evaluation and research.

F. Ensure that effective alcohol and drug abuse prevention education is provided at all levels.

G. Ensure that adequate resources and facilities are provided to successfully and effectively accomplish the ADAPCP mission.

H. Ensure all military and civilian personnel assigned to ADAPCP staffs are appropriately trained and experienced to accomplish their mission effectively.

I. Achieve maximum productivity, reduced absenteeism, and attrition among civilian employees by preventing abuse of alcohol and other drugs.

## V. ELIGIBILITY AND JURISDICTION.

A. Active Army personnel. AR 600-85, para 1-5..

B. ARNG and USAR when on Active Duty (AD) or Active Duty for Training (ADT): all policies apply. When performing military duty in other duty statuses, see AR 600-85, chap 9.

C. Persons eligible to receive military medical services, or eligible to receive medical services under the Federal Civilian Employees Occupational Health Services Program.

1. U.S. citizen civilian employees of the Army, including employees of nonappropriated fund instrumentalities. Special provisions of AR 600-85, chap 5, apply.

2. Retired military personnel.

3. Foreign nationals under Status of Forces Agreement or other treaty arrangements.

4. DoD personnel on a case-by-case basis.

5. Family members of eligible personnel. Special provisions of AR 600-85, chap 5, apply.

D. Members of other services when under the administrative jurisdiction of an Army installation commander.

## VI. PREVENTION.

A. Alcohol and other drug abuse control actions. See, AR 600-85, chap 2.

1. Commanders at all levels must make effective local alcohol and other drug abuse prevention efforts.

2. Commanders will publicize the fact that abuse of alcohol or other drugs will not be condoned, and will promote off duty sports, educational, cultural, religious, or spiritual pursuits as alternatives to abuse of alcohol or other drugs.

3. Officers and NCOs who choose to drink will set the example.

4. Military and civilian personnel will not promote any official or unofficial function which glamorizes the abuse of alcohol (drinking contests, initiation, awarding alcohol as prizes). AR 600-85, para 2-5a (punitive).

5. Military personnel on duty will not have a blood alcohol level of 0.05% or higher. AR 600-85, para 1-10a (punitive).

6. Alcohol will not be served by the drink on Army installations to soldiers on duty. AR 215-1, para 7-14h. An exception to this provision may be granted by the first general officer in the chain of command, to include frocked general officers.

7. Minimum drinking age on Army installations.

a. In the US, the Army follows state law. AR 215-1, para 7-7c. Limited exceptions for soldiers only (not applicable to family members or guests):

(1) Remote installations where privately owned vehicles are not available for soldiers. Installation commanders may request exceptions from the Department of the Army. AR 215-1, para 7-7c(1).

(2) Substantial risk of increased incidence of intoxicated driving by soldiers driving to and from a jurisdiction with a lower drinking age, *e.g.,* proximity to state or international border. Installation commanders may request exceptions from the Department of the Army. AR 215-1, para 7-7c(1). AR 215-1, para 7-7c(2).

(3) Camaraderie exception. "[I]nfrequent, nonroutine military occasions when an entire unit, as a group, marks a uniquely military occasions [on an Army] installation such as the conclusion of arduous military duty or the anniversary of the establishment of a military service or organization." Approved by first general officer in chain of command. AR 215-1, para 7-7c(3).

b. Overseas. 18 years, or according to treaty. AR 215-1, para 7-7a.

8. Installation commanders will establish a local alcohol and drug intervention council (ADIC) or other appropriate human service coordinating forum.

B. Education.

1. Initial entry alcohol and drug abuse education emphasizes prevention, counseling and treatment resources and procedures, and responsibility. Will be completed prior to the award of MOS.

2. Initial education for cadets, officers, and warrant officers also emphasizes duties and responsibilities of junior leaders in the alcohol and drug abuse prevention effort. Will be completed before commissioning or within 90 days after entry on active duty.

3. For DA civilian employees, education within 60 days of initial employment or designation of supervisory responsibilities.

4. Additional education required for soldiers within 60 days after each PCS.

   a. For junior enlisted soldiers (PV1 through SPC/CPL), emphasizes legal consequences under UCMJ and local laws.

   b. For officers and NCOs, emphasizes the command-unique elements of the alcohol and drug abuse and local military and civilian resources.

5. Education for family members on a voluntary basis.

C. Law enforcement objectives.

1. Eliminate the supply of illegal drugs.

2. Identify and apprehend individuals who illegally possess, use, or traffic in drugs.

3. Prevent alcohol and other drug-related crimes, incidents, and traffic incidents.

## VII. IDENTIFICATION.

A. Objectives: discover alcohol and other drug abuse as early as possible and:

1. Refer for treatment those soldiers who desire to be rehabilitated and who demonstrate the potential for retention.

2. Identify and consider for separation those soldiers who do not desire to be rehabilitated or do not show potential for retention.

B. Identification by the commander. Based on observation, suspicion, informant, or other identification of an individual whose job performance, social conduct, interpersonal relationships, physical fitness, or health appears adversely affected because of abuse of alcohol or other drugs.

C. Biochemical testing

1. Purposes.

a. To determine fitness for duty and need for counseling, rehabilitation, or other medical treatment.

b. To determine presence of controlled substances in soldiers participating in ADAPCP.

c. To gather evidence for use in UCMJ actions.

d. To gather evidence for use in administrative actions.

e. To determine the presence of a controlled substance in a soldier's urine or to ascertain the blood alcohol content for a valid medical purpose.

f. To serve as a safeguard at social gatherings when alcohol is served to soldiers who might not otherwise realize how much alcohol they have consumed.

2. Types of biochemical testing programs.

a. Commander directed. *Cross reference: Criminal Law Division instruction on Urinalysis Testing.*

(1) Military inspections, validly conducted under the provisions of Mil. R. Evid. 313.

(2) Fitness for duty determinations.

(3) Based upon probable cause.

b. Physician directed.

(1) To ascertain if soldier requires counseling, treatment, or rehabilitation.

(2) For any other valid medical purpose.

c. Rehabilitation testing.

(1) During detoxification: upon entry and thereafter at discretion of physician.

(2) If detox is not required: during medical evaluation when entering residential treatment.

(3) During any phase of rehab: once a week on an unannounced basis for the first month of rehabilitation is recommended.

d. ADAPCP staff testing.

(1) Periodic, unannounced testing of military and civilian staff.

(2) Submission is a continuing condition of employment

D. Voluntary self-identification.

1. Most desirable method of discovering alcohol or other drug abuse.

2. Normally, soldier should seek help from the unit commander; however, the soldier may initially request help from ADAPCP, MTF, chaplain, or any officer or NCO in soldier's chain of command. The individual contacted will immediately notify the unit commander and Alcohol and Drug Control Officer (ADCO).

E. Medical identification through routine or emergency medical treatment.

F. Identification from investigation or apprehension by civilian or military law enforcement.

## VIII. REHABILITATION.

A. Objectives.

1. Soldiers.

a. Restore soldier to effective duty.

b. Identify those who cannot be rehabilitated within scope of program.

2. Civilian employees. Restore employee to effective performance of the job.

3. Family members. Resolve problems within the family to enable soldier/employee to perform more effectively.

B. Detoxification.

1. Definition: withdrawing alcohol or other drugs from an individual, treating the physical symptoms resulting from that withdrawal, and initiating rehabilitation.

2. Decision to hospitalize will be made by a physician.

3. Detoxification is "cold turkey."

C. Referral. When individuals are identified, voluntarily or involuntarily, as possible alcohol or drug abusers, their unit commander or designated representative will:

1. Advise soldier of UCMJ, Article 31 rights.

2. Explain the limited use policy.

3. Inform soldier of the evidence.

4. Give soldier an opportunity to provide additional evidence, including information on drug sources; disclosure is voluntary.

5. Collect any illegal drugs or paraphernalia that soldier voluntarily relinquishes and turn them over to the PM.

6. Refer for initial screening:

a. Soldiers suspected or identified as drug or alcohol abusers.

b. Soldiers with a blood alcohol level of 0.05% or above while on duty.

c. Soldiers whose urinalysis tests positive.

7. Intake interview (screening and recommendations).

a. Conducted by ADAPCP staff member skilled in alcohol or other drug abuse counseling.

b. ADAPCP counselor will inform the soldier of the limited use policy.

c. Refer for medical evaluation, if appropriate.

8. Disposition of the referral. Commander will consider results of initial ADAPCP screening, and:

a. If commander believes that a soldier would not respond favorably to rehabilitation or, based on the soldier's overall record, does not have the potential for future service, commander *may* initiate separation.

b. If processing for separation is mandatory (see categories *supra* at ¶ III C & D, pp. AA-2 & AA-3), initiate separation for misconduct.

c. If desirable to rehabilitate the soldier, a rehabilitation team will convene as soon as possible.

d. Team will include, at a minimum, the soldier, commander or his designee, and ADAPCP counselor.

e. ADAPCP counselor will recommend to commander disposition of the referral during first meeting of rehabilitation team.

(1) Unit counseling.

(2) Other action (*e.g.*, referral to another agency).

(3) No ADAPCP services needed.

(4) Enrollment.

D. Levels of treatment.

1. Alcohol and Drug Abuse Prevention Training (ADAPT). [N.b.: before 1992, ADAPT was called "Track I." You may still see or hear references to Track 1.] AR 600-85, para 4-5c (I03, 1 Oct 93).

a. Awareness education program.

b. Responsibility of the EDCO (Education Counselor) to establish local program.

c. 6-month follow-up period.

d. Referral to rehabilitation, or other appropriate services, is an option at any point.

2. Track II. Nonresident/outpatient. AR 600-85, para 4-5b(2).

a. Intensive individual, group or family counseling.

b. Enrollment for a minimum of 30 days, maximum of 360 days.

c. No medical evaluation required for enrollment.

d. Normally satisfies state requirement that person attend rehabilitation program.

3. Track III. Residential treatment. AR 600-85, paras 4-5b(3), 4-6, 4-7.

a. Residential medical treatment (6-8 weeks) with nonresident follow-up for a maximum of 360 days.

b. Medical evaluation by a physician is required prior to enrollment.

c. Soldier has long-standing problem of abuse, but for whom prognosis for recovery is favorable with proper treatment.

## IX. LIMITED USE POLICY.

A. AR 600-85, chap 6, § II. The Limited Use Policy (LUP) prohibits the use of certain evidence against a soldier in actions under the Uniform Code of Military Justice or in administrative separation actions on the issue of characterization of services. Think of the policy as a limited safe haven for soldiers who are voluntarily seeking help. See chart at Appendix B.

B. Objectives. AR 600-85, para 6-3.

1. To facilitate the identification of alcohol and drug abusers through self-referral, and the treatment and rehabilitation of those abusers who desire to be rehabilitated and who demonstrate the potential for retention.

2. A shield, not a sword. Not intended to protect a soldier who is attempting to avoid disciplinary or adverse administrative action.

C. What does LUP protect? AR 600-85, para 6-4a.

1. Evidence of a soldier's self-referral to ADAPCP.

2. Information concerning illegal drug or alcohol use or possession *incidental to personal use* obtained as a result of a soldier's emergency medical care for an actual or possible drug or alcohol overdose, *unless such treatment resulted from apprehension* by law enforcement officials.

3. Admissions and other information concerning drug or alcohol abuse or possession of drugs *incidental to personal use* occurring *prior to the date of initial* referral to ADAPCP *provided voluntarily by a soldier as part of his or her initial entry* into ADAPCP.

4. Admissions made by a soldier enrolled in ADAPCP to a physician or ADAPCP counselor during a scheduled interview concerning drug or alcohol abuse or possession of drugs *incidental to personal use* occurring *prior to the date of initial* referral to ADAPCP.

5. Mandatory urine or alcohol breath test results taken to determine a soldier's fitness for duty and the need for counseling, rehabilitation, or other medical treatment. Distinguish probable-cause searches (not protected by LUP) and valid Mil. R. Evid. 313 inspections (not protected by LUP).

D. LUP does ***not*** prohibit:

1. Other adverse administrative actions such as written reprimands, bars to reenlistment, revocation of security clearances, or reductions for inefficiency may be based on limited use evidence.

2. Evidence obtained through independent means, even if the information is also protected by LUP.

3. Using otherwise-LUP barred evidence for *impeachment or rebuttal* in any proceeding in which the *evidence of drug abuse (or lack thereof) has first been introduced by the soldier*.

E. Impact of the government introducing LUP-protected evidence. *Beware of government witnesses inadvertently introducing or referring to LUP-protected evidence.*

1. Administrative separation actions. Respondent gets an honorable discharge. AR 600-85, para 6-5d. "Gov't" includes the initiating commander, all forwarding commanders (in documents going to the board), members of the board of officers, the IO or recorder presenting the case to the board, and the separation authority.

2. UCMJ actions. Remedy will be fashioned by the military judge.

## X. CIVILIAN DRUG TESTING.

A. The issues relating to civilian employee drug testing will not be covered in class or on your examination. This section is provided for your reference only.

B. Compulsory urinalysis justified in law enforcement and certain safety-sensitive jobs.

1. Skinner v. Railway Labor Executive's Assoc., 489 U.S. 602 (1989) (compelling governmental interest in safety);

2. Nat'l Treasury Emp'ees Union v. Von Raab, 489 U.S. 656 (1989) (law enforcement).

C. Challenges to military testing programs.

1. Am. Fed'n of Gov't Emp'ees Local 1533 v. Cheney, 944 F.2d 503 (9th Cir. 1991) (Navy); Nat'l Fed'n of Fed. Emp'ees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990);

2. Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989) (Army);

3. Am. Fed'n of Gov't Emp'ees v. Wilson, 1990 WL 208749 (E.D. Cal. 1990).

D. AR 600-85, ch. 3, effective April 26, 1999, significantly changes the parameters of civilian employee drug testing:

1. Expanded pool of testing designated positions (TDPs).

a. Twelve (12) categories of TDPs

b. Additional TDPs may be designated, but such designations must be approved by the MACOM, DA, and DOD

2. Termination of the regulatory requirement to normally hold drug and alcohol-related disciplinary/performance-based actions in abeyance if employee enrolls in ADAPCP.

E. Types of Testing (Not only TDPs)

1. Random Testing

2. Applicant Testing

3. Follow-up Testing

4. Voluntary Testing

5. Accident/Unsafe Practices Testing

6. Reasonable Suspicion Testing

F. Implementation of this change to AR 600-85 is a change in working conditions for affected bargaining unit employees.

1. Agency must notify union before implementing some changes.

a. If union requests bargaining in a timely manner, agency must not implement changes for bargaining unit positions until negotiations are complete.

b. If union does not request bargaining in a timely manner, agency may implement changes for bargaining unit employees.

2. Agency is not required to bargain over the implementation of changes related to:

a. Supervisory or management positions, and

b. Initial employment testing of non-bargaining unit member applicants.

## XI. CONCLUSION.

APPENDIX A

**ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM (ADAPCP)**

# THE ADAPCP LIMITED USE POLICY

| PROTECTED | NOT PROTECTED |
|---|---|
| 1. Act of voluntary self-referral by member. | 1. Involuntary or command referral by "them": commander, Military Police, civilian police, etc. |
| 2. Voluntary admissions of use and possession incidental to personal use. | 2. Voluntary admissions of sale, transfer, other crimes, etc. (anything other than personal use or personal possession). |
| 3. Voluntary admissions made as part of initially enrolling in the program. | 3. Voluntary admissions made before enrolling or requesting assistance. |
| 4. Voluntary admission made after enrollment, if to doctor or counselor., concerning pre-enrollment use. | 4. Voluntary admissions not made during treatment or not made to a doctor or counselor, or regarding post-enrollment use. |
| 5. Information obtained as a result of emergency medical care (voluntary or overdose) concerning personal use or possession. | 5. Information obtained as a result of emergency medical care ordered by MPs or supervisors, or not concerning personal use or personal possession. |
| 6. Urine and breath test results obtained as a result of a:<br>a. Commander's suspicion concerning fitness for duty.<br>b. ADAPCP monitoring tests. | 6. Urine and breath test results obtained as a result of:<br>a. Probable cause searches.<br>b. Inspections (MRE 313). |
| 7. LUP evidence in separation proceedings on the issues of characterization of service. | 7. LUP evidence on the issue of separation (but soldier will get honorable discharge). |
| 8. LUP evidence in UCMJ actions (Art. 15 or court-martial). | 8. Independently obtained evidence, or LUP evidence used to rebut or impeach respondent's or defense's misrepresentations. |

# CHAPTER Q

# ADMINISTRATIVE REMEDIES


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## Outline of Instruction

# I. INTRODUCTION & REFERENCES.

A. AR 15-180, Army Discharge Review Board.

B. AR 15-185, Army Board for Correction of Military Records.

C. AR 20-1, Inspector General Activities and Procedures.

D. AR 27-10, Chapter 20, Complaints Under Article 138, UCMJ.

E. AR 27-20, Chapter 9, Claims under Article 138, UCMJ.

F. Military Whistleblowers Act, Title 10, U.S.C. § 1034.

G. Department of Defense Directive 7050.6, Military Whistleblower Protection (12 August 1995).

H. Department of Defense Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces (1 October 1997).

I. Department of Defense Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces (28 August 1997).

# II. ARTICLE 138, UCMJ (AR 27-10).

A. Article 138, UCMJ:

> *Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint, and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings and thereon (emphasis added).*

B. Purpose: To provide a way for soldiers to complain when they think they have been wronged by their commanding officers.

C. Army policies relating to Article 138 complaints:

1. Resolution of complaints at the lowest level.

2. Begin with assumption command acted properly.

3. Complainant does not participate after filing complaint.

D. Key definitions.

1. Member of the armed forces: Member of the armed forces on active duty or inactive duty for training and subject to the UCMJ.

2. Commanding officer: Any officer in complainant's chain of command, up to and including the first officer exercising general court-martial jurisdiction over the complainant, authorized to impose Article 15 punishment.

3. Wrong. Discretionary act or omission taken under color of authority which adversely affects complainant personally, that is:

a. in violation of law or regulation;

b. beyond the commander's authority;

c. arbitrary, capricious, or an abuse of discretion, or;

d. materially unfair.

4. Redress.

a. Action by any commander that revokes the act complained of or restores complainant's rights, privileges, property, or status lost as a result of the wrong.

b. Redress usually in the form of a "make whole" remedy.

5. Superior commissioned officer.

a. A commissioned officer in the current chain of command.

b. Senior to the complainant in grade, rank or position.

E. Initial assessment of Article 138 complaints:

1. Is the subject matter appropriate? Not when:

a. Review provided by UCMJ (Article 15 punishment, court martial).

b. AR 15-6 formal board procedure followed (administrative separation boards).

c. Army regulation specifically authorizes an administrative appeal.

2. Even if subject matter is appropriate, complaint may be deficient. Examples:

a. Failure to seek redress from Commander.

b. Untimely complaint (waivable defect).

c. Complainant has left active duty or active Reserve status (non-waivable defect).

F. Complaint procedures.

1. Request for Redress.

a. Written request for redress from the soldier to the commander.

b. Response by commanding officer.

(1) Commander has 15 days to respond.

(2) No response may be considered a denial of the request.

2. Complaint: If redress refused, soldier may submit written Article 138 complaint [Example - Appendix A].

a. Soldier must submit complaint within 90 days of discovery of wrong excluding period when request for redress was in the hands of the commander.

b. The complaint is submitted to complainant's immediate superior commissioned officer.

3. The formal complaint goes up the chain of command to the officer exercising general court-martial jurisdiction (GCMCA) over the commanding officer concerned.

a. Any commander through whom complaint is forwarded may grant redress.

b. Complainant may orally withdraw complaint prior to receipt by GCMCA. After GCMCA receives the complaint, a written request for withdrawal is required.

c. Upon receipt, GCMCA will examine the complaint.

4. The GCMCA must act **personally** on the complaint by taking one of the following actions:

a. Return inappropriate subject matter complaints. Deficient complaints may be returned to the complainant or waived.

(1) The following deficiencies may be waived for <u>good cause</u>:

(a) Complaint not submitted within 90 days of discovery of wrong.

(b) Redress not requested and refused.

(c) Repetitive complaint.

(2) The following deficiencies may <u>not</u> be waived:

(a) Complainant not on active duty or inactive duty for training when complainant presented.

(b) Wrong was not a discretionary act or omission.

(c) Wrong was not committed by complainant's commander.

(d) Wrong did not affect complainant personally.

(e) Complaint does not adequately identify a respondent or the alleged wrong.

b. Grant or deny redress.

c. If redress beyond GCMCA's authority to provide, forward case to command or agency that can.

d. GCMCA then notifies soldier in writing of action taken on the complaint.

5. GCMCA then forwards complaint:

a. After action, GCMCA must forward complaint to HQDA even if the requested relief is granted.

b. Soldier may voluntarily withdraw the complaint.

G. JAG Involvement:

1. Soldier entitled to consultation and advice from military attorney.

2. Respondent commanders may consult their judge advocate.

## III. ARMY DISCHARGE REVIEW BOARD (DRB) (10 U.S.C. § 1553; DOD DIRECTIVE 1332.28; AR 15-180).

A. 10 U.S.C. § 1553:

*The Secretary concerned shall . . . establish a board of review, consisting of five members, to review the discharge or dismissal (other than by sentence of a general court-martial) of any former member of an armed force . . . .*
*A board established under this section may . . . change a discharge or dismissal, or issue a new discharge, to reflect its findings. . . .*

B. Purpose: The purpose of the review is to determine whether the discharge was granted in a proper manner and was fair and equitableconsidering the regulations in effect at the time of the discharge.

C. Review procedures.

1. Application for Review.

a. Submitted on DD Form 293.

b. Include statements, affidavits, or documents.

c. Request specific relief.

(1) Change in character of discharge.

(2) Change in reason for discharge.

2. Must be made within 15 years of date of discharge or dismissal.

D. Review standards.

1. Propriety of Discharge.

a. A discharge shall be deemed proper unless:

(1) Error in fact, law, procedure or discretion at time of issue and applicant was prejudiced; or,

(2) Retroactive change in policy requires change in the discharge.

2. Equity of Discharge.

a. A discharge shall be deemed equitable unless:

(1) Prior policies and procedures differ materially from those currently applicable; and,

(a) New policies and procedures represent a substantial enhancement of rights; and,

(b) Application of current policies and procedures would cast doubt on validity of discharge.

(2) Discharge was inconsistent with standards of discipline then in use.

(3) Relief is warranted on basis of applicant's service record.

(4) Boards look especially hard at "declined Article 15" misconduct resulting in administrative separation rather than courts-martial.

E. Procedural rights of applicants.

1. Record Review.

2. Hearing before Board (O-6 Officers-Extra Duty).

a. May be represented by attorney. (25% relief rate when applicant appears before Board panel--overall relief rate is 14%.)

b. Rules of evidence do not apply.

c. Applicant may offer evidence, call witnesses or testify.

3. Board deliberations, conclusions and opinions.

a. Presumption of regularity in the conduct of government affairs. Burden of proof on applicant.

b. Findings based on majority vote in closed session.

c. Decisional Document prepared.

F. JAG Involvement.

1. Legal advisor to DRB.

2. Advice to soldiers pending discharge and eligible legal assistance clients. Veteran’s organizations (using non-attorney representatives) and private bar provide representation.

## IV. ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (10 U.S.C. § 552; AR 15-185).

A. 10 U.S.C. § 1552:

*The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. [S]uch corrections shall be made by the Secretary, acting through boards of civilians of the executive part of the military department. . . . Except when procured by fraud, a correction made under this section is final and conclusive on all officers of the United States.*

B. Purpose:

1. To correct military records when necessary to correct an error or remove an injustice and pay claims for related lost pay and/or benefits.

2. Allows for relief outside of normal processes without private bills of relief in Congress.

3. Some of the issues considered by the ABCMR:

a. Separations.

b. Consideration for promotions.

c. Evaluation Reports.

d. Pay and Allowances.

e. Memoranda of Reprimand.

C. Composition of the Board: Not less than three civilian officers or employees of the Department of Army (GS13+) [Extra Duty].

D. Procedures.

1. Application for correction submitted on DD Form 149 [Example - Appendix B]. Signed and sworn.

2. Within three years of discovery of alleged error or injustice [waived in interest of justice/good cause]. One appellate court has decided that SSCRA tolls the statute of limitations on BCMR cases, but laches still applies. *See* Detweiler v. Pena, 38 F.3d 591, 595 (D.C. Cir. 1994); Neptune v. United States, 1997 WL 412110 (Fed. Cl. 1997); and Cornetta v. United States, 851 F.2d 1372, 1378 (Fed. Cir. 1988).

E. Action by the Board. (About 35 percent of boarded cases given some relief.)

1. Cased may be denied based on:

a. Insufficient evidence presented by applicant. [Denial on this basis nonprejudicial; applicant may refile claim.]

b. Failure to exhaust administrative remedies.

c. Failure to timely file application.

2. Burden of Proof on Applicant.

3. Board can, but need not, authorize a hearing.

4. Applicant may present evidence, witnesses or testify.

5. Closed deliberations.

6. Written findings, conclusions and recommendations.

a. Delegated authority to take final action in certain cases.

b. Forward record to the Secretary of the Army for decision.

7. Reconsideration may be granted only for newly discovered evidence.

8. Electronic Database of recent ABCMR decisions online at http://arba.army.pentagon.mil/linkspage.htm.

F. ABCMR Processing Time.

1. Active duty cases receive priority--about 120 days

2. Average for all cases--less than 10 months.

G. Appellate Review Type of Federal Court depends on type of claim:

1. Non-monetary relief - U.S. District Courts. Kreis v. Secretary of the Air Force, 866 F. 2d 1508, 1511 (D.C. Cir. 1989); Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L.Ed.2d 586 (1983).

2. Monetary relief/Back Pay - U.S. Court of Federal Claims.

Standard of Review. Relief only granted when an action was "arbitrary, capricious or contrary to agency regulation or statue by weight of substantial evidence"

H. JAG Involvement.

1. Legal Assistance in preparing application for relief.

2. OTJAG, AD LAW, advises ABCMR.

## V. INSPECTOR GENERAL SYSTEM (AR 20-1).

A. Assistance Function. [Chapter 6, AR 20-1]

1. Assist soldiers and civilian employees with complaints, allegations, and requests for assistance concerning matters of Army interest [Inspector General Action Request (IGAR) Appendix C].

2. Chain of Command redress not required, unless specific redress procedures provided by statute or regulation (NCOER/OER appeals, Nonjudicial punishment, Article 138 complaints, Reports of Survey, Relief for Cause, etc.). Once redress procedure used, IG limited to determine if soldier afforded minimal due process. [See AR 20-1, para. 6-7.]

3. Resolution of soldier/civilian assistance complaints/concerns:

a. Confidential Inquiry, subject to FOIA. Don't have to tell command why you wish to see the IG, but must seek permission to visit IG during duty hours [AR 20-1, paras. 1-11, 6-3].

b. IG Courses of Action:

(1) Referral to Chain of Command/Appropriate Staff Agency (e.g., pay complaint to DFAS, nonsupport) [AR 20-1, para 6-6].

(2) IG Inquiry to resolve complaint (informal). [AR 20-1, para. 6-5.]

(3) IG Investigation. [Chapter 7, AR 20-1].

c. IG encouraged to coordinate with local SJA.

d. IG required to provide verbal or written final response to requester [AR 20-1, para. 6-9].

e. Appeal of IG response available to next higher command IG [AR 20-1, para. 6-10].

f. DOD IG Hotline for "fraud, waste and abuse" -- 1-800-424-9098. [DAIG Hotline: 1-800-752-9747]

B. Investigation Function [Chapter 7, AR 20-1].

1. IG has jurisdiction to investigate [AR 20-1, para. 7-3]:

a. Violations of policy, regulation or law.

b. Mismanagement, unethical behavior, or misconduct, which, if true, would be of concern to the directing authority.

2. IG does NOT investigate:

a. Alleged criminal misconduct (except in some cases of conduct unbecoming an officer, dereliction of duty or punitive regulation violation.

b. Alleged individual misconduct that would likely result in adverse action against the individual, if substantiated.

c. JAGC professional misconduct/mismanagement [AR 27-1].

d. Only HQDA (DAIG) may direct IG investigation against General Officers, General Officer selectees, and SES civilians

3. Conduct of IG Investigations

a. Limited to matters approved by Directing Authority-fact-finding only. IG is not law enforcement officer or prosecutor. Aimed primarily at the collection and assessment of command, management, or leadership concerns and breaches of military professional ethics.

b. Due Process Requirements

(1) Notice to Subjects/Suspects of the nature of the allegations, and to their supervisors/commanders.

(2) Appropriate rights warnings.

(3) Confidentiality of statements by witnesses, subjects, and suspects.

(4) Notice to Subjects/Suspects of the results of the investigation upon completion of the Report of Investigation (ROI), and their commanders/supervisors.

(5) DA personnel who are witnesses or subjects may not refuse to answer IG investigation questions unless they are (a) incriminating; (b) privileged communications; or (c) would violate their rights to union representation.

c. Command IG will review the ROI, forward the report to the supporting SJA for legal review, and submit with recommendations to the directing authority.

d. IGs do not make policy recommendations or suggest adverse action against individuals.

e. Directing authority or their designated delegated deputy commander or chief of staff (GO-level) may approve/disapprove all or in part of the ROI and take action within their authority and responsibility.

C. Military Whistleblower Protection Act [Title10, U.S. Code Section 1034, DOD Dir. 7050.6--APPENDIX D].

1. Military commanders and personnel are prohibited from restricting any military member in any manner from lawfully communicating with a Member of Congress or member of an audit, inspection, investigation, or law enforcement organization within DOD, and any other person or organization (including the chain of command) designated under Component regulations or established administrative procedures. [See AR 20-1, para. 1-10a, and AR 600-20, Army Command Policy, paras. 5-8c and 5-12 (15 Jul 99).]

2. Protected communications include those by a military member who complains or discloses information the member reasonably believes constitutes evidence of:

   a. Violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination (race, color, religion. sex or national origin).

   b. Mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.

3. IG is required to investigate allegations of individuals taking or threatening to take unfavorable personnel actions against or withholding or threatening to withhold favorable personnel actions as a reprisal against a member of the Armed Forces for communicating with a Member of Congress or member of an audit, inspection, investigation, or law enforcement organization within DOD. Complaint must be filed with an IG officer to get reprisal protection. IGs and SJAs are to so inform complainants.

4. Reprisal Test: Would the personnel action in question have been taken, withheld, or threatened if the protected disclosure had not been made?

5. Adverse personnel actions include command referrals for mental health evaluation UP DOD Dir. 6490.1, "Mental Health Evaluations of Members of the Armed Forces," 1 Oct. 1997. [*See* APPENDIX E, which includes a copy of the Military Mental Heath Evaluation Protection Act, Commanders' and Soldiers' Counsel Checklists and Sample Soldier Notice.]

6. Military violators of this Act are subject to prosecution under Article 92, UCMJ. [See DOD Directive 7050.6, and AR 20-1, para. 1-10.]

7. Military whistleblower violations are investigated by the DOD IG or the military service IGs. [See DOD Directive 7050.6, and AR 20-1, para. 6-6I.] Investigations must be conducted outside the immediate chain of command of the complainant and the alleged retaliating official.

8. No investigation is required if the allegation is submitted **more than 60 days** from the time the service member became aware of the personnel action that is the subject of the reprisal allegation, or that the action complained of took place during combat. A Commander can elect to continue such an investigation, even if it is over 60 days from the time the complaint is made from the time the reprisal or prohibited action took place.

9. The investigation must be completed **within 90 days** of the original whistleblowing allegation being received by the IG, or the IG will so inform the Secretary of Defense and the complainant, in writing, of the estimated date of ROI completion. A copy of the whistleblower ROI will be forwarded to the complainant [w/o interview summaries or documents, unless requested by the complainant] and Secretary of Defense **within 30 days from completion of the ROI**. The ROI given to the whistleblower complainant will include all factual findings and recommendations, subject to security classification and FOIA limitations.

10. Military member whistleblower reprisal complaint resolutions by a Military Service Secretary may be reviewed by a BCMR, and the Secretary of Defense. (DOD Directive 7050.6).

11. Military Whistleblower complaints do not create a federal private cause of action against the military; they are strictly an administrative remedy. *See* Acquisto v United States, 70 F.3d 1010, 1011 (8th Cir. 1995); Alasevich v. United States Air Force Reserve, 1997 WL 152816, *6 (E.D. Pa. 1997); and Hernandez v. United States, 38 Fed. Cl. 532 (Fed. Cl. 1997).

## VI. CONCLUSION.

# APPENDIX A

## [Sample Article 138 Complaint]

DEPARTMENT OF THE ARMY
COMPANY B, 5/20TH INFANTRY
1ST INFANTRY DIVISION (MECHANIZED)
FORT RILEY, KANSAS 22222

AFKC-IN 13 October 1997

MEMORANDUM THRU Commander, Company B, 5/20th Infantry, 1st Infantry Division (Mechanized), Fort Riley, Kansas 22222

FOR Commander, 5/20th Infantry Battalion, 1st Infantry Division (Mechanized), Fort Riley, Kansas 22222

SUBJECT: Complaint of Wrong (Article 138, UCMJ)

1. I, SFC Cindy A. Crawford, 000-11-3333, am a member of the United States Army on active duty, subject to the Uniform Code of Military Justice, and currently assigned to Company B, 5/20th Infantry Battalion, 1st Infantry Division (Mechanized), Fort Riley, Kansas. On 12 September 1997 while assigned to my present unit I was wronged by my commanding officer, CPT Phoebe Doright, Commander, B Company, 5/20th Infantry Battalion, 1st Infantry Division (Mechanized), Fort Riley, Kansas. I made a written request for redress to CPT Doright on 14 September 1997, but on 19 September 1997 he refused to grant it. The request for redress and her response are attached (Encl). I therefore submit this complaint against CPT Doright under the provisions of Article 138, UCMJ, and Army Regulation 27-10.

2. The wrong which is the subject of this complaint is improper denial of annual leave. The circumstances are as follows: On 3 September 1997, CPT Doright requested volunteers for a domestic action work project the following Saturday at her favorite charity-the Junction City Toxic Waste Fund. Because I already had other plans for the date of the project, I did not participate. On 12 September 1997, I requested annual leave to attend my hometown annual Halloween celebration in Pigs Tail, North Carolina. Captain Doright denied my leave request although I have enough leave accured to cover the requested period.

3. CPT Doright's action in denying my leave request was improper because it was only done in retaliation for my refusal to participate in the volunteer program. CPT Doright's actions also are contrary to paragraph 2-7e, AR 630-5, which advises commanders to place special emphasis on granting holiday leave.

4. I hereby ask as redress that you authorize my leave from 26 October through 2 November 1997.

Encl

CINDY A. CRAWFORD
000-11-3333
SFC, Co B, 5/20th IN
1st IN Div (Mech)

INFORMATION PAPER

DAJA-AL

15 August 1997

SUBJECT: Processing Article 138 Complaints

1. Purpose. To provide information concerning Article 138 procedures.

2. Facts.

a. AR 27-10, chapter 20, implements Article 138, UCMJ.

b. When forwarding a complaint to OTJAG for final action on behalf of the Secretary of the Army, the GCMCA must fully explain the basis for the action on the complaint.

(1) AR 27-10, paragraph 20-11a, requires the GCMCA to investigate the complaint personally or to appoint an investigating officer under AR 15-6. Intervening commanders and the SJA can provide information to the GCMCA to assist in the investigation. Depending on the complexity of the complaint, such information may preclude the necessity to appoint an investigating officer. Sufficient information, however, must be obtained to provide a reasonable basis for the GCMCA's action. AR 27-10, paragraphs 20-11d(2) and d(4)(b), require the GCMCA, after taking action on the complaint, to forward the complaint to OTJAG with the "results of the examination into the complaint" and an endorsement or letter of transmittal "[d]escribing [the GCMCA's] action and the reasons" for that action.

(2) The GCMCA must describe the factual basis for his or her conclusions. It is not sufficient merely to state that the GCMCA found the alleged wrongful action not to be in violation of law and regulation; not to be beyond the legitimate authority of the commanding officer against whom the complaint was made; not to be arbitrary, capricious, or an abuse of discretion; and not to be materially unfair. Under AR 27-10, paragraph 20-4e, these are the factors to be considered in determining whether a commander's act or omisson was wrongful. The mere recitation of these factors in a document describing the GCMCA's action on a complaint does not adequately describe the basis for the action; they are merely conclusions.

(3) If an investigating officer has been appointed, the SJA should ensure that the investigation is complete, that there is a sufficient basis for the findings and recommendations of the investigating officer, and that the GCMCA clearly indicates which of the findings and recommendations are approved. The SJA should ensure that all of the issues presented in the complaint are addressed by the GCMCA, that there is a sufficient factual basis for the GCMCA's action, that the GCMCA's action comports with applicable law and regulation, and that these matters are addressed clearly and specifically in the document forwarding the complaint and allied papers to OTJAG.

c. There is an important distinction between deficient complaints and complaints that are inappropriate for review under Article 138.

(1) A deficient complaint does not substantially meet the requirements of Article 138 and no determination on the merits is required. AR 27-10, paragraph 20-10a, provides guidance for determining whether a complaint is deficient. The GCMCA may waive some deficiencies for "good cause." Paragraph 20-10b identifies which deficiencies may be waived and which may not. For example, a complaint submitted by a former soldier after separation is deficient and the deficiency cannot be waived; however, a complaint submitted before the complainant requests redress from the commander involved is

deficient, but the deficiency may be waived. Deficient complaints, when there is no waiver, should not be forwarded to OTJAG but should be returned to the complainant with an explanation of the deficiency.

(2) Complaints about matters that have specific appeal channels are normally inappropriate for review under Article 138. AR 27-10, paragraph 20-5, lists examples of actions that are normally inappropriate for review under Article 138. Generally, if a soldier has an opportunity to submit information on his or her behalf and the action will be reviewed by an authority superior to the commander initiating the action, the action is inappropriate for review under Article 138. For example, complaints relating to the imposition of nonjudicial punishment are inappropriate for review; however, a complaint concerning the vacation of suspended nonjudicial punishment is reviewable under Article 138 because no review exists by an authority superior to the officer vacating the punishment. Complaints determined to be inappropriate for review must be forwarded to OTJAG for final action.

d. In many cases, GCMCAs are providing some or all of the relief requested by complainants. When this happens, the complainant should be given the opportunity to withdraw the complaint. Once the complaint has reached the GCMCA, withdrawal must be in writing. Withdrawn complaints are not forwarded to OTJAG.

e. If the complainant requests only that a relief for cause evaluation report be withdrawn or revised, the complaint is inappropriate for review under Article 138 because there are specific procedures available to soldiers to appeal evaluation reports. If, however, the complainant requests additional redress, such as reinstatement, the complaint must be reviewed on the merits. Commanders have broad discretion when deciding to relieve a subordinate. Generally, if there is a sufficient basis for the commander to lose confidence in the subordinate, the relief action will be upheld. Caution should be taken to ensure that, if the relief is based on an investigation under AR 15-6, the complainant was provided a copy of relevant portions of the report of investigation and an opportunity to submit a rebuttal prior to relief, as required by AR 15-6, paragraph 1-8, AR 623-105, paragraph 5-18a, for officers, and AR 623-205, paragraph 2-10, for enlisted soldiers. Similarly, a review of the relief of a commander should ensure that the written approval of the first general officer in the chain of command was obtained prior to relief, as required by AR 600-20, paragraph 2-15. This does not preclude a suspension of a commander pending action on the relief.

Mr. Stamets/DSN: 227-1371

INFORMATION PAPER

DAJA-AL 15 AUGUST 1997

SUBJECT: Selected Recent Article 138 Complaints

1. Purpose. To provide information concerning recent Article 138 complaints.

2. Facts.

a. An officer complained that his request for emergency leave was improperly denied. The officer said he needed to go to Panama because, in anticipation of having his request to leave active duty approved, he had signed an employment contract with a Panamanian airline that required him to pay back over $15,500 if he did not comply with the terms of the contract, which included flight training during the period the officer requested emergency leave. The GCMCA determined that the financial loss did not warrant emergency leave. The GCMCA's denial was upheld. It was not an abuse of discretion to decide that the potential loss did not constitute an emergency for which the complainant should be entitled to emergency leave. DAJA-AL 1997/0538.

b. A prisoner at the USDB submitted two requests for redress complaining of conditions at the USDB and alleging misconduct by a member of the USBD staff. The requests for redress could not be processed as Article 138 complaints because the complaints were deficient. The complainant had been discharged from the Army as part of his court-martial sentence prior to the submission of his complaints. AR 27-10, chapter 20-10b(3)(a) requires that a complaint be submitted by a member on active duty. The complaints were forwarded to the Commandant, USDB, for consideration outside Article 138 channels. DAJA-AL 1997/0879.

c. Two NCO's (a married male and a single mother) were ordered to cease contact with one another during off duty hours, unless a third party was present. The battalion commander feared that the NCO's close friendship could create the appearance of an inappropriate relationship. The NCOs complained that they were improperly being denied their First Amendment right of free association. The NCOs requested restoration of their right to associate and reassignment due to fear of reprisal. The GCMCA determined that the appropriate redress was restoration of the complainants' right of free association but not reassignment. The GCMCA's action was upheld because the wrong complained of (possible retaliation) had not occurred. DAJA-AL 1997/0813.

d. A reserve officer, deployed as a civil affairs officer in support of Operation Joint Endeavor, was relieved for cause and received a letter of reprimand. The officer claimed that the adverse actions were taken in reprisal for filing an equal opportunity complaint claiming gender disparate treatment. The complainant also reported the alleged reprisal to the DoD Inspector General. The GCMCA determined that the subject matter was inappropriate for review under Article 138. The determination was upheld. The specific whistleblower reprisal procedures in 10 U.S.C. 1034 were deemed more appropriate for resolution of the complaint than Article 138 procedures. DAJA-AL 1997/0241.

e. A USDB inmate complained that his commander prior to his

incarceration wronged him by approving an Article 139, UCMJ, claim against him. The inmate had contracted for house remodeling services in exchange for a used computer. After transferring the computer to the contractor, the computer was seized by CID personnel as stolen property. The contractor then filed the Article 139 claim. The inmate argued that the monetary award was improper because it was a claim for home remodeling services, not a loss of property. The GCMCA denied redress determining that the commander had not exceeded his authority. The complaint was returned to the GCMCA who was directed to take action to repay the inmate. A claim for services is not a cognizable claim pursuant to Article 139, UCMJ and AR 27-20, chapter 9. DAJA-AL 1996/1776.

f. A master sergeant assigned overseas received an Article 15 for adultery and sodomy with two females on the support staff over whom he had supervisory control. His commander issued him a letter barring him from the installation for 20 years, effective on the complainant's date of retirement. He challenged the bar arguing that it interfered with his use of the commissary, post exchange and medical facilities. The GCMCA denied redress. The GCMCA's action was upheld because retired members had no status under the relevant SOFA as members of the armed forces and, therefore, no statutory right to access commissaries and exchanges. The complainant could obtain medical and dental services at other installations from which he was not barred. DAJA-AL 1996/1657.

g. An officer complained of abuse by his rater. He stated that his rater treated him unprofessionally by canceling his scheduled training, disapproving his leave, and not providing him with quarterly performance counseling. He requested as redress a change of rater. The GCMCA determined that the complaint was inappropriate for review because alternate channels were available to appeal an OER under the procedures in AR 623-105. The complainant was returned for review on the merits because an officer cannot obtain a change of rater under AR 623-105. DAJA-AL 1996/1536.

h. An officer alleged he was ordered to perform TDY at a location he believed to be burdensome on his family in retaliation for testifying at a court-martial on behalf of the accused. The TDY orders were cancelled before the TDY began, but the officer nonetheless submitted an Article 138 complaint seeking an investigation and disciplinary action against those involved in the TDY orders. The GCMCA appointed an investigating officer who interviewed all persons involved and concluded there was a valid operational basis for the TDY, but it was cancelled because of health problems experienced by the officer ordered to TDY after the orders were issued. The GCMCA agreed with the IO's conclusions. (Note also that a request for disciplinary action against other persons is not a proper request for redress under Article 138. See the definition of redress is AR 27-10, paragraph 20-4f.) DAJA-AL 1997/0996.

CPT Campanella/DSN: 227-1371

# APPENDIX B

# Army Board of Correction for Military Records

# [Board for Correction of Military Records Application—DD Form 149]

**APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**

*(Please read instructions on reverse side BEFORE completing application.)*

*Form Approved*
*OMB No. 0704-0003*
*Expires Aug 31, 2000*

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0003), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ADDRESS. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.**

**PRIVACY ACT STATEMENT**

**AUTHORITY:** Title 10 US Code 1552, EO 9397.

**PRINCIPAL PURPOSE:** To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record.

**ROUTINE USE(S):** None.

**DISCLOSURE:** Voluntary; however, failure to provide identifying information may impede processing of this application. The request for Social Security number is strictly to assure proper identification of the individual and appropriate records.

**1. APPLICANT DATA**

| a. BRANCH OF SERVICE *(X one)* | ☐ ARMY | ☐ NAVY | ☐ AIR FORCE | ☐ MARINE CORPS | ☐ COAST GUARD |
|---|---|---|---|---|---|

| b. NAME *(Last, First, Middle Initial) (Please print)* | c. PRESENT PAY GRADE | d. SERVICE NUMBER *(If applicable)* | e. SSN |
|---|---|---|---|
| | | | |

| 2. TYPE OF DISCHARGE *(If by court-martial, state type of court)* | 3. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES *(Active duty, Retired, Reserve, etc.)* | 4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY |
|---|---|---|
| | | |

| 5. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD | 6. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. *(No expense to the Government) (X one)* ☐ YES ☐ NO |
|---|---|
| | |

| 7. COUNSEL *(If any)* | b. ADDRESS *(Street, Apartment Number, City, State and ZIP Code)* |
|---|---|
| a. NAME *(Last, First, Middle Initial)* | |

**8. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE:**

**9. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS:**

**10. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING:** *(If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)*

**11. ALLEGED ERROR OR INJUSTICE**

| a. DATE OF DISCOVERY | b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION. |
|---|---|
| | |

**12. APPLICANT MUST SIGN IN ITEM 16. IF THE RECORD IN QUESTION IS THAT OF A DECEASED OR INCOMPETENT PERSON, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY OTHER THAN APPLICANT, INDICATE RELATIONSHIP OR STATUS BY MARKING APPROPRIATE BOX.**

☐ SPOUSE ☐ WIDOW ☐ WIDOWER ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER *(Specify)*

**13. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM.** *(U.S. Code, Title 18, Sec. 287, 1001, provides that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)*

| 14.a. COMPLETE CURRENT ADDRESS, INCLUDING ZIP CODE *(Applicant should forward notification of all changes of address.)* | b. TELEPHONE NUMBER *(Include Area Code)* | DOCUMENT NUMBER *(Do not write in this space.)* |
|---|---|---|
| | | |

| 15. DATE SIGNED | 16. SIGNATURE *(Applicant must sign here.)* |
|---|---|
| | |

**DD FORM 149, SEP 1997 (EG)** PREVIOUS EDITION IS OBSOLETE. Designed using PerformPro, WHS/DIOR, Sep 97

## INSTRUCTIONS

*(All data should be typed or printed)*

1. For detailed information see: Air Force Instruction 36-2603; Army Regulation 15-185; Coast Guard, Code of Federal Regulations; Title 33, Part 52; or Navy, Code of Federal Regulations; Title 32, Part 723.

2. Submit only original of this form.

3. Complete all items. If the question is not applicable, mark "None."

4. If space is insufficient, use "Remarks" or attach additional sheet.

5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.

6. List all attachments and enclosures.

7. **ITEMS 6 AND 7.** Personal appearance of you and your witnesses or representation by counsel is not required to ensure full and impartial consideration of applications. Appearances and representations are permitted, at no expense to the Government, when a hearing is authorized.

8. **ITEM 8.** State the specific correction of record desired.

9. **ITEM 9.** In order to justify correction of a military record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.

10. **ITEM 11.** 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.

## MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

### ARMY

**(For Active Duty Personnel)**
Army Board for the Correction of Military Records
1941 Jefferson Davis Highway, 2nd Floor
Arlington, VA 22202-4508

**(For Other than Active Duty Personnel)**
Army Review Boards Agency
Support Division, St. Louis
ATTN: SFMR-RBR-SL
9700 Page Avenue
St. Louis, MO 63132-5200

### COAST GUARD

Chairman
Board for Correction of Military Records (C-60)
Department of Transportation
400 7th St., SW
Washington, DC 20590

### NAVY AND MARINE CORPS

Board for Correction of Naval Records
2 Navy Annex
Washington, DC 20370-5100

### AIR FORCE

Board for Correction of Air Force Records
SAF/MIB
550-C Street West, Suite 40
Randolph AFB, TX 78150-4742

**17. REMARKS** *(Applicant has exhausted all administrative channels in seeking this correction and has been counseled by a representative of his/her servicing military personnel office. (Applicable only to active duty and reserve personnel.))*

**DD FORM 149 (BACK), SEP 1997**

# APPENDIX C

## [Inspector General Action Request (IGAR)]

**INSPECTOR GENERAL ACTION REQUEST**

For use of this form, see AR 20-1; the proponent agency is the Office of The Inspector General and Auditor General.

**DATA REQUIRED BY THE PRIVACY ACT OF 1974**

**AUTHORITY:** Title 10, USC, Section 3039.

**PRINCIPAL PURPOSE:** To secure sufficient information to make inquiry into the matters presented and to provide a response to the requestor(s) and/or take action to correct deficiencies.

**ROUTINE USES:** Information is used for official purposes within the Department of Defense; to answer complaints or respond to requests for assistance, advice or information; by Members of Congress and other Government agencies when determined by The Inspector General and Auditor General to be in the best interest of the Army; and in certain cases in trial by court martial other military matters as authorized by the Uniform Code of Military Justice.

**DISCLOSURE OF THE SOCIAL SECURITY NUMBER AND OTHER PERSONAL INFORMATION IS VOLUNTARY. HOWEVER, FAILURE TO PROVIDE COMPLETE INFORMATION MAY HINDER PROPER IDENTIFICATION OF THE REQUESTOR, ACCOMPLISHMENT OF THE REQUESTED ACTION(S) AND RESPONSE TO THE REQUESTOR.**

| LAST NAME - FIRST NAME - MIDDLE INITIAL | GRADE | SSN | DUTY TELEPHONE |
|---|---|---|---|
| | | | |

COMPLETE PRESENT MILITARY ADDRESS *(If no military address, state current civilian address, including Zip Code.)*

SPECIFIC ACTION REQUESTED

INFORMATION PERTAINING TO THIS REQUEST *(Use additional sheets if necessary; list inclosures if applicable.)*

This information is submitted for the basic purpose of requesting assistance, correcting injustices affecting individual, or eliminating conditions considered detrimental to the efficiency or reputation of the Army. I fully understand that I may be held accountable for any statements which are proved to be knowingly untruthful.

| DATE | SIGNATURE |
|---|---|
| | |

**DA FORM 1559-R, OCT 89** REPLACES EDITION OF OCT 86, WHICH IS OBSOLETE. USAPPC V1.00

*THIS SIDE FOR USE BY INSPECTOR GENERAL*

*(When completed, this form becomes an official communication in accordance with AR 20-1.)*

* ORIG: * CASENO: * OPENENDATE: Y Y M M D D

SUSPENSE Y Y M M D D * CASENAME:

CASENAMETYPED: SSN: * HOME CMD:

HOME UNIT:

* RECIPIENT: RECEIPTMODE:

* CASESTATUS: * SOURCE:

* SUBJECT: * COMPONENT:

* CASETYPE: INSPGENL:

TIMEAO: TIMETOTAL: * GRADE: * RACE:

* GENDER *(M/F/U)* SPECIALTY: ACKNOWLEDGE: Y Y M M D D

NOTIFICATIONDATE: Y Y M M D D * CLOSEDATE: Y Y M M D D

* FUNCTION * AGCMDAGN * DETER AGAINSTUNIT

UNITTYPE USERCODE * LIFE CYCLE * RESOURCE

* SYNOPSIS *(Enter case summary, facts determined, action taken):*

* *Indicates a Required Data Element.*

***REVERSE OF DA FORM 1559-R, OCT 89*** USAPPCV1.00

# APPENDIX D

## Military Whistleblower Protection Act

Current through P.L. 105-394, approved 11-13-1998

**10 U.S.C.A. § 1034. Protected communications; prohibition of retaliatory personnel actions**

**(a) Restricting communications with Members of Congress and Inspector General** prohibited.--(1) **No person may restrict a member of the armed forces in** communicating with a Member of Congress or an Inspector General.

**(2)** Paragraph (1) does not apply to a communication that is unlawful.

**(b) Prohibition of retaliatory personnel actions.--(1)** No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing--

**(A)** a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or

**(B)** a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to--

**(i)** a Member of Congress;

**(ii)** an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;

**(iii)** a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; or

**(iv)** any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications.

**(2)** Any action prohibited by paragraph (1) (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

**(c) Inspector General investigation of allegations of prohibited personnel** actions.--(1) **If a member of the armed forces submits to an Inspector General** an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (3).

**(2)** A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

**(A)** A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.

**(B)** Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

**(3)(A)** An Inspector General receiving an allegation as described in paragraph (1) shall expeditiously determine whether there is sufficient evidence to warrant an investigation of the allegation.

**(B)** If the Inspector General receiving such an allegation is an Inspector General within a military department, that Inspector General shall promptly notify the Inspector General of the Department of Defense of the allegation. Such notification shall be made in accordance with regulations prescribed under subsection (h).

**(C)** If an allegation under paragraph (1) is submitted to an Inspector General within a military department and if the determination of that Inspector General under subparagraph (A) is that there is not sufficient evidence to warrant an investigation of the allegation, that Inspector General shall forward the matter to the Inspector General of the Department of Defense for review.

**(D)** Upon determining that an investigation of an allegation under paragraph (1) is warranted, the Inspector General making the determination shall expeditiously investigate the allegation. In the case of a determination made by the Inspector General of the Department of Defense, that Inspector General may delegate responsibility for the investigation to an appropriate Inspector General within a military department.

**(E)** In the case of an investigation under subparagraph (D) within the Department of Defense, the results of the investigation shall be determined by, or approved by, the Inspector General of the Department of Defense (regardless of whether the investigation itself is conducted by the Inspector General of the Department of Defense or by an Inspector General within a military department).

**(4)** Neither an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.

**(5)** The Inspector General of the Department of Defense, or the Inspector General of the Department of Transportation (in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy), shall ensure that the Inspector General conducting the investigation

of an allegation under this subsection is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.

**(d) Inspector General investigation of underlying allegations.**--Upon receiving an allegation under subsection (c), the Inspector General receiving the allegation shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing (as described in subparagraph (A) or (B) of subsection (c)(2)) if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate. In the case of an allegation received by the Inspector General of the Department of Defense, the Inspector General may delegate that responsibility to the Inspector General of the armed force concerned.

**(e) Reports on investigations.--(1)** After completion of an investigation under subsection (c) or (d) or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E), the Inspector General conducting the investigation shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and shall transmit a copy of the report on the results of the investigation to the member of the armed forces who made the allegation investigated. The report shall be transmitted to the Secretary, and the copy of the report shall be transmitted to the member, not later than 30 days after completion of the investigation or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E).

**(2)** In the copy of the report transmitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5. However, the copy need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.

**(3)** If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (1) within 180 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice--

**(A)** of that determination (including the reasons why the report may not be submitted within that time); and

**(B)** of the time when the report will be submitted.

**(4)** The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

**(f) Correction of records when prohibited action taken.--(1)** A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.

**(2)** In resolving an application described in paragraph (1), a correction board--

**(A)** shall review the report of the Inspector General submitted under subsection (e)(1);

**(B)** may request the Inspector General to gather further evidence; and

**(C)** may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.

**(3)** If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1)--

**(A)** may be provided with representation by a judge advocate if--

**(i)** the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);

**(ii)** the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and

**(iii)** the member is not represented by outside counsel chosen by the member; and

**(B)** may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).

**(4)** The Secretary concerned shall issue a final decision with respect to

an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.

**(5)** The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).

**(6)** If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.

**(g) Review by Secretary of Defense.**--Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

**(h) Regulations.**--The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section.

**(i) Definitions.**--In this section:

**(1)** The term "Member of Congress" includes any Delegate or Resident Commissioner to Congress.

**(2)** The term "Inspector General" means the following:

**(A)** The Inspector General of the Department of Defense.

**(B)** The Inspector General of the Department of Transportation, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy.

**(C)** The Inspector General of the Army, in the case of a member of the Army.

**(D)** The Naval Inspector General, in the case of a member of the Navy.

**(E)** The Inspector General of the Air Force, in the case of a member of

the Air Force.

**(F)** The Deputy Naval Inspector General for Marine Corps Matters, in the case of a member of the Marine Corps.

**(G)** An officer of the armed forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the armed forces.

**(3)** The term "unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.

**[(j)** Redesignated (i)]

# APPENDIX E

## Military Mental Health Evaluation Protection Act

**FOR EDUCATIONAL USE ONLY**

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PL 102-484, 1992 HR 5006

<< 10 USCA § 1074 NOTE >>

SEC. 546. MENTAL HEALTH EVALUATIONS OF MEMBERS OF ARMED FORCES.

(a) REGULATIONS.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise applicable regulations to incorporate the requirements set forth in subsections (b), (c), and (d). In revising such regulations, the Secretary shall take into account any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian health organizations.

(b) PROCEDURES FOR OUTPATIENT AND INPATIENT EVALUATIONS.--(1) The revisions required by subsection (a) shall provide that, except as provided in paragraph (4), a commanding officer shall consult with a mental health professional prior to referring a member of the Armed Forces for a mental health evaluation to be conducted on an outpatient basis.

(2) The revisions required by subsection (a) shall provide that, except as provided in paragraph (4)--

(A) a mental health evaluation of a member of the Armed Forces conducted on an inpatient basis shall be used only if and when such an evaluation cannot appropriately or reasonably be conducted on an outpatient basis, in accordance with the least restrictive alternative principle; and

(B) only a psychiatrist, or, in cases in which a psychiatrist is not available, another mental health professional or a physician, may admit a member of the Armed Forces for a mental health evaluation to be conducted on an inpatient basis.

(3) The revisions required by subsection (a) shall provide that, when a commanding officer determines it is

necessary to refer a member of the Armed Forces for a mental health evaluation, the commanding officer shall ensure that, except as provided in paragraph (4), the member is provided with a written notice of the referral. The notice shall, at a minimum, include the following:

(A) The date and time the mental health evaluation is scheduled.

(B) A brief explanation of why the referral is considered necessary.

(C) The name or names of the mental health professionals with whom the commanding officer has consulted prior to making the referral. If such consultation is not possible, the notice shall include the reasons why.

(D) The positions and telephone numbers of authorities, including attorneys and inspectors general, who can assist a member who wishes to question the referral.

(E) The rights of the member under the revisions required by subsection (a).

(F) The member's signature attesting to having received the information described in subparagraphs (A) through (E). If the member refuses to sign the attestation, the commanding officer shall so indicate in the notice.

(4) The revisions required by subsection (a) shall provide that, during emergencies, the procedures described in subsection (d) shall be followed in lieu of the procedures required by this subsection.

(c) RIGHTS OF MEMBERS.--The revisions required by subsection (a) shall provide that, in any case in which a member of the Armed Forces is referred for a mental health evaluation other than in an emergency, the following provisions apply:

(1) Upon the request of the member, an attorney who is a member of the Armed Forces or employed by the Department of Defense and who is designated to provide advice under this section shall advise the member of the ways in which the member may seek redress under this section.

(2) If a member of the Armed Forces submits to an Inspector General an allegation that the member was referred for a mental health evaluation in violation of the revised regulations, the Inspector General of the Department of Defense shall conduct or oversee an investigation of the allegation.

(3) The member shall have the right to also be evaluated by a mental health professional of the member's own choosing, if reasonably available. Any such evaluation, including an evaluation by a mental health professional who is not an employee of the Department of Defense, shall be conducted within a reasonable period of time after the member is referred for an evaluation and shall be at the member's own expense.

(4)(A) No person may restrict the member in communicating with an Inspector General, attorney, member of Congress, or others about the member's referral for a mental health evaluation.

(B) Subparagraph (A) does not apply to a communication that is unlawful.

(4) In situations other than emergencies, the member shall have at least two business days before a scheduled mental health evaluation to meet with an attorney, Inspector General, chaplain, or other appropriate party. If a commanding officer believes the condition of the member requires that such evaluation occur sooner, the commanding officer shall state the reasons in writing as part of the personnel record of the member.

(5) In the event the member is aboard a naval vessel or in a circumstance related to the member's military duties which makes compliance with any of the procedures in subsection (b) impractical, the commanding officer seeking the referral shall prepare a memorandum setting forth the reasons for the inability to comply with such procedures.

(d) ADDITIONAL RIGHTS OF MEMBERS AND PROCEDURES FOR EMERGENCY OR INVOLUNTARY INPATIENT EVALUATIONS.--(1) The revisions required by subsection (a) shall provide that a member of the Armed Forces may be admitted, under criteria for admission set forth in such regulations, to a treatment facility for an emergency or involuntary mental health evaluation when there is reasonable cause to believe that the member may be suffering from a mental disorder. The revised regulations shall include definitions of the terms "emergency" and "mental disorder".

(2) The revised regulations shall provide that, in any case in which a member of the Armed Forces is admitted to a treatment facility for an emergency or involuntary mental health evaluation, the following provisions apply:

(A) Reasonable efforts shall be made, as soon after admission as the member's condition permits, to inform the member of the reasons for the evaluation, the nature and consequences of the evaluation and any treatment, and the member's rights under this section.

(B) The member shall have the right to contact, as soon after admission as the member's condition permits, a friend, relative, attorney, or Inspector General.

(C) The member shall be evaluated by a psychiatrist or a physician within two business days after admittance, to determine if continued hospitalization and treatment is justified or if the member should be released from the facility.

(D) If a determination is made that continued hospitalization and treatment is justified, the member must be notified orally and in writing of the reasons for such determination.

(E) A review of the admission of the member and the appropriateness of continued hospitalization and treatment shall be conducted in accordance with procedures set forth in the regulations as required under paragraph (3).

(3) The revised regulations shall include procedures for the review referred to in paragraph (2)(E). Such procedures shall--

(A) specify the appropriate party (or parties) who is outside the individual's immediate chain of command and who is neutral and disinterested to conduct the review;

(B) specify the appropriate procedure for conducting the review;

(C) require that the member have the right to representation in such review by an attorney of the member's choosing at the member's expense, or by a judge advocate;

(D) specify the periods of time within which the review and any subsequent reviews should be conducted;

(E) specify the criteria to be used to determine whether continued treatment or discharge from the facility is appropriate;

(F) require the party or parties conducting the review to assess whether or not the mental health evaluation was used in an inappropriate, punitive, or retributive manner in violation of this section; and

(G) require that an assessment made pursuant to subparagraph (F) that the mental health evaluation was used in a manner in violation of this section shall be reported to the Inspector General of the Department of Defense and included by the Inspector General as part of the Inspector General's annual report.

(e) CONSTRUCTION.--Nothing in the regulations prescribed under this section shall be construed to discourage referrals for appropriate mental health evaluations when circumstances suggest the need for such action.

(f) PROHIBITION AGAINST THE USE OF REFERRALS FOR MENTAL HEALTH EVALUATIONS TO RETALIATE AGAINST WHISTLEBLOWERS.--(1) The revised regulations required by subsection (a) shall provide that no person may refer a member of the Armed Forces for a mental health evaluation as a reprisal for making or preparing a lawful communication of the type described in section 1034(c)(2) of title 10, United States Code, and applicable regulations. For purposes of this subsection, such communication also shall include a communication to any appropriate authority in the chain of command of the member.

(2) Such revisions shall provide that an inappropriate referral for a mental health evaluation, when taken as a reprisal for a communication referred to in paragraph (1), may be the basis for a proceeding under section 892 of title 10, United States Code. Persons not subject to the Uniform Code of Military Justice who fail to comply with the provisions of this section are subject to adverse administrative action.

(g) DEFINITIONS.--In this section:

(1) The term "member" means any member of the Army, Navy, Air Force, or Marine Corps.

(2) The term "Inspector General" means--

(A) an Inspector General appointed under the Inspector General Act of 1978; and

(B) an officer of the Armed Forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the Armed Forces.

(3) The term "mental health professional" means a psychiatrist or clinical psychologist, a person with a doctorate in clinical social work or a psychiatric clinical nurse specialist.

(4) The term "mental health evaluation" means a psychiatric examination or evaluation, a psychological examination or evaluation, an examination for psychiatric or psychological fitness for duty, or any other means of assessing a member's state of mental health.

(5) The term "least restrictive alternative principle" means a principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate and therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such placement are warranted by the proposed plan of treatment.

(h) REPORT.--At the same time as the regulations required by this section are revised, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report describing the process of preparing the regulations, including--

(1) an explanation of the degree to which any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian mental health organizations were considered;

(2) the manner in which the regulations differ from any such civilian guidelines; and

(3) the reasons for such differences.

(j) CONFORMING REPEAL.--Subsection (g) of section 554 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510) is hereby repealed.

## COMMANDERS' CHECKLIST - MMHEPA

*Developed by CPT Daniel A. Lauretano, 46th Graduate Course

***** = The Military Mental Health Evaluation Protection Act (MMHEPA), National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992); DoD Instruction (DoDI) 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, (28 Aug. 1997); and DoD Directive (DoDD) 6490.1, Mental Health Evaluations of Members of the Armed Forces, (1 Oct. 1997). *See also* DA Message, 080700Z Mar 96, DAPE-HR-L, subject: Mental Health Evaluations (Clarification)(ALARACT 21/96)(8 Mar. 1996).

***1*** = Paragraph D.3.e. of the DoDD, excludes the following referrals, evaluations and interviews from the procedural requirements of the MMHEPA:

Voluntary self-referrals.

Sanity & competency inquiries in accordance with (IAW) Rules for Courts-Martial 706.

Referrals to Family Advocacy Programs (these normally involve medical assessments and treatment of family members by trained personnel). See DoD Directive 6400.1, Family Advocacy Program, 6.1 (23 Jun. 1997) and Army Regulation 608-18.

Referrals to drug and alcohol abuse rehabilitation programs. These normally take place during the "intake procedures." Intake procedures require a psychological evaluation to assess the soldier's need for detoxification and potential for rehabilitation. See DoD Directive 1010.4, Alcohol and Drug Abuse by DoD Personnel, E.3.b(2)(a) (25 Aug. 1980); DoD Instruction 1010.6, Rehabilitation Referral Services for Alcohol and Drug Abusers (13 Mar. 1985); and Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 3-10 (21 Oct. 1988).

Referrals for diagnostic evaluations made by non-command and non-mental health care providers, and with soldier's consent.

Non-discretionary evaluations required by regulation or for special duties or occupational classifications. According to para. D.3.e of the DoDD, if a regulation requires a commander to refer a soldier for a mental health evaluation, the referral is not discretionary.

**Examples of non-discretionary referrals** not falling within the DoD procedural requirements and made IAW Army Regulations:

Security Clearance Evaluations IAW Army Regulation 380-67;

Personnel Reliability Program Evaluations IAW Army Regulation 380-67;

Evaluations made IAW Army Regulation 135-178;

Discharge for the good of the service IAW Army Regulation 635-200, para. 1-34b and Chapter 10, and when the soldier requests a medical examination;

Misconduct IAW Army Regulation 635-200, para. 1-34b, and Chapter 14, section III;

Unsatisfactory performance IAW Army Regulation 635-200, para. 1-34b, and Chapter 13;

Homosexuality IAW Army Regulation 635-200, para. 1-34b, and Chapter 15;

**Examples of discretionary command referrals** falling within the DoD procedural requirements when made as part of an administrative elimination are:

Personality disorders IAW Army Regulation 635-200, para. 5-13, when made to determine if the soldier has a personality disorder.

Parenthood IAW Army Regulation 635-200, para. 1-34b, and para. 5-8;

Alien unlawfully admitted IAW Army Regulation 635-200, paras. 1-34b and 5-10;

Concealing arrest record IAW Army Regulation 635-200, paras. 1-34b and 5-14;

Fight training disqualification IAW Army Regulation 635-200, paras. 1-34b and 5-12;

Separations IAW Army Regulation 635-200, paras. 1-34b, 5-16 and 5-17;

Dependency or hardship IAW Army Regulation 635-200, para. 1-34b, and Chapter 6;

Defective enlistment, reenlistments and extensions IAW Army Regulation 635-200, para. 1-34b, and Chapter 7;

Pregnancy IAW Army Regulation 635-200, para. 1-34b, and Chapter 8;

Entry level separation IAW Army Regulation 635-200, para. 1-34b and Chapter 11;

Conviction by civil court IAW Army Regulation 635-200, paras. 1-34b, 14-5b, and Chapter 14, section II; and

Failure of body fat standards IAW Army Regulation 635-200, para. 1-34b, Chap. 18.

***2*** = According to Section 546(b)(2)(A) of the MMHEPA, you may only refer a soldier for an inpatient mental health evaluation if an outpatient evaluation is not reasonable IAW the "least restrictive alternative principle." Section 546(g)(5) of the MMHEPA defines "least restrictive alternative principle" as:

> A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

Page 2-1 of the DoDD expands this definition to include,

"Such treatments form a continuum of care including no treatment, outpatient treatment, partial hospitalization, residential treatment, inpatient treatment, involuntary hospitalization, seclusion, bodily restraint, and pharmacotheraphy, as clinically indicated." A mental health care provider should advise you on the appropriate "therapeutic setting and treatment."

IF IN DOUBT, PRIOR TO MAKING A NON-EMERGENCY INPATIENT REFERRAL, CONSULT YOUR LEGAL ADVISOR.

***3*** = Page 2-2 of the DoDD and the DoDI define a "mental health care provider" (MHCP) as "a psychiatrist, clinical psychologist, a person with a doctorate in clinical social work, or a psychiatric clinical nurse specialist." The DoDD and DoDI require commander's to consult with an MHCP before referring a soldier for a mental health evaluation, treatment, or hospitalization falling within the DoD procedural requirements. If no MHCPs are available, the commander must consult with a physician or the "senior privileged non-physician provider present." Page 2-3 of the DoDI defines a "senior privileged non-physician provider present" as "in the absence of a physician, the most experienced and trained health care provider who holds privileges to evaluate and treat

patients, such as clinical social workers, a nurse practitioner, an independent duty corpsman, etc." You must then document the results of your consultation and provide a copy to the MHCP performing the evaluation.

***4*** = Paragraph D.8. of the DoDD requires you, upon receiving the MHCP's recommendations, to "make a written record of the actions taken and reasons thereof." If the MHCP recommends that your soldier be separated from the service and you elect to retain the soldier, you must document your reasons and forward a memorandum to your superior within two business days of receiving the MHCP's recommendations.

***5*** = Paragraph D.2.c. of the DoDD requires you to refer soldiers for emergency mental health evaluations when one of your soldiers, by acts or words, is likely to cause injury to himself or herself, or others. You must also make an emergency referral whenever you believe your soldier is suffering from a mental disorder. Before making the emergency referral, you must make every effort to consult with an MHCP. If time and the nature of the emergency do not permit you to consult with an MHCP, you must consult with an MHCP at the MTF or clinic where the MHCP will evaluate your soldier. You must explain to the MHCP your reasons justifying the emergency evaluation. You must then document your conversation with the MHCP and forward a copy of the memorandum to the MHCP. If you are unable to consult with an MHCP prior to or at the MTF or clinic, para. F.1.a(5)(e) of the DoDI, allows you to document your reasons for the emergency evaluation and then forward a copy of the memorandum (via facsimile, overnight mail or courier) to the MHCP. This exception is a limited one.

***6*** = If after the emergency evaluation, an MHCP involuntarily hospitalizes your soldier, in addition to providing the soldier notice of the referral and his or her rights, para. F.2.b(1) of the DoDI requires you to inform the soldier of the "reasons for and the likely consequences of the admission." Para. F.2.b(2) also requires you to advise your soldier that he or she may call a family member, friend, chaplain, attorney, or IG.

## SOLDIER'S COUNSEL CHECKLIST

*Developed by CPT Daniel A. Lauretano, 46th Graduate Course

I. The DoD Directive implementing the Military Mental Health Evaluation Protection Act (MMHEPA) references the Guidelines For Involuntary Civil Commitment[1] (Guidelines) as one source attorneys should use when representing soldiers pending mental health evaluations, treatment or hospitalization. Paragraph E.2 of the Guidelines provides, "for attorneys to assume the proper advocacy role, the attorney must advise the respondent of all available options, as well as the practical consequences of those options . . . the attorney should advocate the position that best safeguards and advances the client's interest." In order to best represent the interests of your client, counsel should use the following suggested approach in accordance with paragraph E1-E7 of the Guidelines.

II. Review of Non-emergency Outpatient and Inpatient Referral Procedural Requirements.

A. In order to determine whether the commander complied with the procedural requirements of the MMHEPA and the DoD Directive and Instruction:

First, meet with your client and determine whether the commander informed your client of the reasons for the referral. You can do this by reviewing the "referral and rights" memorandum provided to the soldier. Ensure your client understands the commander's reasons for the referral.

Second, assess whether the commander based the referral on the immediate facts and circumstances of the case (e.g., client's behavior, client's statements, witness statements, mental health care provider's (MHCP) assessment, etc.). If the commander based the referral on facts and circumstances occurring several days or weeks ago, the referral may be stale and improper. In addition, assess whether the information the commander provided to the MHCP is accurate and complete.

Third, determine whether the commander complied with the consultation requirement. If the commander consulted with an MHCP, contact the MHCP and ensure he or she agreed with the referral. If the

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[1] NATIONAL TASK FORCE ON GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT (Joseph Schneider, et al. eds., 1986). For more information or to order copies of the Guidelines call 1-800-877-1233.

commander did not consult with an MHCP, review the "referral and rights" memorandum and determine whether the commander explains his or her reasons for not consulting an MHCP. If the commander failed to comply with the consultation requirement, the referral is procedurally improper.

Fourth, if the referral is for inpatient evaluation, ensure it complies with the "least restrictive alternative principle" (LRAP). The MMHEPA defines the LRAP as:

> A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

See National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546(g)(5), 106 Stat. 2315, 2419 (1992).

Fourth, assess whether the commander informed your client of the following rights:

The right to speak with a legal assistance attorney about the propriety of the referral;

The right to speak to a civilian attorney of the client's own choosing and expense, about the propriety of the referral;

The right to file a complaint with either the DoD or Army IG alleging that the referral was in reprisal for making or preparing a protected communication.

The right to file a complaint with either the DoD or Army IG alleging that the referral for a mental health evaluation was improper.

The right to be evaluated by an MHCP of the client's own choosing and expense.

The right to discuss the referral with an IG, attorney, member of Congress, or others.

The right to seek assistance from the IG, legal assistance office or the chaplain on rebutting the referral.

If the commander failed to notify your client of the above rights, the referral is procedurally improper.

Fifth, determine whether the commander formally requested the evaluation. If the commander failed to formally request the evaluation, the referral is procedurally improper.

III. Review Client's History and Explore Alternatives.

A. After assessing whether the commander complied with the procedural requirements for the referral, review your clients psychiatric history and explore alternative resolutions to the referral.

First, discuss with your client the facts and circumstances of the referral. While discussing the facts and circumstances of the referral with your client, you should keep in mind that your client may be suffering from a mental disorder or disability. You should, consequently, evaluate your client's information objectively for accuracy and completeness. Ask your client to provide you with names of MHCPs, that have dealt with your client in the past. In addition, ask your client to provide you with names of co-workers, friends, family and other character witnesses.

Second, review your client's medical and any psychiatric records (outpatient and inpatient). In particular, review the client's past psychiatric counselings, treatment and hospitalization.

Third, interview all MHCPs, if any, that examined or treated your client in the past. These MHCPs may provide you insight on possible alternatives to the command referral (e.g., outpatient vs. an inpatient evaluation).

Fourth, interview all witnesses involved with the referral. If the facts and circumstances suggest that the referral is improper, consider presenting these witnesses to the commander, the MHCP, or the reviewing officer to rebut or prevent the referral.

Finally, use information gathered from records, witnesses, MHCPs and your client to explore alternative resolutions to the referral. For example, a counseling session with a chaplain may suffice rather than an outpatient mental health evaluation. Likewise, an outpatient mental health evaluation may be more appropriate than an inpatient evaluation, treatment or hospitalization. Before recommending that your client follow an alternative option, counsel should discuss all alternatives with either the MHCP the commander consulted, or an independent MHCP.

B. After reviewing your client's psychiatric history and exploring alternative resolutions to the referral, explain the effect and any stigma any alternative resolution may have on your client once he or she leaves the Army. For example, the MHCPs negative findings may affect soldier’s ability to acquire future employment.

C. If the client consents, discuss the alternative options with the commander and the MHCP consulted, and negotiate an appropriate resolution for your client.

IV. Emergency Evaluations, Treatment and Hospitalization.

If your client is being referred for an emergency evaluation, treatment or hospitalization, in addition to taking the above steps, counsel should consider the following issues.

First, determine whether the commander informed your client of the reasons for the emergency referral.

Second, determine whether the commander based his or her reasoning for the emergency referral on the DoD's "clear and reasoned judgment" standard.

Third, if the commander did not consult with an MHCP prior to the referral, determine whether the commander "made every effort" to do so. In addition, was the reason for not consulting with an MHCP documented and a copy provided to the MHCP that performed the evaluation. If the commander did consult with an MHCP, ensure the MHCP concurred with the referral.

Finally, if the MHCP hospitalizes your client, ensure an MHCP reviews the propriety of continued hospitalization within twenty-four hours after admittance.

V. Review of Referral, Evaluation and Continued Hospitalization.

A. If an MHCP decides to hospitalize your client, the medical treatment facility (MTF) or clinic commander must appoint an independent medical reviewing officer (RO) within seventy-two hours.

B. Once appointed, the RO must review the propriety of the referral, evaluation and hospitalization. The RO must also assess the propriety of continued hospitalization. Finally, the DoD Directive requires the RO to speak to your client during the review.

C. Since your client has the right to have counsel present and assist the client in the review, counsel should use this opportunity to advance the best interests of the client.

Counsel should consider:

1. Presenting witnesses and documentary evidence to the RO suggesting that continued hospitalization is unnecessary.

2. If the RO decides to keep your client hospitalized, ensure the RO specifies when the next review will occur. The MMHEPA and the DoD Directive mandate that the next review occur within five business days.

**SAMPLE COMMANDER'S NOTICE**
**TO SOLDIER OF REFERRAL AND RIGHTS**

(Office Symbol) (Date)

MEMORANDUM FOR _____ (Soldier's name, rank, and SS#)

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

References: (a) DoD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.

(b) DoD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

(c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.

(d) DoD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

1. In accordance with paragraph F.1.a(4) of reference (b), I am referring you to a mental health care provider for a mental health evaluation.

2. I direct you to meet with _____(name & rank of mental health care provider(s) at _____(MTF or clinic) on _____(date) at _____hours.

XXXX-XX

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

3. I am referring you for a mental health evaluation because of your behavior and/or statements on _____(date(s)). On the stated date(s), you (brief description of behaviors and statements):
_____
_____
_____
_____
_____

4. In accordance with paragraph F.1.a(2) of the DoD Instruction 6490.4, before the referral, **(**on _____ (date) I consulted with _____(name, rank, branch

of each mental health care provider consulted) from the _____(MTF clinic) about your recent behavior and/or statements and _____ _____ (name and rank of each mental health care provider) (did) (did not) concur(s) that a mental health evaluation is necessary**)** or **(**I was unable to consult with a mental health care provider because _____
_____
_____
_____**)**.

5. In accordance with paragraph F.1.a(4) of reference (b), and reference (a) and (c), you have the following rights:

a. The right to speak with a legal assistance attorney for advice on how to rebut this referral if you believe it is improper.

b. The right to speak to a civilian attorney of your own choosing and expense, for advice on how to rebut this referral if you believe it is improper.

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

c. The right to submit to the DoD or the Army Inspector General a complaint that your mental health evaluation referral was a reprisal for making or preparing a protected communication to a statutory recipient. Statutory recipients include members of Congress, an IG, and personnel within DoD audit, inspection, investigation or law enforcement organizations. Statutory recipients also include any appropriate authority in your chain of command, and any person designated by regulation or other administrative procedures to receive your protected communication.

d. The right to submit to the DoD or the Army Inspector General a complaint that your mental health evaluation referral was in violation of reference (a), (b), or (c).

e. The right to be evaluated by a mental health care provider (MHCP) of your choosing and expense, provided the MHCP is reasonably available. If reasonably available, your MHCP must perform the evaluation within a reasonable period of time (not to exceed 10 business days). The evaluation performed by your MHCP will not delay or substitute for an evaluation performed by a DoD mental health care provider.

f. The right to communicate, provided the communication is lawful, with an IG, attorney, Member of Congress, or others about your referral for a mental health evaluation.

g. If applicable, in accordance with 4-2 of the DoD Instruction 6490.4, since you are (deployed) (in a geographically isolated area) because of circumstances related to military duties, compliance with the following procedures _____

_____

are impractical for the following reasons_____

_____.

h. The right, except in emergencies, to have at least two business days before the scheduled mental health evaluation to meet with an attorney, IG, chaplain, friend or family member.

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

6. You may seek assistance from a military or Army employed civilian attorney assigned to the **Legal Assistance Office** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may also call for assistance at _____ (phone number).

7. You may seek assistance from the **installation IG** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may call for assistance at _____(phone number). You may also seek assistance from the **DoD IG** at 1-800-424-9098.

8. You may seek assistance from the **Chaplain** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may also call for assistance at _____(phone number).

_____

(Name)

_____

(Rank/Branch)

Commanding

I have read, understood and received a copy of this memorandum.

Soldier's signature_____. Date_____.

XXXX-XX

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights[2]

IF SOLDIER DECLINES TO SIGN

The soldier declined to sign this memorandum containing the notice of referral and notice of soldier's rights because_____ _____(e.g., gave no reason, quote reason or otherwise). After the witness signed this memorandum, I provided a copy of this memorandum to the soldier.

Witness's signature_____. Date_____.

Print witness's rank and name_____.

[2] This sample form was adapted from enclosure 4 of U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, 4-1 to 4-3 (28 Aug. 1997) and modified for Army use.

# CHAPTER R

# DOD HIV/AIDS POLICY AND THE LAW

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Outline of Instruction

# I. INTRODUCTION.

# II. REFERENCES.

A. DoD Directive 6485.1, Human Immunodeficiency Virus-1 (HIV-1), 19 March 1991.

B. Army Regulation 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (22 April 1994).

C. Air Force Instruction 48-135, Human Immunodeficiency Virus Program (1 August 2000).

D. SECNAV Instruction 5300.30C, Management Of Human Immunodeficiency Virus-1 (Hiv-1) Infection In The Navy And Marine Corps (14 March 90); 12792.4, Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome in the Department of the Navy Civilian Workforce (12 January 1989).

E. Centers for Disease Control and Prevention. HIV/AIDS Surveillance Report, 1997; Vol. 9, No.1. (Copies of the HIV/AIDS Surveillance Report are available free from the CDC National AIDS Clearinghouse, P.O. Box 6003, Rockville, MD 20849-6003; telephone 1-800-458-5231 or 1-301-519-0023.)

# III. THE DISEASE.

A. In General.

B. Disease Progression.

C. Detection.

D. Transmission.

E. Classifications. DODD 6485.1, E2.2; AR 600-110, para. 2-1b. See also Appendix A, this outline.

## IV. DOD AND SERVICE POLICIES.

A. Accession Testing. HIV positive personnel are not eligible for enlistment or appointment in the military, both Active and Reserve Component. DODD 6485.1, para. 4.1; AR 600-110, para. 1-14a.

1. HIV screening for enlisted applicants is conducted at Military Entrance Processing Stations (MEPS). DODD 6485.1, para. 4.2; AR 600-110, para. 3-3b.

2. Officer applicants are screened during pre-contracting, pre-scholarship, or pre-appointment physical examinations. DODD 6485.1, E5; AR 600-110, para. 3-3h.

a. U.S. Military Academy cadets, midshipmen and persons attending the Uniformed Services University of Health Sciences are separated and discharged with an honorable discharge if HIV positivity is the sole basis for discharge. The Superintendent may delay separation until the end of the current academic year or allow graduation in final year. DODD 6485.1, para. E5.1.3; AR 600-110, para. 3-3h(1).

b. ROTC cadets are disenrolled at the end of the academic term in which the HIV infection is confirmed. No recoupment action is initiated. DODD 6485.1, para. E5.1.2; AR 600-110, para. 3-3h(2).

c. OCS candidates who are in their initial entry training are disenrolled from the program and discharged with an honorable or entry level separation, as appropriate. DODD 6485.1, para. E5.1.1; AR 600-110, para. 3-3h(3).

d. OCS candidates who have completed entry level training are disenrolled, reassigned in their original enlisted specialty and administered in accordance with Service regulations for enlisted personnel. DODD 6485.1, para. E5.1.1 AR 600-110, para. 3-3h(3).

e. No waiver for HIV infection is authorized.

f. All personnel disenrolled from officer programs who are separated shall be given preventive medicine counseling and advised to seek civilian treatment.

3. Prior service personnel required to meet accession medical fitness standards must have a negative HIV test no more than 6 months before enlistment in the Selected Reserves. Active duty soldiers transferring to or enlisting in the Selected Reserves without a break in service must have a negative HIV test within the preceding 24 months. AR 600-110, para. 3-3g.

B. Disease Surveillance.

1. DOD Policy (DODD 6485.1, para. E6.2) requires periodic testing with the following priority for military personnel:

a. Deployed or deploying to high HIV risk area,

b. Permanent assignment overseas,

c. Temporary deployment overseas,

d. Specific categories (medical personnel, drug and alcohol rehab, prenatal patients) per service regulation, and,

e. All remaining personnel per service regulation.

2. Army. Active duty and Reserve Component soldiers are periodically screened for evidence of HIV infection.

a. All active duty soldiers are tested routinely at least biennially. AR 600-110, paras. 2-2h and 2-7. Testing is keyed to birth month screening. AR 600-110, para. 2-7b.

b. Active duty and Reserve Component soldiers who PCS to overseas (defined as outside the 50 states, Puerto Rico, and the District of Columbia) must have a negative HIV test within the 6 months prior to their portcall. AR 600-110, paras. 2-2k and 2-7e.

c. Active duty soldiers who are scheduled for overseas TDY or deployment that will not exceed 179 days must have a negative HIV test within the 24 months prior to the departure date. AR 600-110, para. 2-2k(1).

d. Active duty personnel scheduled for overseas TDY or deployment exceeding 179 days must have a negative HIV test within the 6 months prior to departure date. AR 600-110, para. 2-2k(2).

e. Reserve Component soldiers are tested every 5 years. Reserve Component soldiers may also receive testing during their periodic physicals. AR 600-110, paras. 2-2i and 2-8.

f. Reserve Component personnel scheduled for overseas duty: Less than 30 days - 24 months prior to departure date. Greater than 30 days - 6 months prior to their reporting date. AR 600-110, para. 2-2k(3).

3. Navy. SECNAVINST 5300.30C, para. 5

a. Assigned to a deployable unit or stationed overseas (including Reserves) - annual testing.

b. PCS Orders – within 12 months prior to report date.

c. Treated for STD, drug/alcohol abuse, or pregnancy.

d. All others, during routine physical.

4. Air Force. AFI 48-135, para. 3.2.

a. Every 5 years during physical exam (flight physical every 3 years).

b. Prior to overseas assignment.

c. Treatment for pregnancy, STD, or drug/alcohol abuse.

5. Family members and other health care beneficiaries are not required to have an HIV test. However, DA policy is to routinely inform patients that physicians will order any necessary clinically indicated tests, to include HIV, unless the patient specifically declines such tests. DODD 6485.1, para. E6.2.5. Generally, HIV testing is "clinically indicated" under the circumstances listed below:

a. All blood donors;

b. All patients with suspicious illnesses;

c. All persons admitted to Army hospitals unless tested during the proceeding twelve months;

d. All persons seen at sexually transmitted disease clinics;

e. Certain blood recipients;

f. Sexual partners of HIV-infected individuals;

g. All pregnant women at the time of their initial prenatal evaluation and at time of delivery, if the mother is identified as being at high risk;

h. All persons enrolled in alcohol and drug rehabilitation programs (Tracks II or III);

i. Adults undergoing physical examinations;

j. All persons presenting at emergency rooms with evidence of trauma, such as shootings, stabbings, IV drug use, and rape;

k. All persons with acute or chronic hepatitis B infection; and

l. All persons who are dead on arrival or who die in emergency rooms.

6. DOD Civilians.

a. Civilian employees and applicants for employment may not be mandatorily tested for HIV except to comply with valid host nation laws. DODD 6485.1, para. 6.10.

b. HIV-positive civilian employees are treated no differently than other employees. They are permitted to work as long as their performance is acceptable and they do not pose a significant safety or health threat to themselves or others. They are considered handicapped employees within the meaning of the Rehabilitation Act of 1973 and are entitled to a reasonable accommodation if otherwise qualified. AR 600-110, paras. 1-14k, l, and m.

C. Health Education. DODD 6485.1, para. E6.3.

1. Upon identification, military health authorities will counsel the individual and others at risk regarding:

a. Significance of a positive antibody test;

b. Mode of transmission of the virus;

c. Appropriate precautions, personal hygiene, and measures required to minimize transmission;

d. Need to advise any past and future sexual partners of their infection;

e. That they are ineligible to donate blood, organs, or semen;

f. To always use condoms (except with a spouse who is fully informed of the soldier's condition).

g. Counseling is recorded on DA Form 5669-R. Commanders will receive a copy of this form. AR 600-110, para. 2-14d.

h. Soldiers who violate the preventative medicine counseling are subject to administrative separation. AR 600-110, paras. 4-12e and 4-13c.

2. The medical assessment of each exposure to or case of HIV infection includes an epidemiological assessment (EPI) of the potential transmission of HIV to other persons. AR 600-110, para. 7-3.

3. Commander's Counseling. Unlike the Air Force and Navy, the Army specifically provides for Commander Counseling. AR 600-110, para. 2-14.

a. Commanders formally counsel soldiers who test positive for the HIV antibody immediately after the post-diagnosis preventive medicine counseling. Commander counseling includes:

(1) A direct order to verbally advise all sexual partners of their infection prior to engaging in intimate sexual behavior or other behavior involving a significant risk of HIV transmission (such as behavior that would result in the exchange of blood or seminal fluid between persons);

(2) A direct order to use condoms when engaging in sexual relations (including, but not limited to, sexual intercourse, oral-genital, or anal-genital contact) with persons other than their spouse or with their spouse unless the spouse freely and knowingly consents to such relations after being informed of the soldier's infection (See also AR 600-110, para. 2-13b(9);

(3) A direct order not to donate blood, sperm, tissues, or other organs; and

(4) A direct order to inform all health care workers of their infection when seeking medical or dental treatment.

b. Commanders record counseling on DA Form 4856 (General Counseling Form) (see Appendix B, this outline). AR 600-110 includes a reproducible sample form. (**NOTE:** The form is not completely consistent with the 1994 update to AR 600-110. *Compare* DA Form 4856 *with* AR 600-110, para. 2-14c.

c. Commanders maintain the counseling form in unit personnel files. Upon reassignment, commanders forward the form in a sealed envelope to the gaining commander. AR 600-110, paras. 2-14d and 2-17.

d. Air Force Instruction includes a sample order for infected personnel to 1) inform sex partners prior to relations, 2) use transmission protection during sex (e.g. condom), 3) inform emergency care providers of HIV status, 4) inform medical providers of HIV status, and 5) not donate blood, sperm, tissue or organs. AFI 148-135, A14.

e. Navy regulation does not provide for command counseling or a formal preventative HIV order.

D. Retention.

1. Repeal of 10 Feb 96 statute mandating immediate discharge of HIV-positive service members. Repeal of amendments to 10 U.S.C. § 1177 effective 24 Apr 96.

2. Current Policy.

a. Active duty personnel with evidence of HIV infection are referred for medical evaluation board to evaluate and document their fitness for continued service regardless of clinical staging. DODD 6485.1, para. 4.3 and E2.4.2

b. HIV positive service members are managed in the same manner as personnel with other progressive illnesses.

c. Soldiers meeting medical retention standards may reenlist, if otherwise eligible. AR 600-110, para. 4-5a.

d. Personnel showing no evidence of clinical illness (generally associated with WR-1 or WR-2 stages) or other indications of immunologic or neurologic impairment related to HIV infection are not separated solely on the basis of HIV positivity. DODD 6485.1, para. 4.3; AR 600-110, para. 1-14d.

e. Reserve Component soldiers with serologic evidence of HIV infection have 120 days to complete a medical evaluation to determine their fitness for continued reserve service. Reservists found medically fit are permitted to serve in the Selected Reserves in a nondeployable billet, if available. AR 600-110, para. 5-17.

E. Assignment Limitations - Current Policy.

1. HIV-positive service members are not deployed overseas (defined as outside the 50 states, Puerto Rico, and the District of Columbia). DODD 6485.1, para. 6.16; AR 600-110, paras. 1-14e and 4-2a.

2. Soldiers confirmed HIV positive while stationed overseas are reassigned to the United States as soon as possible, regardless of PCS rules. AR 600-110, para. 4-7.

3. HIV-positive soldiers are NOT assigned to:

   a. Any TOE or MTOE unit. AR 600-110, para. 4-2b. Installation commanders may reassign any HIV-infected soldier from such units to TDA units on their installation, provided the soldier has completed a normal tour. AR 600-110, para. 4-2b; or

   b. USAREC, Cadet Command, or ARNG Full Time Recruiting Force if the soldier's medical condition requires frequent follow up and the unit is not near an Army MTF capable of providing such treatment. Commanders must report these soldiers to PERSCOM for assignment instructions. AR 600-110, para. 4-2b(3).

   c. Military education programs resulting in additional service obligation. AR 600-110, para. 4-2b(2). This limitation does not apply to military schools required for career progression, such as an advanced course or CGSC. See also AR 600-110, para. 4-4.

4. Assignment preclusion from units, programs, organizations, or schools other than those listed in the regulation require HQDA (DAPE-HR) approval. AR 600-110, para. 4-2c.

5. Commanders may not change the assignment of an HIV-infected soldier unless required by this regulation or the soldier's medical condition. AR 600-110, para. 4-2d.

6. Commanders may not group HIV-infected soldiers into the same unit, duty area, or living area unless no other unrestricted units, positions, or accommodations are available. AR 600-110, para. 4-2d.

7. Commissioned officers in DOD sponsored professional education programs are disenrolled from the program at the end of the academic term in which the HIV infection is confirmed. Any additional service obligation incurred by participation in the program is waived. Financial assistance received is not subject to recoupment. AR 600-110, para. 4-2b(2).

8. Family members who are confirmed as HIV positive may accompany their sponsor overseas. The sponsor may request deletion from the overseas assignment based on compassionate reasons or may request an "all others" tour. If the initial diagnosis of a family member occurs while overseas, the sponsor may apply for a compassionate reassignment to the United States. Mandatory PCS of the sponsor will not occur based solely on the HIV positivity of the family member. AR 600-110, para. 4-3 and 6-12.

9. Comply with host nation requirements of HIV screening for DOD civilians. DODD 6485.1, para. 4.10

F. Separation.

1. "Individuals with serological evidence of HIV-1 infection who are fit for duty shall not be retired or separated solely on the basis of …HIV-1 infection." DODD 6485.1, para.4.3

2. Regular and Reserve Component service members who are determined to be unfit for further duty due to progressive clinical illness or immunological deficiency due to HIV infection are processed for separation or retirement. DODD 6485.1, para. 4.5.

   a. Regular Army and Reserve Component commissioned and warrant probationary officers, who are confirmed HIV positive within 180 days of their original appointment or who report for initial entry training in an AD status (other than ADT) and are confirmed HIV positive within 180 days of reporting to AD, are processed for discharge under the provisions of AR 635-100, Chapter 5, section IX (Elimination of Probationary Officers). AR 600-110, para. 4-12d.

   b. Enlisted soldiers, confirmed HIV positive within 180 days of initial entry on AD, are separated for the convenience of the government for failure to meet procurement medical fitness standards under the provisions of AR 635-200, paragraph 5-11. See AR 600-110, para. 4-13b.

c. HIV-positive military personnel who fail to comply with lawfully ordered preventive medicine procedures, including the commander's "safer sex" order, are subject to appropriate administrative and disciplinary actions, including separation. AR 600-110, paras. 4-12e, 4-13c, and 2-14c.

d. HIV-positive military personnel may request separation from the service for the convenience of the government. AR 600-110, paras. 4-12a, b, and 4-13a, b.

G. Limited Use Policy.

1. DOD policy (DODD 6485.1, para. E3) prohibits the use of HIV testing information and information obtained during the EPI as an independent basis for adverse administrative or disciplinary action, except for:

a. Accession separations;

b. Voluntary separations;

c. Armed Service Blood Look Back activities;

d. Rebuttal or Impeachment purposes consistent with law or regulation;

e. For administrative or disciplinary actions resulting from disobeying preventative medicine order; and

f. As an element of proof or aggravation in administrative or criminal action.

2. **Adverse personnel actions** include: court-martial; nonjudicial punishment; line of duty determination; involuntary separation action (other than for medical reasons); administrative or punitive reduction in grade; denial of promotion; a bar to reenlistment; as the basis for an unfavorable entry in a personnel record; as a basis to characterize service or to assign a separation program designator; or in any other action considered an adverse personnel action (e.g., OER or NCO-ER). DODD 6485.1, para. E3.2.1; AR 600-110, para. 7-3b.

3. The limited use policy does <u>not</u> apply to:

a. The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) is first introduced by the soldier.

b. Disciplinary or other action based on independently derived evidence.

c. **Nonadverse personnel actions** include such as reassignment; disqualification (temporary or permanent) from a personnel reliability program; denial, suspension, or revocation of a security clearance; suspension or termination of access to classified information; and removal (temporary or permanent) from flight status or other duties requiring a high degree of stability or alertness such as explosive ordnance disposal (a medical evaluation board must determine whether removal from flight status or a similar position is necessary). DODD 6485.1, para. E3.2.3; AR 600-110, para. 4-6.

d. Any evidence or information derived from sources independent of the epidemiological assessment. AR 600-110, para. 7-4d.

H. Release of Information.

1. HIV data on a soldier is covered by the Privacy Act (5 U.S.C. § 552a).

2. Release is on an internal agency "need to know basis." 5 U.S.C. 552a(b)(1).

3. The service regulations stress the need for extra precautions in protecting HIV records. See, e.g., AR 600-110, paras. 1-12g, 1-13f, 1-14n, and 1-14o(3).

a. All soldiers are individually and privately notified of all positive HIV test results in a face-to-face interview with a designated physician. AR 600-110, para. 2-12.

b. Unit commanders will accompany HIV-positive soldiers to the initial notification by medical personnel. Unit commanders will not remain for the EPI. AR 600-110, para. 1-13d.

c. MEDDAC/MEDCEN will notify commander if HIV-positive soldier requires change in profile status.

4. IAW AR 600-110, para. 2-12f, information concerning an individual's HIV positivity is only released outside DOD in the following circumstances:

   a. Military health care beneficiaries who are determined "at risk" (e.g., spouse of an HIV-positive soldier; See also AR 600-110, para. 6-9) are contacted directly by medical authorities and advised to seek medical evaluation;

   b. Individuals who are not military health care beneficiaries, who are determined "at risk" (e.g., sexual partner of an unmarried HIV-positive soldier), are contacted through the local public health authorities, unless disclosure to the civilian health authorities is itself prohibited by the jurisdiction.

   c. Release of information to local (including host nation) health authorities, concerning the identity of HIV-positive individuals, is done in accordance with the reporting requirements of the local jurisdiction.

5. Spouses of Reserve Component HIV-positive soldiers are notified and offered an opportunity for voluntary HIV testing and counseling. AR 600-110, para. 6-9b.

## V. CONCLUSION.

## APPENDIX A

### GENERAL COUNSELING FORM

**For use of this form, see AR 635-200; the proponent agency is MILPERCEN**

**DATA REQUIRED BY THE PRIVACY ACT OF 1974**

AUTHORITY: 5 USC 301, 10 USC 3012 (G).
PRINCIPAL PURPOSE: To record counseling data pertaining to service members.
ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings.
DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.

**PART I - BASIC DATA**

| 1. NAME | | 3. GRADE | 4. SEX |
|---|---|---|---|
| Doe, John Q. | 123-45-6789 | E4 | Male |

| 5. UNIT | *FOR TRAINING UNITS ONLY* | |
|---|---|---|
| | 6. WEEK OF TRAINING | 7. TRAINING SCORES |
| HHC, 1st Training Brigade | | HIGH ____ MED ____ LOW ____ |

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

The purpose of this command counseling is to inform you of DA and command policy regarding your responsibilities as a result of testing positive for the Human Immunodeficiency Virus (HIV) antibody. This counseling supplements and complements the preventive medicine counseling you received on 20 FEB 01.

9. DATE AND SUMMARY OF COUNSELING

I have been advised that you were counseled by Preventive Medicine personnel concerning your diagnosis of HIV positivity, the risk this condition poses to your health, as well as the risk you pose to others. You were advised by medical personnel as to necessary precautions you should take to minimize the health risk to others as a result of your condition. While I have great concern for your situation and needs, in my capacity as a commander, I must also be concerned with, and ensure the health, welfare, and morale of the other soldiers in my command. Therefore, I am imposing the following restrictions:

a. You will verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner.

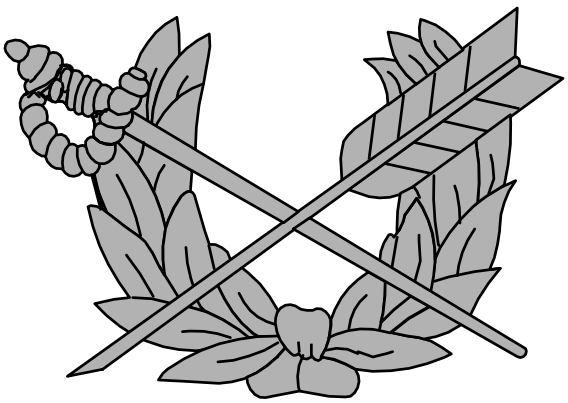
b. You will not donate blood, sperm, tissues, or other organs since this virus can be transmitted via blood and body fluids.

c. You will notify all health care workers of your diagnosed condition if you seek medical or dental treatment, or accident requires treatment. If you do not understand any element of this order, you will address all questions to me. Failure on your part to adhere to your preventive medicine counseling or the counseling I have just given you will subject you to administrative separation and/or punishment under the UCMJ, as I see fit.

*DISPOSITION INSTRUCTIONS*
*This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement*

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

# *BASIC COURSE DESKBOOK*



## Part III
## Civilian Personnel Law

The Judge Advocate General's School
United States Army

March 2001 JA 280

# CHAPTER S

# EQUAL EMPLOYMENT OPPORTUNITY

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**Outline of Instruction**

# I. INTRODUCTION.

# II. EQUAL EMPLOYMENT OPPORTUNITY -- STATUTORY FRAMEWORK.

A. Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, prohibits:

1. Basis: Discrimination on basis of race, color, religion, sex, or national origin in connection with any personnel action; retaliation or reprisal for having engaged in protected activity.

2. Persons covered: Applicants for employment, employees, and former employees.

3. Issues: Fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect person.

B. Age Discrimination in Employment Act, 29 U.S.C.§ 633a, prohibits:

1. Basis: Discrimination on basis of age 40 and over; retaliation or reprisal for having engaged in protected activity.

2. Persons covered: Applicants for employment, employees, and former employees.

3. Issues: Fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages.

C. Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 790-794, and modified by the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213:

1. Basis: Discrimination on the basis of handicapping condition (disability); failure to reasonably accommodate qualified handicapped.

2. Persons covered: Applicants for employment, employees, and former employees.

3. Issue: Test applicant to screen out handicapped; fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages, or be denied "reasonable accommodation" if accommodation does not impose undue hardship on agency.

4. Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, provides protections to private-sector employees similar to those provided federal employees in the Rehabilitation Act and modifies and codifies portions of the Rehabilitation Act. The ADA modifies the term "qualified handicapped individual" to "a qualified individual with a disability." These terms are used interchangeably in this outline.

D. The Equal Pay Act (29 U.S.C. § 206(d)) requires equal pay for equal work.

E. The Civil Rights Act of 1991, Pub. L. No. 102-166 (codified at scattered sections of 42 U.S.C.), provides for the recovery of compensatory damages of up to $300,000 from the federal government. Punitive damages are not recoverable from the federal government

## III. EQUAL EMPLOYMENT OPPORTUNITY AGENCIES.

A. Equal Employment Opportunity Commission (EEOC).

B. Merit Systems Protection Board (MSPB). 5 U.S.C. § 7702. The Civil Service Reform Act of 1978 (5 U.S.C. § 7702) provides for the processing of "mixed cases:" a personnel action that is (1) otherwise appealable and (2) allegedly motivated by prohibited discrimination.

## IV. EEO SUBSTANTIVE ANALYSIS.

A. Theories of Discrimination and Methods of Proof.

1. Disparate Treatment.

2. Definition. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977): "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."

3. Proof of discriminatory motive essential. Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987), *remanded* 905 F.2d 84 (1990); Equal Employment Opportunity Comm'n v. General Telephone Co. of Northwest, Inc., 885 F.2d 575 (9th Cir. 1989).

4. The shifting burdens.

a. Plaintiff's prima facie case. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); U.S. Postal Service v. Aikens, 460 U.S. 711 (1983); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

(1) Member of protected class.

(2) Qualified for job.

(3) Rejected/discharged.

(4) Employer filled job with someone else or still seeking similarly qualified applicants. Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1994).

(5) Additional "background circumstances" required to establish an inference of discrimination in "reverse" discrimination cases. Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

b. Defendant's burden of production. Articulate legitimate nondiscriminatory reason. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Burdine.

c. Plaintiff's rebuttal. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); McDonnell-Douglas; Furnco; Burdine.

(1) Employer's explanation unworthy of belief (pretext); and

(2) Discriminatory reason for action more likely.

d. Ultimate burden of proof remains with plaintiff. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711 (1983); Comer v. Brown, 13 F.3d 404 (10th Cir. 1994) (table); Cosgrove v. Sears, Roebuck, & Co., 9 F.3d 1033 (2d Cir. 1993); LeBlanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993); Odom v. Frank, 3 F.3d 850 (5th Cir. 1993); Rennie v. Dalton, 3 F.3d 1100 (7th Cir. 1993), *cert. den.*, 114 S. Ct. 1054 (1994).

e. A finding of liability under the Equal Pay Act does not support a finding of discrimination under Title VII absent a specific finding of intentional discrimination. Meeks v. Computer Assocs. Int'l, 15 F.3d 1013 (11th Cir. 1994).

B. "Mixed Motive" Discrimination Cases.

1. Law before the CRA 1991. A plaintiff proves prohibited discrimination was a contributing factor in the decision and the defendant proves by a preponderance of evidence that it would have taken the same employment action absent the prohibited discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

2. Current Law. Section 107 of the Civil Rights Act of 1991 modifies the "but for" test in Price Waterhouse. An employee who demonstrates that discrimination was "a motivating factor for any employment practice" has proven an unlawful employment practice. 42 U.S.C. § 2000e-2(m). Fuller v. Phipps, 67 F.3D 1137 (4th Cir. 1995).

a. The employer can avoid full liability only by demonstrating by clear and convincing evidence it would have taken the same action in the absence of discrimination. 42 U.S.C. § 2000e-5(g)(2)(B). Tanca v. Nordberg, 98 F.3d 680 (1st Cir. 1996), *cert. den.*, 117 S.Ct. 1253 (1997).

b. The employee is still entitled to declaratory and injunctive relief recovery of attorney's fees and costs. Russell v. Microdyne Corp., 65 F.3d 1229, 1237 (4th Cir.1995).

C. Disparate impact. The Civil Rights Act of 1991 § 105, overruled portions of the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), and established statutory burdens of proof in disparate impact cases. 42 U.S.C. § 2000e-2.

1. Definition (Int'l Brotherhood of Teamsters): "[E]mployment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."

2. Although traditionally applied to invalidate tests or fixed qualification standards, may be applied to cases where subjective criteria are used to make employment decisions. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

3. No proof of discriminatory motive is required. Typically attacks systemic or mechanical discrimination.

4. Plaintiff's prima facie case. 42 U.S.C. § 2000e-2(k)(1)(A).

a. Member of protected class.

b. Rejected/discharged/segregated/etc. by facially neutral employment practice.

c. Demonstrate (meet burden of production and persuasion--generally with statistical evidence) that each employment practice being challenged adversely affects protected class in disproportionate numbers (or that practices cannot be separated for analysis).

5. Defendant's rebuttal.

a. Under Section 105 of the CRA 1991, the **burden of proof** shifts to the employer to demonstrate that the employment practice is job related for the position in question and consistent with business necessity. 42 U.S.C.§ 2000e-2(k)(1)(A)(i).

b. The employer can also rebut the underlying statistics (e.g., wrong labor market, incomplete data, inadequate techniques) or show that other factors account for the discrepancy. 42 U.S.C. § 2000e-2(k)(1)(B)(2). See also Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)(reversing disparate impact finding for improper use of statistics); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991); Valentino v. U.S. Postal Serv., 674 F.2d 56 (D.C. Cir. 1982); Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985).

6. Plaintiff's reply. Even if defendant satisfies its burden of proof, a plaintiff can prevail by proving that an alternative business practice, which the employer refused to adopt, would have satisfied the employer's business needs without causing such an adverse impact.

D. Retaliation and Reprisal.

1. Elements. Atkinson v. Bd. of Regents, 4 F.3d 984 (4th Cir. 1993); Malarky v. Texaco, Inc., 983 F.2d 1204 (2d Cir. 1993); Miller v. Williams, 590 F.2d 317 (9th Cir. 1979).

a. Individual engaged in protected activity. 42 U.S.C. § 2000e-3.

(1) Opposition clause.

(2) Participation clause.

b. Adverse employment action taken against the employee.

c. Causal connection between protected activity and adverse action.

(1) An inference that a causal connection exists can arise where the individual shows that employer was aware of the protected activity and the adverse action follows the protected activity closely in time. Atkinson.

(2) Protected activity by one employee can protect another from retaliation. Equal Employment Opportunity Comm'n v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993).

2. Employer defenses.

a. Legitimate, non-retaliatory reasons for adverse action. Atkinson v. Bd. of Regents, 4 F.3d 984 (4th Cir. 1993); Butler v. Dep't of Agric. 826 F.2d 409 (5th Cir. 1987).

b. Decision to take adverse action made before protected activity. Newton v. Leggett, 7 F.3d 1042 (8th Cir. 1993).

c. Lack of knowledge of prior protected activity. Jackson v. Brown, 5 F.3d 546 (10th Cir. 1993); Malarky v. Texaco, Inc., 983 F.2d 1204 (2d Cir. 1993); Acosta v. Univ. of the District of Columbia, 528 F. Supp. 1215 (D.D.C. 1981).

d. Prolonged period of time between protected activity and adverse action negates presumption of causal connection. Johnson v. Dep't of Health & Human Servs., 30 F.3d 45 (6th Cir. 1994); Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir. 1982).

E. Handicap (Disability) Discrimination--reasonable accommodation. 29 C.F.R. § 1614.203.

1. Three theories to support claim of handicap (disability) discrimination:

a. Disparate treatment (treating disabled employees less favorably than non-disabled employees);

b. Disparate impact; and

c. Failure to reasonably accommodate in hiring, placement, or advancement opportunities.

2. The plaintiff's burden in disability discrimination cases parallels Title VII disparate treatment analysis:

a. Proof by direct evidence; or

b. Proof by circumstantial evidence establishing a *prima facie* case of disability discrimination--

(1) The employee suffers from a disability;

(2) is qualified for the job;

(3) was subject to an adverse employment action; and

(4) was replaced by a non-disabled person or was treated less favorably than non-disabled employees. *See* Daigle v. Liberty Life Ins. Co., 70 F.3d. 394 (5th Cir., 1995).

c. The burden of production then shifts to the employer to articulate a valid, nondiscriminatory reason for its actions.

3. Plaintiff's prima facie case in accommodation cases: Demonstrate that plaintiff is "qualified handicapped person" ("qualified individual with a disability"). Owens v. U.S. Postal Serv., 37 F.3d 1326 (8th Cir. 1994); Sargent v. Dep't of Air Force, 55 M.S.P.R. 387 (1993).

a. Disabled person--has a record of having, or is regarded as having a physical or mental impairment that substantially limits one or more major life activity. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2; Cook v. State of Rhode Island, 10 F.3d 17 (1st Cir. 1993); Ruiz v. U.S. Postal Svc., 59 M.S.P.R. 76 (1993).

b. Qualified handicapped (individual)--Can perform essential functions of position, with/without reasonable accommodation. Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994).

c. Performance will not endanger health or safety of employee or others. School Board of Nassau County v. Arline, 480 U.S. 273 (1987); Lassiter v. Dep't of Justice, 60 M.S.P.R. 138 (1993).

4. Defenses.

a. Plaintiff not "qualified handicapped person" ("qualified individual with disability"). Bradley v. Univ. of Texas Cancer Center, 3 F.3d 922 (5th Cir. 1993); Jasany v. U.S. Postal Serv., 755 F.2d 1244 (6th Cir. 1985); Vernon v. Veterans Admin., 54 M.S.P.R. 486 (1992); Cohen v. Dep't of Army, 46 M.S.P.R. 369 (1990).

(1) Agency is not obligated to assign employee to permanent light duty. Bauman v. Dep't of Navy, 55 M.S.P.R. 209 (1992).

(2) Reassignment as reasonable accommodation. Agencies must offer to reassign a qualified disabled employee to a funded vacant position located in the same commuting area and serviced by the same appointing authority, unless the agency can demonstrate that the reassignment would impose an undue hardship or disruption on the agency. 29 C.F.R. § 1614.203(g). Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994)(holding that an agency need not establish a new position to accommodate a handicapped employee); Ignacio v. U.S. Postal Serv., 30 M.S.P.R. 471 (Spec. Pan. 1986); Savage v. Dep't of Navy, 36 M.S.P.R. 148 (1988).

(3) For purposes of reassignment, "agency" is military department, not Dep't of Defense. Brown v. Dep't of Navy, 53 M.S.P.R. 537 (1992).

b. The accommodation would impose an undue hardship on agency's operation. Vande Zande v. State of Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995) (finding that the financial condition of an employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983); Bolstein v. Dep't of Labor, 55 M.S.P.R. 459 (1992); Cohen v. Dep't of Army, 46 M.S.P.R. 369 (1990); Widger v. VA, 37 M.S.P.R. 368 (1988).

c. Agency "good faith" attempts to accommodate will preclude recovery of compensatory damages. 42 U.S.C. § 1981a(a)(3); Hocker v. Dep't of Transp., 63 M.S.P.R. 497 (1994).

d. When an employee fails to cooperate, such as failing to submit sufficient medical evidence which would have allowed the agency to determine what accommodation, if any, was appropriate, the agency may proceed with ongoing removal actions. [In this case it was for AWOL.] The Commission noted that the process of identifying a reasonable accommodation is an interactive one, i.e., one in which petitioner and agency work together to identify petitioner's specific physical limitations, identify potential accommodations, and assess how effective each would be. In this case the agency attempted to engage in a dialogue; however, the record reflects that petitioner would not participate. In such a case, the Commission concludes that the agency cannot be held liable for failing to accommodate. Medlock v. Dep't of Air Force, EEOC Petition No. 03970126 (1998).

5. Alcoholism and drug dependence as handicapping conditions; accommodating the alcoholic or drug addict. Lazenby v. Dep't of Air Force, 66 M.S.P.R. 514 (1995); Anderson v. Dep't of Transportation, 59 M.S.P.R. 585 (1993); 42 U.S.C. § 2000e-2(k)(3); 29 C.F.R. § 1614.203(h).

a. In the recent past, alcoholism was viewed as a disability. Reasonable accommodation of an alcoholic required: (1) counseling; (2) a "firm choice" between treatment and discipline (last chance agreement); (3) outpatient treatment; (4) inpatient treatment; and (5) discharge. If the employee does not complete rehabilitation, chooses not to participate, or falls off the wagon, he can be removed. However, no discipline allowed before a firm choice given. Crewe v. OPM, 834 F.2d. 140 (8th Cir. 1987); Rogers v. Lehman, 869 F.2d. 253 (4th Cir. 1989).

b. The current EEOC position is that federal employers are no longer required to provide the reasonable accommodation of a firm choice because the Rehabilitation Act Amendments of 1992 changed the applicable standard. The EEOC noted that Section 104(c)(4) of the ADA (29 U.S.C. § 12114 (c)(4)) permits a covered employer to hold an employee who is an alcoholic to the same qualification standards for employment, or job performance and behavior, as other employees. Johnson v. Babbitt, EEOC Appeal No. 03940100 (March 28, 1996).

c. In a separate case, the MSPB held that the EEOC's decision in Johnson v. Babbitt had a reasonable basis and adopted the EEOC rule for the appellant and future cases. The MSPB went on to state: "In so doing we overrule Harris, 57 M.S.P.R. 124; Banks v. Department of the Navy, 57 M.S.P.R. 141 (1993); and Carlton, 44 M.S.P.R. 477, as well as all other Board decisions that may be interpreted to require imposition of the firm choice rule following the effective date of the Rehabilitation Act Amendments of 1992, October 29, 1992." Kimble v. Navy, 70 M.S.P.R. 617 (1996).

d. Employee involved in on-duty accident while driving under the influence of alcohol (DUI) in a government van which damaged government property, resulted in physical injury to him, and endangered others was NOT a qualified person with a disability under the Rehabilitation Act, and, thus, the employee did not have any right to reasonable accommodation by agency for his alcoholism. Coates v. Dep't. Navy, 74 M.S.P.R. 362 (1997).

e. While agencies are no longer obligated by the ADA and the Rehabilitation Act to provide accommodations formerly required for alcoholics, they may voluntarily do so because the wording of the law is that they "may" hold such employees to the same standards to which they hold others. Moreover, where employee shows that he has a right to such accommodation under agency's own rules and that right has been denied, he has proven affirmative defense of harmful procedural error rather than disability discrimination. Army Regulation 600-85, paras 5-4 and 5-5, require postponing adverse action for 90 days for employees enrolled in ADAPCP at the time it initiates adverse action and to forebear from taking an adverse action upon achievement of a successful result. Humphrey v. Dep't. of Army, 76 M.S.P.R. 519, (1997).

f. **NOTE:** Under the ADA, any person "who currently and knowingly uses or possesses a controlled substance" is excluded from the protections of the ADA.

F. Sexual Harassment. "Neither men nor women should have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).

1. Definition. 29 C.F.R. § 1604.11(a). Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

a. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2. Army Regulation 600-20: Any soldier or civilian employee:

a. In a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of another soldier or civilian employee is engaging in sexual harassment.

b. Who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.

c. Under AR 600-20, sexual harassment is not limited to the workplace, but can occur at almost any place, and violates acceptable standards of integrity and impartiality required of all Army personnel. It interferes with mission accomplishment and unit cohesion. "Such behavior by soldiers or Army civilians will not be tolerated."

3. Title 10 U.S.C. Section 1561. (111 Stat. 1629 (1997)) The National Defense Authorization Act for Fiscal Year 1998 added section 1561 to Title 10 of the United States Code.

a. The section includes a definition of sexual harassment similar (but not identical) to the definition in DoD Dir. 1350.2 and AR 600-20. This new statutory definition is broader than the Title VII definition of sexual harassment.

b. Condonation by persons in supervisory positions **and** deliberate or repeated unwelcome gestures or comments of a sexual nature in the workplace by any member of the armed forces or any DoD civilian employee, are both sufficient to constitute sexual harassment.

4. Types of Sexual Harassment.

a. "Quid Pro Quo" Sexual Harassment: Generally refers to a request for sexual favors in return for a job benefit, or in connection with the threat of the loss of a job, grade, or an unfavorable performance rating if the employee fails to grant the requested favors.

(1) No requirement for resistance to the harassment. Voluntariness not a defense. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990).

(2) Plaintiff need not prove economic loss. Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994).

b. "Hostile Environment" Sexual Harassment:

(1) Elements. Spicer v. Commonwealth of Virginia Department of Corrections, 66 F.3D 705 (4th Cir. 1995); Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3D 525 (1st Cir. 1995), *citing* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986).

(a) Complainant was subject to unwelcome conduct or harassment;

(b) That the harassment was based upon sex;

(c) That the harassment was sufficiently severe or pervasive so as to alter the conditions of the workplace and create an abusive environment; and

(d) The harassment is imputable on some factual basis to the employer.

(2) Does not require the loss of job benefits or opportunities.

(3) Psychological and emotional work environment as a condition of employment. A violation can be shown **either** by evidence that the misconduct interfered with an employee's work **or** by evidence that the misconduct caused serious psychological damage. "Reasonable person" and "reasonable victim" test. Harris v. Forklift Systems, Inc., 114 S. Ct. 367, (1993); Objective/subjective elements. Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995).

(4) Must be "Pervasive . . . severe and persistent". Single act versus pattern of conduct. The requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.

(5) The harassment does not necessarily have to be directed at the complainant. Evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile environment.

(6) The harassing official need not be of the opposite sex as the complainant. Sexual harassment, both quid pro quo and hostile environment, of a male employee by a male supervisor is actionable under Title VII. Oncale v. Sundowner Offshore Services, 523 U.S. ____, 118 S.Ct. 998, (1998).

5. Types of acts encompassed.

a. Visual (leering and ogling);

b. Verbal (derogatory remarks, innuendoes, and jokes);

c. Physical (pinching, fondling, and rape).

6. Agency liability.

   a. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. The employer may raise an affirmative defense that he acted reasonably to prevent and correct any sexually harassing behavior and that the plaintiff failed to take advantage of any preventive or corrective measures provided by the employer. Burlington Industries v. Ellerth 524 U.S. 742; 118 S. Ct. 2257 (1998).

   b. With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. A successful plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of the sexually hostile work environment and took no prompt and adequate remedial action. Spicer v. Commonwealth of Virginia Department of Corrections, 66 F.3d 705 (4th Cir. 1995) (reversing an award for sexual harassment and attorney's fees because the employer acted immediately and effectively to eliminate the offensive, yet isolated, behavior); see also Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995) and Carr v. General Motors Corp., 32 F.3d 1007 (7th Cir. 1994) (holding there are two issues in hostile environment analysis of employer liability: whether the employee was subjected to a hostile working environment; and, whether the employer's response or lack of response to the situation was negligent.); Bouton v. BMW of North America, Inc., 29 F.3d 103 (1994); Carmon v. Lubrizol Corp., 17 F.3d 791 (5th Cir. 1994). Contra, Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994).

7. Disciplinary actions. Civilian employees may be subject to administrative discipline for engaging in sexual harassment under agency regulations prohibiting sexual harassment. King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994); Hillen v. Dep't of Army, 66 M.S.P.R. 68 (1994); Holland v. Dep't of Air Force, 31 F.3d 1118 (Fed. Cir. 1994); Kirk v. Dep't of Navy, 58 M.S.P.R. 663 (1993).

a. No requirement for victims to file EEO complaints. A victim may or may not seek redress, but the agency's right to discipline employees who harass or discriminate is not dependent on employee's action.

b. Supervisors can be held to higher standard than coworkers. Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796 (6th Cir. 1994).

c. Charge as misconduct: violation of AR 600-20. Agency need only show an adverse effect on the efficiency of the service. Standard misconduct action under 5 U.S.C. chapter 75. In Kirk v. Dept. of Navy, 58 M.S.P.R. 663, (1993) the MSPB made it clear that an agency which charges a harasser with violating its policy need only address that policy and need not prove a Title VII violation or 29 CFR violation.

d. Removal is appropriate penalty based on single incident of sexual harassment involving physical contact. Evidence showed the employee a postal supervisor sexually harassed another postal supervisor, including proof that employee left voice mail message for other supervisor stating, "Girl, the sound of your voice makes my thing throb and my toes quiver," he attempted to hug and kiss her after she repeatedly warned him not to, and then he ignored those warnings and hit her on the buttocks. Payne v. USPS, 74 M.S.P.R. 419 (1997).

## V. PROCESSING EEO COMPLAINTS.

A. Administrative Complaint Procedures--Nonmixed Cases.

1. Complaint process.

a. Informal stage: Employee contacts EEO Counselor.

(1) Timing--within 45 days of matter of which complained. 29 C.F.R. § 1614.105(a); Zografov v. VA Medical Center, 779 F.2d 967 (4th Cir. 1985); Boyd v. U.S. Postal Serv., 752 F.2d 410 (9th Cir. 1985).

(a) Commencement of 45-day period.

(i) Personnel action--effective date of action.

(ii) Event not constituting a personnel action--date individual knew or reasonably should have known of discriminatory event.

(b) Tolling of 45-day period. 29 C.F.R. § 1614.105(a)(2). The agency or the Commission shall extend the 45-day time limit when

(i) The individual shows that he or she was not notified of the time limits and was not otherwise aware of them;

(ii) That he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred;

(iii) That despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission;

(c) Posting requirements. 29 C.F.R. § 1614.102(b)(7).

(d) Waiver of time limit. Oaxaca v. Roscoe, 641 F.2d 386 (5th Cir. 1981).

b. Counselor actions. 29 C.F.R. § 1614.105(b)(1).

(1) Initial interview. At the initial counseling session, counselors must advise individuals in writing of their rights and responsibilities, including

(a) The right to request a hearing after an investigation by the agency;

(b) Election rights pursuant to §§ 1614.301 and 1614.302;

(c) The right to file a notice of intent to sue pursuant to §1614.201 (a) and

(d) A lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part.

(e) The duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency.

(f) Counselors must also advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency.

(g) Gather facts from complainant.

(h) Identify primary agency witness (PAW), if any.

(2) Counselors shall advise aggrieved persons that, they may choose between participation in an alternative dispute resolution (ADR) program and the counseling activities provided.

(a) Where the aggrieved person chooses to participate in ADR, the pre-complaint processing period shall be 90 days.

(b) Counselor inquiry, including interview with PAW.

(c) Final interview. §1614.105(d). If the complainant chooses not to take part in ADR, he shall be given final notice of his right to file a formal discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(i) Time--within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. In addition, the 30-day period would be automatically extended to 90 days if the complainant participates in ADR.

(3) Final report. Counselor must submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling. 29 C.F.R. § 1614.105(c).

(a) Identity of complainant. 29 C.F.R. § 1614.105(g). The counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint from that person involving that same matter.

c. Formal stage.

(1) Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b). A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint.

(a) Timing. Within 15 days of final interview with EEO counselor.

(b) Amendment. 29 C.F.R. § 1614.106(d). A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint.

(c) Dismissal of complaint. 29 C.F.R. § 1614.107.

(i) Untimely--at either formal or informal stage. 29 C.F.R. § 1614.107(b).

(ii) Not within purview of 29 C.F.R. § 1614.103.

(iii) Identical complaint.

(iv) Not against the proper agency.

(v) That is the basis of a pending civil action in a United States District Court.

(vi) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory.

(vii) That alleges dissatisfaction with the processing of a previously filed complaint; or

(viii) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.

(ix) Appeal of rejection. 29 C.F.R. §1614.107(b). Where the agency believes that some but not all of the claims in a complaint should be dismissed, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated. The agency shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

(d) After acceptance, the agency may cancel the complaint if employee:

(i) Files suit in federal court.

(ii) Fails to prosecute.

(2) Investigation. Series of interviews or a fact-finding conference resulting in a report of investigation (ROI). AR 690-600, para. 2-9. Agencies must complete the investigation within 180 days of the filing of the complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.106(d)

and 1614.108(e). Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods to develop a record. Agencies are encouraged to incorporate alternative dispute resolution (ADR) techniques. 29 C.F.R. § 1614.108(b).

(a) Complainant decides on course of action -- within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).

(i) Request a final agency decision from the agency head based on the record.

(ii) Request a hearing and final decision from EEOC administrative judge.

d. EEOC hearing. 29 C.F.R. § 1614.109.

(1) Prehearing issues.

(a) Request for hearing.

(b) Dismissals. 29 C.F.R. § 1614.109(b). Administrative judges may dismiss complaints pursuant to 1614.107, on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.

(c) Offers of Resolution. 29 C.F.R. § 1614.109(c). Any time after the filing of the written complaint but not later than the date an administrative judge is appointed to conduct a hearing, the agency may make an offer of resolution to a complainant who is represented by an attorney. Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant, whether represented by an attorney or not. The agency's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief.

(d) Discovery. The parties may engage in discovery before the hearing. 29 C.F.R. § 1614.109(d).

(e) Hearing procedures.

(i) Evidence. 29 C.F.R. § 1614.109(e). Rules of evidence shall not be applied strictly, but AJ may exclude irrelevant or repetitious evidence and any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(ii) Decisions by administrative judges. 29 C.F.R. § 1614.109(i). Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a decision, an administrative judge shall issue a decision on the complaint, and shall order appropriate remedies and relief where discrimination is found, within 180 days of receipt by the administrative judge of the complaint file from the agency.

(f) Final action by agencies. 29 C.F.R. § 1614.110 (a). The agency shall take final action on the complaint

by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal.

(2) Appeal to EEOC. 29 C.F.R. § 1614.401. An appeal of the agency's final action or dismissal of a complaint must be filed with the EEOC's Office of Federal Operations (OFO) within 30 days of receipt of the final action or dismissal. Agency appeals must be filed within 40 days of receipt of the hearing file and decision.

e. Remedial actions. 29 C.F.R. § 1614.501

(1) Nondiscriminatory placement.

(2) Back pay.

(3) Compensatory damages up to $300,000.

(4) Fees and costs.

(5) Other.

f. Miscellaneous issues in the administrative complaint process. 29 C.F.R. § 1614.605.

(1) Representation.

(2) Official time. Reasonable time to prepare and attend; does not allow official time for witnesses to prepare.

B. Administrative Complaint Procedures--Mixed Cases.

1. Initiating the process--Three possible options.

a. Negotiated grievance procedure. 29 C.F.R. § 1614.301(a). When a person is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both.

b. EEOC mixed case complaint. 29 C.F.R. § 1614.302(a)(1). (EEO complaint process minus hearing before EEOC AJ and appeal to EEOC). A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. 29 C.F.R. § 1614.302(a)(1)

c. MSPB mixed case appeal. 29 C.F.R. § 1614.302(a)(2). A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

2. Electing the option. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB.

a. Complaint process. When a complainant elects to file a mixed case complaint, rather than with the MSPB, the procedures set forth above for nonmixed case processing shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(a) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR § 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and

(b) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

b. Other differences in procedures for mixed cases and nonmixed cases.

(1) Hearing in EEO complaint process.

(2) Appeal to EEOC upon completion of MSPB process.

(3) Special Panel if MSPB and EEOC decisions clash.

C. Administrative Complaint Procedures--Class Complaints.

1. Requirement to exhaust administrative class procedures as a prerequisite to maintaining judicial class action.

2. Significant difference in procedures for class complaints.

a. Class agent.

b. Heightened pleading requirement in formal complaint.

c. Preliminary role of administrative judge in determining propriety of class processing.

d. Additional requirements for acceptance of class complaint.

e. Notice to class members and opting out.

f. Individual relief upon finding of class-wide discrimination.

## VI. REMEDIES IN EEO ACTIONS

A. Monetary. 42 U.S.C § 2000e-5(g).

1. Traditional relief:

a. Back Pay. Reduced by interim earnings; employee must be ready, willing, and able to work to be entitled to back pay. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985).

b. Promotion. A "but for" test applied.

c. Reinstatement.

d. Front Pay. Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994).

2. Additional relief under the Civil Rights Act of 1991.

a. Compensatory/punitive damages. Limited to $300,000 above other relief (cap does not include backpay, frontpay, attorney fees, or lost benefits).

b. Jury trials. In any case where the plaintiff seeks compensatory damages.

c. Prejudgment interest.

d. Expert fees.

B. Attorney Fees. 42 U.S.C. § 2000e-5(k). Success on any significant issue in litigation that achieves some benefit to the plaintiff.

C. Injunctive Relief.

D. EEO Recovery Limited by After-Acquired Evidence of Misconduct. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

## VII. CONCLUSION.

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# Outline of Instruction

## I. INTRODUCTION.

## II. REFERENCES.

A. Statutes.

1. Title 5, United States Code, Chapters 11, 12, 21, 23, 33, 51, 55, 75, and 77 (Civil Service Reform Act of 1978).

2. Title 29, United States Code, §§ 791 and 794a (Rehabilitation Act of 1973).

3. Title 29, United States Code, § 633a (Age Discrimination in Employment Act).

4. Title 42, United States Code, §§ 2000e to 2000e-17 (Civil Rights Act of 1964, as amended).

B. Government-Wide Regulations and Guidance.

1. Title 5, Code of Federal Regulations, Chapter I.

2. Title 29, Code of Federal Regulations, Part 1614. Equal Employment Opportunity Commission (EEOC).

## III. ROLES AND FUNCTIONS.

A. Evolution From Spoils System.

1. Pendleton Act, 22 Stat. 403 (1883).

2. Lloyd-LaFollette Act, 37 Stat. 555 (1912).

3. Veterans' Preference Act, 58 Stat. 387 (1944).

4. Civil Service Reform Act of 1978, Pub. L. No. 95-454 (1978).

5. Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376 (1990).

B. Office of Personnel Management (OPM). 5 U.S.C. §§ 1101-1105.

1. Source: A successor agency to the Civil Service Commission created under the authority of the Civil Service Reform Act of 1978.

2. Function: The principal function of the OPM is to set policy and provide guidance to other federal agencies in matters regarding federal employees.

C. Merit Systems Protection Board. 5 U.S.C. §§ 1201-1209; 5 C.F.R. Parts 1201 and 1209.

1. Source: Civil Service Reform Act of 1978.

2. Functions:

a. Hear and adjudicate cases within its jurisdiction.

b. Conduct special studies.

c. Review OPM rules and regulations to determine validity.

d. Conduct special studies regarding civil service.

D. Office of the Special Counsel (OSC). 5 U.S.C. §§ 1211-1219.

1. Source: The Civil Service Reform Act of 1978, Whistleblower Protection Act of 1989, Office of Special Counsel Reauthorization Act of 1995.

2. Function: OSC receives employee complaints on such issues as "whistleblowing," prohibited personnel practices, and other reprisals taken against an employee relating to the merit system.

a. Seek corrective action.

b. Prosecute (administratively) offending agency official.

E. Equal Employment Opportunity Commission (EEOC).

F. Installation Level Players.

1. The Army Labor Counselor.

2. The Civilian Personnel Action Center (CPAC).

3. The Equal Employment Opportunity (EEO) Officer.

## IV. EMPLOYMENT IN THE FEDERAL SERVICE.

A. Composition of the Federal Civil Service.

1. Competitive Service. 5 U.S.C. § 2102, 5 C.F.R. Part 212.

2. Excepted Service. 5 U.S.C. § 2103, 5 C.F.R. Part 213.

3. Senior Executive Service. 5 U.S.C. § 2101a, 5 C.F.R. Part 214.

B. Classification of Positions by Method of Payment. 5 U.S.C. Chapters 51-59.

1. General schedule employees. 5 U.S.C. Chapters 51 and 53. GS-1 - GS-15.

2. Prevailing rate employees (wage grade). 5 U.S.C. §§ 5341-5349. WG-1 - WG-15, WL-1 - WL-15, WS.

3. Senior Executive Service (SES) employees. 5 U.S.C. §§ 5381-5385. ES-1 - ES-6.

4. Nonappropriated fund employees (AR 215-3): Those employees who are not paid from funds appropriated by Congress.

5. Other personnel.

C. Employees--Classified by Tenure Status.

1. Requirement for probationary period. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.801-315.806.

a. Purpose--an extension of the hiring process; to determine the employee's fitness and qualifications for continued employment. 5 C.F.R. § 315.03.

b. Length.

(1) Competitive service--one year. 5 C.F.R. § 315.801.

(2) Excepted service.

(a) Preference eligible excepted service employees must serve a one year probationary equivalent time period.

(b) Nonpreference eligible excepted service employees must serve two years of "current continuous service . . . under other than a temporary appointment . . ." Forest v. Merit Systems Protection Bd., 47 F.3d 409 (Fed. Cir. 1995).

c. Significance of probationary status. 5 C.F.R. § 315.804 (requiring only notice of effective date and stated reason for termination of probationer); Toyens v. Dep't of Justice, 58 M.S.P.R. 634 (1993); Stanley v. Dep't of Justice, 58 M.S.P.R. 354 (1993); Pierce v. GPO, 70 F.3d 106 (1996).

2. Probationary period for new supervisors--one year. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.901-315.908; AR 690-300, ch. 315, subch. 9. If an employee fails to make a nonfrivolous allegation of discrimination based on partisan politics or marital status, the Board lacks jurisdiction to review an agency's action returning a supervisor to a previous grade and pay level. DeCleene v. Education, 71 M.S.P.R. 651 (1996).

## V. EMPLOYEE APPEAL AND GRIEVANCE RIGHTS.

A. Rights Depend On:

1. Type of action taken,

2. Collective bargaining agreement, and

3. Employee status.

B. Without a Collective Bargaining Agreement.

1. "True" adverse actions and appealable performance based actions -- Appeal to MSPB. 5 U.S.C. §§ 4303, 7513, and 7701.

2. Other actions -- Army Administrative Grievance Procedure. AR 690-700, Ch. 771.

C. With a Collective Bargaining Agreement.

1. "True" adverse actions and appealable performance based actions. 5 U.S.C. §§ 4303, 7121, and 7701. See Billops v. Dep't of Air Force, 725 F.2d 1160 (8th Cir. 1984).

a. Appeal to MSPB.

b. Grievance and arbitration.

2. Other disciplinary actions--Grievance and arbitration. 5 U.S.C. § 7121.

D. Employee Status. Competitive Service v. Excepted Service -- What significance? Employee rights in performance-based and adverse actions depend, in part, upon employee status.

1. Much Due Process:

a. Nonprobationary competitive service employees.

b. Nonprobationary-equivalent preference eligible excepted service employees.

c. Most nonprobationary-equivalent nonpreference eligible excepted service employees with more than two years of current continuous service.

2. Little Due Process:

a. Probationary competitive service and probationary-equivalent veterans' preference excepted service employees.

b. Nonpreference eligible excepted service employees with less than two years of current continuous service.

## VI. EMPLOYEE PERFORMANCE.

A. Performance Appraisal System. 5 U.S.C. § 4302; 5 C.F.R. Part 430; AR 690-400, Ch. 4302.

B. Total Army Performance Evaluation System (TAPES). AR 690-400, Ch. 4302.

C. Actions for Unacceptable Performance. 5 U.S.C. § 4303; 5 C.F.R. Part 432; and AR 690-400, Ch. 432 (Performance-Based Actions).

1. Counseling.

2. Reassignment.

3. Reduction in grade.

4. Removal.

D. Proof Requirements.

1. Performance appraisal system approved by OPM. Scillion v. Dep't of Health and Human Services, 45 M.S.P.R. 521 (1990); McKenzie v. Dep't of Interior, 16 M.S.P.R. 397 (1983); Griffin v. Dep't of Army, 23 M.S.P.R. 657 (1984).

2. Employee given written notice of performance standards. Standards themselves are subject to review and challenge. Dancy v. Dep't of Navy, 55 M.S.P.R. 331 (1992) (finding standard must "invoke general consensus as to its meaning and content"); Callaway v. Dep't of Army, 23 M.S.P.R 592 (1984).

3. Employee given notice of performance deficiencies. 5 C.F.R. § 430.204(j)(2). Smallwood v. Dep't of Navy, 52 M.S.P.R. 678 (1992).

a. Written notice.

b. Memo on SF 7-B of oral notice.

4. Employee given reasonable time to improve.

a. Opportunity to improve must be meaningful. Thomson v. Farm Credit Assoc., 51 M.S.P.R. 569 (1991); Sandland v. GSA, 23 M.S.P.R. 583 (1984).

b. Employee improvement during "performance improvement period" (PIP). Zoltowski v. Dep't of Army, 26 M.S.P.R. 525 (1985).

c. 5 C.F.R. § 432.106 - Employee must maintain acceptable performance for 1 year from beginning of PIP or no new PIP is required. Sullivan v. Dep't of Navy, 44 M.S.P.R. 646 (1990); Cohen v. General Servs. Admin., 53 M.S.P.R. 492 (1992).

5. Employee's performance in a critical element remains unsatisfactory. Bowling v. Dep't of Army, 47 M.S.P.R. 379 (1991); Johnson v. VA, 32 M.S.P.R. 443 (1987).

a. Employee Efficiency Rating.

b. Examples of employee's work product.

c. SF 7-B with annotations for all assistance to employee.

d. Supervisor's explanation.

6. Followed proper procedures. Harmless error rule. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3).

a. 30 days advance written notice.

b. Representation.

c. Oral and written replies.

d. Written decision and concurrence of supervisor in a position higher than proposing official.

7. Within 30 days after expiration of advance notice period.

8. Standard of Proof--Substantial evidence. 5 U.S.C. § 7701(c)(1)(A).

9. Alternative to Chapter 43 action--proceed as Chapter 75 action. Lovshin v. Dep't of Navy, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986); McGillivray v. FEMA, 58 M.S.P.R. 398 (1993); Cook v. EEOC, 50 M.S.P.R. 660 (1991); ); Shorey v. Dep't of Army, 77 M.S.P.R. 239, (1998).

10. MSPB cannot mitigate agency action under Chapter 43. Lisiecki v. MSPB, 769 F.2d 1558 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); Cook v. EEOC, 50 M.S.P.R. 660 (1991).

## VII. CIVILIAN EMPLOYEE MISCONDUCT.

A. Types of Actions and Procedural Requirements.

1. Informal actions: oral admonitions/warnings. AR 690-700, Ch. 751.1-3b.

2. Formal actions.

a. Written reprimands. AR 690-700, Ch. 751.3-2.

b. Suspensions for 14 days or less. 5 U.S.C. §§ 7501-7504; AR 690-700, Ch. 752.2-3.

3. "True" adverse actions. 5 U.S.C. §§ 7511-7514; AR 690-700, Ch. 752.3.

a. Types of actions.

(1) Suspensions for more than 14 days.

(2) Furloughs without pay.

(3) Reductions in grade or pay.

(4) Removals.

b. Procedures.

(1) 30 days advance written notice.

(2) Representation.

(3) Oral and written replies.

(4) Written decision.

B. Proof Requirements.

1. When charging employee misconduct charge only what you can prove. "It is not permissible for the MSPB to split a single charge of an agency into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original charge. If the agency fails to prove one of the elements of its charge, then the entire charge must fail." Burroughs v. Dep't of Army, 918 F.2d 170 (Fed. Cir. 1990); King v. Nazelrod, 43 F.3d 663 (1994).

2. An agency may charge an employee with both a substantive offense and with false statements (denials) concerning that offense. Lachance v. Erickson, 118 S.Ct.753 (1998) *overruling* King v. Erickson 89 F.3d. 1575 (Fed. Cir. 1996).

3. Employee committed the act of misconduct.

a. Independent evidence.

b. Evidence of conviction. Beasley v. Dep't of Defense, 52 M.S.P.R. 272 (1992); Otherson v. Dep't of Justice, 711 F.2d 267 (D.C. Cir. 1983).

c. Evidence of indictment. Brown v. Dep't of Justice, 715 F.2d 662 (D.C. Cir. 1983); Engdahl v. Dep't of Navy, 900 F.2d 1572 (Fed Cir. 1990); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976).

4. Nexus requirement: Such cause as will promote the efficiency of the service.

a. General Rule. Requirement to present evidence of nexus. Merritt v. Dep't of Justice, 6 M.S.P.R. 585 (1981).

b. Evidence of nexus.

(1) Current impact at the worksite.

(a) Morale problems in office caused by employee's conduct (other employees are uncomfortable working with/around this employee). Beasley v. Dep't of Defense, 52 M.S.P.R. 272 (1992); Sherman v. Alexander, 684 F.2d 464 (7th Cir. 1982), *cert. denied*, 459 U.S. 1116 (1983).

(b) Impairment of office operation (other employees have to pick up workload of problem employee). Sherman.

(c) Coworkers' apprehension about employee. Backus v. OPM, 22 M.S.P.R. 457 (1984).

(2) Impact on the organization in broader sense. Incident on agency premises requiring use of agency personnel to deal with misconduct. Ingram v. Dep't of Air Force, 53 M.S.P.R. 101, *aff'd*, 980 F.2d 742 (1992); Franks v. Dep't of the Air Force, 22 M.S.P.R. 502 (1984).

(3) Reasonable concern for future impact. Supervisor loses confidence in employee because of nature of misconduct and nature of job. Honeycutt v. Dep't of Labor, 22 M.S.P.R. 491 (1984).

c. Exception. Nexus may be presumed in certain "egregious circumstances." Graham v. U.S. Postal Service, 49 M.S.P.R. 364 (1991); Merritt v. Dep't of Justice, 6 M.S.P.R. 585 (1981) Hayes v. Dep't of Navy, 727 F.2d 1535 (Fed. Cir. 1984).

(1) Application of presumption. Johnson v. HHS, 22 M.S.P.R. 521 (1984); Williams v. GSA, 22 M.S.P.R. 476 (1984); Hayes v. Dep't of Navy, 727 F.2d 1535 (Fed. Cir. 1984).

(2) Employee rebuttal of presumption. Abrams v. Dep't of Navy, 714 F.2d. 1219 (3d Cir. 1983); Johnson; Williams.

5. Appropriateness of penalty choice.

a. "Douglas Factors." Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981). Relevant factors include:

(1) Nature and seriousness of offense;

(2) Employee's job;

(3) Employee's past disciplinary record;

(4) Employee's past work record;

(5) Effect of offense on employee's ability to perform job;

(6) Consistency with penalties to other employees for similar offenses;

(7) Consistency with agency's table of penalties;

(8) Impact on agency's reputation;

(9) Clarity of notice to employee that conduct proscribed;

(10) Potential for employee's rehabilitation;

(11) Mitigating circumstances;

(12) Adequacy of alternative sanctions to deter misconduct by this employee and others.

b. Must present evidence demonstrating consideration of relevant factors (even if employee does not contest propriety of choice). Parsons v. Dep't of Air Force, 707 F.2d 1406 (D.C. Cir. 1983).

6. Followed proper procedures. Harmless error rule. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3).

7. Standard of Proof - An agency must prove all elements of offense charged by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B)). Jacobs v. Dep't of Justice, 35 F.3d 1543 (Fed. Cir. 1994); Perez v. Dep't of Justice, 65 M.S.P.R. 287 (1994); Nazelrod v. Dep't of Justice, 50 M.S.P.R. 456 (1991).

8. Deference to agency in penalty selection--abuse of discretion standard. Uske v. U.S. Postal Serv., 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995); Betz v. General Servs. Admin., 55 M.S.P.R. 424 (1992); Schulmeister v. Dep't of Navy, 46 M.S.P.R. 13 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991).

a. When is agency's penalty choice an abuse of discretion? Miguel v. Dep't of Army, 727 F.2d 1081 (Fed. Cir. 1984).

(1) *De Minimis* misconduct. Skates v. Dep't of Army, 69 M.S.P.R. 366 (1996); Hunt v. U.S. Postal Serv., 29 M.S.P.R. 246 (1985); Taylor v. U.S. Postal Serv., 29 M.S.P.R. 350 (1985).

(2) Choice of maximum penalty not necessarily abuse of discretion. Stump v. Dep't of Transp., 761 F.2d 680 (Fed. Cir. 1985).

b. Not all agency charges sustained. When reviewing a case in which some, but not all, of the agency charges have been sustained, the Board may not independently determine penalties. When the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated wither in its final decision or during proceedings before the Board that it desires a lesser penalty be imposed on fewer charges. LaChance v. Devall, 178 F. 3d 1246 (1999).

c. Beware of mitigation. Barrett v. Dep't of Transp., 65 M.S.P.R. 186 (1994); Walsh v. Dep't of Veterans Affairs, 62 M.S.P.R. 586 (1994); Taylor v. Dep't of Justice, 60 M.S.P.R. 686 (1994).

C. Practice tips.

1. Early Labor Counselor involvement is essential. Evaluate the evidence. Develop the charges and ensure you can prove the elements.

2. Address the relevant *Douglas* factors in notice of proposed action.

3. Address the relevant *Douglas* factors in the final decision letter.

4. Have the deciding official state the appropriate penalty for each charge he sustains, and then the appropriate cumulative penalty.

5. Present testimony of deciding official at MSPB hearing.

6. Use the table of penalties.

7. Be reasonable!!

## VIII. CONCLUSION.

# CHAPTER U

# FEDERAL LABOR-MANAGEMENT RELATIONS OVERVIEW

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# Outline of Instruction

*The Congress finds that [union participation]-*
*safeguards the public interest,*
*contributes to the effective conduct of public business, and*
*facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment. . .*
*Therefore, labor organizations and collective bargaining in the civil service are in the public interest.* (5 U.S.C. § 7101).

## I. REFERENCES.

A. Title VII, Civil Service Reform Act of 1978. 5 U.S.C. §§ 7101-7135.

B. Executive Order 12,871, 58 Fed. Reg. 52,201 (1993).

C. Regulations of Program Authorities. 5 C.F.R. §§ 2420-2472.

D. DOD Directive 1400.25M, Subchapter 711, Labor-Management Relations in the Department of Defense, 20 December 1995.

E. Government Reporting Services.

1. Reports of the Federal Labor Relations Council/Authority (published by U.S. Gov't Printing Office).

2. Releases of the Federal Service Impasses Panel (published by U.S. Gov't Printing Office).

F. *The Army Lawyer*, Labor and Employment Law Notes.

G. Law of Federal Labor-Management Relations, JA 211 (July 2000).

H. Peter B. Broida, A Guide to Federal Labor Relations Authority Law and Practice (13th ed. 2000), Dewey Publications, Inc., P. O. Box 663, Arlington, Virginia 22216.

# II. INTRODUCTION.

A. Civilian Work Force and Unions (As of January 1997).

1. Exclusive Recognition by Agencies.

| | |
|---|---|
| Federal Employees Represented Government Wide: | 1,098,072 |
| Decrease From 1993: | 164,787 |
| Percentage Of All Federal Employees: | 59% |
| Percentage Represented in 1993 | 59% |

2. Percentage of Employees Organized, by Agency.

| AGENCY | PERCENTAGE REPRESENTED |
|---|---|
| Air Force | 74% |
| Army | 59% |
| Navy | 57% |

3. Exclusive Recognition by Major Unions.

| UNION | EMPLOYEES REPRESENTED |
|---|---|
| AFGE | 596,206 |
| NTEU | 136,577 |
| NFFE | 123,660 |
| NAGE | 54,712 |
| MTC | 25,256 |
| IAM | 20,633 |

AFGE - AMERICAN FEDERATION OF GOV'T EMPLOYEES
NFFE - NATIONAL FEDERATION OF FED. EMPLOYEES
NTEU - NATIONAL TREASURY EMPLOYEES UNION
MTC - METAL TRADE COUNCIL
NAGE - NATIONAL ASSOCIATION OF GOV'T EMPLOYEES
IAM - INTERNATIONAL ASSOC. OF MACHINIST

B. Responsibilities of the Labor Counselor.

1. Aids in making policies and procedures for the administration of labor/management relations.

2. Participates in contacts with the exclusive representative.

3. Represents management (command) in third-party proceedings.

4. Renders legal advice to the management team when it is negotiating a collective bargaining agreement (CBA).

5. Renders legal advice on the interpretation and application of the CBA.

## III. BASIC TERMINOLOGY.

A. Agencies of the Federal Sector. This includes any Executive branch agency, the Library of Congress, and the Government Printing Office. It excludes most agencies with law enforcement and national security missions.

1. Agencies that are specifically excluded include:

a. The General Accounting Office;

b. The Federal Bureau of Investigation;

c. The Central Intelligence Agency;

d. The National Security Agency;

e. The Tennessee Valley Authority;

f. The Federal Labor Relations Authority; and

g. The Federal Service Impasses Panel.

2. President's Authority.

a. The President may issue an order excluding any agency or subdivision of any agency from the coverage of the Statute if the President determines that:

(1) The agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(2) The provisions of the Statute cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations. 5 U.S.C. § 7103(b).

b. The President may issue an order suspending any provision of the Statute with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia if the President determines that the suspension is necessary in the interest of national security. 5 U.S.C. § 7103(b)(2).

(1) NFFE and H.Q. U.S. Army, Korea, 4 FLRA 68 (1980); DOD, DA and 8th Army, Korea v. FLRA and NFFE, 685 F.2d 641 (D.C. Cir. 1982).

(2) Executive Order 12,391, 4 November 1982. Partial Suspension of Federal Service Labor-Management Relations Statute Overseas.

B. Employee. 5 U.S.C. §§ 7103(a)(2) and (3).

1. Person employed in an agency, or person whose employment has terminated because of an Unfair Labor Practice (ULP).

2. Statutory exclusions.

a. Alien or noncitizen of the U.S. who occupies a position outside the U.S;

b. Member of the uniform services;

c. Supervisor or a management official;

d. An officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

e. Any person who participates in a strike in violation of § 7311.

C. Bargaining Unit. Group of employees with similar interests.

1. Statutory criteria. 5 U.S.C. § 7112(a). The Authority examines the totality of the circumstances in each case in making appropriate unit determinations under § 7112(a)(1) of the Statute. Naval Fleet and Industrial Supply Center, Norfolk and AFGE Local 53, 52 FLRA 950 (1997); DOJ, Office of the Chief Immigration Judge, Chicago, and AFGE, 48 FLRA 620 (1993).

2. In determining appropriate bargaining units, the FLRA considers three factors:

   a. The unit must ensure a clear and identifiable *community of interest* among the employees in the unit.

      (1) The Authority has not specified individual factors or the number of factors required to determine that employees share a community of interest. Health and Human Services, Region II, and NTEU, 43 FLRA 1245 (1992).

      (2) Among the factors considered are: the work performed; skills, training and education of the employees; geographic proximity of work sites; relationship of the work; common supervisors; organizational relationships; common applicability of personnel practices and working conditions; and bargaining histories. Redstone Arsenal and AFGE, 14 FLRA 150 (1984); DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA 620 (1993).

   b. The unit must promote *effective dealings* with the agency involved.

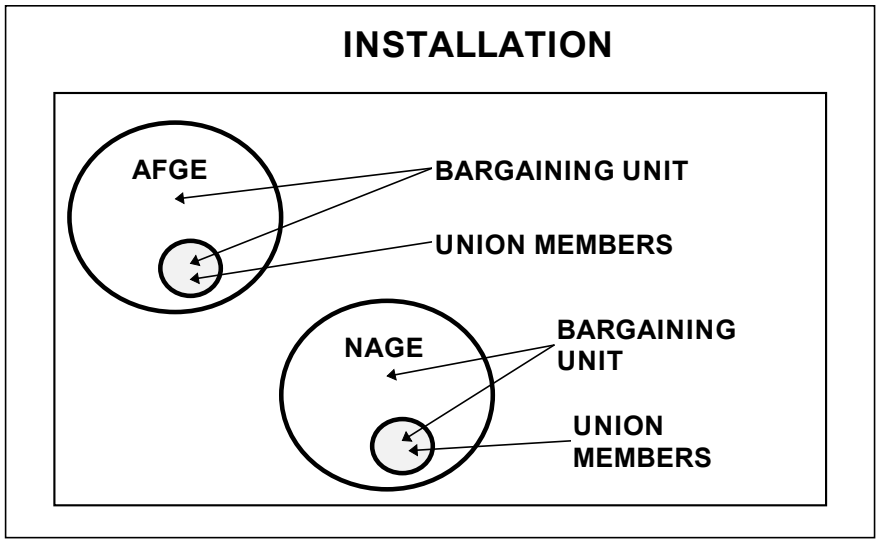
      (1) Will there be authority at the level of organization to make decisions for the group?

(2) Factors to consider include: the level at which negotiations will take place, at what point grievances will be processed, whether substantial authority exists at the level of the unit sought, and bargaining history. U.S. DoD, National Guard Bureau and Association of Civilian Technicians, 55 FLRA No. 115 (1999) (concluding that a proposed consolidation of existing bargaining units in 39 states and representing about 53% of eligible National Guard technicians nationwide was not appropriate); DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA at 637; DLA, Defense Plant Representative Office-Thiokol, and NFFE, 41 FLRA 316, 328-329 (1991).

c. The unit must promote *efficiency of the operations* of the agency involved.

(1) Is the unit size and make-up appropriate to allow for necessary interactions without duplication of effort and excessive disruption of the mission?

(2) Factors to consider include: relationship of the bargaining unit to the agency's organizational and operational structure; the degree to which there is interchange outside the unit sought; the extent of differences with other groups of employees outside the unit sought; whether negotiations would cover problems common to employees in the unit; and bargaining history. *See* Naval Fleet and Industrial Supply Center, Norfolk and AFGE Local 53, 52 FLRA 950 (1997).




3. Mandatory Exclusions. A unit cannot include any of the following categories of employees:

a. Any management officials or supervisors, unless they have been historically included in the unit.

(1) Supervisors. 5 U.S.C. §§ 7103(a)(10) and 7112(b)(1); Interpretation and Guidance, 4 FLRA 754 (1980) (agency determination, for merit pay, that employee is manager or supervisor has no impact on inclusion in unit).

(a) Can they hire, fire, assign work, promote, suspend, or recommend any of the above in more than just a clerical capacity?

(b) Must supervise "employees" as defined in 5 U.S.C. § 7103.

(2) Management officials. 5 U.S.C. §§ 7103(a)(11) and 7112(b)(1); Internal Revenue Service, 9 FLRA 175 (1982) (public affairs specialist implements rather than shapes policy); New York N.G., 9 FLRA 16 (1982) (agency attorneys are not management officials because they implement policy rather than formulate policy).

(a) Do they formulate, determine, or influence agency policy?

(b) Dep't of Agriculture, Food and Nutrition Service, 34 FLRA 143 (1989) (computer specialist not management official since would only advise manager in event of problem); EPA, Research Triangle Park, 12 FLRA 358 (1983) (ADP security specialist was management official because he developed security policy and had authority to shut down the facility in event of security breach).

b. Any confidential employee. 5 U.S.C. §§ 7103(a)(13) and 7112(b)(2); Bureau of Mines, 9 FLRA 14 (1982) (secretaries to research directors are confidential employees where directors effectuated policy in labor management relations); GSA National Archives and Records Service, 8 FLRA 333 (1982) (member of management negotiating team).

c. Any employee engaged in personnel work in other than a purely clerical capacity. 5 U.S.C. § 7112(b)(3).

d. Any employee engaged in administering the provisions of the Statute. 5 U.S.C. § 7112(b)(4).

e. Professional employees in the same unit as other employees only if a majority of the professional employees vote for inclusion in the unit. 5 U.S.C. §§ 7103(a)(15) and 7112(b)(5).

(1) A professional employee means an employee engaged in the performance of work:

(a) Requiring the knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or hospital;

(b) Requiring the consistent exercise of discretion and judgment in its performance;

(c) Which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work);

(d) Which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(2) An employee who has completed the courses of a specialized intellectual instruction and study prescribed above, and is performing related work under an appropriate direction or guidance to qualify the employee as a professional employee.

f. Any employee engaged in intelligence, counterintelligence, investigative, or security work that directly affects national security. 5 U.S.C. § 7112(b)(6).

g. Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity. 5 U.S.C. § 7112(b)(7). The test is are the employees involved in the design, analysis, or monitoring of security systems and procedures?

h. Temporary employees. Generally no community of interest. Federal Aviation Technical Center, 44 FLRA 1238 (1992) (temporary detail of supervisor to unclassified position, for over a year, during investigation did not justify including him in union); *but see* Lower Rio Grande Valley District Office and AFGE Local 3904, 16 FLRA 180 (1984) (temps with "reasonable expectancy of continued employment" may be in bargaining unit).

D. Exclusive Representative. Any labor organization which is certified under the Statute as the sole representative of employees in an appropriate unit, or that was recognized as such immediately before the effective date of the Statute and continues to be so recognized. 5 U.S.C. § 7103(a)(16).

1. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

2. An exclusive representative must adopt and subscribe to standards of conduct that assure it will maintain democratic principles and a system of financial responsibility. 5 U.S.C. § 7120.

a. The Assistant Secretary of Labor for Labor Management Relations is responsible for the standards of conduct for labor organizations.

b. Criteria. 5 U.S.C. § 7103(a)(4). A labor organization cannot:

(1) Deny membership because of race, color, creed, national origin, sex, age, civil service status, political affiliation, marital status, or handicapping condition;

(2) Advocate the overthrow of the United States government;

(3) Be sponsored by the agency; or

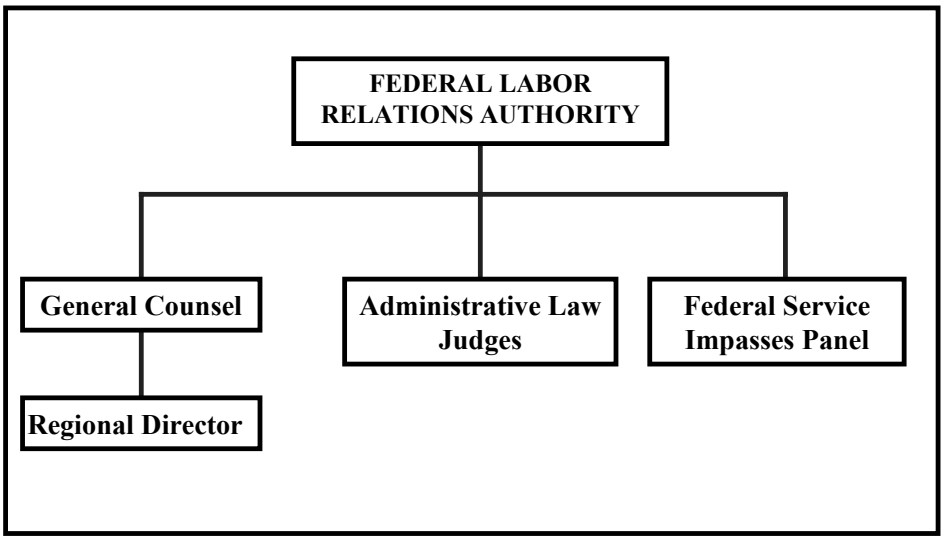
(4) Participate in a strike.

E. Collective Bargaining Agreement. The contract. An agreement negotiated by management and the exclusive representative.

F. Unfair Labor Practice. A violation of the labor statute by an individual, agency, or union.

G. Grievance. A violation of the collective bargaining agreement by an individual, agency, or union.

# IV. PROGRAM AUTHORITIES.




**Federal Labor Relations Authority**

A. Federal Labor Relations Authority. 5 U.S.C. § 7104.

1. Overall program administration.

2. Makes negotiability determinations.

3. Renders final decisions in unfair labor practices (ULPs).

4. Reviews arbitration awards.

B. General Counsel. 5 U.S.C. § 7104(f).

1. Prosecutes unfair labor practices.

2. Supervises the Regional Directors.

C. Regional Directors.

1. Seven locations.

   a. Boston. (Includes Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Eastern Pennsylvania, Rhode Island, and Vermont.)

   b. Washington, D.C. (Includes the District of Columbia, Maryland, and Virginia.)

   c. Atlanta. (Includes Alabama, Florida, Georgia, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and the Virgin Islands.)

   d. Chicago. (Includes Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Eastern Missouri, Ohio, Western Pennsylvania, West Virginia, and Europe.)

   e. Dallas. (Includes Arkansas, Louisiana, Oklahoma, Texas, and Panama.)

   f. Denver. (Includes Alaska, Arizona, Colorado, Idaho, Kansas, Western Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming.)

   g. San Francisco. (Includes California, Hawaii, Oregon, Washington, and Asia.)

2. Determine appropriate bargaining units.

3. Investigate ULPs.

4. Supervise elections.

D. Administrative Law Judges. 5 U.S.C. § 7105(e)(2), 5 C.F.R. § 2421.9. Hear ULP complaints.

# V. UNION ORGANIZING.

A. Elections. 5 U.S.C. § 7111(a).

1. Timeliness Requirements.

a. Election Bar. 5 U.S.C. § 7111(b), 5 C.F.R. § 2422.12(a).

(1) The Rule: An election is not permitted within 12 months of a previous election in which the union failed to obtain the requisite number of votes.

(2) For the rule to apply, the bargaining unit must be the same unit or a subdivision thereof.

b. Certification Bar. 5 U.S.C. § 7111(f)(4) and 5 C.F.R. § 2422.12(b). An election is not permitted within 12 months of certification of a labor organization as the exclusive representative for the bargaining unit.

c. Contract/Agreement Bar. 5 U.S.C. § 7111(f)(3), 5 C.F.R. § 2422.12(d) & (e).

(1) The Rule: A labor organization that desires to displace an incumbent exclusive representative may file a petition:

(a) Upon termination of the CBA if CBA is in existence for 3 years or less, or

(b) If the CBA is in existence for greater than 3 years, at the 3 year point.

(c) If filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement.

(2) Purpose of the Contract/Agreement Bar.

(3) If there is no termination date or it is indefinite, there is no Agreement Bar.

(4) Agreement signed the same day as a petition is filed will act as a bar unless the Agency received notice that the petition was filed before the agreement was signed. III Corps & Fort Hood and NFFE, 51 FLRA 934 (1996).

d. Bar During Agency Head Review. 5 C.F.R. § 2422.12(c). Bars petitions during any period of agency head review under 5 U.S.C. § 7114. Bar expires after:

(1) Thirty days, or

(2) Agency head takes action on the Collective Bargaining Agreement.

2. Regional Director Conducts or Supervises the Election. 5 C.F.R. § 2422.23.

a. Showing of Interest.

(1) Definition and Purpose. 5 U.S.C. § 7111(b)(1)(A) and 5 C.F.R. § 2421.16.

(2) Evidence of showing of interest.

(a) Authorization cards or affidavits.

(b) Dues allotment forms or records.

(3) Minimum interest requirements. 5 C.F.R. §§ 2422.9 & 2422.10.

(a) Thirty percent for original representation petition.

(b) Intervening unions - ten percent within 10 days of posting notice of an upcoming election.

(c) Incumbent - automatically included.

(4) Equivalent Status. Equivalent status achieved when Regional Director determines that showing of interest is adequate and notifies parties. DoD and Education Association of Panama, 44 FLRA 419 (1992).

(a) It is an ULP to assist a labor organization lacking equivalent status. 5 U.S.C. § 7116(a)(3); Gallup Indian Medical Center, Gallup, New Mexico, 44 FLRA 217 (1992).

(b) Unions with equivalent status are entitled to "customary and routine" services and facilities. U.S. Army Air Defense Center, Fort Bliss, Texas, 29 FLRA 362 (1987).

b. Notice of election is posted. 5 C.F.R. § 2422.23(b).

c. Consent agreement is negotiated.

d. Observers are appointed. 5 C.F.R. § 2422.23(h).

e. Challenged ballots are impounded. 5 C.F.R. § 2422.24.

3. Labor organization needs the vote of a majority of eligible employees who vote to win. 5 U.S.C. § 7111(a).

a. Run-off Election, 5 C.F.R. § 2422.28: Three or more on the ballot and none gets a majority of the valid votes cast but can eliminate one or more parties.

b. Inconclusive Election, 5 C.F.R. § 2422.29: Three or more on the ballot, none gets a majority of the valid votes cast and all are tied or all are tied except one who has a greater number (but not majority) of votes.

4. Objections to Election. 5 C.F.R. § 2422.26.

a. Grounds.

b. Regional Director's Preliminary Investigation.

c. Hearing if there is a relevant issue of fact. 5 C.F.R. § 2422.27.

d. Regional Director issues a decision. 5 C.F.R. § 2422.27(c). This decision may be appealed to the Authority. 5 C.F.R. § 2422.31.

5. Certification. 5 C.F.R. § 2422.32.

B. Nonemployee Access on the Installation.

1. No "right" to access.

a. Babcock v. Wilcox, 351 U.S. 105 (1956). The case involved an attempt by union organizers to distribute literature in the private parking lot of a plant. The Court held that an employer may deny access to property by nonemployee union organizers, provided (1) the union is reasonably able to communicate with the employees by other means, and (2) the employer's denial does not discriminate against the union by permitting other unions with equal status to solicit or distribute literature.

b. First Amendment Issue. National Treasury Employees Union v. King, 798 F.Supp. 780 (D.D.C. 1992) (the NTEU successfully raised a constitutional challenge to the limitation of outside union solicitation in public areas under the control of a federal agency, when that agency has treated the location as a public forum).

c. NTEU v. FLRA, 55 FLRA No. 158 (1999) (explaining that if an employer maintains a "no-solicitation" policy, it may ban non-employee union solicitation while at the same time permitting a small number of beneficent organizations on its premises).

2. Inaccessible Employees. Barksdale Air Force Base and NFFE, 45 FLRA 659 (1992) (ULP to allow nonemployee representative unless union can show that despite diligent effort, it has been unable to reach the agency's employees through reasonable, alternative means of communication).

- Reasonable means include: mailings, TV and radio ads, billboards, information booths at shopping centers or commuter stations, and/or employee organizer(s).

C. Employees' Right to Solicit Union Membership on the Installation.

1. Generally, cannot prohibit solicitation on the installation in non-work areas during non-work time.

a. Department of Commerce and Hanlon, 26 FLRA 311 (1987) (ULP to prohibit employee union solicitation in work area during non-work times, absent evidence of disruption);

b. GSA and Hanlon, 26 FLRA 719 (1987) (ULP to prohibit showing of union recruiting movie during nonwork times in nonwork areas of federal building, including lobby);

c. GSA and Hanlon, 29 FLRA 684 (1987) (ULP to limit times Hanlon could use lobby and content of union materials).

2. May restrict solicitation on the installation. GSA, 9 FLRA 213 (1982) (not ULP to prohibit desk-to-desk distribution of union leaflets in work area).

3. May restrict wearing of union paraphernalia while on duty. DOJ v. FLRA, 955 F.2d 998 (5th Cir. 1992) (Border Patrol officers proposed to wear union pins with uniform); AFGE and Idaho Army and Air National Guard, 32 FLRA 539 (1988) (military technicians proposed special patches).

4. Treat exclusive representative equal to private organizations operating on the activity. IRS and NTEU, 42 FLRA 1034 (1991) (union request to hold bake sale).

D. Management Neutrality. 5 U.S.C. §§ 7116 (a)(1) - (a)(3) and 7102.

1. Management may not aid, nor hinder, the union organization effort. Air Force Plant Rep. Office, 5 FLRA 492 (1981) (commander's published comments "implying that unions were unnecessary, undesirable, and difficult to remove" considered improper); and DA, Fort Sill, Oklahoma, 29 FLRA 1110 (1987) (photograph of union officials with Army and White House representatives during contested election improper).

2. Management may act and speak in some instances. 5 U.S.C. § 7116(e).

a. Publicize election and encourage employees to vote.

b. Correct the record.

c. Inform employees about Government policy concerning labor-management relations.

## VI. SCOPE OF COLLECTIVE BARGAINING.

A. Philosophy.

1. 5 U.S.C. § 7114(a)(4) provides that the ". . . agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and *negotiate in good faith* for the purpose of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist any negotiation." (emphasis added)

2. The refusal to negotiate in good faith is an ULP.

a. Management. 5 U.S.C. § 7116(a)(5).

b. Union. 5 U.S.C. § 7116(b)(5).

B. Bargaining in good faith includes the obligations to:

1. "[B]e represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment . . ." 5 U.S.C. § 7114(b)(2).

2. "[M]eet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays." 5 U.S.C. § 7114(b)(3). AAFES McClellan Base Exchange, McClellan Air Force Base, California and AFGE Local 1857, 35 FLRA 764 (1990); Department of the Army, Lexington Bluegrass Army Depot, Lexington, Kentucky, v. Local 894 AFGE, AFL-CIO, 89 FSIP 143 (1990).

3. "[A]pproach negotiations with a sincere resolve to reach a collective bargaining agreement." 5 U.S.C. § 7114(b)(1).

4. "[F]urnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law*, data which is normally maintained by the agency in the regular course of business; which is *reasonably available* and *necessary* for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . ." 5 U.S.C. § 7114(b)(4).

a. To the extent not prohibited by law. This applies mainly to Privacy Act concerns.

(1) The Privacy Act precludes the release of name and home addresses of federal employees to the union. United States Department of Defense v. FLRA, 510 U.S. 487 (1994).

(2) The Privacy Act applies to all union requests for information. FAA, New York TRACON, Westbury, NY and National Air Traffic Controllers Association, 50 FLRA 338 (1995).

(3) If sanitized information will serve the purpose and protect Privacy Act concerns, that information must be provided. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (The agency violated the FSLMRS by failing to provide the union with copies of sanitized disciplinary action taken against employees similarly situated with the bargaining unit employee that the union was representing).

b. Reasonably Available.

(1) Request cannot be excessive or outrageous. DOJ v. FLRA, 991 F.2d 285 (5th Cir. 1993).

(2) Destroying requested information can be a ULP. SSA, Dallas and AFGE, AFL-CIO, Local 1336, 51 FLRA 1219, 1224-1226 (1996).

(3) Failure to inform union that information no longer exists is an unfair labor practice. SSA, Dallas and AFGE, AFL-CIO, Local 1336, 51 FLRA 1219, 1226-1227 (1996).

(4) Failure to provide the information in a timely manner is an unfair labor practice. HQDA, 90th Regional Support Command and AFGE, Local 1017, 1999 FLRA LEXIS 200, FLRA ALJ Dec. No. 144 (1999) (finding the agency committed an ULP when it did not give the union documents when it asked for them and instead told the union it could have official time to make copies itself).

c. Necessary.

(1) The union must show a "particularized need" for the information. This is a link between the information sought and the duties of representation. IRS, Kansas City and NTEU, 50 FLRA 661 (1995) (adopting one standard for determining whether information is necessary to provide to a union under 5 U.S.C. § 7114(b)(4)); AFGE, AFL-CIO, Local 2343 v. FLRA, 144 F.3d 85 (D.C. Cir. 1998) (affirming FLRA's determination that a union's mere statement that it needed certain information to prepare for arbitration did not satisfy the articulation and particularized need requirements of § 7114(b)(4)(B)); U.S. Dep't of Justice, INS v. FLRA, 144 F.3d 90 (D.C. Cir 1998) (affirming FLRA's decision that even though a union is not obligated to provide representation to a bargaining unit employee in responding to a proposed removal, if it does provide representation, then the union is entitled to exercise its right to request information under the Statute).

(2) It is a ULP to refuse to provide documentation when the union has shown a particularized need for the information and no countervailing interests outweigh that need. AFGE Local 2343 v. FLRA, 144 F.3d 85 (D.C. Cir. 1998) (rejecting union's claim that particularized need is automatically established when requested documents discuss a specific incident); DOJ, INS v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (agency committed ULP when it failed to give union a copy of an investigatory file for which union showed it had a particularized need); Air Force v. FLRA, 104 F.3d 1396 (D.C. Cir. 1997) (agency violated the FSLMRS when, after the union had shown a particularized need for information concerning disciplinary action taken against a supervisor who allegedly used physical force against a BU member, the agency failed to provide the requested documentation); DOJ v. FLRA, 991 F.2d 285 (5th Cir. 1993) (union failure to disclose why documents were necessary for grievance of performance appraisal); SSA, Dallas and AFGE, AFL-CIO, Local 1336, 51 FLRA 1219 (1996) (union failed to establish that disclosure or "memory joggers" was necessary); U.S. Border Patrol & AFGE, 47 FLRA 684 (1993) (agency ordered to disclose all proposal and decision letters in the region).

d. The agency's statutory duty to furnish information extends to the full range of representational activity, not just in the context of pending negotiations between labor and management. FAA and National Air Traffic Controllers, 55 FLRA 254 (1999) (finding that the agency committed an ULP by not giving the exclusive representative of bargaining unit employees information that was necessary for it to determine seniority under the parties' collective bargaining agreement).

5. If an agreement is reached, sign and implement the agreement. 5 U.S.C. § 7114(b)(5).

C. When to Bargain.

1. Contract: Management must negotiate with a new exclusive representative at the inception of a new contract and before renewal of an existing contract.

2. Mid-Contract: When appropriate, management must continue to negotiate during the life of the contract.

a. Either party may refuse to bargain over issues covered by the CBA. Health and Human Services and AFGE, 47 FLRA 1004 (1993).

b. Both sides must negotiate over management-initiated midterm proposals.

c. Union's right to initiate midterm bargaining.

(1) Depends on statutory interpretation by the FLRA. *See* NFFE, Local 1309, v. Dep't of the Interior, 119 S. Ct. 1003 (1999) (In reversing a lower court holding that the statutory duty to bargain does not include midterm bargaining (or bargaining about midterm bargaining), the Supreme Court held that the Federal Labor Relations Authority has the legal power to determine whether the parties must engage in midterm bargaining (or bargaining about that matter)).

(2) Unions have a statutory right to initiate midterm bargaining. Department of the Interior and National Fed'n of Fed. Employees, Local 1309, 56 FLRA 45 (2000) (concluding that an agency must bargain over a proposal that obligates it to bargain over midterm issues not covered by the CBA).

D. What to Bargain.

1. Conditions of Employment Are Negotiable. 5 U.S.C. § 7102(2).

*"Personnel policies, practices, and matters, . . . affecting working conditions"* 5 U.S.C. § 7103(a)(14).

a. Examples of "Conditions of Employment".

(1) Wages and Benefits. Fort Stewart Schools v. FLRA, 110 S.Ct. 2043 (1990) (proposal concerning mileage reimbursement for teachers negotiable); Department of the Army v. FLRA, 914 F.2d 1291 (9th Cir. 1990) (proposals for holiday and disability insurance for NAFI employees negotiable).

(2) Amount charged for food served in agency cafeteria. Marine Corps Logistics Base, Barstow, 46 FLRA 782 (1992) (price of soda in vending machines negotiable); Department of Veterans Affairs and NAGE, 44 FLRA 162 (1992) (price of food in cafeteria negotiable).

(3) Removal of vending machines and microwave oven from break area. Department of Veterans Affairs and NAGE, 44 FLRA 179 (1992) (movement of good vending machines to another location was negotiable).

(4) Subscription to the Federal Times Newspaper. SSA and AFGE, 37 FLRA 880 (1990) (termination of office copy of newspaper was negotiable).

(5) Location of water coolers. Department of Labor and AFGE, 37 FLRA 25 (1990) (removal of temporary water cooler not removed after completion of repairs was negotiable).

(6) Office with a "view." NFFE and EPA, 39 FLRA 291 (1991) (time limits on relocation to windowless office while office repaired are negotiable).

b. Examples of items **not** found to be "Conditions of Employment."

(1) Matters concerning individuals not in the bargaining unit. AFGE v. FLRA, 110 F.3d 810 (D.C. Cir. 1997) (A proposal which directly implicates or purports to regulate supervisors' conditions of employment by redefining RIF competitive areas which included supervisors, was outside of the duty to bargain because supervisors are not members of the bargaining unit); ACT and State of New York, Division of Military and Naval Affairs, 11 FLRA 475 (1983) (proposal concerning filling military positions not negotiable); NAGE Local 2272 and Scott AFB, 7 FLRA 710 (1982) (proposal concerning discipline of managers and supervisors not negotiable).

(2) Use of recreational facilities while on off-duty status was not negotiable. NAGE, Local R5-168 and DA, 19 FLRA 552 (1985).

(3) Proposal that Agency will forgive an outstanding debt owed to it by a NAFI was not negotiable. IFPTE and Dep't of Navy, 44 FLRA 302 (1992).

c. Proposal must rise to the level that creates a bargaining obligation. GSA Region 9 and NFFE Local 81, 52 FLRA 1107 (1997) (agency was not required to bargain over temporarily relocating a BU employee from one building to another because the effect was de minimis); HHS and AFGE, 24 FLRA 403 (1986) (change in employee's title, but not duties, did not create a duty to bargain).

2. Topics Precluded From Negotiation by Statute.

a. Proposals That Conflict With Any Federal Statute Are Not Negotiable. GSA v. FLRA, 86 F.3d 1185 (D.C. Cir., 1997) (determination of whether GSA police officers could legally carry firearms home between shifts under the authorizing statute was a matter for the Administrator to decide, not the FLRA).

b. Proposals That Conflict With Government-Wide Rules or Regulations (also referred to as "outside agency" regulations) Are Not Negotiable (5 U.S.C. § 7117(a)(2) and (3)).

(1) What are Government-Wide Regulations? Regulations and official declarations of policy that apply to the Federal civilian workforce as a whole and are binding on the Federal agencies and officials to which they apply. Defense Contract Audit Agency, Central Region and AFGE, 47 FLRA 512, 521 (1993).

(2) Notice of government-wide regulations that conflict with CBA. Fort Hood and AFGE, 40 FLRA 636 (1991) (notice required before change in government-wide regulation is included in automatically reviewed contract); U.S. Customs Service, 9 FLRA 983 (1982) (union proposal that when Government-wide regulations are issued after the date the agreement becomes effective, the contract will prevail, was negotiable).

c. Proposals That Conflict With Agency Regulations - Where There is a Compelling Need.

(1) Procedures. 5 C.F.R. Part 2424 (revised April 1999). Proper forum to address the question is negotiability proceedings, not ULP hearing. FLRA v. Aberdeen Proving Ground, 485 U.S. 409 (1988) (agency refused to bargain alleging compelling need, no ULP).

(2) Compelling need criteria. 5 C.F.R. § 2424.50; NTEU and FDIC, 14 FLRA 179 (1984) (union proposal about when members can take compensatory time was negotiable because no compelling need).

(a) The rule or regulation is essential to the accomplishment of the mission of the agency.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency under law or outside authority, which is essentially nondiscretionary in nature.

d. Proposals that conflict with MACOM/Local Regulations must be negotiated. 5 U.S.C. § 7117(a)(3).

e. Matters Contrary to Statutory Management Rights Are Not Negotiable. 5 U.S.C. § 7106(a).

(1) Mission, budget, organization, numbers of employees, and internal security practices.

(2) In accordance with applicable laws -- to hire, assign, direct, layoff, and retain employees; or to suspend, remove, reduce in grade or pay, or to take disciplinary action against such employees. 5 U.S.C. § 7106(a)(2)(A).

(3) To assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted. 5 U.S.C. § 7106(a)(2)(B).

(4) Filling positions by promotions and appointments. 5 U.S.C. § 7106(a)(2)(C). NFFE, Local 1745 v. FLRA, 828 F.2d 834 (D.C. Cir. 1987) (proposal for union membership on rating and ranking panels was not negotiable); Department of Treasury, 24 FLRA 494 (1986) (union proposal that management consider unit members first for vacancies was negotiable).

f. Emergency actions. 5 U.S.C. § 7106(a)(2)(D). IBEW, Local 350 and Army Corps of Engineers, St. Louis, Missouri, 55 FLRA 243 (1999) (finding that the term "emergency" is now negotiable and stating that previous FLRA decisions that held that defining "emergency" automatically affected a management right would no longer be followed).

3. Permissive/Optional Areas of Negotiation. 5 U.S.C. § 7106(b)(1).

a. The Numbers, Types, and Grades of Employees or Positions Assigned to any Organizational Subdivision, Work Project, or Tour of Duty (commonly called "Staffing Patterns"). NFFE Local 2148 and U.S. Department of the Interior, Office of Surface Mining, Albuquerque, NM, 53 FLRA 427 (1997) (Proposals seeking to add positions and fill vacancies concern staffing patterns and are negotiable at the election of the agency).

b. Technology, Methods and Means of Performing Work. AFGE and SSA, 11 FLRA 576 (1983) (union proposal that all examiners have a phone on their desk was a permissive topic).

c. The Rule:

(1) Management has the discretion to negotiate. 5 U.S.C. § 7106(b)(1).

(2) Management may negotiate the proposal, then declare it non-negotiable. National Park Service, 24 FLRA 56 (1986) (union proposal requiring help or mechanical aides for lifting heavy objects a permissive topic).

(3) Once agreement is reached, proposal under § 7106(b) may not be declared non-negotiable. National Park Service, 24 FLRA 56 (1986) (agreement could not be declared non-negotiable at agency head review).

(4) If the parties disagree over whether a proposal is a permissive topic or a management right not subject to negotiation, the FLRA will first determine whether a proposal is within the duty to bargain, and then, if necessary, address claims that would determine whether a proposal is electively negotiable. AFGE, Local 222 and HUD, 54 FLRA 171 (1998).

4. Effect of Executive Order 12,871, 1 Oct 1993 on Permissive Topics.

a. Language.

*SEC. 2. IMPLEMENTATION OF LABOR-MANAGEMENT PARTNERSHIPS THROUGHOUT THE EXECUTIVE BRANCH. The head of each agency subject to the provisions of chapter 71 of title 5 United States Code shall: . . .*

*(d) Negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same; . . .*

*SEC. 3. NO ADMINISTRATIVE OR JUDICIAL REVIEW. This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.*

b. FLRA Decisions: Executive Order 12,871 is not an election to bargain. Department of Commerce Patent and Trademark Office and Patent Office Professional Association, 53 FLRA 858 (1998) (partial decision and procedural order); NAGE v. FLRA, 1999 U.S. App. LEXIS 14172 (June 25, 1999) (holding that section 2(d) of Executive Order 12871 did not effect an election by the agency to negotiate on matters covered by 5 U.S.C. §7106(b)(1)).

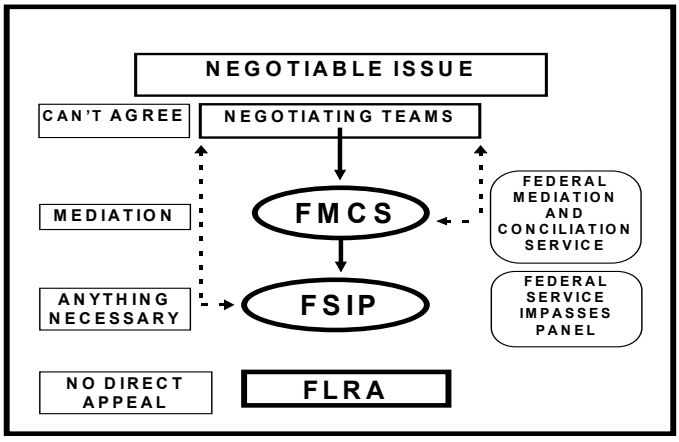
c. Court Decisions: Executive Order 12,871 is not an election to bargain. National Ass'n of Gov't Employees v. FLRA, 179 F.3d 946 (D.C. Cir. 1999); American Fed'n of Gov't Employees, Council 147 v. FLRA No. 98-70912, 204 F.3d 1272 (9th Cir. 2000).

5. Management Must Usually Negotiate "Impact and Implementation" of a Non-negotiable Management Right Decision. 5 U.S.C. § 7106(b)(2) & (3).

a. Procedures to be utilized in exercising a management right.

b. To lessen the impact on employees adversely affected by the exercise of management rights.

## VII. IMPASSE RESOLUTION.




**Impasse Resolution Process**

A. Federal Mediation and Conciliation Service (FMCS). 29 C.F.R. Part 1403.

1. Notification to Federal Mediation and Conciliation Service.

a. Prior to Contract Expiration.

b. Upon Impasse.

2. Functions of the FMCS.

a. Mediation. Suggest Solutions.

b. Referral to FSIP.

B. Request Assistance of Federal Service Impasses Panel.

1. FSIP Authority. 5 U.S.C. § 7119(b)(5). The Panel or shall consider the impasse and shall. . . take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

2. Issues considered. Impasse issues, not negotiability issues.

3. FSIP's Courses of Action. 5 U.S.C. § 7119(b)(5)(B)(iii); 5 C.F.R. § 2472.11.

a. Resumption of Negotiations.

b. Resumption of Negotiations with Mediation Assistance.

c. Make Recommendations.

d. Make a Decision and Order.

e. Authorize or Direct Mediation or Arbitration.

f. Final-Offer Selection.

C. No Direct Appeal of FSIP Decision to FLRA. Council on Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984) (union petition for review of allegedly illegal FSIP decision review was found to be precluded absent extraordinary circumstances); New York National Guard, 2 FLRA 185 (1979) (when agency sought review of FSIP order allowing civilian technicians to wear civilian clothes the Authority held there was no authority for direct appeal).

## VIII. REPRESENTATIONAL RIGHTS. When can the union be present?

A. Formal Discussions.

*An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices, or other general condition of employment . . .* 5 U.S.C. § 7114(a)(2)(A).

1. The rule: Management must give the exclusive representative advance notice and an opportunity to be represented at a formal discussion.

    a. Mere presence of union officials is insufficient; advance notice must be given. Department of Treasury, 29 FLRA 610 (1987) (union steward was present and participated in monthly meeting); McClellan Air Force Base, 29 FLRA 594 (1987) (JAG, on phone with union when witness arrived, notified union but did not invite union to the discussion).

    b. Union representative has the right to speak and comment. Nuclear Regulatory Commission, 21 FLRA 765 (1986) (ULP when management interrupted union representative whenever he spoke).

2. Formality is determined by the totality of the circumstances. Some factors that indicate the level of formality include: where meeting held, how long it lasted, who was present, agenda, and were notes kept. *See, e.g.*, Luke Air Force Base, Arizona and AFGE, Local 1547, 54 FLRA No. 75 (1998) (Concluding that an agency's settlement negotiations with a bargaining unit employee concerning an EEO complaint were formal discussions).

B. Investigatory Examinations. NLRB v. Weingarten, 420 U.S. 251 (1975) (NLRB case where employee being interrogated about a theft asked for a union representative and the representative was denied).

*An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.* 5 U.S.C. § 7114(a)(2)(B).

1. Management Options.

    a. Allow representative to attend,

b. End the interview, or

c. Give employee the option of either answering the questions without a union representative or having no interview at all. Bureau of Prisons, Leavenworth, 46 FLRA 820 (1992) (Office of Inspector General investigator gave employee being interrogated the choice of remaining silent or proceeding without a union representative).

2. Employees must be reminded of their rights under this section annually. 5 U.S.C. § 7114(a)(4). Sears v. Dept. of Navy, 680 F.2d 863 (1st Cir. 1982) (the Navy did not need to give additional notice where they provided annual notice).

3. Inspectors general ARE agency representatives when they conduct an employee examination covered by §7114(a). NASA v. FLRA, 119 S. Ct. 1979 (1999) (finding that while Congress intended that OIGs would enjoy a great deal of autonomy, the OIG investigative office still performs on behalf of the particular agency in which it is stationed and therefore acts as an agency representative when it conducts examinations covered by §7114(a)).

C. Fact-Gathering Sessions and Brookhaven Warnings.

1. A "fact-gathering session" is an interview between an agency representative and a bargaining unit employee to ascertain necessary facts in preparation for third party proceedings.

2. Brookhaven Warnings. Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982).

a. Management must:

(1) inform the employee who is to be questioned of the purpose of the questioning;

(2) assure the employee that no reprisal will take place if he or she refuses; and

(3) obtain the employee's participation on a voluntary basis.

b. The questioning must occur in a context that is not coercive in nature.

c. The questioning must not exceed the scope of the legitimate purpose of the inquiry.

3. Brookhaven warnings must be given even if the discussion is formal and the union has been given advance notice and an opportunity to be present. Veterans Administration and AFGE, 41 FLRA 1370 (1991).

4. The warnings must be given at each fact-gathering session.

## IX. UNFAIR LABOR PRACTICES.

A. Both Agencies and Unions are Prohibited from Committing ULPs.

1. Management ULPs. 5 U.S.C. § 7116(a).

a. Interference with Basic Employee Rights.

b. Discrimination to Encourage or Discourage Union Membership.

c. Improper Assistance to a Labor Organization.

d. Retaliation Against an Employee for Filing a Complaint or Giving Information.

e. Refusal to Negotiate in Good Faith.

f. Bypassing the Union.

g. Refusal to Cooperate at Impasse.

h. Enforcement of Rules in Conflict with CBA.

i. Otherwise Fail or Refuse to Comply with Provisions of the Statute.

2. Management's Defenses To Unfair Labor Practices.

a. De Minimis Changes. HHS and AFGE, 24 FLRA 403 (1986) (change of employees title without change in duties was de minimis).

b. Dual Motive ULP Cases. Agency must show that it would have taken the same action in the absence of protected activity and that the action was legitimate. Warner Robins Air Force Base and AFGE Local 987, 52 FLRA 602 (1996) (denial of temporary promotion for union president not a ULP). FEMA and AFGE, Local 4060, 52 FLRA 486 (1996) (Agency failed to establish that its failure to act on union president's request for a personnel action was legitimate).

c. Wrong Appeal Route.

(1) Issues which can be raised under a statutory appeals procedure may not be raised as a ULP. 5 U.S.C. § 7116(d).

(2) Except for matters covered by a statutory appeals procedure (5 U.S.C. §§ 4303, 7512 or 2302(b)(1)), other problems involving conditions of employment that are covered by the CBA may be raised by grievance/arbitration or ULP, but not both. 5 U.S.C. § 7116(d).

(3) Until recently, if an issue were clearly a matter of contract interpretation, the FLRA would require the parties to use grievance/arbitration. The Authority now will interpret the contract using the standards and principles applied by arbitrators in order to determine the express terms of the agreement and the intent of the parties. HHS and AFGE, 47 FLRA 1167 (1993); IRS, 47 FLRA 1091 (1993) (union alleged violations of union rights and agency responded that the parties had agreed in the contract that it was permissible).

3. Union ULPs. 5 U.S.C. § 7116(b).

a. Interference with Basic Employee Rights.

b. Cause the Agency to Discriminate Against an Employee.

c. Coerce a Union Member as Punishment, Reprisal, or for the Purpose of Impeding the Member's Work Performance.

d. Discriminate in Union Membership Based Upon Race, Color, Creed, National Origin, Sex, Age, Civil Service Status, Political Affiliation, Marital Status, or Handicapping Condition.

e. Refusal to Negotiate in Good Faith.

f. Failure to Cooperate at Impasse.

g. Call or Participate in a Strike or Work Slow Down, or Condone Such Activity.

h. Otherwise Fail or Refuse to Comply with Provisions of the Statute.

B. ULP Remedies.

1. Cease and desist order.

2. Status quo ante (SQA).

3. Retroactive Bargaining Order (RBO).

4. Reinstate employee with backpay.

   a. Need statutory authority to order backpay. SSA v. FLRA, 201 F.3d 465 (D.C. Cir. 2000) (reversing the FLRA determination that employees were entitled to interest on liquidated damages because liquidated damages, awarded employees through arbitration under the Fair Labor Standards Act, were not "pay, allowances, or differentials" within the meaning of the Backpay Act).

   b. Backpay is limited to six years under the Backpay Act. *See also* NTEU and Federal Deposit Ins. Corp., 53 FLRA 1469 (1998) (reversing precedent, the FLRA concluded that arbitrators are bound by the SOL set forth in the Fair Labor Standards Act) (*judicial review denied for lack of jurisdiction*).

5. Order any remedial action necessary to carry out the purposes and policies of the statute.

## X. GRIEVANCE/ARBITRATION.

*Every collective bargaining agreement must have a grievance procedure in which the last step must be binding arbitration.* 5 U.S.C. § 7121(a)(1).

A. Typical four-step negotiated grievance procedure.

1. First Line Supervisor.

   a. Oral Complaint.

   b. Decision in 48 Hours.

2. Second Line Supervisor.

a. Written Complaint.

b. To Supervisor Within 72 Hours of First Line Supervisor's Denial.

c. Decision in 5 Days.

3. Civilian Personnel Officer/Deputy Post Commander.

a. Written Complaint.

b. Within 7 Days of Second Line Supervisor's Denial.

c. Decision Within 10 Days.

4. Binding Arbitration.

a. Management or Union Invokes.

b. Very Limited Review by the FLRA.

B. Union has the right to be present during the grievance/arbitration hearings.

## XI. SUCCESSORSHIP AND ACCRETION.

A. FLRA's framework for determining how accretion and successorship apply when an agency reorganizes. AFGE and Navy Fleet and Industrial Supply Center, 52 FLRA 950 (1997).

1. The first step is to determine if the employees are in a new appropriate bargaining unit.

2. If the employees are in a new appropriate bargaining unit, apply the successorship analysis.

3. If the employees are not in a new appropriate bargaining unit, apply the accretion analysis.

B. Successorship following reorganization. Naval Facilities Engineering Service Center, Port Hueneme, California and National Association of Government Employees, 50 FLRA 363 (1995). The gaining entity is a successor, and the union retains its status as the exclusive representative of the employees who are transferred, when:

1. An entire recognized unit, or portion thereof, is transferred.

2. The transferred employees are:

a. in an appropriate bargaining unit after the transfer, and

b. constitute a majority of such employees in such unit.

3. The gaining entity has substantially the same organizational mission as the losing entity.

4. The employees are performing substantially the same duties.

5. No election is necessary to determine representation.

C. Accretion applies when the transferred employees:

1. Are not in an appropriate bargaining unit.

2. Are functionally and administratively integrated into existing units.

3. Are appropriate to add to the bargaining unit.

D. Restructuring existing units.

1. Chain of command reorganization. Navy Base Norfolk, Virginia and NAGE, Local R4-1, 56 FLRA No. 47 (2000).

   a. A change in an agency's chain of command does not, by itself, render an existing unit inappropriate. Rather, the FLRA will evaluate how such a change has affected each of the three criteria for appropriate units, as applied to the existing unit and any proposed, new units.

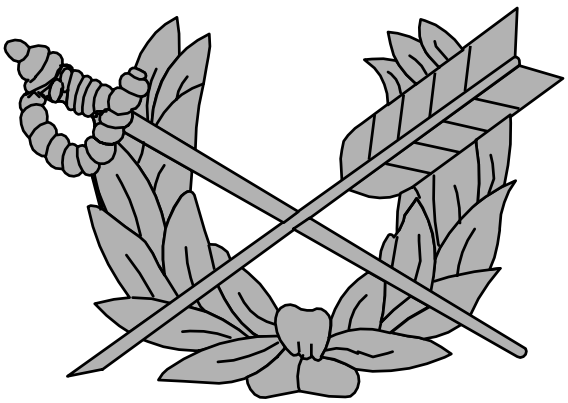
   b. If an agency reorganizes and there are competing claims of successorship, the FLRA will first evaluate the proposed bargaining units that will most fully preserve the status quo in terms of bargaining unit structure and the relationship of employees to their chosen exclusive representative. If it finds the existing unit continues to be appropriate, the FLRA will not address any petitions that attempt to establish different unit structures.

2. An agreement between unions that would change the structure of existing bargaining units by removing employees from a unit represented by one union to a unit represented by the other is not valid because it interferes with the fundamental right of employees to determine their exclusive representation, and thwarted the Authority's representation process. NAGE/SEIU, Local 5000, and SEIU and Dep't of Veterans Affairs, Washington, D.C., 52 FLRA 1068 (1997).

## XII. CONCLUSION.

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

# *BASIC COURSE DESKBOOK*



## Part IV
## Practical Exercises/Seminar

The Judge Advocate General's School
United States Army

March 2001 JA 280

# CHAPTER V

JAGS-ADA (351)

MEMORANDUM FOR BASIC CLASS OFFICERS

SUBJECT: Line of Duty Investigation Practical Exercise

1. This memorandum introduces line of duty investigations to Judge Advocate Officer Basic Course students. This exercise will be introduced and discussed as a part of scheduled class instruction**. You will not prepare a written submission as part of this exercise; however, review the factual situation prior to class and be prepared to discuss the problem.**

2. Background.

a. You are newly assigned to the Administrative Law Division of the Staff Judge Advocate's Office, Fort Blank, Virginia, in 200X. Your boss, Major J. D. Madison, calls you in to discuss office procedure generally and to give you an action to complete.

b. In addition to other duties as assigned, Major Madison informs you that you will be the office point of contact for line of duty Investigations. After a general discussion of the line of duty systems at Fort Blank, Major Madison hands you the enclosed line of duty investigation for your review.

3. Assignment - Review the request for legal review and the statements/evidence that are included with it. Be prepared to discuss the underlying facts presented in these materials.

4. The Line of Duty Investigation Practical Exercise is an **ungraded exercise**. It is an orientation exercise; its review in class will give you a feel for additional graded practical exercises that follow.

JAGS-ADA (351)
SUBJECT: Line of Duty Investigation Practical Exercise

5. Feel free to discuss the materials included with this practical exercise with fellow students. Keep track of questions or comments that you have so that they can be the subject of discussion in class or brought to the faculty's attention, as appropriate. Please see me if you have any questions.

Encl

MICHAEL P. BOEHMAN
MAJ, JA
Professor, Administrative
and Civil Law Department

## STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS

For use of this form, see AR 600-8-1, the proponent agency is DCSPER

| THRU: *(Include ZIP Code)* | TO: *(Include ZIP Code)* | FROM: *(Include ZIP Code)* |
|---|---|---|
| Commander<br>A Co, 1/21 FA<br>Fort Blank, VA 22222 | Commander<br>52d FA Bde<br>Fort Blank, Va 22222 | Commander<br>Fort Blank Community Hospital<br>Fort Blank, VA 22222 |

| 1. NAME OF INDIVIDUAL EXAMINED *(Last, First, and Middle Initial)* | 2. SSN | 3. GRADE |
|---|---|---|
| MARIN, JOHN A. | 123-45-6789 | PFC |

| 4. ORGANIZATION AND STATION | 5. ACCIDENT INFORMATION | |
|---|---|---|
| | a. DATE | b. PLACE *(City and State)* |
| A Co, 1/21 FA<br>Fort Blank, Va 22222 | 2 Oct 9x | Fort Blank, VA |

**SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR**

| 6. INDIVIDUAL WAS | 7. NAME OF HOSPITAL OR TREATMENT FACILITY | |
|---|---|---|
| ☐ OUT PATIENT ☒ ADMITTED ☐ DEAD ON ARRIVAL | Fort Blank Community Hospital | ☐ CIVILIAN ☒ MILITARY |

| 8. HOUR AND DATE ADMITTED | 9. HOUR AND DATE EXAMINED |
|---|---|
| 1320 hrs 1 Oct 9x | 1530 hrs 1 Oct 9x |

10. NATURE AND EXTENT OF ☒ INJURY ☐ DISEASE ☐ RESULTING IN DEATH *(Explain)*
Facial trauma

11. MEDICAL OPINION:
*a.* INDIVIDUAL ☐ WAS ☒ WAS NOT UNDER THE INFLUENCE OF ☐ ALCOHOL ☐ DRUGS *(Specify)*:
*b.* INDIVIDUAL ☒ WAS ☐ WAS NOT MENTALLY SOUND *(Attach Psychiatric evaluation if appropriate).*
*c.* INJURY ☐ IS ☒ IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.
*d.* INJURY ☐ WAS ☐ WAS NOT INCURRED IN LINE OF DUTY. *BASIS FOR OPINION:*
Unknown

| 12. THE FOLLOWING DISABILITY MAY RESULT | 13. BLOOD ALCOHOL TEST MADE | 14. NO. OF MG ALCOHOL/100 ML BLOOD |
|---|---|---|
| ☒ TEMPORARY ☐ PERMANENT PARTIAL ☐ PERMANENT TOTAL | ☐ YES ☒ NO | |

15. DETAILS OF ACCIDENT OR HISTORY OF DISEASE *(how, where, when)*
Patient reportedly in a fight in the barracks.

| 16. DATE | 17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR | 18. SIGNATURE |
|---|---|---|
| 5 Oct 9x | SAM A. HUGHS, CPT, MS Patient Administrator | |

**SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER**

| 19 DUTY STATION | 20. HOUR AND DATE OF ABSENCE | |
|---|---|---|
| ☒ PRESENT FOR DUTY ☐ ABSENT WITHOUT AUTHORITY ☐ ABSENT WITH AUTHORITY: ☐ ON PASS ☐ ON LEAVE | *a.* FROM | b. TO |

21. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERRED WITH THE PERFORMANCE OF MILITARY DUTY *(Explain in Item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance)*
☐ YES ☐ NO

| 22. INDIVIDUAL WAS ON | 23. HOUR AND DATE TRAINING | |
|---|---|---|
| ☒ ACTIVE DUTY ☐ ACTIVE DUTY FOR TRAINING ☐ INACTIVE DUTY TRAINING | a. BEGAN<br>1 Aug 9x | b. ENDED |

24. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING ☐ DIRECTLY TO TRAINING ☐ DIRECTLY FROM TRAINING

| 25. MODE OF TRANSPORTATION | 26. HOUR BEGINNING TRAVEL | 27. DISTANCE INVOLVED | 28. NORMAL TIME FOR TRAVEL |
|---|---|---|---|
| | | | |

29. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE
☐ PRESENT FOR DUTY ☐ ABSENT WITH AUTHORITY ☐ ABSENT WITHOUT AUTHORITY

30. DETAILS OF ACCIDENT - REMARKS *(If additional space is needed, continue on reverse) (Attach inclosures as necessary)*
On 1 Oct 9x, PFC Marin was in a fight with PVT Malone. As a result of being struck, PFC Marin suffered a fracture of his cheekbone. PFC Marin was evacuated to Fort Blank Community Hospital.

| 31. FORMAL LINE OF DUTY INVESTIGATION REQUIRED | 32. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY *(Not applicable on deaths)* |
|---|---|
| ☒ YES ☐ NO | ☐ YES ☒ NO |

| 33. DATE | 34. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER | 35. SIGNATURE |
|---|---|---|
| 16 Oct 9x | STEVEN J. ROWSON, 1LT, FA, XO | |

**DA FORM 2173, OCT 72** REPLACES DA FORM 2173, 1 JUN 66, WHICH IS OBSOLETE. USAPPC V2.00

F1 HELP AVAILABLE ON CODES IN ( )

**MILITARY POLICE REPORT**
For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| MILITARY POLICE REPORT NUMBER | DATE | USACRC CONTROL NUMBER |
|---|---|---|
| 0250-9X-A | 9X1005 | 9X-A-0250-B |

| THRU: | TO: | FROM: |
|---|---|---|
| CDR, 52D FA BDE<br>CDR, 1/21 FA BN<br>FORT BLANK, VA 22222 | CDR<br>A CO, 1/21ST FA<br>FORT BLANK, VA | CDR, FORT BLANK<br>ATTN: ABCD-MP<br>FORT BLANK, VA 22222 |

1. REPORT TYPE/STATUS: ☐ Information ☐ Commander's Action *(DA Form 4833)* ☐ Supplemental ☒ Complaint

2. EVALUATION: ☒ Criminal Offense ☐ Military Offense ☐ Traffic Offense ☐ Founded ☐ Unfounded ☐ Information

| 3. COMPLAINT/OFFENSE/INCIDENT *(See Reverse/Attached for Summary)* | 4. LOCATION ☒ On Post ☐ Off Post *(Address)* | 5. TIME OF OFFENSE | 6. DATE OF OFFENSE |
|---|---|---|---|
| ART 128, ASSAULT, SUBJ 1;<br>ART 128, ASSAULT, SUBJ 2 (over) | BLEACHER AREA, ADJACENT<br>A CO, 1/21ST FA<br>FORT BLANK, VA 22222 | 1130 | 9X1001 |

| 7. OFFENSE CODES | 8. COMPLAINT RECEIVED BY | 9. TIME RECEIVED | 10. DATE RECEIVED |
|---|---|---|---|
| 5C1K | | 1200 | 9X1001 |

11. MP ACTION REFERRED TO: ☒ MPI ☐ CID ☐ Civil Authorities ☐ Traffic ☐ Other *(Specify)* — a. DATE REFERRED:

| 12. NAME OF SUBJECT | a. GRADE | b. ORGANIZATION *(Include address and telephone number)* |
|---|---|---|
| MARIN, JOHN A. | PFC | A CO, 1/21ST FA<br>FORT BLANK, VA 22222 |

| c. SSN | d. PLACE OF BIRTH | e. DATE OF BIRTH |
|---|---|---|
| 123-45-6789 | Charlottesville, VA | 720611 |

| f. CAT (1) | g. COLOR HAIR | h. COLOR EYES | i. WEIGHT | j. HEIGHT | k. AGE | l. JUVENILE | m. SEX |
|---|---|---|---|---|---|---|---|
| A | BROWN | BLUE | 165 | 68" | 23 | ☐ Yes ☒ No | ☒ Male ☐ Female |

| n. COMPLEXION | o. RACE (2) | 13. INVOLVEMENT | 14. DRESS | 15. COOPERATIVE | 16. IDENTIFYING MARKS |
|---|---|---|---|---|---|
| FAIR | C | ☐ Alcohol ☐ Drugs | ☒ Uniform ☐ Civilian | ☒ Yes ☐ No | NONE VISIBLE |

**17. PERSONS RELATED TO REPORT** ***(Place Additional Entries on Reverse/Attached)***

| a. NAME | b. GRADE | c. SSN | d. ORGANIZATION/ADDRESS/TELEPHONE NO. | e. (1) | f. (3) |
|---|---|---|---|---|---|
| MATTHEWS, STANLEY R. | SSG | 678-91-0123 | A CO, 1/21ST FA<br>FORT BLANK, VA 22222 | A | B |
| LAUGHTON, CHARLES O. | PVT | 802-12-2395 | A CO, 1/21ST FA<br>FORT BLANK, VA 22222 | A | B |
| COLGATE, WILLIAM F. | PVT | 218-67-8011 | A CO, 1/21ST FA<br>FORT BLANK, VA 22222 | A | B |
| TRACEY, RICHARD | MPI | | MILITARY POLICE STATION<br>FORT BLANK, VA 22222 | A | E |
| HOLMES, SHERLOCK | MPI | | MILITARY POLICE STATION<br>FORT BLANK, VA 22222 | A | E |
| | | | | | |

**18. PROPERTY DATA**

| a. DATE | b. (4) | c. (5) | d. AMOUNT |
|---|---|---|---|
| N/A | | | |
| | | | |
| | | | |

**19. DISPOSITION OF**

a. OFFENDER: RELEASED TO DRILL SGT ON DD FORM 629

b. EVIDENCE: NONE TAKEN

ENCLOSURES
5-DA 2823
2-DA 3881

DISTRIBUTION
1-PM FILES
1-UNIT

**FOR THE COMMANDER** ***(Strike out if not applicable)***

TYPED NAME, RANK AND TITLE OF REPORTING OFFICER
BESSIE B. TUCKER
CHIEF, PM ADMIN

SIGNATURE

| (1) CATEGORY | | (2) RACE | (3) STATUS | | (4) PROPERTY TYPE | | (5) PROP ACTION |
|---|---|---|---|---|---|---|---|
| A-Army | F-Contractor | R-Red | A-Not Used | E-Military Police | A-Govt Prop/Funds | E-Private Property | A-Lost |
| B-Other Service | G-Other Govt Empl | M-Yellow | B-Witness | F-Civil Authorities | B-Govt Vehicle | F-Private Vehicle | B-Stolen |
| C-Family Member | H-FGN Natl Empl | N-Black | C-Victim | G-Sponsor | C-NAF Prop/Funds | G-Host Govt Prop/Funds | C-Recovered |
| D-DA Civilian | I-Other FGN Natl | C-White | D-Complainant | | D-NAF Vehicle | H-Host Govt Vehicle | D-Damaged |
| E-Civilian | J-Other | H-Hispanic | | | | | |
| | | X-Other | | | | | |

**DA FORM 3975, MAY 1988** EDITION OF JAN 74 IS OBSOLETE USAPPC V3.00

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| FORT BLANK, VA 22222 | 3 OCT 9X | 1830 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| MARIN, JOHN A. | 123-45-6789 | PFC |

ORGANIZATION OR ADDRESS
A CO, 1/21ST FA BN, FORT BLANK, VA 22222

I, JOHN A. MARIN, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I John Marin was sitting at the bleachers eating sack lunches when PVT Malone was asking where his bag of chips was. He couldn't find it so he grabbed mine and said it was his which I told him no, because I'd remembered setting my chips down so I grabbed it back. Then i saw him grab SPC Boon's bag of chips and then he grabbed mine and crushed them up and placed them in his brown bag. Then i reached over and crushed the bag of chips he had. After that I remembered getting hit in the face and stood up and hit PVT Malone with my palm in back of the head and took off running. PVT Malone then caught up to me and I only remember getting hit once then I apparently blacked out. I vagley remember what went on after that, but I did remember waking up in back of a truck. END OF STATEMENT

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | |
|---|---|---|
| D | | PAGE 1 OF 1 PAGES |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

NOTHING FOLLOWS

**AFFIDAVIT**

I, JOHN A. MARIN, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*(Signature of Person Making Statement)*

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 3D day of October, 19 9 at Fort Blank, VA

ORGANIZATION OR ADDRESS

*(Signature of Person Administering Oath)*

JOHN J. RUSSEL, 1LT, FA
*(Typed Name of Person Administering Oath)*

ORGANIZATION OR ADDRESS

ART 136 UCMJ (b)(4)
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| FORT BLANK, VA 22222 | 2 OCT 9X | 1457 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| MALONE, EDWARD R. | 345-67-8910 | PVT |

ORGANIZATION OR ADDRESS
A CO, 1/21ST FA BN, FORT BLANK, VA 22222

I, EDWARD R. MALONE, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I, PVT malone, was sitting on the bleachers eating a sacked lunch when I realized that my bag of chips was missing that I placed beside my sandwiches. I asked PVT Marin if those were my chips he had and he said no. Then I asked SPC Boon if those wer mine that wer laying beside him, and he said no. Then I ased where wer his laying, he told me the same place taht I put mine earliere so I told him that they were mine and I got them. he took them back from me amd I got them back from him and smashed them and emptied them into the brown sack so neither of us could have them. Then SPC Boon gave me his and I gave PT Marin the chips in the brown sack. Then I gave him the empty chip bag with the chips in the bag (brown bag). Then he gave the empty bag back to me, then I gave it back to him. He gave it back then I pushed the bag the bag in his chest. Then he stood up and said if you want to hit me again mother%$#@#&^?, hit me. Then I just started back eating. Thats when he punched me in the back of my head. He started running and I caught him and hit him about twice and got up.

Q: INV RICHARD TRACEY
A: PVT EDWARD MALONE

Q: DID PVT MARIN OR SPC BOON EVER ADMIT TO TAKING YOUR CHIPS?
A: NO.
Q: HOW MANY TIMES WERE YOU STRUCK BY PVT MARIN?
A: ONCE.
Q: HOW MANY TIMES DID YOU STRIKE PVT MARIN EXCEPT FOR THETWO TIMES AFTER YOU CHASED HIM?
A: THAT WAS IT.
Q: WHERE DID YOU STRIKE PVT MARIN?
A: I HIT HIM IN THE FACE.
Q: WHAT WAS THE APPROXIMATE TIME THAT THIS INCIDENT OCCURED?
A: ABOUT 1145.
Q: WHERE DID THIS INCIDENT TAKE PLACE?
A: IN THE COMPANY AREA.
Q: HOW DID YOU STRIKE PVT MARIN (OPEN OR CLOSED FISTS)?
A: CLOSED.
Q: HOW DID PVT MARIN STRIKE YOU (IN THE BACK OF THE HEAD)?
A: WITH HIS FIST.
DO YOU HAVE ANY FURTHER INFORMATION TO ADD TO THIS STATEMENT AT THIS TIME?
A: NO, SIR.

END OF STATEMENT

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 1 PAGES |
|---|---|---|
| E | | |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT_____ DATED_____CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE_____ OF_____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

NOTHING FOLLOWS

**AFFIDAVIT**

I, EDWARD R. MALONE, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*(Signature of Person Making Statement)*

WITNESSES:

ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 2D day of October, 19 9 at Fort Blank, VA 22222

*(Signature of Person Administering Oath)*

JOHN J. RUSSEL, 1LT, FA
*(Typed Name of Person Administering Oath)*

ART 136, UCMJ (b)(4)
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| FORT BLANK, VA 22222 | 2 OCT 9X | 1246 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| LAUGHTON, CHARLES O. | 802-13-2395 | PVT |

ORGANIZATION OR ADDRESS
A CO, 1/2ST FA BN, FORT BLANK, VA 22222

I, CHARLES O. LAUGHTON, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I witnessed PVT Malone chasing PVT Marin through the company area. As Malone caught marin, they fell to the ground. Malone rolled on top of Marin and struck him several times in the facial area. Then Malone jumped up and proceeded to walk away. This incident occured at approximately 1115 on the date of 1 Oct 9x.

END OF STATEMENT

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 1 PAGES |
|---|---|---|
| F | | |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT_____ DATED_____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE_____ OF_____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

NOTHING FOLLOWS

**AFFIDAVIT**

I, CHARLES O. LAUGHTON, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*(Signature of Person Making Statement)*

WITNESSES:

ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 2d day of October, 19 9 at Fort Blank, Va 22222

*(Signature of Person Administering Oath)*

JOHN J. RUSSEL, 1LT, FA
*(Typed Name of Person Administering Oath)*

ART 136, UCMJ (b)(4)
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| FORT BLANK, VA 22222 | 2 OCT 9X | 1300 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| COLGATE, WILLIAM F. | 218-67-8011 | E-1 |

ORGANIZATION OR ADDRESS
A CO, 1/21ST FA, FORT BLANK, VA 22222

I, WILLIAM F. COLGATE, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

On 2 Oct 9x at about 1115 I saw Malone and Marin on the top of the bleachers. They were arguing I don't know about what. i was sitting on the bottom facing them eating lunch. Then Marin jumped up and started talking shit to Malone. I told Marin to SIT down I told him that a few times. Then Marin SLAPPED Malone on the back of the head adn then Marin ran and Malone chased him and caught him. They rolled over each other and Malone punched 5-6 times. Malone got off I went over and thought he was taking seizure, his body was tight and his eyes were rolled back. Then SGT Nelson came over and told us to get him on his feet and then he performed the Heimlick manuever on him then we layed him down then SGT Matthews came over and made me get blankets and then we picked him up and took him to the hospital. END OF STATEMENT.

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 1 PAGES |
|---|---|---|
| G | | |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT_____ DATED_____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE_____ OF_____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

NOTHING FOLLOWS

**AFFIDAVIT**

I, WILLIAM F. COLGATE, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____

_____

_____
ORGANIZATION OR ADDRESS

_____

_____

_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this _____ day of _____, 19_____ at _____

_____
*(Signature of Person Administering Oath)*

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| FORT BLANK, VA 22222 | 10 OCT 9X | 1245 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| MATTHEWS, STANLEY R. | 678-91-0123 | SSG |

ORGANIZATION OR ADDRESS
A CO, 1/21ST FA BN, FORT BLANK, VA 22222

I, STANLEY R. MATTHEWS, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

AT APPROXIMATELY 1115 1 OCT 9X I SSG MATTHEWS WAS IN THE UNIT DAYROOM, WHEN A PRIVATE CAME RUNNING IN AND SAID THERE WAS A HURT PVT. I THEN PROCEEDED TO GO OUTSIDE AND SEEN PVT MARIN LYING FACE DOWN. I SAID MARIN WHAT IS YOUR FIRST NAME, HE SAID JOHN. I THEN SAID DO YOU KNOW WHO I AM HE SAID MATTHEWS, I ASKED HIM IF HE WAS HURT ANYWHERE BESIDES HIS FACE. HE SAID NO, I THEN TOLD MARIN WE WERE GONNA PLACE HIM ON HIS BACK AND IF HE HURT WHILE DOING THIS LET US KNOW. MYSELF AND SGT NELSON ROLLED HIM ON TO HIS BACK. I THEN CALLED 2 PRIVATES OVER TO MARIN AND THEN TOLD MARIN WE WERE GONNA PLACE HIM INT THE UNIT PICKUP, WE DID THIS THEN I PROCEEDED TO THE HOSPITAL.

Q: DID YOU IDENTIFY THE OTHER PERSON IN THE FIGHT?
A: YES
Q: WHAT IS HIS NAME?
A: PVT MALONE

END OF STATEMENT

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 1 PAGES |
|---|---|---|
| H | | |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT_____ DATED_____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE_____ OF_____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

NOTHING FOLLOWS

**AFFIDAVIT**

I, STANLEY R. MATTHEWS, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____

_____

_____
ORGANIZATION OR ADDRESS

_____

_____

_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this _____ day of _____, 19_____ at _____

_____
*(Signature of Person Administering Oath)*

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| FORT BLANK, VA 22222 | 6 NOV 9X | 1000 | |
| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | | GRADE/STATUS |
| RUSSEL, JOHN J. | 234-56-7890 | | 0-2 |
| ORGANIZATION OR ADDRESS | | | |
| B CO, 1/21ST FA, FORT BLANK, VA 22222 | | | |

I, JOHN J. RUSSEL, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

ON 6 NOVEMBER 199X, I TALKED TO PFC MARIN'S COMPANY XO, 1LT HENRY A. ROWLAND. HE STATED THAT NEITHER PFC MARIN NOR PVT MALONE HAD BEEN IN OTHER FIGHTS AND DIDN'T SEEM TO BE THE TYPE TO PICK FIGHTS. NEITHER OF THESE SOLDIERS WAS IN ANY OTHER TROUBLE BEFORE THEIR ARRIVAL TO THE BEST OF MY KNOWLEDGE.

JOHN J. RUSSEL
1LT, FA
Investigating Officer

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 1 PAGES |
|---|---|---|
| I | | |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT_____ DATED_____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE_____ OF_____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

**AFFIDAVIT**

I, _____, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE _____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____
_____
_____
ORGANIZATION OR ADDRESS

_____
_____
_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this _____ day of _____, 19_____ at _____

_____
*(Signature of Person Administering Oath)*

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority To Administer Oaths)*

| INITIALS OF PERSON MAKING STATEMENT | PAGE OF PAGES |
|---|---|

# CHAPTER W

## Investigation Seminar Problem

1. Introduction:

a. Judge advocates can serve in several capacities when dealing with an informal investigation under the provisions of AR 15-6. As advisors to the Investigating Officer (IO), judge advocates brief the IO on issues relating to an investigation, help the IO develop an investigative plan, and advise the IO during the investigation on questions such as what the evidence is demonstrating, what further evidence might be helpful and where it could be obtained, and whether there is reason to suspect an individual has committed an offense and should be warned of his rights before questioning. Part I of this exercise will highlight issues for you as a legal advisor.

b. Judge advocates will also be asked to review AR 15-6 reports of investigation (ROI) for legal sufficiency. In your seminar, you will apply your knowledge to a sample AR 15-6 investigation.

2. Assignment:

a. Part I: Review AR 15-6 provisions relating to informal investigations and AR 600-20, paras 4-14, 4-16, and 6-3 through 6-5. Read the Investigation Guide for Informal Investigations (attached). Read the assignment at Part I. Write down three issues significant issues you believe should be addressed in the legal review. Be ready to turn this list in at the start of the seminar. You should make an extra copy for your use during the seminar.

b. Part II: In the seminar, we will discuss the legal issues and possible resolutions raised by the investigative record in Part I. The greater your familiarity with the investigative record, the more you will get out of the seminar.

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# ARMY REGULATION 15-6

# INVESTIGATION GUIDE

# FOR

# INFORMAL INVESTIGATIONS

**JANUARY, 1998**

## INTRODUCTION

**1. PURPOSE**:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. This guide includes the changes implemented by Change 1 to AR 15-6. Many of those changes are significant; consequently, the information in the guide based on the changes is italicized.

**2. DUTIES OF AN INVESTIGATING OFFICER:** The primary duties of an investigating officer are:

a. to ascertain and consider the evidence on all sides of an issue,

b. to be thorough and impartial,

c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and

d. to report the findings and recommendations to the appointing authority.

**3. AUTHORITY**:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that usually have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is designated.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as reports of survey and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6 or these procedures, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contains time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, *or DA civilian employees paid under the General Schedule, Level 13 (GS 13), or above* may be investigating officers. The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, *the appointing authority should select the best qualified person for the duty based on their education, training, experience, length of service, and temperament.*

## PRELIMINARY MATTERS

**1. Appointing authority.**

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations:

- any general court-martial convening authority, including those who have such authority for administrative purposes only,

- any general officer,

- a commander at any level,

- a principal staff officer or supervisor in the grade of major or above,

- any state adjutant general, and

- *a DA civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.*

b. *Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of $1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.*

**2. Appointment procedures.** Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

**3. Obtaining assistance.** The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: *Complex and sensitive cases include those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.*

**4. Administrative matters.** As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file.

**5. Concurrent investigations.** *An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency to avoid duplication of effort wherever possible*. If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer. Additionally, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct.

## CONDUCTING THE INVESTIGATION

**1. Developing an investigative plan.**

a. The investigating officer's primary duty is to gather evidence, and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of (1) an understanding of the facts required to reach a conclusion, and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

**2. Obtaining documentary and physical evidence.**

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. The report of investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

**3. Obtaining witness testimony.**

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

b. Witness statements should be taken on DA Form 2823. Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.)

d. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the local Labor Counselor. Commanders and supervisors, however, have the authority to order military personnel and to direct Federal employees to appear and testify. Civilian witnesses who are not Federal employees may agree to appear, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained and only after coordinating with the legal advisor or appointing authority.

**4. Rights Advisement.**

a. All soldiers suspected of criminal misconduct must first be advised of their rights. DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a Report of Survey, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

**5. Scheduling witness interviews.** The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

- When planning who to interview, work from the center of the issue outward. Identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interviews of key witnesses to be as complete as possible, avoiding the "backtracking" described above.

- Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant to the inquiry.

- Any information that is relevant should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

- It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

- At some point, there will be no more witnesses available with relevant and useful information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

**6. Conducting witness interviews.** Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:

- Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

- Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

- Focus on relevant information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and useful to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

- Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

- Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.

**7. Rules of Evidence**: Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

- The information must be relevant and material to the matter or matters under investigation.

- Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

- The result of polygraph examinations may be used only with the subject's permission.

- Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

- "Off-the-record" statements are not acceptable.

- An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

**8. Standard of Proof.** Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

## CONCLUDING THE INVESTIGATION

**1. Preparing Findings and Recommendations.** After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

- Facts: To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.

- Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that will become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

- Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

**2. Preparing the Submission to the Appointing Authority.** After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet in the following order:

- appointing order,

- initial information collected,

- rights warning statements,

- chronology, and

- exhibits (with an index).

**3. LEGAL REVIEW**:

a. AR 15-6 does not require that all informal investigations receive legal review. *The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters.* Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

- whether the investigation complies with requirements in the appointing order and other legal requirements,

- the effects of any errors in the investigation,

- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and

- whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

## CHECKLIST FOR INVESTIGATING OFFICERS

**1. Preliminary Matters:**

a. Has the appointing authority appointed an appropriate investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

**2. Investigative Plan.**

a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?

b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?

c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

**3. Conducting the Investigation.**

a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?

b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

**4. Preparing Findings and Recommendations.**

a. Is the evidence assembled in a logical and coherent fashion?

b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?

d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?

e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

**5. Final Action.**

a. Was an appropriate legal review conducted?

b. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?

c. Have the necessary taskers been prepared to implement the recommendations?

# PART II

SCENARIO:

It is December 4, 2000 and you are looking through your in-box. You find a request from the DISCOM Commander (COL Johnstown) for a legal review on the report of investigation conducted by MAJ Denver. You and your teammates will submit one copy of your team's legal review of the investigation, making conclusions as to its sufficiency and providing your recommendations on what action the DISCOM commander should take.

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**REPORT OF PROCEEDINGS BY INVESTIGATING OFFICER/BOARD OF OFFICERS**

For use of this form, see AR 15-6; the proponent agency is OTJAG

IF MORE SPACE IS REQUIRED IN FILLING OUT ANY PORTION OF THIS FORM, ATTACH ADDITIONAL SHEETS

**SECTION I - APPOINTMENT**

**Appointed by** **DISCOM, 46th Infantry Division (Mechanized, Fort Wahoo, VA 22902**

on __23 October 2000___ (*Attach inclosure 1: Letter of appointment or summary of oral appointment data.)(See para 3-15, AR 15-6.}*

**SECTION II - SESSIONS**

The *(investigation)(board)* commenced at ____Fort Wahoo, VA_____ at __0800_____
*(Place)* *(Time)*

on ____23 October 2000_____ *(If a formal board met for more than one session, check here . Indicate in an inclosure the time each session began and ended, the place, persons present and absent, and explanation of absences, if any.* ) *The following persons (members, respondents, counsel) were present: (After each name, indicate capacity, e.g., President, Recorder, Member, Legal Advisor)*

MAJ Stuart Denver, HQ Co., 21st Forward Support Battalion, FWVA - Inv. Off.

The following persons *(members, respondents, counsel)* were absent: *(Include brief explanation of each absence.) (See paras 5-2 and 5-8a, AR 15-6)*

The *(investigating officer)(board)* finished gathering/hearing evidence at _____0800_____ on 27 October, 2000_____

and completed findings and recommendations at _____1600_____ on _____2 November 2000_____
*(Time)* *(Date)*

**SECTION III - CHECKLIST FOR PROCEEDINGS**

| A. COMPLETE IN ALL CASES | | YES | NO1 | NA2 |
|---|---|---|---|---|
| 1 | Inclosures *(para 3-5, AR 15-6)*<br>Are the following inclosed and numbered consecutively with Roman numerals: *(Attached in order listed)* | | | |
| | a. The letter of appointment or a summary of oral appointment date? | X | | |
| | b. Copy of notice to respondent, if any? *(See item 9, below)* | | | X |
| | c. Other correspondence with respondent or counsel, if any? | | | X |
| | d. All other written communications to or from the appointing authority? | | | X |
| | e. Privacy Act Statements (Certificate, if statement provided orally)? | X | | |
| | f. Explanation by the investigating officer or board of any unusual delays, difficulties, irregularities, or other problems encountered (e.g., absence of material witnesses)? | | | X |
| | g. Information as to sessions of a formal board not included on page 1 of this report? | | | X |
| | h. Any other significant papers (other than evidence) relating to administrative aspects of the investigation or board? | | | X |

*FOOTNOTES:* *1 Explain all negative answers on an attached sheet.*
*2 Use of the N/A column constitutes a positive representation that the circumstances described in the question did not occur in this investigation or board.*

**DA FORM 1574 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE )** *Page 1 of 4 pages*

| 2 | Exhibits *(para 3-16, AR 15-6)* | YES | NO1 | N/A2 |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| | a. Are all items offered (whether or not received) or considered as evidence individually numbered or lettered as exhibits and attached to this report? | X | | |
| | b. Is an index of all exhibits offered to or considered by the investigating officer/board attached before the first exhibit? | X | | |
| | c. Has the testimony/statement of each witness been recorded verbatim or been reduced to written form and attached as an exhibit? | X | | |
| | d. Are copies, descriptions, or depictions *(if substituted for real or documentary evidence)* properly authenticated and is the location of the original evidence indicated? | X | | |
| | e. Are descriptions/diagrams included of locations visited by the investigating officer/board *(para 3-6b, AR 15-6)?* | | | X |
| | f. Is each written stipulation attached as an exhibit and is each oral stipulation either reduced to writing and made an exhibit or recorded in a verbatim record? | | | X |
| | g. If official notice of any matter was taken over the objection or a respondent or counsel, is a statement of the matter of which official notice was taken attached as an exhibit *(para 3-16d, AR 15-6)?* | | | X |
| 3 | Was a quorum present when the board voted on findings and recommendations? | | | X |
| B | COMPLETE ONLY FOR FORMAL BOARD PROCEEDINGS *(Chapter 5, AR 15-6)* | | | |
| 4 | At the initial session, did the record read or determine that all participants had read the letter of appointment? | | | |
| 5 | Was a quorum present at every session of the board *(para 5-2b, AR 15-6)?* | | | |
| 6 | Was each absence of any member properly excused *(para 5-2s, AR 15-6)?* | | | |
| 7 | Were members, witnesses, reporter, and interpreter sworn, if required *(para 3-1, AR 15-6)* | | | |
| 8 | If any members who voted on findings or recommendations were not present when the board received some evidence, does the inclosure describe how they familiarized themselves with that evidence? | | | |
| C | COMPLETE ONLY IF A RESPONDENT WAS DESIGNATED *(Section II, Chap. 5, AR 15-6)* | | | |
| 9 | Notice to respondents *(para 5-5, AR 15-6):* | | | |
| | a. Is the method and date of delivery to the respondent indicated on each letter of notification? | | | |
| | b. Was the date of delivery at least five working days prior to the first session of the board? | | | |
| | c. Does each letter of notification indicate - | | | |
| | (1) the date, hour, and place of the first session of the board concerning that respondent? | | | |
| | (2) the matter to be investigated, including specific allegations against the respondent, if any? | | | |
| | (3) the respondent's rights with regard to counsel? | | | |
| | (4) the name and address of each witness expected to be called by the recorder? | | | |
| | (5) the respondent's rights to be present, present evidence, and call witnesses? | | | |
| | d. Was the respondent provided a copy of all unclassified documents in the case file? | | | |
| | e. If there were classified materials, were respondent and counsel given access & an opportunity to examine them? | | | |
| 10 | If any respondent was designated after proceedings began *(or otherwise was absent during part of proceedings):* | | | |
| | a. Was he properly notified *(para 5-5, AR 15-6)?* | | | |
| | b. Was record of proceedings and evidence received in his absence made available for examination by him and his counsel *(para 5-4c, AR 15-6)?* | | | |
| 11 | Counsel *(para 5-6, AR 15-6):* | | | |
| | a. Was each respondent represented by counsel? | | | |
| | Name and business address of counsel: | | | |
| | | | | |
| | *(If counsel is a lawyer, check here )* | | | |
| | b. Was respondent's counsel present at all open sessions of the board relating to that respondent? | | | |
| | c. If military counsel was requested but not made available, is a copy *(or, if oral, a summary)* of the request and the action taken on it included in the report *(para 5-6b, AR 15-6)?* | | | |
| 12 | If respondent challenged the legal advisor or any voting member for lack of impartiality *(para 5-7, AR 15-6):* | | | |
| | a. Was the challenge properly denied and by the appropriate officer? | | | |
| | b. Did each member successfully challenged cease to participate in the proceedings? | | | |
| 13 | Was the respondent given an opportunity to *(para 5-8a, AR 15-6):* | | | |
| | a. Be present with his counsel at all open sessions which deal with any matter which concerns that respondent? | | | |
| | b. Examine and object to the introduction of real & documentary evidence, including written statements? | | | |
| | c. Object to the testimony of witnesses and cross-examine witnesses other than his own? | | | |
| | d. Call witnesses and otherwise introduce evidence? | | | |
| | e. Testify as a witness? | | | |
| | f. Make or have his counsel make a final statement or argument *(para 5-9, AR 15-6)?* | | | |
| 14 | If requested, did the recorder assist the respondent in obtaining evidence in possession of the Government and in arranging for the presence of witnesses *(para 5-8b, AR 15-6)?* | | | |
| 15 | Are all of the respondent's requests and objections which were denied indicated in the report of proceedings or in an inclosure or exhibit to it *(para 5-11, AR 15-6)?* | | | |

**SECTION IV - FINDINGS** *(para 3-10, AR 15-6)*

The *(investigating officer)(board)* having carefully considered the evidence, finds:

1. There is insufficient evidence to support the allegation in the 6-BOSS complaint that the chain of command in G Company, 123d FSB does not care about female soldiers.

2. There is insufficient evidence to support the allegation in the 6-BOSS complaint that women soldiers are pulling extra duty more than male soldiers do. In addition, I find there is insufficient evidence to show that the officers in G Company pull any extra duty not required by their duty position and responsibilities.

3. There is insufficient evidence to support the allegation in the 6-BOSS complaint that the women soldiers are not being promoted in G Company. The only evidence of a woman being non-promoted pertains to an officer, not a soldier. That information is purely speculative as the officer has been informed by the battalion commander that she will not be recommended for promotion unless she improves her performance. I find this officer is, at best, an average performer, and given her supervisor's current record of counseling, may not be eligible for promotion to 1LT. This officer is 2LT Atchison.

4. I find that the command climate in G Company supports good performers and eliminates weak or sub-standard performers. I find no evidence of special treatment for men or of poor treatment for women. I have found some evidence of what could be seen as offensive behavior but nothing that makes me conclude it affects the command climate.

**SECTION V - RECOMMENDATIONS** *(para 3-11, AR 15-6)*

In view of the above findings, the *(investigating officer)(board*) recommends:

1. No further action be taken to respond to the complaint against the chain of command in G, 123d FSB.

2. Reply by endorsement to the SGS that no action is required on the 6-BOSS and close the complaint file.

**SECTION VI - AUTHENTICATION** *(para 3-17, AR 15-6)*

THIS REPORT OF PROCEEDINGS IS COMPLETE AND ACCURATE. *(If any voting member or the recorder fails to sign here or in Section VII below, indicate the reason in the space where his signature should appear.)*:

Stuart Denver

| | |
|---|---|
| *(Recorder)* | *(Investigating Officer) (President)* |
| *(Member)* | *(Member)* |
| *(Member)* | *(Member)* |

**SECTION VII- MINORITY REPORT** *(para 3-13 AR 15-6)*

To the extent indicated in Inclosure _____, the undersigned do(es) not concur in the findings and recommendations of the board. *(In the inclosure, identify by number each finding and/or recommendation in which the dissenting member(s) do(es) not concur. State the reasons for disagreement. Additional/substitute findings and/or recommendations may be included in the inclosure.)*

| | |
|---|---|
| *(Member)* | *(Member)* |

**SECTION VIII- ACTION BY THE APPOINTING AUTHORITY** *(para 2-3-13 AR 15-6)*

The findings and recommendations of the *(investigating officer)(board)* are *(approved)(disapproved)(approved with the following exceptions/substitutions). (If the appointing authority returns the proceedings to the investigating officer or board for further proceedings or corrective action, attach that correspondence (or a summary, if oral) as a numbered inclosure.)*

 **FOR EDUCATIONAL USE ONLY - NOT EXACT DUPLICATE**

FWVX 23 October 2000

MEMORANDUM FOR MAJ Stuart Denver, HQ Co., 21st Forward Support Battalion, Fort Wahoo, VA 22902-5006

SUBJECT: Appointment as Investigating Officer

1. You are hereby appointed as an investigating officer under the provisions of AR 15-6. You are to investigate complaints of a hostile atmosphere against female soldiers in Company G, 123d Forward Support Battalion.

2. You will conduct your investigation as an informal investigation under AR 15-6 and report your findings no later than 6 November 2000. You will take sworn statements from all witnesses and will submit your findings and recommendations on DA Form 1574. If you suspect any individual of having committed an offense under the Uniform Code of Military Justice, you will inform him of his rights under Article 3, UCMJ.

3. You will obtain a briefing on your duties from the Office of the Staff Judge Advocate at building 5 before commencing your investigation. Refer all legal questions to the OSJA.

FOR THE COMMANDER:

*Earnest T. Grant*
EARNEST T. GRANT
CPT, TC
DISCOM Adjutant

Enclosure 1

# *6-BOSS*

## ON THE PULSE OF FORT WAHOO

The Commanding General's *6-BOSS* line received the following inquiry concerning a member of your command:

> "The chain of command in G Company, 123d FSB, doesn't care about female soldiers. We are getting assigned to extra duty and getting by on promotions. There is even a really bad leadership atmosphere among the NCOs towards women soldiers."

You should investigate this matter and reply by endorsement to the Commanding General (ATTN: Secretary General Staff) NLT 8 November 2000____.

FW Form 101-4

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Enclosure II

**SWORN STATEMENT**

**For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel**

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| Fort Wahoo VA | 27 Oct 00 | | |
| LAST NAME, FIRST NAME, MIDDLE NAME | SSN | | GRADE/STATUS |
| Joliet, Tom | 491-99-0494 | | 1SG |

ORGANIZATION OR ADDRESS

G Company, 123d FSB

I, Tom Joliet, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I have been the 1SG of G Co since Dec 1998. The present CO, CPT Boston, assumed command about 5 months ago. In this brief period, the unit has turned around completely. Morale is better; equipment maintenance has greatly improved; and personnel test scores are significantly higher. No disrespect to the former CO, but I would attribute these improvements to CPT Boston's leadership.

I am aware that someone has made a complaint of sexual harassment against CPT Boston, criticizing the "atmosphere" in the unit, claiming that it is hostile to women soldiers - even among the NCOs. I do not have any knowledge of these matters related to the specific allegation, but I can state for a fact that the "atmosphere" in G Co is fine for all soldiers, women included. I checked with the NCOs and no one complained.

This whole things sounds like a lot to do about nothing. I understand that the CO is accused of being sexist because he sometimes refers to female soldiers as "you people." I have heard him use this phrase, and it was obvious he intended no offense. I just think that the person complaining is being overly sensitive. It's unfair to read anything negative into this choice of words. I've called male soldiers a lot worse things during my time in the Army. As an African American, I know how easy it is to jump on a word that someone uses to accuse them of racism. In fact, I often counsel young minority soldiers to resist that temptation. I tell them that, rather than getting bent out of shape over a name, they should look at whether they are being treated fairly and given an equal chance to advance. And it's the same thing for women. They get a fair shake in this unit. Some of them just have to develop a thicker skin.

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | |
|---|---|---|
| A | TJ | PAGE 1 OF 2 PAGES |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

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STATEMENT *(Continued)*

I was also told that the screen saver on CPT Boston's computer was cited as another example of the so called hostile environment for women that exists in the unit. I am familiar with the screen saver. CPT Boston showed it to me one evening when he and I were working late. The door to his officer was closed and no one else was around. I've only seen it once, but as I recall, it's a silhouette of a nude woman. I could understand the controversy if the thing was out in the open. But the back of CPT Boston's monitor faces the entrance to his office. You can only see the screen from behind his desk. If someone did see it, they probably had no business being back there to begin with. I will admit that something like that can be misunderstood. So it probably would be a good idea for CPT Boston to get rid of it. I've told him as much, and he agreed. It's probably gone by now.

I remember an incident where I had to redo the delegation of authority card for the arms room because the CO signed the wrong block. ----- END OF STATEMENT -----

**AFFIDAVIT**

I, Tom Joliet HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ___. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*Tom Joliet*

*(Signature of Person Making Statement)*

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 27 day of Oct, 2000
at Fort Wahoo, VA

ORGANIZATION OR ADDRESS

***Stuart Denver***

*(Signature of Person Administering Oath)*

Stuart Denver, MAJ, AG

*(Typed Name of Person Administering Oath)*

ORGANIZATION OR ADDRESS

15-6 Officer

*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

PAGE **2** OF **2** PAGES

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**SWORN STATEMENT**

**For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel**

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| Fort Wahoo, VA | 24 Oct 00 | | |
| **LAST NAME, FIRST NAME, MIDDLE NAME** | **SSN** | | **GRADE/STATUS** |
| Camden, Gerald T. | 133-00-6772 | | LTC |

ORGANIZATION OR ADDRESS

HHC, 123d FSB

I, Gerald T. Camden, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I am the battalion commander of the 123d FSB. You asked me to give a statement about some allegations of a hostile sexual harassment atmosphere in G Co., 123d FSB. I have never observed any sexual harassment in Golf or any of my other companies. I do not tolerate such conduct. In fact, no one has ever come to me at all about sexual harassment or a hostile atmosphere. If anyone in my battalion has a problem like that I have an open door policy and will see any soldier for any reason. I have no idea why anyone would go to the 6-BOSS line with that kind of gripe. I think Golf is becoming an outstanding company. Ed Boston is an outstanding commander. I don't believe I have to keep a close eye on him - he gets things done! He has a few problem soldiers but he has been clearing them out. I know about some problems with 2LT Atchison. Ed came to speak with me about Renee just a few weeks ago. She just isn't developing as a real team player in Golf. I talked to her about it and explained that she needed to get squared away ASAP or I would not be recommending she get her 1LT on time. I based this on both CPT Boston's appraisal and on the recent Command Inspection. Her arms room only got a Conditional Go. That is below the standard I have set. I have not looked into the problem, but I am sure that any officer could fix the problem with some effort and teamwork. I have never looked into her personnel file. I do not know what her OBC record was. As far as I am concerned her performance in the real world of the FSB is the key factor in deciding whether she advances or not. I have the utmost respect for Ed Boston. He is hardworking and dedicated. He is the best company commander I have. He took the worst company in the battalion and in only four months turned it into the best. I have no doubts about his ability or judgment. ----------END OF STATEMENT---------- *GTC*

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | |
|---|---|---|
| B | *GTC* | PAGE 1 OF 2 PAGES |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

STATEMENT *(Continued)*

**AFFIDAVIT**

I, Gerald T. Camden HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Gerald T. Camden

*(Signature of Person Making Statement)*

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 24th day of Oct, 2000 at Fort Wahoo, VA

Stuart Denver

*(Signature of Person Administering Oath)*

ORGANIZATION OR ADDRESS

Stuart Denver

*(Typed Name of Person Administering Oath)*

ORGANIZATION OR ADDRESS

AR 15-6 Investigator

*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT PAGE **2** OF **2** PAGES

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**SWORN STATEMENT**

**For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel**

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| Fort Wahoo VA | 24 Oct 2000 | | |
| LAST NAME, FIRST NAME, MIDDLE NAME | SSN | | GRADE/STATUS |
| Englewood, Henry | 268-13-2143 | | 1LT |

ORGANIZATION OR ADDRESS

G Company, 123d FSB

I, Henry Englewood, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

***I am the Company G Executive Officer. I am responsible for supervising and counseling all of the lieutenants. The commander, CPT Boston, has required me to do monthly counseling on each lieutenant since August. I have worked closely with 2LT Atchison and have observed her performance many times. I have always been pleased. She is bright, articulate, and hardworking. I would be happy to serve with her again. I always gave her good counseling statements. She recently took over the arms room, which had serious record-keeping problems. She came up with a fix for the problems from now on, but the old records are still messed up. She wrote a memo identifying the problem and put it in the arms room files. When the Command Inspection team saw the memo, they gave the arms room a Conditional Go. I don't blame 2LT Atchison for this - I think she did all she could do.***

***CPT Boston has been a good commander and has always treated me fairly. I'm not sure how he gets along with the female soldiers in our unit. I've heard him say that women get pregnant to avoid duty. One time the commander showed me his computer which had a high-resolution screen saver picture of a naked lady. I don't know where he got it, but he showed it to all the male lieutenants and the first sergeant.***

*------ END OF STATEMENT ------*

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | |
|---|---|---|
| C | *HE* | PAGE 1 OF 2 PAGES |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

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STATEMENT *(Continued)*

**AFFIDAVIT**

I, Henry Englewood HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*Henry Englewood*

*(Signature of Person Making Statement)*

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 24 day of Oct, 2000 at Fort Wahoo, VA

*Stuart Denver*

*(Signature of Person Administering Oath)*

ORGANIZATION OR ADDRESS

Stuart Denver, MAJ, AG

*(Typed Name of Person Administering Oath)*

ORGANIZATION OR ADDRESS

15-6 Officer

*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT *HE*



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**SWORN STATEMENT**

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| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| Fort Wahoo, VA | 24 Oct 2000 | | |
| LAST NAME, FIRST NAME, MIDDLE NAME | SSN | | GRADE/STATUS |
| Franklin, Marie | 087-55-9962 | | 1LT |

ORGANIZATION OR ADDRESS G Co, 123d FSB

I, Marie Franklin, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

The EO atmosphere in G/123 is not in keeping with the Army's standard. If you aren't a white male, you have to fight for everything you get. I have been assigned to this company for 27 months, ever since I got here from Ordance Officer Basic. CPT Boston is the third company commander I have worked for and he is the worst leader we have had, at least in terms of taking care of his soldiers.

Under CPT Houston and LTC Idaho's command, things in G Co weren't too bad. Some of the NCOs had attitude problems about working with women in leadership positions, but with a woman as battalion commander they kept their attitudes to themselves most of the time. When they said something out of line, the 1SG or company commander would correct them.

Ever since last summer, things have started to change. CPT Boston took over with a get the job done, no-nonsense attitude. I respect his technical proficiency and understand what he is trying to do with the company, but he has no concept of what he is doing to people. Soldiers work for him out of fear, not out of respect. If you are one of his "good old boys," he jokes with you and lets his guard down a little from time to time. If you aren't part of the in crowd (and all women and all black NCOs are excluded), he is all starch and no nonsense. He tries to maintain a consistent appearance in public, but soldiers are beginning to catch on.

During the first few weeks after CPT Boston took over, everybody was working very hard. CPT Boston made comments about "you people" and "those people." At first I thought he was referring to soldiers who worked for him but it soon became clear that "you people" and "those people" were women soldiers. When CPT Boston used the term "soldiers," it was clear he meant male soldiers. During a company officers meeting once, he even said he had a great advantage, that he understood the Army better because of the source of his commission. I didn't realize it at the time, but I learned later he was referring to the fact that he went to the Citadel. When I realized what he was saying, I was furious. What does he think my USMA degree means?

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | |
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| D | ***MF*** | PAGE 1 OF 5 PAGES |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

STATEMENT *(Continued)*

During an officer's call last August (right after the battalion change of command?), I asked the new battalion commander about equal opportunity and sexual harassment training. I figured it would be a non-confrontational way of reminding people that women and minority soldiers are professionals who have something to contribute. Was I ever wrong. CPT Boston came down on me like a ton of bricks. During the happy hour at the club which followed the officers call, he ordered me to report to his office that evening after things broke up. When we got to his office, he was furious. He spouted off about me being disloyal and going behind his back and setting LTC Camden up for failure with a blind-sided question. At first I didn't know what he was talking about but then he practically screamed something about "bogus sexual harassment" at me. I was shocked. LTC Idaho and CPT Houston both wanted all of us officers to be totally frank with them and no questions were off limits. CPT Boston was the extreme opposite. He was practically foaming at the mouth. He said if I was so interested in "extra" training, that I could research all of the Army's standardized unit training requirements and brief him on them in one week's time. I couldn't believe it. My main extra duty was being the company Motor Officer. LT Chen, one of our other platoon leaders, is the company Training Officer. Early the following week, when I was working one evening on that briefing, CPT Boston stopped by my office and used a very sarcastic tone of voice to "suggest" that since I was so interested in "training" I use my "extra" time during the evenings when I was at the office to check on the other soldiers who were performing "extra training." I checked with the SDO

**AFFIDAVIT**

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_____
*(Signature of Person Making Statement)*

WITNESSES:

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ORGANIZATION OR ADDRESS

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_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this _____ day of _____, 19_____
at _____

_____
*(Signature of Person Administering Oath)*

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority to Administer Oaths)*



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STATEMENT *(Continued)*

and no soldiers were performing extra training but several were pulling extra duty as Article 15 punishment. I did check in with the NCO who was charged with supervising the soldiers on punishment detail and I asked her if she needed any officer assistance. She said everything was in order so I left it at that.

On the Friday, when I was scheduled to give CPT Boston the training requirements briefing, I reported to his office as ordered. He was working on his computer. He told me to stand by while he finished his document. A couple of minutes later, he said he was ready for the briefing. I told him I had set up the training room for the briefing. He laughed and said I needed to be flexible, that he would take the briefing at his desk. So I excused myself and went to the training room and got the charts I had prepared. When I came back, he told me not to bother with charts, just to give him the details. So I briefed him from my note cards, standing in front of his desk. I could see a reflection of his computer screen in the window behind him. At first the picture looked like a nude woman but whenever CPT Boston bumped into his desk, the mouse moved and the screen changed to what looked like an aircraft control panel. He was visibly impatient and kept looking at this watch. At one point he told me to hurry up or he would miss all of happy hour at the club.

**AFFIDAVIT**

I, _____ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____
_____
_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this _____ day of _____, 19_____
at _____

_____
*(Signature of Person Administering Oath)*

_____
_____
_____
ORGANIZATION OR ADDRESS

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT ***MF*** PAGE **3** OF **5** PAGES

**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT *(Continued)*

After these events, I seriously considered filing a formal EO complaint against CPT Boston but decided it wasn't worth the hassle. West Point taught me the Army has lots of individuals who are racist or sexist or both but most of them get what's coming to them sooner or later. I figured putting up with CPT Boston was part of the cost of doing business. I didn't want to admit he was getting to me: I was in the top 25% of my West Point class and Commandants List at Ordnance Officer Basic. I wanted to make the Army a career and feared retribution if I complained.

Things got worse. In Oct, we were getting ready for NTC rotation. At a staff meeting, we were going over our personnel lists and I reminded the CO that PFC Webb, a mechanic, was on profile which prevented her from heavy lifting and from wearing MOPP gear. CPT Boston asked what the profile was for and how long it would last. It was a pregnancy profile and the delivery date wasn't til Feb. He looked right at me and said, "typical woman. That's how you people get out of tough duty: just get pregnant." I was literally speechless and couldn't believe that an officer in today's Army would say such a thing, especially in front of 5 other officers. When I escorted CPT Boston through the motor pool for his change of command inventory, I briefed him on our mechanics, including PFC Webb and her husband who had been trying to have a baby ever since they got to Fort Wahoo. Although the 1SG wanted to use PFC Webb as a company clerk during her pregnancy, she volunteered to work in the PLL cage to help the company get ready for the command inspection. She usually has to be ordered to take her required rest breaks and to go home at the end of the medically mandated 8 hour shift. CPT Boson's comment about PFC Webb was uncalled for.

**AFFIDAVIT**

I, _____ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____
_____
_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this _____ day of _____, 19_____
at _____

_____
*(Signature of Person Administering Oath)*

_____
_____
_____
ORGANIZATION OR ADDRESS

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT ***MF*** PAGE **4** OF **5** PAGES

**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT *(Continued)*

Last month was the last straw. I went to 2LT Atchison's office after work to see if she was ready to go for a run as planned. Her door was closed and when I went in, I saw she had been crying. I asked her what was the matter and she told me they were going to non-advance her to 1LT. I was furious: 2LT Atchison has worked extremely hard for our company and she has come a long way since she arrived. She's made her share of 2LT mistakes but she gets the job done and really tries to do her best. I think she is way ahead of the other 2LT who arrived from OBC with her. It's complete nonsense to say she is not a "team player." More than any other officer in G, she's here nights and weekends, never complains, and never makes a big deal about problems women have to put up with from CPT Boston. I thought I could put up with difficult individuals you encounter in an Army career but seeing 2LT Atchison treated that way, after everything she's done, made me realize life is too short. She asked me not to tell anyone but I figured someone with authority to change things had to know about what was going on. I called the DISCOM Adjutant and asked to see the commander under his open door policy but the adjutant said I had to tell him the subject, that the commander wanted to know the topic of open door visits. I decided then to use the 6-BOSS complaint. I realize now I can't expect fair treatment from CPT Boston or LTC Camden. When my obligation is up, I plan to resign my commission and look for a job where I'll be judged on what I do, not on my gender or color. ----- END OF STATEMENT -----

**AFFIDAVIT**

I, _____ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

***Marie Franklin***

_____

*(Signature of Person Making Statement)*

WITNESSES:

_____

_____

_____

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this 24th day of ___October, 2000___

at Fort Wahoo, VA

***Stuart Denver***

_____

*(Signature of Person Administering Oath)*

_____

_____

_____

ORGANIZATION OR ADDRESS

Stuart Denver

_____

*(Typed Name of Person Administering Oath)*

AR 15-6 Investigator

*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

PAGE **5** OF **5** PAGES

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**SWORN STATEMENT**

**For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel**

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| Fort Wahoo, VA | 26 Oct 2000 | | |
| **LAST NAME, FIRST NAME, MIDDLE NAME** | **SSN** | | **GRADE/STATUS** |
| Atchison, Renee | 134-55-6897 | | 2LT |

ORGANIZATION OR ADDRESS

G Company, 123d Forward Support Battalion

I, Renee Atchison, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I have been assigned to G Co, 123d FSB since Aug 1999. Before coming here, I attended OBC. I was Distinguished Military Graduate of the ROTC program at Wahoo State University.

Since May I have been the platoon leader of the Supply & Services Platoon. In July I picked up the Arms Room as an additional duty assignment.

My last OER at the time of the change of command was from CPT Ralph Houston, the old company commander. He top-blocked me and recommended I be promoted at the earliest opportunity. The senior rater was LTC Mary Idaho, the old battalion commander. She top blocked me also, commenting I had boundless potential and saying I should be selected for early promotion. She changed command with LTC Camden in September and I have not seen LTC Camden a whole lot.

CPT Boston took command in May. The company was not doing very well under the old CO. One of the weak areas was the arms room. I was given charge of the arms room right after the change of command. The CO told me to do whatever it took to square it away. The CO came down on us kind of hard, but I felt like he came down on the women the hardest. I remember one day when 1LT Franklin told the CO that one of her female soldiers was on limited duty because of pregnancy. LT Franklin told him that the female soldier could not go with us to the National Training Center because of the extreme heat and cold out there. Her doctor was concerned because she has premature labor or something. The CO kind of blew up and said "Typical woman, get pregnant to get out of the tough duty - you just can't rely on them." Another time, the XO, 1LT Englewood, told the CO that they had to arrange for port-a-lets for both male and female soldiers during that big exercise, Operation Grand Slam. The post environmental people said a company our size had to have at least three. The XO wanted to designate one for women and two for men but the CO got hot and said "All my portable (well, he used a curse word here but he meant toilets) are for soldiers. I ain't giving special preference to women."

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | |
|---|---|---|
| E | **RA** | PAGE 1 OF 3 PAGES |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

STATEMENT *(Continued)*

I was working hard to get ready for our annual command inspection in August. I went to the arms room officer course on post in the middle of July and realized that our accountability paperwork was all messed up. I started working late to fix it. All of the officers started working late but I remember seeing 1LT Franklin working late by herself a whole lot in August. I asked her what she was working on and she said "A special project for the CO." She didn't look very happy. I could not fix the problems in the arms room because the paperwork was messed up in the past. I just put a memorandum for record in the files that we had discovered a defect and would prevent it in the future. It seems the armorer was not signing out the weapons, he was just using the weapons card. Well, the CI team found this problem when they came around in September. The arms room got a conditional GO because the paperwork foul up was a potential No Go area but we caught it ourselves.

I remember a couple of other incidents with CPT Boston. One day, in late July, I was getting the access roster squared away on the arms room and had to get the CO's signature on some "delegation of authority" cards. I took them to his office and gave them to him to sign. He signed in the wrong place and I had to make up new cards. I took them back in and he said, "come around here and show me where to sign." I went around to the back of his desk and pointed to the block at the bottom of the card. While I was there, I caught a glimpse of his computer screen. He has it pointed towards his seat. The screen save was a picture of a nude woman. He noticed me looking at it and pushed his mouse, making the picture go away, and said, "Oh, excuse me." Later that week, we were all working late to get ready for the CI. It was Saturday evening; all the officers had

**AFFIDAVIT**

I, _____ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____
_____
_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this _____ day of _____, 19_____ at _____

_____
*(Signature of Person Administering Oath)*

_____
_____
_____
ORGANIZATION OR ADDRESS

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT RA PAGE **2** OF **3** PAGES

**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT *(Continued)*

worked that day on their additional duty areas. It was about 1900 and the mess halls were all closed. The other officers had left about 1830. The CO came to my office and sat on the edge of my desk and asked me to come to dinner with him at the O club. He said afterwards we could go downtown to a movie or something like that. I felt kind of awkward about it since he was married and stuff, and I said I wasn't hungry. He left my office right away. Ever since he has hardly ever spoken to me. Even when I get my monthly counseling, the XO just brings me the statement. They have been kind of bad lately. Before that day, the CO used to come to my office and close the door and sit down and counsel me about my performance. Now I never see him.

About two weeks ago I got called in by LTC Camden. He told me that he was recommending that I not get my 1LT on time. He said it was because I was not performing up to standard. He said I was not a "team player." He added that the other reason was the poor counseling statements and the performance of the arms room on the command inspection. I went back to the company and was really upset. I told LT Franklin about it and she was upset too.

***I have attached copies of the counseling statements from the XO and CO and my last OER.***

---------- END OF STATEMENT ----------

**AFFIDAVIT**

I, Renee Atchison HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ___. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

***Renee Atchison***

*(Signature of Person Making Statement)*

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 26th day of October, 2000

at Fort Wahoo, VA

ORGANIZATION OR ADDRESS

***Stuart Denver***

*(Signature of Person Administering Oath)*

Stuart Denver

*(Typed Name of Person Administering Oath)*

ORGANIZATION OR ADDRESS

AR 15-6 Investigator

*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

PAGE **3** OF **3** PAGES

**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

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**GENERAL COUNSELING FORM**

**For use of this form, see AR 635-200; the proponent agency is MILPERCEN**

**DATA REQUIRED BY THE PRIVACY ACT OF 1974**

AUTHORITY: 5 USC 301, 10 USC 3012 (G).
PRINCIPAL PURPOSE: To record counseling data pertaining to service members
ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings.
DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.

**PART I - BASIC DATA**

| 1. NAME | 2. SOCIAL SECURITY NO. | 3. GRADE | 4. SEX |
|---|---|---|---|
| ATCHISON, RENEE | | 2LT | F |

5. UNIT

G CO., 123d FSB

*FOR TRAINING UNITS ONLY*

6. WEEK OF TRAINING

7. TRAINING SCORES

HIGH ____ MED ____ LOW ____

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

MONTHLY COUNSELING - June 2000

9. DATE AND SUMMARY OF COUNSELING

The new CO has initiated monthly counseling on all the LTs. I will be counseling you every month on your performance.

1. Keep up the good work in the S&S platoon. Training stats are 93%. The standard is 98%. Keep getting folks out to train.

2. Arms room is looking up. Remember the Command Inspection is coming up.

3. Outstanding job as range OIC on M16 range. Bn Cdr gave us a "huah coin" in recognition.

*DISPOSITION INSTRUCTIONS*

*This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement*

**DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

**PART III - AUTHENTICATION**

| 10, NAME, GRADE, SIGNATURE OF COUNSELOR | DATE |
|---|---|
| Henry Englewood *Henry Englewood* | *June 2000* |

11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:

*N/A*

| 12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| Renee Atchison *Renee Atchison* | |

13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK

**PART IV - REHABILITATION**

14. REHABILITATION RESULTS/COMMENTS

| 15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| 16. NAME, GRADE, SIGNATURE OF COUNSELOR | |

**PART V - UNIT COMMANDER INTERVIEW**

17. INTERVIEW RESULTS AND RECOMMENDATION

- ***Marvelous*! *Keep up the fight!***
- ***Golf leads the way!***

| 18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER | DATE |
|---|---|
| *EC Boston III* | |

**FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE**

**GENERAL COUNSELING FORM**

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**PART I - BASIC DATA**

| 1. NAME | 2. SOCIAL SECURITY NO. | 3. GRADE | 4. SEX |
|---|---|---|---|
| ATCHISON, RENEE | | 2LT | F |

| 5. UNIT | *FOR TRAINING UNITS ONLY* | |
|---|---|---|
| | 6. WEEK OF TRAINING | 7. TRAINING SCORES |
| G CO., 123d FSB | | HIGH ____ MED ____ LOW ____ |

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

MONTHLY COUNSELING - July 2000

9. DATE AND SUMMARY OF COUNSELING

Monthly performance.

1. Arms room is first priority for CI. Keep plugging.

2. S&S platoon vehicle maintenance is up. Your operational readiness rate is over 95% - Great job.

3. Training stats at 95% - 98% is goal.

*DISPOSITION INSTRUCTIONS*
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**DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

**PART III - AUTHENTICATION**

| 10, NAME, GRADE, SIGNATURE OF COUNSELOR | DATE |
|---|---|
| Henry Englewood *Henry Englewood* | *July 2000* |

11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:

*N/A*

| 12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| Renee Atchison *Renee Atchison* | |

13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK

**PART IV - REHABILITATION**

14. REHABILITATION RESULTS/COMMENTS

| 15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| 16. NAME, GRADE, SIGNATURE OF COUNSELOR | |

**PART V - UNIT COMMANDER INTERVIEW**

17. INTERVIEW RESULTS AND RECOMMENDATION

- ***Remember - All "Go's" on C.I.!***
- ***Doing Great - Big Push Next Month*!**

| 18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER | DATE |
|---|---|
| ***EC Boston III*** | |

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**GENERAL COUNSELING FORM**

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**PART I - BASIC DATA**

| 1. NAME | 2. SOCIAL SECURITY NO. | 3. GRADE | 4. SEX |
|---|---|---|---|
| *ATCHISON, RENEE* | | *2LT* | *F* |

| 5. UNIT | *FOR TRAINING UNITS ONLY* | |
|---|---|---|
| | 6. WEEK OF TRAINING | 7. TRAINING SCORES |
| *G CO., 123d FSB* | | HIGH ____ MED ____ LOW ____ |

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

*MONTHLY COUNSELING - August 2000*

9. DATE AND SUMMARY OF COUNSELING

***Monthly counseling.***

***1. Appreciate long hours for CI!***

***2. Training stats at 97% - 1 to go***

***3. Watch personal affairs - late on 6 Oct because of car trouble.***

***4. Keep up great work.***

*DISPOSITION INSTRUCTIONS*
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**DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

**PART III - AUTHENTICATION**

| 10, NAME, GRADE, SIGNATURE OF COUNSELOR | DATE |
|---|---|
| Henry Englewood *Henry Englewood* | *Aug 2000* |

11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:

*N/A*

| 12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| Renee Atchison *Renee Atchison* | |

13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK

**PART IV - REHABILITATION**

14. REHABILITATION RESULTS/COMMENTS

| 15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| 16. NAME, GRADE, SIGNATURE OF COUNSELOR | |

**PART V - UNIT COMMANDER INTERVIEW**

17. INTERVIEW RESULTS AND RECOMMENDATION

- ***Must improve now - Marginal overall***
- ***Get on team for C.I.!***
- ***No "No Go" is acceptable. Shape up.***

| 18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER | DATE |
|---|---|
| ***EC Boston III*** | |

**FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE**

**GENERAL COUNSELING FORM**

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**DATA REQUIRED BY THE PRIVACY ACT OF 1974**

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**PART I - BASIC DATA**

| 1. NAME | 2. SOCIAL SECURITY NO. | 3. GRADE | 4. SEX |
|---|---|---|---|
| ATCHISON, RENEE | | 2LT | F |

5. UNIT

G CO., 123d FSB

*FOR TRAINING UNITS ONLY*

6. WEEK OF TRAINING

7. TRAINING SCORES

HIGH ____ MED ____ LOW ____

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

MONTHLY COUNSELING - September 2000

9. DATE AND SUMMARY OF COUNSELING

Monthly performance review.

1. Thanks for top job on CI. Make sure the "Conditional Go" in Arms room does not happen next year - you did your best.

2. Training at 98% - Made it - Huah!

3. Thanks for good vehicle maintenance effort. You helped S&T platoon pass CI. Great.

*DISPOSITION INSTRUCTIONS*
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**DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

**PART III - AUTHENTICATION**

| 10, NAME, GRADE, SIGNATURE OF COUNSELOR | DATE |
|---|---|
| Henry Englewood *Henry Englewood* | *Sept 2000* |

11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:

*N/A*

| 12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| Renee Atchison *Renee Atchison* | |

13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK

**PART IV - REHABILITATION**

14. REHABILITATION RESULTS/COMMENTS

| 15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| 16. NAME, GRADE, SIGNATURE OF COUNSELOR | |

**PART V - UNIT COMMANDER INTERVIEW**

17. INTERVIEW RESULTS AND RECOMMENDATION

- ***I disagree with XO. Arms room is unacceptable.***
- ***My standard is 100% - No slack in training. 1.5% dead is still DEAD!***
- ***Fix NOW!***

| 18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER | DATE |
|---|---|
| ***EC Boston III*** | |

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**GENERAL COUNSELING FORM**

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**PART I - BASIC DATA**

| 1. NAME | 2. SOCIAL SECURITY NO. | 3. GRADE | 4. SEX |
|---|---|---|---|
| ATCHISON, RENEE | | 2LT | F |

| 5. UNIT | *FOR TRAINING UNITS ONLY* | |
|---|---|---|
| | 6. WEEK OF TRAINING | 7. TRAINING SCORES |
| G CO., 123d FSB | | HIGH ____ MED ____ LOW ____ |

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

MONTHLY COUNSELING - October 2000

9. DATE AND SUMMARY OF COUNSELING

Monthly performance review

1. I think you are on the right track. You need to cultivate role as team player.

2. Platoon maintenance down to 93%. Let's get it back to 98%

*DISPOSITION INSTRUCTIONS*
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**DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

**PART III - AUTHENTICATION**

| 10, NAME, GRADE, SIGNATURE OF COUNSELOR | DATE |
|---|---|
| Henry Englewood *Henry Englewood* | *Oct 2000* |

11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:

*N/A*

| 12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| Renee Atchison *Renee Atchison* | |

13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK

**PART IV - REHABILITATION**

14. REHABILITATION RESULTS/COMMENTS

| 15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED | DATE |
|---|---|
| 16. NAME, GRADE, SIGNATURE OF COUNSELOR | |

**PART V - UNIT COMMANDER INTERVIEW**

17. INTERVIEW RESULTS AND RECOMMENDATION

- ***Performance not improving - Maintenance stats an indicator of overall duty: down.***
- ***I am very disappointed and will be talking to the battalion commander.***

| 18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER | DATE |
|---|---|
| *EC Boston III* | |

**FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE**

**PART I - ADMINISTRATIVE DATA**

| a. LAST NAME, FIRST NAME, MIDDLE INITIAL | b. SSN | c. GRADE | d. DATE | OF | RANK | e. BR | f. designated specialties | g.PMOS | h. STA CODE |
|---|---|---|---|---|---|---|---|---|---|
| Atchison, Renee | 134-55-6879 | 2LT | 98 | 06 | 06 | QM | 92A | | 13026 |

| i. UNIT, ORGANIZATION, STATION, ZIP CODE OR APO, MAJOR COMMAND | j. REASON FOR SUBMISSION | k. CMD CODE |
|---|---|---|
| G Company, 123d FSB, 46th ID (Mech), Fort Wahoo, VA 22902 FORSCOM | 03 Change of Rater | |

| l. PERIOD COVERED FROM (Year Month Day) | THRU (Year Month Day) | m. NO. OF MONTHS | n. MILPO CODE | o. RATED OFFICER COPY *(check one and date)* | p. FORWARDING ADDRESS |
|---|---|---|---|---|---|
| 99 05 17 | 00 05 16 | 6 | FC37 | __X__ 1. GIVEN TO OFFICER _____<br>____ 2. FORWARDED TO OFFICER<br>_____ | |

q. EXPLANATION OF NONRATED PERIODS

**PART II - AUTHENTICATION** *(Rated officer signature verifies PART I data and RATING OFFICIALS ONLY)*

| a. NAME OF RATER (Last, First, MI) | SSN | SIGNATURE |
|---|---|---|
| Houston, Ralph | 119-55-0923 | *Ralph Houston* |

| GRADE, BRANCH, ORGANIZATION, DUTY ASSIGNMENT | DATE |
|---|---|
| CPT, TC, Company G, 123d FSB, 46th ID(M), Fort Wahoo, VA 22902 | *22 May 2000* |

| b. NAME OF INTERMEDIATE RATER (Last, First, MI) | SSN | SIGNATURE |
|---|---|---|
| | | |

| GRADE, BRANCH, ORGANIZATION, DUTY ASSIGNMENT | DATE |
|---|---|
| | |

| c. NAME OF SENIOR RATER (Last, First, MI) | SSN | SIGNATURE |
|---|---|---|
| Idaho, Mary J. | 596-55-0983 | ***Mary J. Idaho*** |

| GRADE, BRANCH, ORGANIZATION, DUTY ASSIGNMENT | DATE |
|---|---|
| LTC(P), QM, HHC 123d FSB, 46th ID(M), Fort Wahoo, VA 22902 | ***7 June 2000*** |

| d. SIGNATURE OF RATED OFFICER | DATE | e.DATE ENTERED ON DA 27-1 | f. RATED OFFICER MPO INITIALS | g. SR MPO INITIALS | h. NO. OF INCL |
|---|---|---|---|---|---|
| ***Renee Atchison*** | ***10 June 00*** | 16 May 2000 | | | |

**PART III - DUTY DESCRIPTION** *(Rater)*

| a. PRINCIPAL DUTY TITLE | b. SSI/MOS |
|---|---|
| Supply and Service Platoon Leader | 92A005 |

c. REFER TO PART IIIa, DA FORM 67-8-1 Serves as platoon leader of supply and service platoon in General Support company of FSB. Responsible for general supply and service support within the brigade rear. Responsible for timely and accurate ordering and delivery of all classes of supply within the BSA. Responsible for maintenance of all platoon vehicles. Serves in additional duty areas of vector control officer, voting officer, unit tax officer and unit morale and welfare officer.

**PART IV - PERFORMANCE EVALUATION - PROFESSIONALISM** *(Rater)*

a. PROFESSIONAL COMPETENCE *(In lines 1 through 14 below, indicate the degree of agreement with the following statements as being descriptive of the rated officer. Any comments will be reflected in b below.)* HIGH DEGREE ← 1 2 3 4 5 → LOW DEGREE

| | | | |
|---|---|---|---|
| 1. Possesses capacity to acquire knowledge/grasp concepts | 1 | **8**. Displays sound judgment | **1** |
| 2. Demonstrates appropriate knowledge and expertise in assigned tasks | 1 | 9. Seeks self-improvement | 1 |
| 3. Maintains appropriate level of physical fitness. PASS 0200 | 1 | 10. Is adaptable to changing situations | 1 |
| 4. Motivates, challenges and develops subordinates | 1 | 11. Sets and enforces high standards | 1 |
| 5. Performs under physical and mental stress | 1 | 12. Possesses military bearing and appearance 66/127 YES | 1 |
| 6. Encourages candor and frankness in subordinates | 1 | 13. Supports EO/EEO | 1 |
| 7. Clear and concise in written communication | 1 | 14. Clear and concise in oral communication | 1 |

b. PROFESSIONAL ETHICS *(Comment on any area where the rated officer is particularly outstanding or needs improvement*

| | |
|---|---|
| 1. DEDICATION<br>2. RESPONSIBILITY<br>3. LOYALTY<br>4. DISCIPLINE<br>5. INTEGRITY<br>6. MORAL COURAGE<br>7. SELFLESSNESS<br>8. MORAL STANDARDS | a.3 Is physically fit - scored 300 on the APFT.<br>a.8 Displayed outstanding judgment on FTX "Operation Home Run" by personally securing lost equipment.<br>b.1 Dedicated to troops and duty. A caring leader<br>b.8 Displays highest personal standards of ethics. |

**DA FORM 67-8 FOR EDUCATIONAL USE ONLY - NOT EXACT DUPLICATE**

PERIOD COVERED 990516-000515

**PART V - PERFORMANCE AND POTENTIAL EVALUATION** *(Rater)*

a. RATED OFFICER'S NAME Atchison, Renee SSN 134-55-6879

RATED OFFICER IS ASSIGNED IN ONE OF HIS/HER DESIGNATED SPECIALTIES/MOS X YES _____ NO

b. PERFORMANCE DURING THIS RATING PERIOD. REFER TO PART III, DA FORM 67-8 AND PART III a. b. and c., DA FORM 67-8-1

[X] ALWAYS EXCEEDED REQUIREMENTS [ ] USUALLY EXCEEDED REQUIREMENTS [ ] MET REQUIREMENTS [ ] OFTEN FAILED REQUIREMENTS [ ] USUALLY FAILED REQUIREMENTS

c. COMMENT ON SPECIFIC ASPECTS OF THE PERFORMANCE. REFER TO PART III, DA FORM 67-8 AND PART III a. b. and c., DA FORM 67-8-1. DO NOT USE FOR COMMENTS ON POTENTIAL:

2LT Atchison is a bright young officer. She has exceeded my every expectation as platoon leader of the Supply and Service platoon. She quickly established herself as an integral part of the unit, winning praise from the supported brigade S-4. 2LT Atchison's emphasis on teamwork resulted in a thoroughly combat ready platoon. She instituted a cross-training program in which soldiers with different supply MOS designations could cross-train in other MOS areas. This resulted in an increase in requisition request processing throughout the unit. This outstanding officer was selected to train Reserve Component supply personnel during the Division's annual summer "Partnership in Training" program with the division round-out brigade. She planned, coordinated, and executed a dynamic program of instruction that ensured that all supply personnel in the round-out brigade were fully capable of supporting the 3d Brigade if activated. She performed with equal brilliance in the additional duty areas of vector control officer, voting officer and unit tax officer. She is clearly an outstanding performer.

d. THIS OFFICER'S POTENTIAL FOR PROMOTION TO THE NEXT HIGHER GRADE IS

[X] PROMOTE AHEAD OF CONTEMPORARIES [ ] PROMOTE WITH CONTEMPORARIES [ ] DO NOT PROMOTE [ ] OTHER *(Explain below)*

e. COMMENT ON POTENTIAL

Promote this officer at the earliest opportunity. She must be given the opportunity to serve as a company executive officer at the earliest opportunity. This officer has the potential to go very far in the Army. Cultivate and groom her for command.

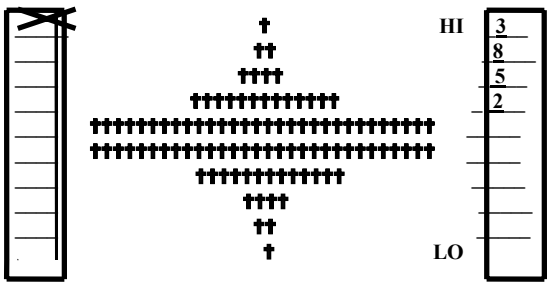
**PART VI - INTERMEDIATE RATER**

a. COMMENTS

**PART VII - SENIOR RATER**

a. POTENTIAL EVALUATION *(See Chapter 4, AR 635-1-5_*

SR




A COMPLETED DA FORM 67-8-1 WAS RECEIVED WITH THIS REPORT AND CONSIDERED IN MY EVALUATION AND REVIEW

X YES ___ NO *(Explain in b)*

b. COMMENTS I could not be more pleased with the start that 2LT Renee Atchison has made in the Army. This bright young officer has established herself as a key player in this battalion. Her rapid acceptance of critical responsibility with the company and battalion has far surpassed her peers. On a recent field exercise, she personally secured some high value equipment that had been lost from a convoy. She stayed at her post and sent for assistance thus ensuring continued accountability of the equipment. She was one of only two lieutenants from the entire DISCOM selected to teach reserve component personnel this summer. This officer has boundless potential. Select her for early promotion and send her to the advanced course.

**DA FORM 67 - 1 (FOR EDUCATIONAL USE ONLY - NOT EXACT DUPLICATE)**

**SWORN STATEMENT**

**For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel**

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| Fort Wahoo, Va | 27 Oct 00 | | |
| **LAST NAME, FIRST NAME, MIDDLE NAME** | **SSN** | | **GRADE/STATUS** |
| Boston, Edward C. III | 573-99-8877 | | CPT |

ORGANIZATION OR ADDRESS

G Company, 123d FSB

I, Edward C. Boston III, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

Questions: MAJ DENVER

Answers: CPT BOSTON

Q. How long have you been the commander?

A. About 5 months.

Q. How big is your company?

A. The authorized strength is 115. There are 108 assigned.

Q. How many females are in you unit?

A. There are two female LTs and 28 female NCO/soldiers.

Q. Have there been any complaints made to you about sexual harassment?

A. None prior to this. Everyone works very well together.

Q. Do you have a screen saver in your office?

A. Yes I have one on my computer.

Q. Describe it.

A. It shows a girl in a bikini and the top falls off.

Q. Has anyone seen this screen saver?

A. Yes. The 1SG and some of the LTs have seen it. It is not something that is on display. The only way to see it is to come behind my desk. I normally don't let people back there.

Q. Did LT Atchison ever see it?

A. She might have on one occasion. It came on unexpectedly when she was briefing me on something. As soon as I saw it, I hit the mouse to make it go away.

Q. Have any of the other female soldiers seen it?

A. No.

Q. Can a reflection of it bee seen in your office window?

A. I don't have a window in my office.

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | |
|---|---|---|
| E | ***ECB*** | PAGE 1 OF 6 PAGES |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

STATEMENT *(Continued)*

Q. How often are the LTs in your unit counseled?
A. Monthly by the XO.
Q. Do you counsel the officers personally?
A. Sometimes.
Q. Where do these counseling take place?
A. It depends on the reason for the counseling. Sometimes it is done at the work site, sort of an on-the-spot-correction. Other times it is more formal and I use the office.
Q. Do you ever counsel LTs in their office?
A. Sometimes. But they don't all have personal offices where we can shut the door and have privacy.
Q. Are the female LTs counseled differently than the males?
A. No.
Q. Do you ever counsel male LTs in your office.
A. Yes.
Q. Do you remember LT Franklin asking about sexual harassment during an officers call?
A. Yes. She embarrassed me and the Battalion Commander. The Battalion commander was fairly new at the time and this was more of a get acquainted session. Out of the blue she asks this question about training on sexual harassment. I talked to her later about it and had her research training requirements.
Q. Was she being punished for asking about sexual harassment?
A. No. There was nothing wrong with the question. The problem was the timing and forum where she asked the question.

**AFFIDAVIT**

I, _____ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____
_____
_____
ORGANIZATION OR ADDRESS

_____
_____
_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this _____ day of _____, 19_____
at _____

_____
*(Signature of Person Administering Oath)*

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority to Administer Oaths)*



**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT *(Continued)*

Q. Did LT Franklin have to perform extra duty in addition to the research?
A. No.
Q. Did you require her to supervise soldiers performing extra duty?
A. No. I asked her to check on the extra duty soldiers. That is not performing extra duty. It is something I would expect any officer to do on their own if they were in the company area after normal duty hours. I frequently stop in after duty hours to check on soldiers. I expect my officers and NCOs to do the same.
Q. Did you intend for LT Franklin to have to work late in order to get the research done?
A. I expected her to work as long as necessary to get the job done. That attitude of only working during normal duty hours was one of the reasons that this company was so screwed up when I took over. I want her to understand that this is not an 8-5 job - especially for officers. Several of the officers and NCOs were not happy when I took over and put out the message that we will work until the job is done, even if that means all night in some cases. I don't think LT Franklin was or is completely happy with that.
Q. What about LT Atchison, how is she doing?
A. She is an average performer. I was disappointed with the recent results in the inspection. I thought she could have put more effort into fixing the problem.

**AFFIDAVIT**

I, _____ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

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ORGANIZATION OR ADDRESS

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_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this _____ day of _____, 19_____
at _____

_____
*(Signature of Person Administering Oath)*

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority to Administer Oaths)*



**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT *(Continued)*

Q. Did you recommend that she not be promoted to 1LT?
A. Yes. Part of the reason that I told the Battalion commander that I would not recommend her now was to get her attention. The Battalion Commander told her that she had a couple months to get her act together before a final decision would be made. I want to see how she deals with this and how her attitude is before I make a final recommendation.
Q. Have you treated her any different because she is a female?
A. I don't think so. I got the impression that the prior chain of command, especially the battalion commander, gave the female LTs a little more of a break. I don't do that. Everyone is expected to perform to the same standard. If they can't do the job then I will get rid of them.
Q. Has LT Atchison failed to perform to the standard?
A. I think so. She needs more maturity. She needs to show more initiative. She is technically competent but that is only part of being an officer. Part of it is a judgment call on my part based on what I've seen over the last few months. I think her performance has leveled off and even declined in the last couple of months. I haven't seen the growth and improvement that I expected.
Q. Have you treated any of the females in the unit differently?
A. Not differently then the males. It may be different then the prior chain of command.

**AFFIDAVIT**

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_____
*(Signature of Person Making Statement)*

WITNESSES:

_____
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_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this _____ day of _____, 19_____
at _____

_____
*(Signature of Person Administering Oath)*

_____
_____
_____
ORGANIZATION OR ADDRESS

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT ***ECB*** PAGE **4** OF **6** PAGES

**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT *(Continued)*

Q. How would you describe the attitude of your unit towards women?
A. I'm not sure I understand the question. Everyone is treated fairly. But, this is no cake walk. This is a unit that can be deployed on short notice to support a Mechanized Infantry Brigade. I am not going to have people in the unit that can't perform that mission.
Q. Do you think the screen saver is offensive to women?
A. I hadn't really thought about that since they don't see it. If it is a problem, I'll take it off the computer.
Q. Do you think women can perform the mission your unit has?
A. Yes. Those that want to can. I get frustrated when someone can't deploy. I don't think it's fair to the other soldiers.
Q. Do you ever make comments about female soldiers who become pregnant?
A. I may have. Like I said, it is mostly just frustration on my part. If I did say anything it would only be to the chain of command. There is nothing I can do about it. If a soldier is pregnant and can't deploy, we just have to get someone else to go in her place. Luckily it hasn't happened in an area where there is no back-up.
Q. Do you think your comments could be viewed as hostile towards women?

**AFFIDAVIT**

I, _____ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

_____
*(Signature of Person Making Statement)*

WITNESSES:

_____
_____
_____
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths this _____ day of _____, 19_____
at _____

_____
*(Signature of Person Administering Oath)*

_____
_____
_____
ORGANIZATION OR ADDRESS

_____
*(Typed Name of Person Administering Oath)*

_____
*(Authority to Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT ***ECB*** PAGE **5** OF **6** PAGES

**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT *(Continued)*

A. No. If I made a comment about a soldier being nondeployable that would be the end of it. I would not hold that against anyone. The soldiers all know that I will treat them fairly if they do the job.

Q. What if they can't do the job because of pregnancy?

A. That's not what I meant. Pregnant soldiers still do a job. It may not be on a deployment, but I don't punish them for that.

Q. Do you ever refer to female soldiers as "you people"?

A. I may have. It is a term I use often when referring to a group of people, male or female. I frequently say things like "You people need to get your act together." It is not limited to female soldiers.

Q. Did you ever refer to females as "you people" when talking about latrines in the field?

A. I may have. Part of the unit was going to the field and some asked about making on of the latrines - Female only. I said that I didn't think we needed to make any special arrangements. The latrines were Porta-johns. They had doors with locks on them.

Q. Is there any thing else you want to add?

A. I don't think there is a problem in my company. There are a few people who are unhappy with the fact that they have to work harder now and can't slide the way they did before. I don't think I've done anything wrong. -------END OF STATEMENT-------

**AFFIDAVIT**

I, Edward C. Boston III HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

***E C Boston III***

*(Signature of Person Making Statement)*

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 27 day of Oct, 2000 at Fort Wahoo

***Stuart Denver***

*(Signature of Person Administering Oath)*

*(Typed Name of Person Administering Oath)*

*(Authority to Administer Oaths)*

ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

INITIALS OF PERSON MAKING STATEMENT



**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

# RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

**For use of this form, see AR 190-30; the proponent agency is ODCSOPS**

## DATA REQUIRED BY THE PRIVACY ACT

**AUTHORITY:** Title 10, United States Code, Section 3012(g)
**PRINCIPAL PURPOSE:** To provide commanders and law enforcement officials with means by which information may be accurately identified.
**ROUTINE USES:** Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
**DISCLOSURE:** Disclosure of your Social Security Number is voluntary.

| 1. LOCATION | 2. DATE | 3. TIME | 4. FILE NO |
|---|---|---|---|
| **Fort Wahoo VA** | 27 Oct 00 | | |

| 5. NAME *(Last, First, MI)* | 6. SSN | 7. GRADE/STATUS |
|---|---|---|
| **Boston, Edward C. III** | 573-99-8877 | CPT |

8. ORGANIZATION OR ADDRESS G Co., 123d FSB

## PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

**Section A. Rights**

The investigator whose name appears below told me that he/she is with the United States Army 21st Forward Support Battalion and wanted to question me about the following offense(s) of which I am suspected/accused: sexual harassment, maltreatment of subordinate
Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that have the following rights

1. I do not have to answer any questions or say anything.
2. Anything I say or do can be used as evidence against me in a criminal trial.
3. (*For personnel subject to the UCMJ)* I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me or both.

- or -

*(For civilians not subject to the UCMJ)* I have the right to talk privately to a lawyer before, during and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.
4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

5. COMMENTS *(Continue on reverse side)*

**Section B. Waiver**

I understand my rights as stated above. I am willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES *(if available)*

| 1a. NAME *(Type or print)* | 3. SIGNATURE OF INTERVIEWEE |
|---|---|
| | ***EC Boston III*** |
| b. ORGANIZATION OR ADDRESS AND PHONE | 4. SIGNATURE OF INVESTIGATOR |
| | ***Stuart Denver*** |
| 2a. NAME *(Type or Print)* | 5. TYPED NAME OF INVESTIGATOR |
| | Stuart Denver |
| b. ORGANIZATION OR ADDRESS AND PHONE | 6. ORGANIZATION OF INVESTIGATOR |
| | HQ Co., 21st FSB, Fort Wahoo, VA |

**Section C. Non-waiver**

1. I do not want to give up might rights:
___ I want a lawyer ___ I do not want to be questioned or say anything

2. SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT *(DA FORM 2823)* SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED

**DA FORM 3881 (FOR EDUCATIONAL PURPOSES ONLY - NOT AN EXACT DUPLICATE)**

## PART II - RIGHTS WARNING PROCEDURE

### THE WARNING

1. WARNING - Inform the suspect/accused of:
   a. Your official position.
   b. Nature of the offense(s).
   c. The fact that he/she is a suspect/accused.
2. **RIGHTS -** Advise the suspect/accused of his/her rights as follows:
   "Before I ask you any questions, you must understand your rights."
   a. "You do not have to answer my questions or say anything."
   b. "Anything you say or do can be used as evidence against you in a criminal trial."
   c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

- or -

*(For civilians not subject to the UCMJ)* You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."

   d. "If you are now willing to discus the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights.

### THE WAIVER

"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Have you ever requested a lawyer after being read your rights?"
(If the suspect/accused says "yes," find out when and where. If the request was recent *(i.e., fewer than 30 days ago*), obtain legal advice on whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)

"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)
"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" *(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)*

### SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation , and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:
1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.
2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section of the waiver certificate and initialed by the suspect/accused.

WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS/HER RIGHTS DURING THE INTERROGATION PROCESS. If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")

COMMENTS *(Continued)*

**REVERSE OF DA FORM 3881 (EDUCATIONAL PURPOSES ONLY-NOT EXACT DUPLICATE)**

*SAMPLE LEGAL REVIEW*

**DEPARTMENT OF THE ARMY**
The Park Ranger General's School
Charlottesville, Virginia 22903-1781

JAGS-ADA (15-6) 1 July 1999

MEMORANDUM FOR Commandant, The Park Ranger General's School, 600 Massie Road
Charlottesville, VA 22903-1781

SUBJECT: Legal Review -- Academic Board of 1LT Yogi J. Bear, 123-45-6789, 4th Advanced Picnic Basket Theft Prevention Course, The Judge Advocate General's School

1. The academic board, appointed under the provisions of AR 15-6, to consider whether 1LT Yogi J. Bear met the established standards for graduation from the Advanced Picnic Basket Theft Prevention Course is legally sufficient. Procedures used by the board were in accord with those established by AR 15-6. Findings are supported by evidence gathered during the course of the board proceedings. Recommendations are logically developed from the findings.

2. My recommendation for substitution and approval of alternative findings and recommendations is based on the following analysis:

a. If 1LT Bear's research paper into picnic basket design is deemed to be a failing effort, Finding 1, only one additional finding, Finding 5, must be approved to support one of the established recommendations.

(1) Your appointment memorandum tasked the board to make an initial, specific finding as to whether 1LT Bear should receive a failing grade for his research paper submitted in partial satisfaction of the requirements for graduation from the Advanced Picnic Basket Theft Prevention Course. The board specifically found that 1LT Bear should receive a failing grade for his Advanced Picnic Basket Theft Prevention Course research paper (Finding 1). Going further, the board made additional findings. The board developed the facts and circumstances relating to the submission of the research paper in question (Finding 5), and related 1LT Bear's overall duty and academic performance (Findings 7 and 8). Providing still further background, the board sought to establish the facts and circumstances relating to rejection of 1LT Bear's initial research paper (Finding 2); his responsibility for the failure of the currently examined research paper (Finding 4); and the relationship, in general, of the research paper to the Advanced Picnic Basket Theft Prevention Course (Findings 3 and 6).

(2) If the board was to determine that 1LT Bear's research paper should receive a failing grade, your appointment memorandum then tasked the board to make further recommendations.

The stated alternatives were whether he should be given a reasonable opportunity to rewrite and resubmit his research paper, or be declared a non-graduate and dismissed from this course. Given the board's determination that 1LT Bear's research paper should receive a failing grade (Finding 1), only the finding that explains the context of that failure (Finding 5) would be absolutely required to then support one of the two established recommendations. While 1LT Bear's overall duty and academic performance (Findings 7 and 8) and his responsibility for the failure of the research paper (Finding 4) have relevance in determining the board's recommendation, as well as your directed action, neither is strictly dependent on those factors.

b. Recommendation c, recommending reevaluation of the research paper, should contain additional procedural guidance. Specifically, you should direct the Academic Director should designate three graders, without prior knowledge of this case to evaluate the resubmitted research paper, in accordance with The Park Ranger General's School (TPRGS) Circular 351-6, paragraph 8b(6).

c. I recommend disapproval of Recommendation d, recommending establishment of a policy and procedure for handling all plagiarism allegations. Recommendation d, while supported to some degree by evidence developed by the board (Finding 2), exceeds the scope of the academic board's appointment memorandum. Further review of current policies and procedures with regard to allegations of student plagiarism is warranted prior to any action.

Encl
as

WINNIE THE POOH
LTC, JA
Chief, Administrative and Civil Law Division

The following approved findings and directed actions are substituted for the Academic Board's findings and recommendations:

Finding 1. 1LT Bear's current paper, submitted for evaluation on 26 May 1998, contains numerous, substantial deficiencies and errors, as evaluated under the criteria establihed in the Professional Writing Program Manual, 46th Advanced Picnic Basket Theft Prevention Course, The Judge Advocate General's School, Army, Appendix D, pp. 10 - 12, and warrants a failing grade.

Finding 2. 1LT Bear was provided with approximately thirty-five (35) days, ending on 15 June 1998, to complete a research paper in partial satisfaction of the requirements for graduation from the Advanced Picnic Basket Theft Prevention Course. The 15 June 1998 suspense was after the scheduled date for graduation of 1LT Bear's Advanced Picnic Basket Theft Prevention Course. Recognizing that his scheduled graduation date would occur prior to the suspense for completion of the research paper, 1LT Bear was repeatedly counseled by faculty and administration personnel to use the full allotted time to complete his research paper. He was furthis counseled that extensions of the suspense for completion of the research paper would be liberally granted. In an effort to graduate with members of his Advanced Picnic Basket Theft Prevention Course, 1LT Bear submitted his research paper for evaluation on 26 May 1998, 20 days prior to its due date.

Finding 3. Although 1LT Bear's research paper was accepted for grading when he submitted it on 26 May 1998, the fifteen days he took for this effort were insufficient for his to complete satisfactorily a research paper of the type required under the current Writing Program.

Action 1. 1LT Bear's research paper submitted for evaluation on 26 May 1998 is assigned a failing grade.

Action 2. 1LT Bear is given an additional three weeks, 21 days, from the date of receipt of this action to submit a revised research paper. Considering the opportunity 1LT Bear has received over the past two months to work on his research paper, this additional three weeks for completion of his research paper are an adequate period to satisfactorily complete this assignment.

DA Form 1574, Section VII, Action by Appointing Authority -- Academic Board of 1LT Bear J. Bear, 123-45-6789, 4th Advanced Picnic Basket Theft Prevention Course, The Park Ranger General's School

Recommendation 3. 1LT Bear's revised research paper will be graded by three faculty members, appointed by the Director of Academics, who have not previously graded earlier versions of his research paper or participated in the processing of his Academic Board. 1LT Bear's revised ("rewritten") research paper will be graded in accordance with TPRGS Circular 351-6, paragraph 8b(6).

PADDINGTON BEAR
COL, IN
Commandant

# CHAPTER X

JAGS-ADA (351)

MEMORANDUM FOR BASIC CLASS OFFICERS

SUBJECT: Report of Survey Practical Exercise

1. This memorandum introduces an administrative law practical exercise for Judge Advocate Officer Basic Course students. Your written submission should comply with the requirements of Army Regulation 25-50, Preparing and Managing Correspondence. The due date will be posted separately.

2. Background.

a. You are newly assigned to the Administrative Law Division of the Staff Judge Advocate's Office, Fort Blank, Virginia. The year is 200X. Your boss, Major J. D. Salinger, calls you in to discuss office procedure generally and to give you an action to complete.

b. In addition to other duties as assigned, Major Salinger informs you that you will be the office point of contact for Reports of Survey. After a general discussion of the Report of Survey system at Fort Blank, he hands you the enclosed Report of Survey to review.

3. Assignment.

a. Review the request for legal review, research the issues, and prepare a **first endorsement** (see AR 25-50) for the action back to the requestor which communicates your analysis and conclusions regarding legal sufficiency. The endorsement should conform to the requirements of AR 25-50 and be for your signature. Address any questions regarding preparation of the endorsement to me or your faculty advisor. You will attend a seminar to discuss the exercise and review proposed solutions. Your written exercise will be turned in prior to the seminar. Keep a copy of your submission and bring it with you to discuss. Your faculty advisor will review your exercise and discuss it with you.

4. **This is a graded exercise** and may form the basis for comments in your Academic Evaluation Report (AER). Specific grading criteria for this practical exercise will be distributed to you separately.

JAGS-ADA
SUBJECT: Report of Survey Practical Exercise

5. **This practical exercise is an individual exercise (no collaboration with others).** Please see me or your faculty advisor if you have any questions.

Encl

MICHAEL P. BOEHMAN
MAJ, JA
Professor, Administrative
and Civil Law Department

ABCD-SUPT (735-5) 3 November 199X

MEMORANDUM FOR OSJA, ATTN: ABCD-JAG-AD, Fort Blank, VA

SUJBECT: Report of Survey 9X-42

1. Request your legal sufficiency review of the above referenced report of survey.

2. POC for this request is CPT Smith, 8th Support Battalion S-4.

FOR THE COMMANDER:

Encl

DAVID R. DENT
CPT, QM
Adjutant

ABCD-SUPT (735-5) 10 October 199X

MEMORANDUM FOR SFC Jean Getty, B Co, 108th Signal Company, Fort Blank Virginia 22222

SUBJECT: Duty Appointment

1. Effective 10 October 199X, SFC Jean Getty, 456-98-0976, is hereby appointed as an Survey Officer for a Report of Survey # 9X-42.

2. Authority: AR 735-5.

3. Purpose: To perform a survey investigation IAW AR 735-5. You will obtain the details pertaining to the missing radio discussed in the ROS 9X-42.

4. Period: Until the investigation is completed and no further investigation is required, unless released sooner by appointing authority.

5. Special Instructions: Conduct of this investigation will be your primary duty until the investigation is submitted to the appointing authority. Your findings will be supported by substantial evidence. Your report of investigation will be submitted to this headquarters, NLT 10 November 199X.

FOR THE COMMANDER:

JAMES F. BOND
MAJ, OD
Adjutant

**DEPARTMENT OF THE ARMY**
**REPORT OF SURVEY**
**For use of this form, see AR 735-5; the proponent agency is ODCSLOG**

| 1. DATE PREPARED | 2. SURVEY NUMBER |
|---|---|
| 9x0930 | 9x-42 |

| 3. TYPE OF PROPERTY | 4. ADDRESS OF ACCOUNTABLE OFFICER |
|---|---|
| Installation Property | 108th Signal Company, Fort Blank, VA 22222 |

5. ORIGINATOR *(Accountable officer, or primary hand receipt holder)*
Henry T. Lawes, CPT, SC, Commanding

| 6. NATIONAL STOCK NUMBER | 7. ITEM DESCRIPTION | 8. QTY | 9. UNIT PRICE | 10. TOTAL COST |
|---|---|---|---|---|
| 5820-02-T33-6832 | RADIO MOBILE MOTOROLA MPD 16<br>SN# 818213 | 1 | 1,700.00 | 1,700.00 |

11. DATE AND CIRCUMSTANCES

On 20 August 199x, the monthly arms room inventory was conducted by CPT Foufax, Sandy L. After inventorying radios, it was discovered that the radio with serial number 818213 was not in the arms room nor signed out for the day. There was no record of the radio being turned into the shop for repair. At that time, SPC Adams, Jane A., notified me and called hand receipt holders that are signed for radios to check to see if one of their personnel had swapped out a radio because there was a radio in the arms room at the time of the inventory that was not assigned to the arms room. On 30 August 199x, I directed an inventory of radios in the arms room and discovered that serial number 818213 was still missing. I then went through the daily sign out sheets (Form 1-2) for the month of August 199x to see when the radio was last accounted for. I discovered that on 15 August 199x PV2 McClean, 30th Signal Detachment, had signed for the radio and had not signed it back into the arms room. 30th Signal detachment was then notified of the situation and they in turn notified PV2 McClean's Platoon Sergeant, SFC Quick. Also talked with SSG Reynolds and LT Dane. As of 19 September 199x, SFC Quick and PV2 McClean had not been able to locate the radio.

| 12. AFFIDAVIT | SIGNATURE AND DATE | 13. Subscribed and sworn to *(or affirmed)* before me at this day of |
|---|---|---|
| I do solemnly swear *(or affirm)* that *(to the best of my knowledge and belief)* the articles of public property shown above and/or on attached sheets were lost, destroyed, damaged, or worn out in the manner stated, while in the public service. | TYPED NAME, GRADE, AND SSN<br>HENRY T. LAWES, CPT<br>801-32-1119 | NAME AND GRADE *(type and sign)* |

| 14. DATE | 15. NAME, GRADE, AND SIGNATURE OF ACCOUNTABLE OFFICER | 16. DOCUMENT NUMBER |
|---|---|---|
| 9X1002 | FRANKLIN PIERCE, 1LT, SC<br>Property Book Officer | AZ992 |

17. APPOINTING AUTHORITY

I have received the evidence pertaining to the lost, damaged, or destroyed property, and have determined that the following action is required.

a. ☐ No further investigation is required. There is no positive evidence of negligence. I do not suspect willful misconduct, or deliberate unauthorized use. I hereby forward this document to the approving authority for final action. *(Proceed to block 37.)*

b. ☐ The circumstances surrounding the lost, damaged or destruction warrants further investigation. *(Proceed to block 21.)*

c. ☐ Conduct an investigation according to AR 15-6. Attach this document, as an exhibit, to the investigation and forward it to the approving authority.

| 18. DATE | 19. TYPED NAME, GRADE, AND TITLE OF APPOINTING AUTHORITY | 20. SIGNATURE |
|---|---|---|
| | | |

**DA FORM 4697, SEP 81**

DA FORM 4696(TEST), 1 JUL 78 and DA FORM 4697(TEST), 1 JUL 78 ARE OBSOLETE.

USAPPCV3.00

| 21. APPOINTING AUTHORITY | 22. STATION | 23. DATE |
|---|---|---|
| HQ, 8th Support Battalion | FORT BLANK, VA 22222 | 9X1012 |

24. NAME, GRADE OF SURVEYING OFFICER
GETTY, JEAN D. E-7

25. YOU ARE APPOINTED SURVEYING OFFICER BY ORDER OF: WILLIAM BALDWIN, LTC, OD, Commanding
*(Typed name, grade of Appointing Authority)*

26. FINDINGS AND RECOMMENDATION

I have examined all available evidence as shown in exhibits A to E and as indicated below have personally investigated the same and it is my belief that the article(s) listed hereon and/or attached to sheets, total cost $ 1,700.00

was lost as a result of negligence by PV2 McClean, 801-23-1345, 30th Signal Detachment, Fort Blank, VA 22222.

Findings: That prior to 15 August 199x a Mobile Motorola MPD 16 radio serial number 818213 was accounted for on Form 1-2 this form shows that the radio had been signed in and out of the arms room. On 15 August 199x at 1330 PV2 McClean of the 30th Signal Detachment signed out radio number 16 serial number 818213 and never signed the radio back into the arms room on Form 1-2. Upon completion of researching all Forms 1-2 after 15 August 199x to the present revealed that radio number 818213 was no longer accounted for nor was the radio signed out to anyone. There is no clear control of the radios being issued by the armors in the arms room. During my checks of the radios in the arms room three additional radios were believed to be missing. Further checking with the radio shop in Fort Lee, Va, revealed that there were two radios that were not signed for properly on hand receipts. The armor's continued to count 52 radios thru 20 August 199x when CPT Foufax conducted a 100% inventory where it was discovered that radio number 818213 was missing from the arms room. The radio was five years old.

Recommendation: That PV2 McClean be held pecuniarily liable in the amount of $1,275 for lost property. Recommend that 108th Signal Company have all non-essential radios returned back to unit supply room and conduct a 100% visual and serial number radio inventory. Further recommend that all armors be properly trained on the correct procedures on filling out Form 1-2 and conducting daily inventories at the end of each shift.

PV2 McClean's monthly base pay at time of the loss was $913.20. Total price: 1700 - (25% depreciation) 425 = $1,275.

| 27. RECOMMEND PECUNIARY CHARGE | a. ACTUAL LOSS | b. AMOUNT CHARGED | c. LOSS TO GOVERNMENT |
|---|---|---|---|
| | $1,700.00 | $1,275.00 | $425.00 |

| 28. DATE | 29a. TYPED NAME, GRADE OF SURVEYING OFFICER | b. SIGNATURE |
|---|---|---|
| 9x1109 | GETTY, JEAN, E-7 | |

30. A

I have examined the findings and recommendations of the Surveying Officer on this report of survey and the exhibits to E and ☒ desire to make a statement which is attached hereto; ☐ do not desire to make a statement. I am aware of my right to legal advice in preparing the statement and, if a pecuniary charge is finally approved, to make appeal and *(If an enlisted man)* my right to request remission of indebtedness. I am/am not the accountable officer for the lost or damaged property. The property was/was not my personal arms or equipment.

| 31. DATE | 32a. TYPED NAME, GRADE OF INDIVIDUAL BEING CHARGED | b. SIGNATURE |
|---|---|---|
| 9X1109 | MCCLEAN, MILDRED D. | |

| 33. RECOMMENDATION BY THE APPOINTING AUTHORITY | 34. COMMENTS |
|---|---|
| ☐ CONCUR<br>☐ NONCONCUR | |

| 35. DATE | 36a. TYPED NAME, GRADE & TITLE OF APPOINTING AUTH | b. SIGNATURE |
|---|---|---|
| | | |

37. APPROVING AUTHORITY
a. ☐ REJECTED. Investigation is required. Appoint a survey officer. Date _____ Initials _____
b. ☐ REJECTED. Investigation incomplete. Additional information required. Date _____ Initials _____
c. ☐ APPROVED BY AUTHORITY OF THE SECRETARY OF THE ARMY.

38. PECUNIARY CHARGE
a. ACTUAL LOSS
b. AMOUNT CHARGED
c. LOSS TO GOVERNMENT

| 39. DATE | 40a. TYPED NAME, GRADE & TITLE OF APPROVING AUTH | b. SIGNATURE |
|---|---|---|
| | WILLIAM BALDWIN, LTC, OD<br>Commanding | |

**REVERSE, DA FORM 4697, SEP 81** USAPPCV3.00

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| BLDG 10, FORT BLANK, VA 22222 | 9X1020 | 0945 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| JONES, JOHN PAUL | 821-19-2131 | PFC |

ORGANIZATION OR ADDRESS
108TH Signal Company, Fort Blank, VA 22222

I, JOHN P. JONES, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

THAT ON THE 15TH OF AUGUST 199X ISSUED RADIO #818213 TO PFC MCCLEAN AND SHE NEVER RETURNED IT ON MY SHIFT.

Q: DID YOU EVER RECEIVE A RADIO CARD FROM MCCLEAN?

A: I CAN'T REMEMBER THAT FAR BACK ABOUT A RADIO CARD.

Q: WHERE DO YOU KEEP RADIO CARDS WHEN ISSUING RADIOS OUT TO SOLDIERS?

A: WE KEEP THEM ALONG WITH THE WEAPON CARDS IN THE EMPTY WEAPON SLOT.

Q: HOW OFTEN DO SOLDIERS SIGN OUT RADIOS WITHOUT A RADIO CARD?

A: USUALLY EVERYDAY SOLDIERS FORGET TO BRING RADIO CARDS SO WE HAND RECEIPT THEM A RADIO.

END OF STATEMENT

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 1 PAGES |
|---|---|---|
| A | | |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPC V2.00

STATEMENT *(Continued)*

NOTHING FOLLOWS

**AFFIDAVIT**

I, JOHN P. JONES, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*(Signature of Person Making Statement)*

WITNESSES:

ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 20th day of October, 19 9 at Fort Blank, Va 22222

*(Signature of Person Administering Oath)*

JEAN GETTY, SFC
*(Typed Name of Person Administering Oath)*

ART 136, UCMJ (b)(4)
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| BLDG. 10, FORT BLANK, VA 22222 | 9X1020 | 0930 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| ADAMS, JANE A. | 505-35-1982 | SPC/E-4 |

ORGANIZATION OR ADDRESS
108th Signal Company, Fort Blank, VA 22222

I, JANE A. ADAMS, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

On 20 August 9x CPT Foufax conducted the monthly inventory of the arms room. After completing the inventory it was noted that one (1) radio serial number 818213 was not accounted for. It was neither physically present nor was there any documentation of the radio being turned into maintenance for repair. At that time I notified CPT Lawes of the missing radio and contacted hand receipt holders to see if one of their soldiers had possibly swapped out one of their inoperable radios for one assigned to the arms room. Then on 30 Aug 9x I went to the arms room to inventory radios and discovered that radio 818213 was still not accounted for. I then gave all the Forms 1-2 for the month of August to CPT Lawes. He and I went through all of them to see when the radio was last accounted for. That's when it was discovered that on 15 August 9x PV2 McClean of 30th Signal Detachment was the last to sign for the radio and had not signed it back in. There was another radio not accounted for at the time of the inventory, but it was found to be in the possession of the Signal Detachment and was recovered later that same day (20 Aug) and returned to the arms room.

The reason for the time lapse (20 Aug - 19 Sept) before initiating a report of survey is because I wanted to give PV2 McClean time to try and locate the aforementioned missing radio.

Q: Why are they maintained in weapons rack?
A: Because when an individual signs out his/her weapon, radio cards are put in the rack along with the individuals weapon card.

Q: If an individual does not have a radio card, can he/she sign out a radio?
A: Yes, but by using a hand receipt and signing the Form 1-2.

END OF STATEMENT

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 1 PAGES |
|---|---|---|
| B | | |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPCV2.00

STATEMENT *(Continued)*

NOTHING FOLLOWS

**AFFIDAVIT**

I, JANE A. ADAMS, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*(Signature of Person Making Statement)*

WITNESSES:

ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 20th day of October, 19 9 at Fort Blank, VA 22222

*(Signature of Person Administering Oath)*

JEAN GETTY, SFC
*(Typed Name of Person Administering Oath)*

ART 136, UCMJ, (b)(4)
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT



USAPPC V2.00

**SWORN STATEMENT**

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

| LOCATION | DATE | TIME | FILE NUMBER |
|---|---|---|---|
| BLDG 10, FORT BLANK, VA 22222 | 9X1102 | 1415 | |

| LAST NAME, FIRST NAME, MIDDLE NAME | SOCIAL SECURITY NUMBER | GRADE/STATUS |
|---|---|---|
| McCLEAN, MILDRED D. | 801-23-1345 | E-2 |

ORGANIZATION OR ADDRESS
30th Signal Detachment, Fort Blank, VA 22222

I, MILDRED D. McCLEAN, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

On August 15, 199x, during completion of my duty on the road I had returned to the arms room to turn in my equipment. Upon turning in my equipment I had not signed my name to the roster for turning in radio #818213. But I had received my radio card back and have since been using the same radio card. I have been later told that the same GE radio was lost, found again, then never found and still lost. Thats all I know.

END OF STATEMENT

| EXHIBIT | INITIALS OF PERSON MAKING STATEMENT | PAGE 1 OF 1 PAGES |
|---|---|---|
| C | | |

*ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.*

**DA FORM 2823, JUL 72** SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED. USAPPCV2.00

STATEMENT *(Continued)*

NOTHING FOLLOWS

**AFFIDAVIT**

I, MILDRED D. McCLEAN, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

*(Signature of Person Making Statement)*

WITNESSES:

ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 2d day of November, 19 9 at Fort Blank, VA 22222

*(Signature of Person Administering Oath)*

JEAN GETTY, SFC
*(Typed Name of Person Administering Oath)*

ART 136, UCMJ (b)94)
*(Authority To Administer Oaths)*

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

USAPPC V2.00

| WEAPONS, AMMUNITION AND RADIO REGISTER | | | | | | ORGANIZATION: 108th Signal Company | | | |
|---|---|---|---|---|---|---|---|---|---|
| TYPE | SERIAL # | IN AMMO OUT | | IN TIME/DATE OUT | | ISSUED TO (SIGNATURE & SSN) | ISSUOR | TURN-IN BY (SIGNATURE) | CHECKED IN (SIGNATURE) |
| GE | 809200 | | | 1130<br>9X0815 | 0500<br>9X0815 | | JPJ | | |
| GE | 705002 | | | 1125<br>9X0815 | 0515<br>9X0815 | | JPJ | | |
| GE | 702159 | | | 1115<br>9X0815 | 0516<br>9X0815 | | JPJ | | |
| GE | 818213 | | | | 0520<br>9X0815 | | JPJ | | |
| GE | 912221 | | | 1140<br>9X0815 | 0525<br>9X0815 | | JPJ | | |
| GE | 777903 | | | 1132<br>9X0815 | 0530<br>9X0815 | | JPJ | | |
| GE | 508889 | | | 1845<br>9X0815 | 1302<br>9X0815 | | JPJ | | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| GE | 885222 | | | 1850<br>9X0815 | 1310<br>9X0815 | | JPJ | | |
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| GE | | | | | | | | | |
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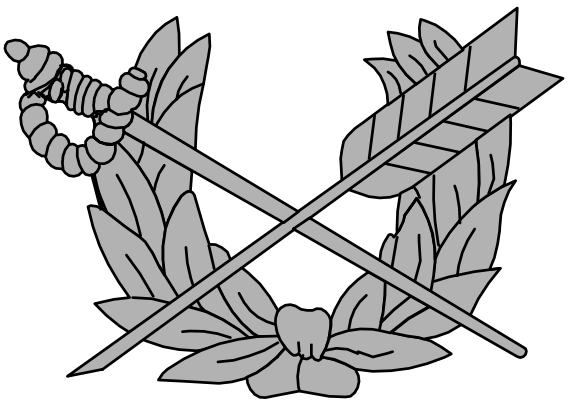
FORM 1-2 (Fort Blank Local)

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

# *BASIC COURSE DESKBOOK*



## Part V
## Lawyer Skills

The Judge Advocate General's School
United States Army

March 2001 JA 280

# CHAPTER Y

# SAMPLE INSTALLATION LEGAL OPINIONS

FT-BLANK (210-1a) ___ October 200_

MEMORANDUM FOR Staff Judge Advocate

SUBJECT: Request for Opinion

1. Please answer the following question for the Post Commander:

   Can the Post Commander and I accept a complimentary membership in the Soldiers' Family Association (SFA)?

2. Here is the additional information you requested when I called:

   a. SFA is a local family organization dedicated to identifying and resolving issues of concern to Fort Blank uniformed services families.

   b. SFA extended the offers in recognition that the Post Commander and I are leaders who share SFA's concern for the well-being of service families.

   c. SFA is an independent, nonprofit association, staffed primarily by volunteers. Its monthly newsletter informs its members about issues important to military families.

   d. Membership fee: $18.

I. WANTA GIFT
LTC, IN
Chief of Staff

FT-BLANK-SJA (FT-BLANK/__ Oct 0_) 1st End MAJ Counsel/ec/123-4567
SUBJECT: Request for Opinion

SJA (ATTN: FT-BLANK-SJA), Fort Blank, VA 22903-1781 __ October 200_

FOR Chief of Staff, Fort Blank

1. You and the Post Commander may accept a complimentary 1-year membership in SFA as explained in your request. Although the membership was offered because of your official positions, it is worth less than $20 and may be accepted pursuant to 5 C.F.R. § 2635.204 and Chapter 2 of DOD 5500.7-R, Joint Ethics Regulation.

2. UP JER 3-202, you and the Post Commander may not participate in the management of SFA as an official representative of the Army unless such participation is approved by the Secretary of the Army. You and the Post Commander may participate in SFA in your personal, individual capacities.

3. If you or the Post Commander chooses to participate in SFA in your personal capacities, you must ensure that you do not create the appearance that the Army officially endorses or sanctions the organization. Under 5 C.F.R. § 2635.702(e), when participating in your personal capacity, you may use your rank, but not your official title, in supporting organizational activities. For example, you may sign an endorsement, "Colonel, U.S. Army," but may not refer to your official position as Chief of Staff.

ETHICS COUNSEL
MAJ, JA
Ethics Counselor

AQRE-JAA (PAD/__ Oct 0_) (600) 2d End CPT Admin/aa/545-3285
SUBJECT: Legal Review of Line of Duty Investigation (SPC Smith, Mark A.)

Office of the Staff Judge Advocate, Fort Blank, VA 41905 __ October 200_

FOR Commander, 19th Infantry Brigade, ATTN: Personnel Officer, Fort Blank, VA 41905

1. I have reviewed the enclosed line of duty investigation. I have no legal objection to the finding of Not in Line of Duty - Due to Own Misconduct.

2. Pursuant to AR 600-8-1, paragraph 40-9*b*, I have made the following conclusions:

a. All legal requirements have been complied with in the conduct of the investigation.

b. No errors exist in the investigation that would materially or adversely affect the respondent's rights.

c. The findings of the investigating officer are substantiated by substantial evidence of record.

d. No claim for recovery of costs of government medical care is evident from the facts presented.

3. No further legal review is required.

FOR THE STAFF JUDGE ADVOCATE:

Encl
nc

BERNHARD T. CHIEF
MAJ, JA
Chief, Administrative and
Civil Law Division

(Endorsement to Line of Duty Investigation. Basic memorandum **NOT** provided.)

AQRE-JAA (AQRF-4/__ Jan 0_) (735) 1st End CPT Admin/aa/545-3285
SUBJECT: Legal Review of Report of Survey # 33-90

Office of the Staff Judge Advocate, Fort Blank, VA 41905 __ January 200_

FOR Commander, 19th Infantry Brigade, ATTN: S-4, Fort Blank, VA 41905

1. I have reviewed the enclosed Report of Survey and find that it lacks sufficient evidence to justify imposing pecuniary liability on SPC Jones.

2. The Findings of the Survey Officer state that SPC Jones lack of a license was the proximate cause of the accident. Her lack of a license may indicate a lack of skill that led to the accident. However, the lack of a license by itself is not the cause of the accident.

3. Block 11 of the DA 4697 mentions that the Military Police Reports pertaining to this accident were not available as of __ November 200__. If the circumstances behind the loss or damage were already investigated by a board of officers, military police, or other authorized official, obtain a copy of the report or extracted information, and attach it to the report of survey as an exhibit. AR 735-5, paragraph 13-29d. In this particular case, the Military Police report would be extremely beneficial to the determination of liability. The Survey Officer has obtained eyewitness statements that indicate that SPC Jones over controlled the vehicle. While these are probative on the issue of whether she made some error in driving, they are not dispositive on the issue of whether that error was the proximate cause of the accident. The Military Police reports are prepared by personnel trained in accident investigation. The opinion of the investigator is extremely useful in determining if any action of SPC Jones led to the accident.

4. The Survey Officer should also determine if the dispatcher or any drivers prior to SPC Jones had any duty to ensure she was qualified to drive the vehicle. If such a duty existed by SOP or regulation, then the Survey Officer should consider what effect a breach of that duty had upon this incident.

(Endorsement to Report of Survey. Basic memorandum **NOT** provided.)

5. Upon completion of further investigation, this survey should be returned to this office if the approving authority believes that liability may be assessed against any person. If you have any questions about this Report of Survey, please contact me, or the action officer, CPT Admin at 545-3286/3287.

FOR THE STAFF JUDGE ADVOCATE:

Encl
nc

BERNHARD T. CHIEF
MAJ, JA
Chief, Administrative and
Civil Law Division

SUBJECT: Legal Review of Discharge (Chapter 14-SGT Smythe)

Office of the Staff Judge Advocate, Fort Blank, VA 41905 __ February 200_

FOR Commander, The School Brigade, ATTN: S-1 (Legal), United States Army Messket Center, Fort Blank, VA 41905

1. Pursuant to your request, I have reviewed the discharge file on SGT Smythe and find it legally insufficient for further action under AR 635-200, paragraph 14-12b.

2. None of the counseling statements in the file adequately warned SGT Smythe of the consequences of his actions as required by paragraphs 1-18a(5) and b(2) of the regulation. Only three of the counseling statements mention administrative discharge. None of them mention possible characterization or the consequences of a less than honorable discharge. Adequate counseling is a non-waivable requirement.

FOR THE STAFF JUDGE ADVOCATE:

BEN T. ATTORNEY
Attorney Advisor
Acting Chief, Administrative and
Civil Law Division

(Endorsement to Discharge Packet. Basic memorandum **NOT** provided.)

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