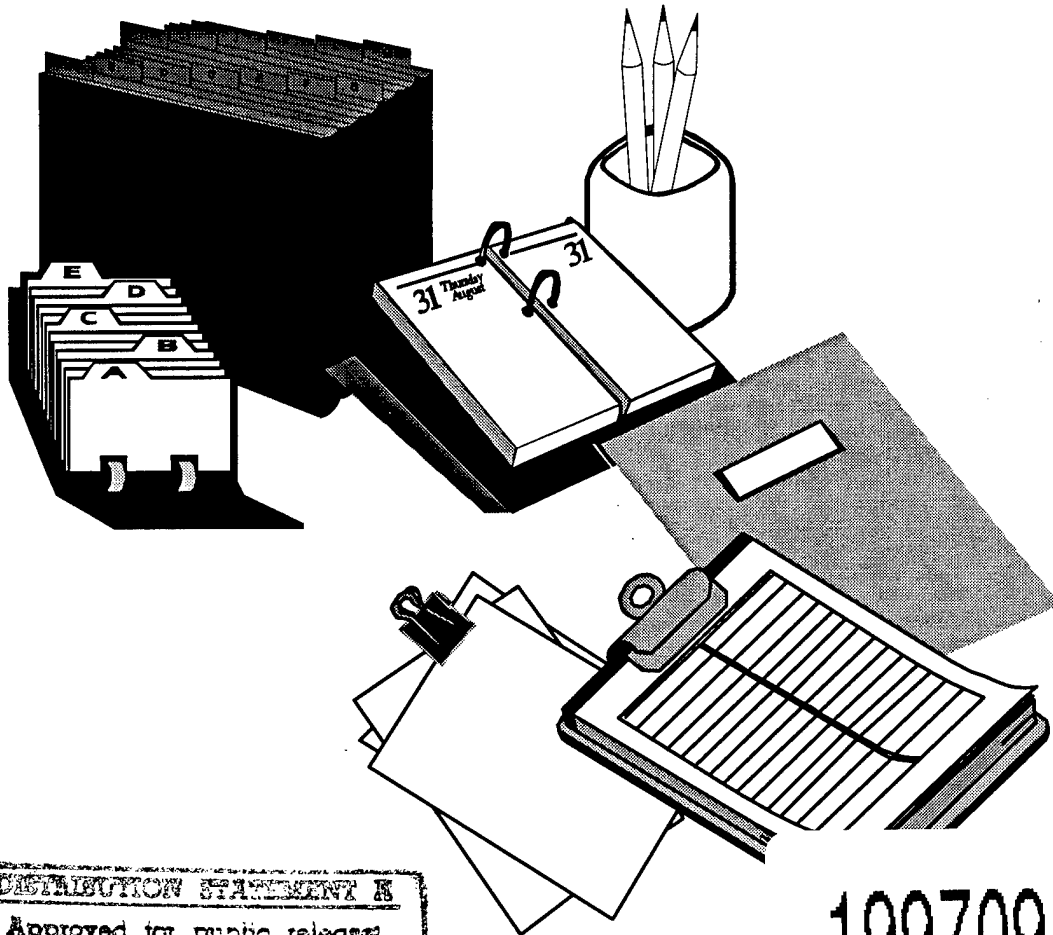


# Legal Assistance Office Administration Guide



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## PREFACE

This publication is one of a series prepared and distributed by the Legal Assistance Branch of the Administrative and Civil Law Department of The Judge Advocate General's School, U.S. Army (TJAGSA). Legal assistance attorneys should find this series useful in the delivery of legal assistance. The information contained herein is as current as possible as of the date of publication. Attorneys should recall, however, the law is subject to legislative amendment and judicial interpretations that occur much more rapidly than this publication can be updated and distributed. For this reason, use this publication only as a guide and not final authority on any specific law or regulation. Where appropriate, legal assistance attorneys should consult more regularly updated references before rendering legal advice.

The series contains summaries of the law, guidance, and sample documents for handling common problems. The sample documents are guides only. Legal assistance attorneys should ensure that the samples are adapted to local circumstances and are consistent with current format provisions in Army Reg. 25-50 prior to reproduction and use.

While forms can save time for both attorneys and clerk-typists, indiscriminate use of such forms is inherently dangerous. Standard form language may not be fully appropriate for the particular client's situation. Also, the use of a form detracts from the personalized, individual service attorneys strive to give their clients. Nonetheless, the careful, selective use and editing of forms can enhance an attorney's service to clients by reducing document-drafting time and helping remind the attorney of important requirements in drafting legal documents.

The series is part of the continuing effort to improve and expand the resources available to legal assistance practitioners. As you use this publication, if you have any recommendations for improvement, please send your comments and suggestions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

Legal assistance attorneys are encouraged to maintain this publication in a three-ring binder until a replacement is issued. In future years, specific page changes may be published instead of reprinting the entire publication.

Each year, the Legal Assistance Branch receives many requests for its publications. Because of limited budgetary and personnel resources, however, additional outside distribution of these materials in printed format is not possible.



There are, however, several ways to obtain many of these publications. First, the Defense Technical Information Center (DTIC) makes some of these publications available to government users. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone (703) 767-9087 or DSN 427-9087.

Second, this and many other word processing documents are uploaded on to the Legal Automation Army-Wide Systems Bulletin Board System (LAAWS BBS). Some of these are now in or being converted to Microsoft Word version 6.0 format. Others are in ASCII and WordPerfect. Users can sign on the LAAWS BBS by dialing (703) 806-5772 with the following telecommunications configuration: 2400 - 19,200 bps; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. After signing on to the LAAWS BBS, the desired publication can be downloaded to the user's computer. Consult THE ARMY LAWYER for current information on new publications available through the LAAWS BBS. Questions concerning LAAWS BBS should be directed to the OTJAG LAAWS office at (703) 805-2922.

Lastly, some of these publications are also available on the LAAWS Compact Disk Series (CD-ROM). For more information, contact the LAAWS Office located at Fort Belvoir, Virginia, telephone (703) 806-5764 or DSN 656-5764.

The following Legal Assistance Branch publications are currently available in "zipped" format:

<u>Number</u>	<u>Title</u>
JA 260	Soldiers' & Sailors' Civil Relief Act
JA 261	Legal Assistance Real Property Guide
JA 262	Legal Assistance Wills Guide
JA 263	Legal Assistance Family Law Guide
JA 265	Legal Assistance Consumer Law Guide
JA 267	Uniformed Services Worldwide Legal Assistance Office Directory
JA 269	Legal Assistance Federal Income Tax Information Series
JA 271	Legal Assistance Office Administration Guide
JA 272	Legal Assistance Deployment Guide
JA 274	Uniformed Services Former Spouses' Protection Act - Outline and References
JA 275	Model Tax Assistance Program
JA 276	Preventive Law Series

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This publication does not promulgate Department of the Army policy and does not necessarily reflect the views of The Judge Advocate General or any government agency.

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## **CHAPTER 1**

### **Introduction**

The following two articles contain an excellent overview of the legal assistance program. Approximately 90% of what a legal assistance office manager or chief needs to know is contained in AR 27-3 and these two articles. New office managers are encouraged to read both AR 27-3 and these two articles. The second article begins on page 77.



# The New Army Legal Assistance Regulation

Colonel Alfred F. Arquilla  
Chief, Legal Assistance Division  
Office of The Judge Advocate General

## I. Introduction

This article explains Army Regulation 27-3, The Army Legal Assistance Program<sup>1</sup> (AR 27-3), and addresses the changes in the legal assistance program that have occurred over the past two years. AR 27-3 governs the delivery of legal services to soldiers, their families, and other eligible clients on their personal legal affairs, needs, and problems.<sup>2</sup> AR 27-3 is a complete revision of the previous legal assistance regulation,<sup>3</sup> in both content and organization.

The drafting of AR 27-3 began in 1991 in the aftermath of Operations Desert Shield and Desert Storm (Desert Storm)<sup>4</sup> by the Legal Assistance Task Force--Desert Storm/Demobilization (LATF).<sup>5</sup> The draft regulation incorporates the lessons learned from Desert Storm<sup>6</sup> and other recent conflicts,<sup>7</sup> as well as those that were "relearned" from the 1985 Gander crash.<sup>8</sup>

AR 27-3 is designed to give Army leaders the flexibility to respond to these and other legal assistance emergencies. It is written in language that applies to the active component (AC) and the Reserve components (RC) of the Army<sup>9</sup>--during both peace and war--and to all Army legal offices, regardless of size.<sup>10</sup>

During the course of rewriting AR 27-3, all prior regulations and policy letters on legal assistance were reviewed. Much of this material was updated and incorporated. On the other hand, when policies or rules had no rational basis or did not conform to practice, they were discarded. Some of the fictions discarded in the revised regulation included the following:

- Only attorneys designated by staff judge advocates (SJAs) or supervising attorneys provide legal assistance.<sup>11</sup>
- Legal assistance is provided only by legal assistance offices established by commanders.<sup>12</sup>
- Wills, powers of attorney, and other legal help provided to RC soldiers by RC judge advocates in preparation for mobilization is not legal assistance.<sup>13</sup>

· United States Army Reserve judge advocates assigned to troop program units (TPUs) and ARNG judge advocates assist soldiers and other eligible clients with legal problems only while these judge advocates are serving on active duty.<sup>14</sup>

· An AC legal assistance attorney must accompany an RC judge advocate whenever the latter provides in-court representation to a legal assistance client.<sup>15</sup>

## **II. Brief History of Legal Assistance**

Prior to World War II, no legal assistance program existed in any of the military services. Soldiers and sailors requiring help with personal legal problems had to hire civilian lawyers.<sup>16</sup> Even a service member with basic legal needs related to military service, such as obtaining a power of attorney for family members left behind, had to meet those needs at his or her own expense without any help from a military attorney.<sup>17</sup>

World War II was accompanied by the induction of millions of citizens and their immediate deployment overseas for extended--and often indefinite--periods. Following the passage of the Selective Training and Service Act in September 1940, and throughout the war, citizens were inducted--often on very short notice and with little time to settle their personal legal affairs. Accordingly, even before the war began, service members needed access to affordable legal help to protect their interests under the Soldiers' and Sailors' Civil Relief Act (SSCRA) and other laws.

In a rapidly growing Army, judge advocates had to be augmented to provide legal assistance, civilian lawyers had to be made available to help soldiers when necessary, and a "method of contact between the serviceman, the lawyer in the service, and the civilian lawyer [had to exist] in order that the latter two could help the first."<sup>18</sup> The legal assistance program and the various bar associations facilitated this contact.

Beginning in September 1940, the military services, in cooperation with the American Bar Association (ABA), began providing legal assistance to service members. Legal assistance was provided during induction to help resolve unsettled legal problems and unsatisfied legal needs. Afterwards, if legal assistance was required on these--or on any new legal problems or needs--military lawyers, working with state and local bar associations, would assist in making referrals to civilian lawyers in the locales where help was required. This cooperative effort between the military services and bar associations also led to the publication of the first legal assistance manuals and deployment "check-lists."<sup>19</sup>

The first official recognition of legal assistance in the military services (in this case the Army) occurred on 16 March 1943. On this date, fifty years ago, War

Department Circular No. 74<sup>20</sup> was published. This circular required The Judge Advocate General (TJAG) to work closely with the Committee on War Work of the ABA--and SJAs to work with like-named committees of the various state bar associations--to develop a uniform approach "to make adequate legal advice and assistance available throughout the Military Establishment to military personnel in the conduct of their personal affairs." By the end of the war, over 1600 legal assistance offices in the Army had performed this important mission.

Following World War II, the ABA and all military services decided that the legal assistance program

should be continued as a permanent activity in the armed forces, not only because of the need of those in the service for such assistance, but also as a matter of national defense in having the system maintained in effect, even if on a greatly reduced basis, so that it could be expanded without delay to meet any future national security emergency.<sup>21</sup>

The character of the Army's legal assistance program has varied considerably over the years. During World War II and the Korean War, legal assistance was little more than a referral program in which Army lawyers provided general legal counseling, but referred most of the actual legal work, including wills and powers of attorney, to civilian lawyers.<sup>22</sup> The legal work provided by civilian lawyers to soldiers and their families usually was not free. The bar associations generally assisted service members only in finding "competent" and "sympathetic" lawyers who would "give due consideration to the serviceman's ability to pay reasonable fees for necessary services." Nevertheless, procedures existed for referring so-called "charity cases" to legal aid offices.<sup>23</sup>

Even as late as 1965, the role of a legal assistance attorney was little more than that of a "legal advisor and consultant" who had to abide by extensive limitations that were placed on the preparations of tax returns, pleadings, briefs, official correspondence, and even letters written on behalf of clients.<sup>24</sup> During the late 1960s and throughout the 1970s, these limitations began to fall by the wayside as a result of several developments. One was the so-called 1969 Carey Amendment to the Economic Opportunity Act of 1964,<sup>25</sup> which extended legal services to certain enlisted personnel and their families. Nevertheless, because these expanded legal assistance services were provided by attorneys working for the then-Office of Economic Opportunity, rather than judge advocates, the Carey Amendment implied that the military no longer could, or should, "take care of its own."<sup>26</sup> Another development was the effort on the part of Army lawyers to remove unnecessary restrictions that hampered their legal representation of clients.<sup>27</sup> Finally, many believed that expanding legal assistance services would make the Army a more attractive career for lawyers while helping to ease the Army's then-existing Judge Advocate General's Corps (JAGC) officer retention problem.



Over the years, legal assistance in the Army has evolved from a referral program into the comprehensive program that exists today, as exemplified by AR 27-3. When referrals to civilian lawyers occur, they generally are made because the legal relief that clients are seeking can be obtained only in court. Even then, clients at many installations are assisted in proceeding pro se on certain legal matters or, in some instances, provided in-court representation by Army lawyers.

Since World War II, during periods of peace and war--as well as military build ups and reductions--legal assistance has been provided on a continuous basis in each of the military services. No reason exists to believe that this will change in the future. The Army always has taken the lead in legal assistance--both in terms of the scope of legal services provided and the eligibility of clients authorized to receive those services--and continues to do so today.

### **III. Legal Basis for Legal Assistance**

The legal basis for the Army Legal Assistance Program is found at 10 U.S.C. § 3013(g), which authorizes the Secretary of the Army to "prescribe the duties of members of the Army and civilian personnel of the Department of the Army . . . and . . . prescribe regulations to carry out his functions, powers, and duties under this title."<sup>28</sup> Those functions, described in subparagraph (b) of the statute, include "[s]ervicing, "[m]obilizing," "[d]emobilizing," [a]dministering (including the morale and welfare of personnel)," and "[m]aintaining."<sup>29</sup>

Another statutory basis for the Army Legal Assistance Program is 10 U.S.C. § 1044, which provides as follows:

#### § 1044. Legal assistance

(a) Subject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with their personal civil legal affairs to--

(1) members of the armed forces under his jurisdiction who are on active duty;

(2) members and former members under his jurisdiction entitled to retired or retainer pay; and

(3) dependents of members and former members described in clauses (1) and (2).

(b) Under such regulations as may be prescribed by the Secretary concerned, the Judge Advocate General (as defined in Section 801(1) of this title) under the jurisdiction of the Secretary is responsible for establishment and supervision of legal assistance programs under this section.

(c) This section does not authorize legal counsel to be provided to represent a member or former member of the armed forces, or the dependent of a member or former member, in a legal proceeding if the member or former member can afford legal fees for such representation without undue hardship.

(d) The Secretary concerned shall define "dependent" for the purposes of this section.<sup>30</sup>

The Army never has interpreted this 1984 statute to be a limitation on legal assistance.<sup>31</sup> The statute merely states what may be done (and what already was being done), and contains no prohibitions whatsoever. The language of this statute represents a compromise reached among the ABA and others who sought to make legal assistance in the military services a statutory entitlement and those who opposed that idea, particularly in the absence of congressional funding to support a mandatory legal program. The legal assistance program, which had its inception during World War II, predates this statute by several decades, and already had statutory authorization under 10 U.S.C. § 3013(g).<sup>32</sup>

#### **IV. Organization of AR 27-3**

AR 27-3 is organized into five chapters with two appendices. Chapter 1, entitled "Introduction," states the statutory basis for the Legal Assistance Program<sup>33</sup> and describes in great detail the responsibilities that TJAG; the Chief, Army Legal Assistance Division, Office of The Judge Advocate General (OTJAG); the Chief, United States Army Trial Defense Service (USATDS); the Commandant, The Judge Advocate General's School, Army (TJAGSA); commanders; SJAs; and other supervising attorneys have in the Legal Assistance Program.<sup>34</sup> Almost all this material is new.

Chapter 2, entitled "Legal Assistance Providers and Clients," describes the mission of the Legal Assistance Program<sup>35</sup> and its military basis,<sup>36</sup> and describes who is authorized to provide<sup>37</sup> and to receive<sup>38</sup> legal assistance. It also outlines procedures for limiting legal assistance to certain categories of clients or to certain services.<sup>39</sup>

Chapter 3, entitled "Legal Assistance Services," provides policy guidance on the preventive law<sup>40</sup> and client legal services that make up the Legal Assistance Program. A clear distinction is made between the different types of legal assistance cases<sup>41</sup> and the

different types of legal assistance services.<sup>42</sup> This distinction between cases and services also is used in the new record and reporting forms and procedures discussed in Chapter 5.

Chapter 4, entitled "Professional Matters," provides policy guidance on matters concerning professional conduct and resources. This chapter, however, does not restate any of the Rules of Professional Conduct for Lawyers.<sup>43</sup> Instead when necessary, the chapter merely incorporates these rules by reference and provides related legal assistance policies and procedures.<sup>44</sup> As to professional resources, this chapter addresses two important resources available to attorneys providing legal assistance: The Legal Automation Army-Wide System--Legal Assistance (LAAWS-LA) computer software program<sup>45</sup> and the Judge Advocate General's Corps (JAGC) Reserve Officer Legal Assistance Directory.<sup>46</sup> This chapter also adds entirely new material on liability issues pertaining to the provision of legal services and on the authorized use of volunteers in the Army Legal Assistance Program.<sup>47</sup> Neither of these subjects ever has been addressed previously in Army legal assistance regulations.

Chapter 5, entitled "Administration," provides policy guidance on the control of privileged information, and discusses two newly revised legal assistance forms: DA Form 2465 (Client Legal Assistance Record) and DA Form 4944-R (Report on Legal Assistance Services). These reports are incorporated in the LAAWS-LA software program so that legal assistance client records and statistical reports may be maintained and printed using desk-top computers.

Sections I and II of appendix A to AR 27-3 list every Army regulation involved in providing legal assistance. These sections should serve as a useful reference for attorneys trying to find the number of an Army regulation on a particular subject. Appendix B to AR 27-3 contains the instructions for completing the new legal assistance forms. Finally, the glossary contains listings of all the abbreviations and comprehensive definitions of all the terms used in AR 27-3. The definitions are required reading for anyone trying to gain a clear understanding of AR 27-3.

## **V. Legal Assistance Mission**

The mission of the Army Legal Assistance Program is stated in AR 27-3 as follows:

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--

- (1) Meeting their needs for information on personal legal matters.

- (2) Resolving their personal legal problems whenever possible.<sup>48</sup>

The first part of the mission addresses preventive law. Soldiers and their families need to be informed of legal issues and services so that their actions or inactions do not cause them legal difficulties or unnecessary expenses. The second part of this mission involves the legal assistance services that are provided directly to eligible clients on their personal legal problems and needs.

AR 27-3, and previous Army legal assistance regulations, are based on the premise that legal assistance services directly support the military mission, that these legal services must be continuous during both peace and war, and that they must provide more than just referral assistance. To ensure that commanders and Army lawyers do not lose sight of the reasons why Army lawyers provide free legal assistance services--particularly during the present post-Cold War period and resulting budget reductions occurring within all the military services--the military basis of the program is stated in AR 27-3 in great detail. AR 27-3 indicates that the legal assistance program is based on the following four military needs:

- (1) Readiness. Because AC and RC soldiers and emergency-essential DA employees must be prepared for immediate mobilization and deployment, their personal legal affairs must be in order at all times. Although the goal is to prepare soldiers for such eventualities well in advance of their occurrence, the future legal needs of many soldiers cannot always be anticipated or met even under the best of plans. Possessing the capability to deliver legal assistance on short notice to great numbers during a brief period of time is essential to readiness.

- (2) Morale. Fostering the high morale of soldiers and their families is an important aspect of readiness. High morale is enhanced by providing soldiers and their families information, advice, and assistance responsive to their personal legal needs and problems.

- (3) Discipline. Personal legal difficulties may cause low morale and disciplinary problems and may adversely affect combat readiness. Prompt legal assistance in resolving these difficulties is an effective preventive law measure.

- (4) Quality force. Providing legal assistance is part of the Army's ongoing effort to maintain a quality of life that will attract quality people. The Army must take care of its own if it is to recruit and retain a quality force.<sup>49</sup>

## VI. Legal Assistance Responsibilities

### A. General

Unlike prior Army legal assistance regulations, AR 27-3 lists the responsibilities of those assigned to various positions in Headquarters, Department of the Army (HQDA), and at each Army installation, in carrying out the mission of the Army Legal Assistance Program. TJAG "is responsible for the overall supervision and administration of the legal assistance program." Additionally, for the first time, TJAG is authorized to grant exceptions to AR 27-3 on his or her own initiative or in response to a request from a commander.<sup>50</sup>

The legal assistance responsibilities of others listed in AR 27-3 include the Commandant, TJAGSA, whose instructors train Army lawyers "in areas of the law, policy, doctrine, and professional responsibility that are relevant to legal assistance," and who update legal assistance materials, including the content of the LAAWS-LA software program, which are used in providing legal assistance.<sup>51</sup> Also listed is the Chief, Information Management Office, OTJAG, who produces and distributes periodic updates of the LAAWS-LA software program to legal assistance attorneys throughout the Army,<sup>52</sup> and the Chief, USATDS, who, subject to other USATDS missions, makes USATDS attorneys available to provide legal assistance.<sup>53</sup>

The legal assistance responsibilities of other officials listed in AR 27-3 are discussed in greater detail below.

### B. Chief, Legal Assistance Division, Office of The Judge Advocate General<sup>54</sup>

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.<sup>55</sup> This officer also has limited authority to grant exceptions on a case-by-case basis to the provisions of AR 27-3 that govern who is authorized to provide and receive legal assistance. This officer also may grant exceptions as to the nature of the legal assistance that may be provided.<sup>56</sup>

In light of lessons learned from the recent Persian Gulf War, AR 27-3 gives specific responsibility to the Chief, Legal Assistance Division, to "[a]dvise TJAG on legal assistance problems and needs, including those that arise during war or national emergencies, or during or following any local disaster that causes an increased need for legal services from eligible clients . . . ."<sup>57</sup> In a war or other crisis in which a large number of American casualties occur or are expected to occur, or in which the Reserves are expected to be called to active duty in great numbers, Army lawyers must be prepared to meet the increased legal assistance demand with all available resources, including the timely mobilization of RC judge advocates when necessary.<sup>58</sup>

AR 27-3 also designates the Chief, Legal Assistance Division, as the "sole authority" for authorizing RC judge advocates to earn retirement points for legal assistance work performed when not on active duty.<sup>59</sup> Under AR 27-3, the Chief, Legal Assistance Division, 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."<sup>60</sup>

### C. Commanders

Legal assistance is a commander's program.<sup>61</sup> This is significant because the Army would not provide legal assistance unless commanders actually wanted legal assistance services available to their soldiers and other eligible clients.

Because legal assistance is not mandated by any law or regulation--not even AR 27-3--the commander of each military installation or other activity must determine whether legal assistance services will be made available to soldiers and other eligible clients. The commander decides whether legal assistance will be provided and, if so, the scope of the legal assistance services that will be provided. The commander determines the extent of the services through the authorization and staffing of legal assistance military and civilian personnel positions and the allocation of other resources, such as building space and money in the command. Therefore, whether or not a legal assistance program exists is dependent on whether the installation or activity commander<sup>62</sup> has "one or more" AC, RC, or DA civilian attorneys assigned to his or her staff "who provide legal assistance on either a full or part-time basis as part of their duty or job descriptions."<sup>63</sup> If, as defined, a commander has a legal assistance program in his or her command, then the commander is responsible for supporting it with adequate funding, staffing, and facilities.<sup>64</sup>

A number of small Army commands and installations also have legal assistance programs. Some have no AC, RC, or DA civilian attorneys assigned, while others may have one or more attorneys assigned. None of them, however, provide legal assistance "as part of their duty or job descriptions." If legal assistance is not mentioned as part of their duties or job descriptions, these attorneys still may provide legal assistance on an intermittent basis as long as they comply with AR 27-3.<sup>65</sup> The only consequence that the absence of a legal assistance program has, in this regard, is that a commander does not have to carry out the responsibilities specified in AR 27-3.<sup>66</sup>

### D. Supervising Attorneys

Whether or not a legal assistance program exists, supervising attorneys are responsible for all legal assistance services provided in their commands or on their installations.<sup>67</sup> The term "supervising attorney" includes an SJA; deputy SJA; chief of legal assistance; and any other AC, RC, or civilian attorney exercising supervisory authority over those providing legal assistance services.<sup>68</sup> Given the wide range of sizes

and primary missions in AC and RC legal offices throughout the Army, AR 27-3 leaves to SJAs the decision on who in their offices may exercise authority over various legal assistance matters. Therefore, within a particular legal office, more than one supervising attorney likely will exist. AR 27-3 leaves to an SJA (or other principal legal advisor) the decision on the extent to which, if at all, authority on legal assistance matters is delegated within a particular legal office to subordinate supervising attorneys.<sup>69</sup>

Other responsibilities of supervising attorneys include coordinating legal assistance policies with local courts and bar associations where they might have an interest in these policies, involving commanders with their legal assistance programs--particularly in the area of preventive law and income tax assistance, and training legal assistance personnel.<sup>70</sup>

## VII. Legal Assistance Providers

Unlike the 1989 regulation, AR 27-3 deliberately omits any use of the terms "legal assistance attorney" or "legal assistance office." This omission is not intended to suggest that AR 27-3 abolishes these terms; rather, it suggests that, from a regulatory perspective, no difference exists among legal assistance provided in an office designated as a "legal assistance office," in another setting,<sup>71</sup> or by an attorney whose duty position is a full or part-time legal assistance attorney or something else. Those who provide legal assistance are governed by AR 27-3 regardless of whether or not a legal assistance program exists on the installation or command to which they are assigned.

No longer does one have to be officially designated as a legal assistance attorney before he or she can provide legal assistance.<sup>72</sup> AR 27-3 authorizes every judge advocate and every civilian attorney to provide legal assistance "unless inconsistent with superior orders or other duties or responsibilities."<sup>73</sup> This change is designed to address liability concerns raised by some judge advocates, both in the RC and AC, who provided legal assistance during Desert Storm, but who never were designated officially as legal assistance attorneys. This change is also intended to provide SJAs with the flexibility in legal assistance emergency situations to use all personnel resources available--including civilian attorneys who ordinarily do not provide legal assistance.<sup>74</sup>

Those authorized to provide legal assistance are summarized as follows:

(1) All judge advocates serving on active duty regardless of component.

(2) All USAR and ARNG judge advocates assigned to judge advocate positions in troop program units (TPUs) and all ARNG judge advocates assigned to judge advocate positions, even while in civilian status when providing legal assistance in accordance with AR 27-3.

(3) All USAR and ARNG judge advocates, regardless of assignment, who have been authorized to provide legal assistance by the Chief, Legal Assistance Division, OTJAG, when they are not serving on active duty (including inactive duty for training, AT, and active duty for training).

(4) DA civilian attorneys.

(5) Licensed or otherwise professionally qualified attorneys under foreign law who are employed by the United States Army and who work under the direction of a supervising attorney while providing legal assistance on foreign law matters.<sup>75</sup>

The list of providers is limited to attorneys and does not include paralegals or clerical staff. The omission of nonlawyers is deliberate. Nonlawyers do not provide legal assistance; rather, they assist attorneys in providing legal assistance. An attorney is always responsible for the legal assistance provided to a client.

The Chief, Legal Assistance Division, OTJAG, has authority to grant exceptions to AR 27-3 on who may provide legal assistance on a case-by-case basis. This authority, however, cannot be used to authorize volunteers to provide legal assistance.<sup>76</sup>

### **VIII. Liability**

AR 27-3 is the first legal assistance regulation to contain a full discussion on the subject of liability protection for legal assistance providers and their assistants, and on the related issue regarding the authorized use of volunteers in the legal assistance program. These subjects are discussed fully because of the numerous questions that arose during and following the Persian Gulf War. The issue of liability was primarily a concern among RC judge advocates,<sup>77</sup> while questions about using volunteers came from AC judge advocates.

An attorney who provides legal assistance in accordance with AR 27-3 is performing an official function of the United States Army.<sup>78</sup> AR 27-3 provides specific guidance to attorneys, paralegals, and others involved in providing legal assistance--as well as to claimants--on how to proceed when a malpractice claim is made.<sup>79</sup> This guidance discusses the exclusive remedy provided by the Federal Tort Claims Act (FTCA)<sup>80</sup> for these claims, the way in which those sued may request to be represented by the Department of Justice,<sup>81</sup> and the way in which those who have paid money to defend against these claims on their own may obtain indemnification from the United States Government.<sup>82</sup>



AR 27-3 now provides a bright-line rule as to whether the activities of an AC or RC attorney come within the coverage of the FTCA. The bright-line rule poses the following questions: (1) did the act or omission giving rise to a claim occur during the course of providing legal assistance services on a "no-fee" basis?; (2) was the attorney authorized to provide these services under AR 27-3; and (3) was the client eligible to receive these services under AR 27-3?<sup>83</sup> If the answer to each of these questions is an unqualified "yes," the attorney is acting within the scope of his or her military duties and the exclusive remedy provided by the FTCA applies. The bright-line rule also applies to the act or omission of any employee--such as a secretary or paralegal--or a volunteer supporting the legal assistance services being provided by an attorney that gave rise to a claim.

## **IX. Volunteers**

AR 27-3 is the only Army regulation that provides detailed guidance on the use of volunteers in an Army legal office.<sup>84</sup> This guidance, for the most part, would apply not only to Army legal assistance services, but also to other Army legal services. This guidance also addresses the closely related issue of FTCA liability for the activities of volunteers.<sup>85</sup> The following types of volunteers may be used to support Army legal assistance services:

- (1) Those who provide tax assistance as part of the Internal Revenue Service (IRS) Volunteer Income Tax Assistance (VITA) program.<sup>86</sup>
- (2) Those who provide tax assistance services through Army Community Service (ACS) and official family support groups.<sup>87</sup>
- (3) Student volunteers who assist those providing legal assistance services.<sup>88</sup>

AR 27-3 provides the statutory and regulatory restrictions that apply to the use of volunteers in the Army Legal Assistance Program. AR 27-3 obviously does not apply to volunteer or other activities outside of the legal assistance program. For example, AR 27-3 restrictions on eligible legal assistance clients do not apply to volunteers who provide tax assistance under the VITA or ASC Programs unless they are performing duties under the supervision of Army legal office personnel.<sup>89</sup> Nevertheless, other restrictions governing these programs do apply.<sup>90</sup>

Certain additional restrictions apply to Army Legal Assistance Program volunteers. Generally, they may not be compensated<sup>91</sup> and must work under the direct supervision of an employee (including an officer or enlisted soldier), or under the direct supervision of another volunteer whose services are supervised directly by such an employee. A clear statement should be provided to the volunteer on the scope of his or

her duties and on the importance of protecting the confidentiality of attorney-client communications.<sup>92</sup>

When student volunteers support legal assistance programs in or outside the United States, each volunteer "must be enrolled full-time in a junior college, college, university, law school, or comparable recognized institution,"<sup>93</sup> and the student's work in the legal office must be part of an established program between the legal office and the student's school "that is designed to provide educational experiences for students."<sup>94</sup> Additionally, student volunteers may not be used to displace any employee,<sup>95</sup> and may not have access to any record protected by the Privacy Act<sup>96</sup> without the client's consent.<sup>97</sup>

The list of legal assistance providers does not include civilian attorney volunteers. This omission is deliberate. Most civilian lawyers will not provide voluntary services to the Army unless they can be assured of personal liability protection from the federal government in the event of a legal malpractice claim.<sup>98</sup> Not only can this assurance not be provided, but also, in almost all instances, the Army legally cannot even accept the voluntary or gratuitous services of civilian lawyers for legal work they might perform in a legal office.<sup>99</sup> The only possible exception to this prohibition is in the area of tax assistance services. In this area, the Army can accept the voluntary services of civilian lawyers and others through the IRS VITA program and ACS's tax assistance program.<sup>100</sup>

## **X. Legal Assistance Clients**

No one has a right to legal assistance. Neither statute nor Army regulation create such a right.<sup>101</sup> AR 27-3 merely indicates which persons are eligible to receive legal assistance and the limitations on the assistance that may be provided. Those persons, and the applicable limitations, are summarized as follows:

- (1) Service members in the AC, as well as their family members.
- (2) Service members in the RC, as well as their family members, when the service member is serving on active duty. (Supervising attorneys may limit legal assistance to emergencies or to certain categories of cases based on availability of expertise or resources when RC soldiers are serving on active duty for twenty-nine days or less).
- (3) All other RC service members, subject to the following limitations:
  - (a) From RC judge advocates: legal assistance is limited to RC service members on personal legal problems and needs that may adversely affect readiness or that have arisen from or have

been aggravated by military service, including military administrative matters. (RC supervising attorneys may limit legal assistance to emergencies or to certain types of cases based on the availability of expertise or resources.)

(b) From AC and RC legal offices: Premobilization legal preparation (PLP) for RC service members and their family members. (PLP includes legal counseling and the drafting and execution of wills and powers of attorney in preparation for mobilization.)

(4) AC and RC service members, as well as their family members, when the service member is receiving military retirement or disability pay.

(5) Surviving family members of AC, RC, and retired service members who would be eligible for legal assistance if the service or retired member were alive.

(6) Civilian employees of the DOD, including DA employees:

(a) Against whom pecuniary liability has been recommended with regard to presenting matters in rebuttal to, or on appeal from, such charges.

(b) Who are serving with the Armed Forces of the United States in a foreign country. (Family members who accompany them may also receive legal assistance.)

(7) Civilian employees of the DA and their family members subject to the following limitations:

(a) Employees, and their family members who will accompany or have accompanied them, when the employee has accepted overseas employment or already is on such duty and has returned to the continental United States on home leave. (Legal assistance is limited, as determined by the supervising attorney, to matters that relate to processing for overseas employment or, for an employee on home leave, to help with an ongoing legal assistance matter being handled overseas).

(b) Employees and their family members, when the employee works in the United States, its possessions, or territories, and is classified as a "mission-essential" or "emergency-essential" civilian personnel, and has been notified that he or she is being

deployed. (Legal assistance is limited to matters, as determined by the supervising attorney, that relate to deployment. Legal assistance is authorized for employees and family members for a reasonable period after the employee returns from deployment to close out ongoing legal assistance matters that arose before or during deployment).

(8) Primary next of kin (PNOK), executors, personal representatives, administrators, and legally recognized estate representatives for matters relating to the settlement of estates of the following:

(a) AC or RC soldiers who die while in a military duty status.

(b) United States citizens and nationals who are civilian employees of DOD and who are serving with or accompanying United States Armed Forces outside the United States at the time of their deaths.

(9) Fiduciaries, including those who hold powers of attorney, who have been appointed by those listed below to manage their property or handle their personnel affairs. (Legal services are limited to matters that would otherwise be within the scope of the legal assistance program if the grantor were present).

(a) AC or RC soldiers who are serving in a combat zone.

(b) United States citizens and nationals who are civilian employees of the DOD and who are serving with or accompanying United States Armed Forces in a combat zone.

(10) Members of other military forces, and their family members who accompany them, when the service member is serving in the United States.

(11) Prisoners who, although discharged from military service, still remain confined within a United States military confinement facility.<sup>102</sup>

The new regulation makes several changes to the list of eligible clients. Most of these changes represent "carry-overs" from the exceptions that were made to the previous legal assistance regulation during and following the war with Iraq.<sup>103</sup> Legal assistance has been significantly expanded in the Reserves.<sup>104</sup> Other changes in client eligibility

extended limited legal assistance to DA civilian employees classified "mission-essential" (upon notification that they are being deployed) on legal needs (as well as those of their family members) relating to their deployment.<sup>105</sup> Legal assistance also is extended to the PNOK, including parents of soldiers, and of DOD civilian employees who die outside the United States, on matters relating to the settlement of estates.<sup>106</sup>

Legal assistance also is extended for the first time to those possessing powers of attorney to manage the personal affairs of AC and RC soldiers and DOD civilian employees serving in combat zones. Legal assistance in these cases is limited to "matters that would otherwise be within the scope of the legal assistance program if the grantor were present."<sup>107</sup>

Nevertheless, legal assistance is not authorized for civilian contractors--that is, persons not otherwise authorized legal assistance under AR 27-3 who work for persons or firms having a contract with the DOD. The previous legal assistance regulation was unclear on this point. Although no statute restricts judge advocates from providing legal assistance to civilian contractors or their family members, it should be authorized only if it has a military purpose. Supervising attorneys must conserve their limited legal resources. They may, however, authorize a temporary variation from AR 27-3--or a commander may seek a permanent exception to AR 27-3--to provide legal assistance to civilian contractors.<sup>108</sup>

## **XI. Scope of Legal Assistance**

### **A. General**

Legal assistance is provided in two ways: by meeting the needs of potential clients "for help and information on legal matters," and by helping individual clients resolve "their personal legal problems whenever possible."<sup>109</sup> The former is a preventive law effort and the latter consists of client services.

Legal assistance is defined as "legal advice, counseling, and other help and information provided to eligible clients on their personal legal affairs" pursuant to AR 27-3. A client's personal legal affairs are defined as "legal matters of an individual for which legal assistance may be provided" pursuant to AR 27-3.<sup>110</sup> Together, these apparently circuitous definitions mean that if a particular legal service for an individual on a particular legal problem is specifically authorized under AR 27-3, then it is legal assistance.<sup>111</sup> In drafting AR 27-3, an effort was made to address, or at least list, every possible legal assistance case or service. Given the need to maintain some flexibility in the legal assistance program, however, this listing is not exclusive. Any other kind of legal-assistance-type service not listed may be provided when a supervising attorney determines that "available resources, personnel, and expertise are sufficient to provide the assistance needed."<sup>112</sup>

The scope of the Army Legal Assistance Program is defined by its preventive law and client service components. A particular preventive law effort is within the scope of the legal assistance program if it addresses the needs of those in the military community for help and information on their personal legal affairs.<sup>113</sup> Otherwise, the particular legal service will be no more than a matter of statistical consequence<sup>114</sup> because whatever preventive law information is being disseminated probably will fall within some other area of legal practice in the Army--for example, claims, military justice, or administrative law. That preventive law efforts may benefit persons other than authorized legal assistance clients is also, as a practical matter, beyond regulatory control in most instances.

On the other hand, whether a particular client service is authorized under AR 27-3 is a matter of importance because AR 27-3 contains not only authorizations, but also certain limitations and outright prohibitions on the type of cases that may be handled, and the type of legal services that may be provided, under the legal assistance program.<sup>115</sup> Furthermore, only eligible legal assistance clients may be assisted.

Under AR 27-3, commanders and supervising attorneys also have authority--on their own or with TJAG's approval--to limit legal assistance to certain categories of clients or to certain types of cases or services.<sup>116</sup> Therefore, an attorney providing legal assistance must be aware, not only of the provisions of AR 27-3 in these areas, but also of the manner in which his or her supervising attorney has exercised authority in these areas.

Another consideration affecting the scope of legal assistance is the competence of the individual legal assistance attorney. A lawyer is duty-bound not to represent a client "whose needs exceed either the lawyer's competence or authority to act in the client's behalf."<sup>117</sup> Legal assistance attorneys assist clients from all states, as well as from other jurisdictions and nations, on all types of personal legal matters. These matters can be handled properly only if these lawyers are provided with continuing legal education that will allow them to achieve and maintain the required proficiency to provide expansive legal services.

#### B. "Fee" and "No-fee" Cases

AR 27-3 makes a distinction between cases in which a client is paying a fee for professional services<sup>118</sup> and those in which the client is not paying a fee. "No-fee" cases are within the scope of the legal assistance program if all other requirements of AR 27-3 are met, but "fee" cases are not.<sup>119</sup> The primary reason for this distinction is clearly to separate the legal assistance clients of RC judge advocates<sup>120</sup> from clients they, or their firms, assist on a commercial basis.

A second reason for this distinction is to avoid duplicating or interfering with the legal services that have been provided when a client already has retained civilian counsel.

One concern in this area is to conserve limited legal assistance resources.<sup>121</sup> Another concern is to discourage a client's use of a legal assistance attorney's time to obtain a "second opinion."<sup>122</sup>

Finally, AR 27-3 is a legal assistance regulation, and other activities not authorized or addressed in AR 27-3 are not necessarily prohibited. For example, an Army attorney may help a civilian lawyer--or other person not authorized legal assistance--with the translation of a letter from German into English, assist on an issue of military law,<sup>123</sup> or provide notary service<sup>124</sup> when doing so does not interfere with official business and serves a military purpose. The new AR 27-3 does not authorize these because they are not legal assistance. They are not prohibited and such gestures on the part of judge advocates promote good relations with the public, as well as with fellow lawyers in private practice.

### C. Specific Limitations

AR 27-3 revises, consolidates, updates, and--in one instance regarding claims against the United States--corrects the limitations on the scope of legal assistance from the previous regulation. The previous regulation specifically prohibited or limited legal assistance in the following areas: civilian and military criminal matters, claims and potential litigation against the United States, and private income-producing business activities. In addition, the regulation prohibited providing military administrative law opinions on behalf of clients, representing clients in court against the United States, and assisting clients in "fee-generating and prepaid representation cases."<sup>125</sup>

AR 27-3 divides all limitations on legal assistance services between those in which no legal advice or assistance may be provided, and those in which only limited legal advice or guidance may be provided as specified.<sup>126</sup> These are summarized below as follows:

(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.<sup>127</sup>
- (b) Private business activities.
- (c) Civil litigation against the United States.

(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.<sup>128</sup>

(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.<sup>129</sup>

(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.<sup>130</sup>

The prohibition on providing legal assistance on private business activities includes any legal help on "personal and commercial business activities intended to result in economic gain."<sup>131</sup> This prohibition means that legal assistance attorneys may not assist clients on legal matters pertaining to civilian employment--regardless of whether they work for the government, a private business, or themselves.<sup>132</sup> Additionally, clients may not receive assistance on business investments and other such transactions. Clients, however, may be provided legal assistance on matters relating to the rental or sale of "principal residences," which, as defined in AR 27-3, includes family residences that the client currently occupies; seeks to occupy; or once occupied, but no longer occupies because of military orders.<sup>133</sup>

The distinction between "litigation against the United States," when legal assistance is prohibited, and "claims or civil lawsuits against the United States," when limited assistance is allowed, is based on whether or not a lawsuit has been filed. "Litigation against the United States" includes any civil lawsuit in which the United States has an interest. Advising a client concerning such a case requires a supervising attorney's approval,<sup>134</sup> in-court representation would require TJAG approval.<sup>135</sup> On the other hand, legal assistance attorneys still may provide advice to--and supervising attorneys may authorize in-court representation for--clients involved in the following types of lawsuits, even though they typically are prosecuted in the name of the United



States: noncriminal federal income tax matters, bankruptcy proceedings, or civil and criminal matters brought before a United States magistrate on a military installation.<sup>136</sup> When an individual seeks "to file a claim or civil lawsuit against the United States," legal assistance is "limited to general advice on administrative or legal procedures and filing requirements, and on the client's need to retain a civilian lawyer in order to obtain further legal advice or assistance."<sup>137</sup>

#### D. Local Limitations

In the aftermath of the Cold War, efforts are underway to decrease the size of the Armed Forces. AR 27-3 was drafted with this in mind.<sup>138</sup> A commander who has a legal assistance program effectively can eliminate the program by abolishing all the positions that staff the program. More likely, however, personnel cuts--when and if they occur in an existing program--will be piecemeal in nature.

Where a legal assistance program exists, a commander has great latitude in defining its scope. AR 27-3 distinguishes between legal assistance cases and services that must be provided and those that may be provided.<sup>139</sup> The distinction between required and optional cases and services is designed to foster consistency, while allowing for flexibility in legal assistance programs from one Army installation to another.<sup>140</sup>

AR 27-3 provides maximum flexibility to commanders and SJAs by allowing them to structure their legal assistance programs in light of local conditions, and available resources and expertise. When some, but not all of the resources are cut from an existing legal assistance program, both an AC commander and a supervising attorney have the authority to eliminate all "optional" legal assistance "cases," such as adoptions and civilian criminal matters, and "optional" legal assistance "services," such as electronic income tax filing and pro se assistance.<sup>141</sup> If legal assistance services need to be limited further, then a supervising attorney may request that the commander authorize that legal assistance be denied to certain categories of eligible clients, such as military retirees.<sup>142</sup> A commander may authorize that all or some legal assistance services be denied to certain eligible clients even while "optional" legal assistance services continue to be provided to other eligible clients.<sup>143</sup>

In addition, to foster some degree of consistency between various legal assistance programs, AR 27-3 divides legal assistance services and cases between those that are "required" and those that are "optional." AR 27-3 allows SJAs to request exceptions<sup>144</sup> or to authorize temporary variations<sup>145</sup> when available resources or expertise do not allow legal assistance in "required" areas.

The type of legal service rendered in any particular case may be limited further by the time or resources available to the legal assistance attorney, as well as by restrictions placed upon the attorney by AR 27-3, or by his or her supervising attorney. When limitations caused by lack of expertise, time, or resources exist, a legal assistance attorney

still is expected to assist the client by providing initial advice, if possible,<sup>146</sup> and by making a referral to another Army lawyer or civilian lawyer,<sup>147</sup> or by providing a list of civilian lawyers who can handle the type of case at hand.

All SJAs who have legal assistance programs are expected to establish and publish new policy letters that fully implement AR 27-3.<sup>148</sup> The policy letter should address who has the authority in the legal office to carry out the responsibilities and make the related decisions on all legal assistance matters. The responsibilities related to these decisions are listed at Appendix A of this article and are broken down into three areas: those relating to the commander, management, and client services. As to client services, the policy letter also should address which "optional" legal assistance "cases" may be handled by attorneys and which "optional" legal "services" may be provided. The policy letter, which either the SJA or commander may sign, should indicate specifically who may authorize exceptions to policy. All "required" and "optional" legal assistance cases and services under AR 27-3 are listed at Appendix B of this article which also lists those cases and services outside the scope of legal assistance.

The new AR 27-3 contains the following new provision:

Legal assistance will not be denied or delayed on the basis of the command, installation, or military department to which a client is assigned or with which a client is affiliated. However, a commander may deny certain legal assistance services, or legal assistance in certain cases, to eligible clients who are assigned to, or affiliated with, another military department that does not routinely provide such legal assistance services, or legal assistance in such cases.<sup>149</sup>

The first sentence of this provision is designed to prevent Army legal offices from discriminating against soldiers assigned to other Army commands or installations, or their family members, as well as against those assigned or affiliated with other military departments. Army legal offices often are tempted to favor their own soldiers over those assigned elsewhere when scheduling or providing legal assistance. This discriminatory practice specifically is prohibited unless an exception has been granted pursuant to AR 27-3.<sup>150</sup>

The military services traditionally have extended legal assistance services to all eligible clients, regardless of the military service to which they are assigned or affiliated--a tradition that is continued in AR 27-3.<sup>151</sup> In recent years, however, this tradition has begun to place a strain on the resources of a few Army legal offices, particularly in areas where Army commands are co-located with either Air Force or Navy commands. The strain occurs when Air Force or Navy personnel refer clients to Army legal offices for legal assistance services that are not provided routinely by those military services, such as separation agreements, income tax return preparation, and electronic tax filing. Among Army lawyers, this problem is commonly known as "dumping."<sup>152</sup> Under AR 27-3,

commanders now have the authority in these situations to deny such legal assistance services to those not affiliated with the Army to conserve legal assistance resources for Army clients.<sup>153</sup>

Commanders, presumably acting on behalf of supervising attorneys, also may request TJAG to grant exceptions to AR 27-3. For example, a commander might request an exception to structure or restructure a legal assistance program in light of available or limited resources.<sup>154</sup> A commander also may request authority from TJAG to deny legal assistance services to the family members of AC soldiers so that legal assistance services may be provided to all soldiers who need them.<sup>155</sup> Although this type of solution is not encouraged, it would be consistent with the four military needs, discussed earlier, that serve as the basis for the Army's legal assistance program.<sup>156</sup>

## **XII. Legal Assistance in the Reserves**

### **A. General**

AR 27-3 addresses the following types of RC judge advocates:

(1) Those assigned to RC units, which include the following:

(a) All ARNG judge advocates.

(b) All USAR judge advocates who are assigned to units (i.e., TPUs).

(2) USAR judge advocates in the Individual Ready Reserve (IRR) (i.e., those not assigned to RC units), including individual mobilization augmentees (IMAs).<sup>157</sup>

### **B. Background**

Under previous legal assistance regulations, providing legal assistance services in the Reserves was limited strictly.<sup>158</sup> Personnel assigned to the RC generally were not authorized to receive legal assistance unless they were serving on military duty. Even then, they were not extended the same legal assistance services afforded AC personnel unless they were serving on active duty for thirty days or more.<sup>159</sup> RC personnel training outside the United States, regardless of their periods of duty, could receive legal assistance on "simple wills and powers of attorney and problems relating to preparing for active duty,"<sup>160</sup> while those serving in the United States for twenty-nine days or less, and their family members, were limited to legal assistance "for emergencies only."<sup>161</sup>

RC personnel and their family members were authorized to receive PLP from RC judge advocates "at any time."<sup>162</sup> Strangely PLP was not defined as legal assistance but, nevertheless, was described to include legal counseling to soldiers and their families on their personal legal affairs, and legal services such as wills and powers of attorneys.<sup>163</sup>

RC judge advocates could provide legal assistance only when they were serving on active duty.<sup>164</sup> This restriction generally meant that RC judge advocates could provide legal assistance only during weekend drill periods and during their two weeks of Annual Training (AT). This restriction applied to legal assistance provided by RC judge advocates to AC soldiers and other eligible clients,<sup>165</sup> but not to PLP counseling and services provided to RC soldiers and their families.<sup>166</sup>

On the other hand, RC judge advocates who were designated by TJAG as special legal assistance attorneys (SLAAs) could provide legal assistance any time, regardless of whether they were on or off duty, or assigned to a RC unit or not.<sup>167</sup> This distinction had no basis in law<sup>168</sup> and made very little sense. Obviously less reason exists to control the off-duty legal assistance activities of judge advocates assigned to RC units than those not assigned to any unit at all. Nevertheless, previous legal assistance regulations went in just the opposite direction, effectively prohibiting off-duty legal assistance activities by those assigned to units unless they were designated as SLAAs.<sup>169</sup>

The procedure for authorizing RC judge advocates to provide legal assistance for retirement points was designed primarily for USAR judge advocates in the USAR Individual Ready Reserve (IRR)--that is, those not assigned to TPUs. Prior Army legal assistance regulations, however, never limited SLAA designation to judge advocates assigned to the IRR. Judge advocates assigned to the ARNG or to USAR TPUs generally earn the maximum number of retirement points each year that they are authorized to credit toward retirement through participation in weekend drills and AT. They generally do not need to perform legal assistance work to earn retirement points. Only judge advocates in the USAR IRR, including IMAs, need to do legal assistance or other work to earn enough points for a "good retirement year."<sup>170</sup>

### C. The War with Iraq--Mobilization and Demobilization

Not surprisingly, during and following the war with Iraq, many RC judge advocates expressed concerns over the extent to which, if at all, the United States Government would stand behind them if malpractice claims arose out of the legal assistance services they were providing to AC and RC personnel and their families incident to mobilization and demobilization. Their concerns were legitimate because the legal assistance regulation then in effect prohibited RC judge advocates, unless they were on duty, from providing legal assistance to anyone.<sup>171</sup>

Nevertheless, much of the assistance that occurred during peacetime was being provided by RC judge advocates during weekend drills, as well as during their "off duty"

hours during the work week--often at their civilian law firms.<sup>172</sup> This problem became even more acute for RC judge advocates after large numbers of RC soldiers were called to active duty. The active duty status of these soldiers meant that all of the family members that they left behind also became entitled to legal assistance. Even some of the on-site assistance that was provided by RC judge advocates was without benefit of military orders which meant that they were just "volunteering their time" to meet the legal assistance work load.<sup>173</sup>

The method chosen to address the concerns of RC judge advocates about liability protection was to encourage all USAR and ARNG judge advocates to apply for designation as SLAAs.<sup>174</sup> Under the legal assistance regulation then in effect, SLAAs were not limited to providing legal assistance services during only weekend drills.<sup>175</sup> This was the easiest way to afford maximum liability protection to RC judge advocates. Any other method would have required a major revision of the legal assistance regulation then in effect. This measure promptly met the liability concerns of RC judge advocates. It also laid the foundation for the new approach taken in AR 27-3 concerning legal assistance in the Reserves.

#### D. New Provisions

1. RC Legal Assistance Providers.--All USAR judge advocates assigned to TPUs and all ARNG judge advocates now may provide legal assistance unless inconsistent with superior orders or other duties or responsibilities, even while in civilian status, when acting pursuant to AR 27-3.<sup>176</sup> This is one of the most significant changes made in AR 27-3 in response to the many legal assistance "lessons learned" from Desert Storm.

In addition, all RC judge advocates, regardless of assignment, may continue to provide legal assistance while not on active duty if authorized by the Chief, Legal Assistance Division, OTJAG.<sup>177</sup> All ARNG and USAR judge advocates, including IMAs and others in the IRR, may--and are encouraged to--apply for authorization, even if not seeking to earn retirement points.<sup>178</sup> Any RC judge advocate who wants to earn retirement points for legal assistance,<sup>179</sup> however, must submit an application to the Chief, Legal Assistance Division, OTJAG, and, as part of that application, must agree to be listed in the JAGC Reserve Officer Legal Assistance Directory (Directory).<sup>180</sup> This requirement is based on the so-called "one Army" concept and on the needs of the Army Legal Assistance Program. If RC judge advocates want to earn retirement points for legal assistance they must agree to assist their fellow AC and RC judge advocates on legal assistance matters within their areas of specialty. One of the primary needs of the legal assistance program, given the diversity of state domiciliaries among its clients, is to identify and fully employ RC judge advocates across the United States who can assist on legal assistance issues, cases, and publications within their areas of expertise. This need now is met by AR 27-3 and the procedures in place, together with the success that has been achieved in expanding size and use of the Directory.

Reserve component judge advocates listed in the Directory agree to assist legal assistance attorneys on "legal questions and issues" in their areas of expertise.<sup>181</sup> They may, but are not required to, accept a legal assistance client referral.<sup>182</sup> They may, if they desire, volunteer to assist TJAGSA legal assistance instructors by updating the state-law-specific sections of TJAGSA legal assistance publications and LAAWS-LA software program materials.<sup>183</sup>

An application form, DA Form 7206-R (Application to Provide Legal Assistance Work for Retirement Points and to be Listed in the JAGC Reserve Officer Legal Assistance Directory) now is included in AR 27-3, together with directions on its submission and completion.<sup>184</sup> The records of officers listed in the Directory, which include all attorneys authorized to provide legal assistance for retirement points throughout the Army, are maintained in the Office of the Chief, Legal Assistance Division, OTJAG. Each record includes the completed DA Form 7206-R; a copy of the letter authorizing the RC judge advocate to provide legal assistance for a period of three years; and all copies of correspondence to, from, and on behalf of, the RC judge advocate concerned.

ARNG and USAR TPU judge advocates may obtain retirement points by submitting their completed copies of DA Form 1380 (Record of Individual Performance of Reserve Duty Training) through their units for all legal assistance work performed except legal research on a legal assistance subject on behalf of a TJAGSA instructor. All those performing legal research on a legal assistance subject, and all IMAs and other judge advocates in the IRR performing any type of legal assistance work for retirement points, submit their completed copies of DA Form 1380 through Legal Assistance Division (Directory), The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200.<sup>185</sup>

2. RC Legal Assistance Clients.--RC members and their family members are authorized to receive legal assistance under certain circumstances.<sup>186</sup> RC members serving on active duty for more than twenty-nine days, and their family members, may receive legal assistance on equal footing with AC service members and their families. Legal assistance for RC members serving on active duty for twenty-nine days or less, and their family members, continues to be limited, as under the prior legal assistance regulation, because of limited resources. AC legal offices often cannot meet the potential demand for legal services by RC personnel, which surges at certain installations when RC units perform their two weeks of AT. AC supervising attorneys, however, may now limit legal assistance to emergencies or to certain categories of cases for RC personnel on active duty for twenty-nine days or less, based on the availability of resources or expertise, regardless of where RC soldiers are training.<sup>187</sup>

For the first time, RC members are authorized by military regulation to obtain legal assistance services from RC judge advocates on a permanent basis. The language used in AR 27-3 to accomplish this is similar to that used to authorize legal assistance to

RC members following the war with Iraq.<sup>188</sup> AR 27-3 authorizes RC judge advocates to provide legal assistance to RC members "on personal legal problems and needs that may adversely affect readiness or that have arisen from or been aggravated by military service, including military administrative matters."<sup>189</sup> The interpretation of this provision, and the extent to which legal assistance will be provided, if at all, is left to the discretion of RC supervising attorneys, who "may limit legal assistance to emergencies or to certain types of cases based on availability of expertise or resources."<sup>190</sup>

In addition, AR 27-3 authorizes both RC and AC judge advocates to provide PLP to RC soldiers and their family members.<sup>191</sup> AR 27-3 defines PLP as "[I]legal assistance counseling and the preparation of wills and powers of attorney, for ARNG and USAR soldiers and their family members in anticipation of the always present possibility of mobilization."<sup>192</sup>

The expansion of legal assistance in the Reserves is based on meeting the same military needs for which legal assistance is provided in AC units.<sup>193</sup> Another reason for this expansion is to provide legal assistance training and experience to all RC judge advocates, any of whom--as the last war demonstrated--may be called upon on very short notice to provide legal assistance to soldiers and their families.

### **XIII. Types of Legal Assistance Cases**

#### **A. General**

The breakdown of cases and services appearing in AR 27-3 predates the work in OTJAG and the United States Army Legal Services Agency to develop "data modeling" wiring diagrams that fully describe the input and output of all legal services and support provided throughout the Army. In the Army Legal Assistance Program, "input" consists of the personal legal problems and needs of eligible clients that come within the scope of AR 27-3. "Output," on the other hand, consists of "services"--that is, preventive law services; administrative services for clients, such as notarizations; and client legal services, such as counseling, negotiation, and in-court representation.<sup>194</sup>

The listing of legal assistance cases and services in AR 27-3, although comprehensive, is not intended to be exclusive.<sup>195</sup> Supervising attorneys have authority to authorize legal assistance in any type of case not listed that involves an eligible client's personal legal affairs or needs.<sup>196</sup>

The new AR 27-3 divides all legal cases and services between those in which legal assistance is "required" and those in which legal assistance is "optional."<sup>197</sup> In other words, the characterization of a case depends on the availability of expertise and resources.<sup>198</sup> This breakdown, depicted at Appendix B of this article, represents the consensus of opinion expressed by the commands with which AR 27-3 was staffed.

Those cases and services for which legal assistance is "required" reflect the following tenets behind the Army Legal Assistance Program:

- (1) The primary client to be served is the active duty soldier, especially those within the lower enlisted ranks.
- (2) The primary military needs met by the program are readiness, morale, and discipline.<sup>199</sup>
- (3) The most important cases are those in which a client is in serious legal difficulty or need.
- (4) An attorney's time should be used to resolve problems and needs that require legal expertise or have command interest.<sup>200</sup>
- (5) Consistent with available resources and expertise, certain minimum legal services should be provided to each client seen. That help includes alerting the client to the nature of the legal problem at hand, and either helping the client resolve the problem or referring the client to someone who can.

As reflected at Appendix B of this article, the new AR 27-3 breaks down legal assistance cases into ten separate categories.<sup>201</sup> The discussion below highlights the significant changes made by AR 27-3 in some of these case categories.

## B. Family Law

This area includes marriage, annulment, paternity, child custody, nonsupport, legal separation, divorce, and adoption. This traditional area of legal assistance is governed, for the most part, by applicable state law. AR 27-3 makes no significant changes in the way these cases are handled by legal assistance attorneys.

One area of continuing concern for legal assistance attorneys is Army Regulation 608-99 (AR 608-99). This punitive regulation prohibits soldiers from wrongfully withholding custody of their children from a lawful custodian, and from failing to provide financial support to their family members, including in some cases, their illegitimate children. AR 608-99 presently prohibits, as a violation of a lawful general regulation, any soldier's failure to provide financial support to unmarried children under the age of eighteen years or to comply with a court order on child custody involving an unmarried child under the age of fourteen years.<sup>202</sup>

A recent draft revision of AR 608-99 proposed to raise these ages to twenty-one years in both situations. Given the punitive nature of AR 608-99, this change--whose merits are arguable<sup>203</sup>--could have increased greatly the involvement of legal assistance



attorneys and others in cases over which the Army should have little official interest and in which the courts likely would never grant any relief, absent unusual circumstances.

In response to this proposed change, AR 27-3 provides, that "Family members seeking to enforce Army policy in cases involving financial support of children 18 years of age and over, custody of children 14 years of age and over in the absence of duress, and other cases, as appropriate" may be referred for help elsewhere on the installation, such as the inspector general's office, the proponent of AR 608-99, or the installation activity responsible for the enforcement of AR 608-99.<sup>204</sup>

This provision of the AR 27-3 has been overtaken by events. Because of the growing complexity of the subjects addressed by AR 608-99,<sup>205</sup> The Adjutant General, who is the proponent of this regulation, offered proponenty of AR 608-99 to TJAG accepted this offer.<sup>206</sup> Therefore, any future changes to AR 608-99 are likely will not deviate from legal assistance policies, nor will those changes require legal assistance attorneys to get involved with policy-enforcement issues having no relationship to family law.

### C. Estates

1. Wills--The original draft of AR 27-3 proposed specific guidance requiring attorney interviews with clients before wills were drafted, discouraging "mass" will executions (then defined as involving more than four wills at a time), cautioning against executing wills "that are quickly prepared" during readiness exercises, and counseling that wills "should ordinarily not be witnessed by other deploying soldiers during preparations for overseas movement and preparations for overseas replacement." Several commands that reviewed the draft regulation commented that, although the guidance was well intended, it was not very realistic outside an office environment.<sup>207</sup>

Accordingly, the guidance on wills was modified in the new AR 27-3. The new regulation requires that "[n]o will may be executed until an attorney interviews the client and reviews the will."<sup>208</sup> Furthermore, "an attorney will be present to supervise the execution of the will and will review the will after the client and witnesses have signed the will."<sup>209</sup> The requirement that an attorney interview the client at some time before the will is executed, and be present to supervise its execution, has been substituted for the language in the draft regulation that discouraged the mass execution of wills.

AR 27-3 requires that an attorney who drafts a will put his or her name and state bar on the will as its drafter.<sup>210</sup> Some of the commands that reviewed the draft regulation again expressed their concerns.<sup>211</sup> This requirement allows the drafter of the will to be located if, during probate proceedings, questions arise concerning the testator's intent. Because probate proceedings may take place years--if not decades--after a will is drafted, this information provides the easiest method for locating the responsible attorney, who may have long since left the Army. In addition, although no desire exists to "micro-

manage" the way attorneys draft and execute wills, a means of accountability must exist should complaints (or litigation) arise. Finally, legal assistance attorneys should take professional pride and responsibility for the work they do, including the work done by the paralegals, legal clerks, and secretaries they supervise. They are cautioned that "[t]he same legal professional standards that apply to preparing and executing wills in an Army legal office apply to those that are prepared and executed during a military exercise," and that "follow-up appointments" should be made when those standards cannot be met during an exercise.<sup>212</sup>

AR 27-3 also requires the attorney responsible for drafting the will to insert the following statement in each will he or she prepares (a statement that also is included as part of LAAWS-LA wills program):

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).<sup>213</sup>

Finally, in response to complaints received during and following Desert Storm, AR 27-3 provides that a "fill-in-the blank" will is permissible for states in which the execution of such wills is specifically authorized by statute.<sup>214</sup>

2. Servicemen's Group Life Insurance.--Following both the Gander crash and the Persian Gulf War numerous instances arose in which deceased soldiers had made "by-law" beneficiary designations on their Servicemen's Group Life Insurance (SGLI) forms, the legal effect of which obviously did not comport with their real wishes.<sup>215</sup> Of particular concern then, as now, was the widespread practice in personnel offices throughout the military services of encouraging service members to make so-called "by-law" beneficiary designations rather than designate beneficiaries by name. This means that, upon the service member's death, insurance proceeds are distributed to the service member's next of kin in accordance with federal law,<sup>216</sup> which may not always be consistent with the service member's intent.

Military lawyers and commanders dedicate a considerable amount of resources to ensure that service members have wills that fully reflect their true intents and that comply with applicable state laws. For most service members however, SGLI proceeds are, routinely, the largest part of their potential estate. This is even more true in light of a recent change in the law that raised the maximum amount of SGLI coverage that a service member may elect from \$100,000 to \$200,000.<sup>217</sup>

As a result of recent efforts by the chiefs of legal assistance from each of the military services,<sup>218</sup> under the auspices of the ABA Standing Committee on Legal Assistance for Military Personnel (LAMP), the Department of Veterans' Affairs revised the SGLI election form referenced in AR 27-3.<sup>219</sup> The new form, SGLV-8286 (dated Nov. 1992), presently is being used throughout the military services, and more fully

advises service members about the legal consequences of their SGLI beneficiary elections.<sup>220</sup>

AR 27-3 directs legal assistance attorneys to counsel service members about the legal effects of their SGLI beneficiary designations, especially "by-law" designations, when assisting them with their wills.<sup>221</sup> Service members also should be assisted with executing new SGLI election forms when the ones they have filed do not comport with their wishes. Although this assistance need not include the actual execution of SGLI election forms, attorneys should have blank forms, or copies of thereof, available so that they may show clients, in appropriate cases, how to complete this form so that their SGLI proceeds will be directed in the manner they desire. Service members also should be informed about the location of the appropriate personnel office where these forms need to be filed.<sup>222</sup> Furthermore, during readiness exercises, judge advocates are advised to "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."<sup>223</sup>

3. Casualty Assistance.--Legal assistance on matters relating to the settlement of estates now may be extended to the PNOK (including surviving parents) of "AC or RC soldiers who die while in a military duty status," and to the PNOK of "civilian employees of the Department of Defense . . . who are serving with or accompanying United States Armed Forces in a combat zone at the time of their deaths."<sup>224</sup> These provisions extend legal assistance on estate matters for the first time to surviving parents--not just surviving spouses and children--and to the PNOK of RC soldiers and DOD civilian employees in the circumstances described.<sup>225</sup> AR 27-3 directs the attention of legal assistance attorneys to the fact the distribution of SGLI proceeds to certain PNOK may be restricted by law in certain situations.<sup>226</sup>

4. Life-threatening Injuries and Illnesses.--Legal assistance attorneys occasionally are called upon to provide legal advice on so-called military "death-bed" retirements. The advice sought is whether the surviving spouse or children would be financially better off, insofar as military benefits are concerned, if a terminally ill or fatally injured soldier were to die while on active duty or while in a retired status.<sup>227</sup> AR 27-3 identifies others on the installation who can provide assistance in this area, and indicates that assistance also may be sought from the Legal Assistance Division, OTJAG.<sup>228</sup>

#### D. Economic--Veteran Reemployment Rights Law

For the first time, AR 27-3 provides guidance<sup>229</sup> to legal assistance attorneys on assisting RC soldiers who seek reemployment under the Veteran Reemployment Rights Law (VRRL)<sup>230</sup> and similar state statutes. This guidance is basically a restatement of previous information distributed by the LATF following Operation Desert Storm while RC soldiers were being demobilized.<sup>231</sup> Then, as now, judge advocates are cautioned in VRRL cases not to contact an employer or take any other action that may be viewed by the Department of Justice or the Department of Labor (DOL) as legal representation of the soldier.<sup>232</sup> The reason for this restriction on legal assistance is that such legal representation could jeopardize a soldier's ability to obtain free help from the DOL in getting his or her job back, or in obtaining free representation in court from a United States Attorney should litigation become necessary.<sup>233</sup>

The mere involvement of DOL often will motivate employers quickly to settle VRRL cases to the service member's advantage. For this reason, together with the free cost of the DOL's assistance, restricting the involvement of legal assistance attorneys in VRRL cases, at least initially, often works to the benefit of service members. DOL assistance however, is not without problems in some cases, and for this reason, the Chief, Legal Assistance Division, OTJAG, has authority under AR 27-3 to grant exceptions to this restriction and to authorize in-court representation in appropriate VRRL cases.<sup>234</sup> Additionally, the restriction on the activity of legal assistance attorneys in VRRL cases does not apply to a reemployment rights case being pursued under state law.<sup>235</sup>

#### E. Military Administrative Cases

The wide range of military administrative actions in which soldiers may become involved is an important area of legal assistance work. The importance of this area is apparent when one considers that most clients assisted in these cases are soldiers and that a fair and prompt disposition of these cases enhances discipline, morale, and readiness.<sup>236</sup>

Some legal assistance attorneys view their roles as family law practitioners with primary emphasis on assisting clients with wills, divorces, adoptions, landlord-tenant and contract disputes, and consumer-credit problems. They view many of the military administrative difficulties in which soldiers sometimes become involved as generally arising from acts of misconduct that should be handled by USATDS attorneys. Many USATDS attorneys, on the other hand, together with trial counsel and military judges, view these cases of "secondary importance" to the trial of court-martial cases.

Some legal assistance attorneys believe all military administrative cases should be handled by USATDS attorneys. Undoubtedly an equal number of USATDS attorneys believe that all such cases should be handled by legal assistance attorneys.

At a number of installations these differences of opinion have been resolved in memoranda of understanding (MOUs) between SJAs and USATDS counsel. The content of these MOUs generally provide that USATDS attorneys should assist clients who cannot be helped by legal assistance attorneys because of conflicts of interest, and that USATDS attorneys should handle certain military administrative cases arising out of acts of misconduct. The division of specific military administrative cases between legal assistance and USATDS attorneys was inconsistent from one military installation to another.

One primary goal undertaken in revising AR 27-3 was to distinguish the legal services provided under the legal assistance program from those provided by USATDS attorneys. Nevertheless, an absolute, unqualified division of all military administrative cases between SJAs and USATDS is not possible. Appendix B of this article reflects the detailed, but qualified, breakdown between legal assistance cases and USATDS cases contained in AR 27-3.<sup>237</sup> This division of cases, as well as the qualifying language preceding it, represents a compromise reached after numerous discussions between the Chief, Legal Assistance Division, OTJAG, and the Chief, USATDS, both before and after 20 December 1991, when the draft copy of AR 27-3 officially was staffed for comment throughout the Army.

The goal in dividing military administrative cases between legal assistance and USATDS attorneys was not to shift as much of this workload as possible to USATDS. The primary mission of USATDS attorneys is to defend soldiers being tried by courts-martial. But for this primary mission, USATDS would not exist. None of the other valuable legal services provided by USATDS attorneys, such as counseling soldiers facing nonjudicial punishments or adverse personnel actions, would have justified establishing USATDS as an organization separate and apart from the SJA offices from which USATDS positions were taken. This philosophy is incorporated fully in AR 27-3,<sup>238</sup> and likely will not change in the future.

Some also have suggested that USATDS should be staffed more fully so that its attorneys can "help out more" with the client work load on military administrative matters, or assume the legal assistance mission altogether.<sup>239</sup> These suggestions, however, miss the point that USATDS was established as a "stove pipe" organization, not to deliver client legal services efficiently,<sup>240</sup> but solely to eliminate the perception that Army defense counsel were not truly independent from those responsible for prosecuting their clients.

Several commands through which AR 27-3 was staffed commented that the detailed delineation between legal assistance and USATDS cases would be very helpful in developing a more uniform approach among Army installations that provide legal services. Although AR 27-3 does not prohibit MOUs between SJA offices and USATDS counsel, the intent was to make such MOUs unnecessary. At a minimum, AR 27-3

provides a common point of reference for negotiating MOUs, which also should foster a greater degree of uniformity among Army installations.<sup>241</sup>

Although it might have been helpful to establish a bright-line rule that all military administrative cases involving hearings should be handled by USATDS attorneys and those that do not should be handled by non-USATDS attorneys, this was not realistic, desirable, or necessary. While some USATDS attorneys may possess greater expertise in representing soldiers at military administrative hearings, developing this expertise in others is also important. These cases also should not divert USATDS attorneys from their primary military justice mission, which requires a significant amount of training.

Those military administrative cases listed as USATDS cases under AR 27-3--that is, officer and enlisted separation actions, officer resignations in lieu of criminal or administrative proceedings, reductions in grade, and recruiter misconduct--involve hearings requiring representation. In addition, these cases likely involve allegations of serious misconduct and pending criminal charges against soldiers.

On the other hand, cases listed as "SJA [legal assistance] cases" generally do not involve hearings, and are less likely to involve serious misconduct or pending criminal charges.<sup>242</sup> Also, legal assistance generally is "optional" in cases that possibly may involve hearings.<sup>243</sup> Two exceptions are military investigations, in which soldiers are named as respondents, and actions initiated by soldiers to correct their military records.<sup>244</sup>

Nevertheless, even though legal assistance may be "required"--or initially may be provided--in a case in which a client may be "authorized" the presence and assistance of counsel at an eventual hearing, this does not mean that a client has the right to the presence and assistance of military counsel during the hearing.<sup>245</sup> The scope of legal assistance, even in "required" cases, can be limited by a supervising attorney. This is because a non-USATDS attorney who desires to appear as counsel before a military administrative hearing first must have the approval of a supervising attorney.<sup>246</sup> Therefore, the list of military administrative cases for which legal assistance to clients is "required" must be read in conjunction with the requirement that the approval of a supervising attorney is required to represent these clients in administrative board proceedings.

The division of military administrative cases between SJAs and USATDS must be read in conjunction with the guidance that precedes it. AR 27-3 provides the following:

Subject to other USATDS mission requirements, USATDS attorneys should ordinarily assist soldiers on military administrative actions that--

- (a) Are initiated on the basis of alleged violations of the Uniform Code of Military Justice (UCMJ); or

(b) Are related to impending, pending, or recently completed UCMJ proceedings.<sup>247</sup>

Many of the military administrative cases listed as "SJA [legal assistance] cases," such as bars to reenlistment, suspensions of favorable personnel actions, and memoranda of reprimand almost always are initiated on the basis of alleged UCMJ actions, or "impending, pending or recently completed UCMJ proceedings."<sup>248</sup> So why are these not listed as USATDS cases? The basis for most of these actions almost always will be the UCMJ, and therefore a USATDS concern. The workload and availability of the USATDS counsel, however, may dictate that what would otherwise be a USATDS case, will be a legal assistance matter.<sup>249</sup>

This qualified division of military administrative cases recognizes that legal assistance and USATDS staffing and client case loads vary considerably from one installation to another. This disparity occurs because the staffing of a USATDS office on any particular installation is based, as it should be, on accomplishing the primary mission of USATDS on that installation, not on providing legal assistance services. For this reason, USATDS attorneys are not stationed at every Army installation, and their availability at all installations to assist on legal assistance cases will always be subject to other USATDS missions.<sup>250</sup>

The new AR 27-3 defines the scope of the Army Legal Assistance Program in this area for the first time, and provides a rational basis for dividing military administrative cases between USATDS and non-USATDS attorneys on a case-by-case basis or by MOU.<sup>251</sup> Consequently, AR 27-3 will foster a greater degree of uniformity from one installation to another on who handles these cases. This will allow training to be focused on actual legal assistance practice and will improve statistical reporting.<sup>252</sup> AR 27-3 also provides a great degree of flexibility from one Army installation to another based on SJA and USATDS staffing and client case loads. Most importantly, the guidance provided supports the client because it seeks to avoid, whenever possible, the need for a client to see more than one attorney on legal actions arising from the same course of conduct or misconduct.<sup>253</sup> This, in turn, also enhances the efficiency of all client legal services by eliminating duplication of effort and unnecessary referrals back and forth between USATDS and non-USATDS attorneys.<sup>254</sup>

Except for military administrative cases, USATDS attorneys, when they provide legal assistance, are required to comply with all the record-keeping, reporting, and other requirements contained in AR 27-3. USATDS attorneys also are required to comply with "locally established legal assistance policies and procedures."<sup>255</sup> These local policies and procedures include those contained in local SJA policy letters and command directives issued pursuant to AR 27-3.<sup>256</sup>

In conclusion, the decision on whether a USATDS attorney should assist a client on a military administrative or other legal assistance case should depend on the answers to the following questions:

(1) Are attorneys in the SJA or USATDS office precluded from assisting the client because of a conflict of interest? If the answer to this question is "yes," every effort should be made by attorneys in the nonconflicted office to assist the client.

(2) Is the client already being assisted on the same or related problem by an attorney in the SJA or USATDS office? If the answer to this question is "yes," every effort should be made, consistent with the client's wishes and needs, to continue legal assistance with the same attorney, or with an attorney from the same office. If assistance cannot be provided in a timely manner by that attorney or office, an attorney from the other office, if available, should provide the legal assistance required.

(3) Is the client seeking legal help for the first time on a particular legal assistance problem or need involving a military administrative action? If the answer to this question is "yes," then a non-USATDS attorney should provide assistance unless on of the following conditions exists:

(a) An agreement exists between a legal assistance and USATDS attorneys to the contrary; or

(b) The administrative action arises from a violation of the UCMJ or is related to a UCMJ proceeding, and a USATDS attorney is available to provide legal assistance.

#### F. Taxes

Tax, as one category of legal assistance cases, includes federal, state, and foreign taxation of property and income.<sup>257</sup> In this category, all legal assistance services, such as counseling, correspondence and negotiation with tax officials and others, preparation and filing of tax returns, and referrals to civilian lawyers, are provided.<sup>258</sup>

Federal and state income tax assistance--to include the preparation and electronic filing of returns--continues to be a major feature of the Army Legal Assistance Program.<sup>259</sup> As in the past, tax assistance services continue to have separate reporting requirements. The specific requirements for after-action reports at the end of the tax season (due 1 June for installations in the United States and 1 July for those outside the United States) now are contained in AR 27-3.<sup>260</sup>



The previous legal assistance regulation required TJAG approval of any request (presumably from an Army installation commander) "to establish a commercial tax preparation service that compete with a free service under the Army Tax Assistance Program."<sup>261</sup> This provision lost its effectiveness when, prior to 1989, HQDA allowed the Army and Air Force Exchange Service (AAFES) to enter into a concessionaire contract with H&R Block. This decision permitted H&R Block to provide tax preparation services on Army installations subject to command authorization.

AR 27-3 continues to recognize that installation commanders have the final say on who provides tax services on the installation and that TJAG's role is limited. TJAG cannot prevent commercial tax services from being provided on a particular installation.<sup>262</sup> TJAG only can influence that decision by continued support of the legal assistance effort at each installation to provide free tax assistance services to soldiers and their families.

Accordingly, AR 27-3 requires commanders "to consult with their (SJAs) on the need, if any, to establish or continue commercial tax services (or any other legal assistance-type services) on their installations."<sup>263</sup> A similar responsibility exists on the part of SJAs to initiate this consultation and to keep commanders informed about Army tax assistance services on the installation.<sup>264</sup>

#### G. Civilian Criminal Matters

The initial draft of AR 27-3 proposed restricting legal assistance attorneys handling civilian criminal matters from contacting civilian court or prosecuting officials to obtain information, to request delays in proceedings, or to request that charges be dismissed. The reason for this proposed restriction was that civilian criminal matters, like military justice matters, did not fit squarely within the definition of what one usually would define as a client's "personal legal affairs."<sup>265</sup>

Consistent with comments made on other parts of AR 27-3 during its staffing, however, legal assistance attorneys wanted to do more, not less, in assisting clients. Legal assistance attorneys want to assist clients by finding out whether a warrant for arrest has been issued, by attempting to quash it if one has been issued, by attempting to get criminal charges dismissed, reduced, or resolved administratively, and by negotiating "long-distance" pleas on behalf of clients located far from the court in which they are suppose to appear. Many of these clients are the minor children of service members and other eligible clients.

Because of comments received during the staffing of AR 27-3, the guidance on civilian criminal matters was rewritten to authorize the very things the draft regulation would have prohibited. Legal assistance remains optional on civilian criminal matters, but nothing restricts legal assistance on these matters, other than the area of in-court representation. This guidance is consistent with the previous legal assistance

regulation.<sup>266</sup> Based on comments received during staffing, however, in-court representation now is allowed--if authorized by a supervising attorney--for civilian criminal matters heard before a United States magistrate on a military installation.<sup>267</sup> In-court representation in these cases, unlike in civil proceedings, is not limited to soldiers, but the financial hardship test applies in determining which clients are eligible for in-court representation before a United States magistrate.<sup>268</sup>

In-court representation before a United States magistrate should be the exception, rather than the norm, and supervising attorneys carefully should review requests for in-court representation on a case-by-case basis. As with in-court representation in civil proceedings, supervising attorneys are expected to coordinate policies in this area with the court and appropriate bar associations before authorizing in-court representation before a United States magistrate.<sup>269</sup>

#### **XIV. Types of Legal Assistance Services**

##### **A. General**

The Army Legal Assistance Program provides for two types of services: preventive law services and client services.<sup>270</sup> The following discussion highlights changes from the previous legal assistance regulation in these areas.

##### **B. Preventive Law Services**

Preventive law once was a separate program with its own Army regulation.<sup>271</sup> The "program" and its regulation then was incorporated in the previous legal assistance regulation.<sup>272</sup> AR 27-3 discusses preventive law as an important area in the Army Legal Assistance Program, but dispenses with much of the verbiage that was used to describe it in previous regulations.<sup>273</sup>

Preventive law is not peculiar to legal assistance, despite its close association with legal assistance in the past.<sup>274</sup> For government practitioners, preventive law is an effective method to practice law, whether the area of law is legal assistance, contract law, environmental law, claims, administrative law, or criminal prosecution. Preventive law saves time, effort, and expense by preventing problems instead of solving them.

AR 27-3 requires commanders to sponsor preventive law initiatives,<sup>275</sup> and makes them responsible for ensuring that preventive law services are provided in their commands.<sup>276</sup> SJAs, on the other hand, are required to seek "command support and involvement" on their own preventive law initiatives,<sup>277</sup> and are encouraged to be aggressive and innovative in their preventive law efforts.<sup>278</sup>

Preventive law remains an important area in the Army Legal Assistance Program. Keeping a client out of legal trouble is more important to a client than helping him or her with damage control after the mistake is made. AR 27-3 directs that the common legal problems of soldiers and their families be examined for ways in which those problems can be avoided, that regulatory or statutory "fixes" be recommended, and that these solutions be shared with other attorneys providing legal assistance.<sup>279</sup> AR 27-3 also requires that "[l]ocal print and electronic media and training and education programs" be used to inform soldiers and their families of their legal rights and entitlements; local legal problems and ways to avoid them; and the location, telephone numbers, and hours of operation of the legal assistance office.<sup>280</sup>

### C. Client Services

1. General.--As reflected at Appendix B of this article, the new AR 27-3 breaks down legal assistance client services into ten separate types of services.<sup>281</sup> Each listed client service, except for ministerial services--such as witnessing signatures and providing notary services<sup>282</sup>--is a legal service separate and distinct from the others. This breakdown also makes each service easy to tabulate for the purpose of statistical reporting.

An attorney is expected to provide some legal counseling to every client he or she sees.<sup>283</sup> Nevertheless, the effectiveness of a particular attorney--and of the legal assistance office to which he or she is assigned--is measured not only by the number of clients counseled, but also by the number and types of other legal assistance services provided to these clients.

Under AR 27-3, these legal services include legal negotiation, which may be nothing more than a simple discussion of a client's problem with an opposing party or counsel.<sup>284</sup> This same service performed in writing, is legal correspondence.<sup>285</sup> Legal document preparation is another legal service, used broadly, to describe not only the drafting and review of wills and powers of attorney, but also the preparation of tax returns.<sup>286</sup> Legal document filing also is used broadly to describe the filing of legal documents with a court or other governmental body.<sup>287</sup> Two significant areas of legal assistance practice in this area are the electronic filing of income tax returns<sup>288</sup> and, to a lesser extent, the growing area of pro se assistance.<sup>289</sup>

2. Pro se Assistance and In-Court Representation.--Pro se is defined as an appearance in court or other "proceeding by a person who represents himself or herself without the assistance of counsel during the proceeding."<sup>290</sup> Pro se assistance is the help (short of in-court representation) provided by legal assistance attorneys "to non-lawyer clients to file legal documents, papers, or pleadings in civil proceedings, such as small claims or uncontested divorces."<sup>291</sup>

In-court representation is defined as "Appearing, or providing notice of appearing, as counsel on behalf of a client in a military, civil, or civilian-criminal proceeding, or taking any action which constitutes or could require counsel to appear as the attorney of record in any proceeding."<sup>292</sup> The definition of "in-court representation" is worded broadly to cover any legal assistance to a client that exceeds the scope of pro se assistance.<sup>293</sup> The definition includes military proceedings (both military justice and administrative); "civil proceedings" (noncriminal trials and administrative hearings conducted by a municipal, state, federal (outside DOD), or foreign judge or official); and "civilian-criminal proceedings" (criminal and quasi-criminal trials and hearings conducted by municipal, state, federal (outside DOD), or foreign judge or official).<sup>294</sup>

The in-court representation of clients in military justice proceedings is outside the scope of legal assistance.<sup>295</sup> As previously discussed, the in-court representation of clients in civilian-criminal proceedings, except before a United States magistrate on a military installation, is not authorized under AR 27-3.<sup>296</sup> The in-court representation of soldiers in military administrative proceedings is authorized if approved by a supervising attorney, but these cases generally are handled by USATDS attorneys.<sup>297</sup> Accordingly, only pro se assistance and in-court representation in civil proceedings remain to be discussed.

Pro se assistance and in-court representation are two of the most valuable legal assistance services to clients because, for most legal problems and needs, either of these services eliminates a client's need to hire a civilian lawyer. Each of these legal services--particularly in-court representation--has the added benefit of providing valuable training and experience to legal assistance attorneys, especially civilian attorneys employed by the Army who are authorized to practice law in the courts outside the installation. For this reason, in-court representation is not limited to civil proceedings within the United States, but includes those conducted in foreign courts as well.<sup>298</sup>

Nevertheless, pro se assistance and in-court representation also can be extremely time-consuming and, for that reason, these services should not be allowed to exhaust resources that are needed to provide more basic legal services to other clients.<sup>299</sup> These legal services also have the greatest potential to give judges, bar associations, and individual civilian lawyers cause to complain about the Army Legal Assistance Program.<sup>300</sup> The goal of the Army Legal Assistance Program is not to compete with lawyers in private practice or to irritate judges with pro se filings. For this reason, and to keep complaints from lawyers and judges to an absolute minimum, SJAs are required to coordinate their policies on both in-court and pro se assistance with local civilian judges, lawyers, and bar associations.<sup>301</sup>

Because supervising attorneys have been given the authority to authorize in-court representation or pro se assistance,<sup>302</sup> this authority has been accompanied by the responsibility--in the event that authorization is given--to document the coordination that occurred beforehand with local civilian judges and bar associations.<sup>303</sup> Supervising

attorneys, keeping in mind "local sensitivities and concerns," also are required to maintain and update records on this coordination and to maintain records on any complaints made and their resolutions.<sup>304</sup> This requirement ensures that the SJA or HQDA will have access to a file upon which to base a response, should anyone complain about pro se assistance or in-court representation at a particular installation.<sup>305</sup>

In-court representation in civil proceedings is limited to AC or RC soldiers "[f]or whom hiring civilian lawyers would entail substantial financial hardship to themselves or their families."<sup>306</sup> The determination on which soldiers meet this criteria is left to the discretion of supervising attorneys.<sup>307</sup> Supervising attorneys are directed to determine financial hardship by "generally" considering the criteria followed by local governments in providing free legal representation to its citizens or, in the absence of such criteria or in foreign nations, to limit in-court representation to "soldiers in the pay grades of E4 and below."<sup>308</sup> Although this criteria may appear harsh to some, the key is not the actual criteria applied at a particular installation, but whether that criteria has taken into account "local sensitivities and concerns" and has been coordinated with local courts and bar associations.<sup>309</sup>

The foregoing limitations on providing in-court representation only to soldiers in financial hardship cases does not apply to the assistance provided to the PNOK in the probate or settlement of estates involving soldiers who die while in a military duty status, to soldiers asserting their veterans' reemployment rights under applicable federal and state laws,<sup>310</sup> or to abused (including neglected) children in family advocacy cases.<sup>311</sup> These limitations also do not apply to pro se assistance cases.<sup>312</sup> The coordination requirement however, applies to all pro se assistance and in-court representation cases.<sup>313</sup>

AR 27-3--unlike the previous legal assistance regulation--firmly states that, except for the two instances already noted, in-court representation is limited to soldiers only.<sup>314</sup> This restriction is driven both by resources and policy. The resource reasons are obvious; the policy reasons are less so. The previous legal assistance regulation "generally" evidenced a preference for limiting in-court representation to soldiers to prevent a legal assistance attorney "from representing a family member who is pursuing a legal action against an active duty soldier."<sup>315</sup> This policy is based on several important reasons. The primary focus of the legal assistance program is soldier readiness, morale, discipline and retention.<sup>316</sup> In addition, providing a reasonable explanation to soldiers who complain that they cannot obtain in-court representation in actions against their spouses, when their spouses have been successful in obtaining in-court representation from legal assistance attorneys against them from the same or a different installation, is very difficult.<sup>317</sup>

Finally, special provisions apply to RC judge advocates. All RC judge advocates must obtain the approval of their supervising attorneys (or the Chief, Legal Assistance Division, OTJAG, if not assigned to a USAR TPU or the ARNG) to provide pro se assistance.<sup>318</sup> All RC judge advocates must obtain the approval of their supervising attorney (if assigned to a USAR TPU or to the ARNG) and the Chief, Legal Assistance

Division, OTJAG, before they may provide in-court representation to a client.<sup>319</sup> Two reasons exist for these requirements. First, HQDA must be able to track these cases and fix responsibility for them should an inquiry arise on the manner in which they were handled. Secondly, providing representation for RC soldiers at military administrative hearings occasionally requires coordination with USATDS.

3. Legal Referrals and Providing Lists.--Legal assistance includes any help provided by an attorney to a client in obtaining the legal services of another. Given the limited scope of the Army Legal Assistance Program, this is one of the most valuable legal services provided by legal assistance attorneys, and yet, it is one of the most neglected. Any failure on the part of legal assistance attorneys to provide meaningful help in this area likely will result in others on the installation, such as commanders, family advocacy personnel, and nurses, filling the void by making their own recommendations on civilian lawyers. The failure to do better in this area also could result in an AAFES effort to bring private law firms on Army installations in much the same way AAFES brought commercial tax preparers on the installation.<sup>320</sup>

AR 27-3 encourages by-name referrals more than the previous legal assistance regulation.<sup>321</sup> AR 27-3, for the first time, distinguishes a by-name referral for a client from providing a client with a list of civilian lawyer's names--including just the name of one lawyer. A referral may be to a military attorney or a civilian lawyer, or to any military or civilian office that may be of assistance to the client, such as a local ACS office, inspector general, or consumer protection office.<sup>322</sup> A referral presupposes that a legal assistance attorney has communicated with the party to whom the client is being referred before making the actual referral. Providing a list of civilian lawyers or the telephone number of a lawyer referral office or other office is not a referral; it is, at best, a suggestion to a client on a possible course of action.<sup>323</sup> Providing lists is discouraged unless that is all the client desires.<sup>324</sup>

AR 27-3 directs that clients be assisted whenever possible without referral or providing lists. Referrals should be made only when they are required by AR 27-3--or by supervising attorneys as in a policy letter--and when they are in the best interest of the client.<sup>325</sup>

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.<sup>326</sup>

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.<sup>327</sup>

Before making a referral to a particular civilian lawyer, particularly to one in the local community outside the installation, the legal assistance attorney is expected to have some knowledge about the lawyer's background, areas of legal expertise, legal malpractice insurance coverage, standing with the local bar disciplinary body, and "ability to meet the specific needs of the client."<sup>328</sup> A legal assistance attorney also can negotiate a fee on behalf of the client, and express a personal opinion about the ability of the lawyer to whom the client is being referred.<sup>329</sup> The legal assistance attorney however, should "make it clear . . . that any decision to consult with the lawyer is solely that of the client and that the client is free to retain any lawyer."<sup>330</sup>

The JAGC Reserve Officer Legal Assistance Directory also can be used to refer a client to an RC judge advocate who has agreed to accept the referral. An RC judge advocate can accept the referral in his or her capacity as an RC judge advocate, in which case no fee for professional services may be charged. The mere fact that an RC judge advocate is listed in the directory, however, does not preclude him or her from accepting a referral when a fee for professional services will be charged.<sup>331</sup> In these instances the client must understand fully that the referral is for a fee and that the RC judge advocate is accepting the client's case in a private, nonofficial capacity.<sup>332</sup>

Finally, supervising attorneys are required to monitor the number and type of referrals to ensure that clients are being helped as fully as possible, and to determine the

need for additional training, supervision, or other actions.<sup>333</sup> This review also should include a check on whether any "appearance of favoritism" has arisen in the referrals made to civilian lawyers in which any fee for professional services will be charged.<sup>334</sup> Such an "appearance" occurs when repeated referrals in these cases are made to the same lawyer or an "unreasonably limited number of lawyers, or to those lawyers only listed in the JAGC Reserve Officer Legal Assistance Directory."<sup>335</sup>

4. Mediation--Mediation was added as an additional legal assistance service, following formal staffing of AR 27-3, based on comments received that mediation is used at some Army installations to settle disputes. Mediation services may be provided as part of a formal program authorized by the commander responsible for the legal assistance program.<sup>336</sup> Attorneys providing mediation services must comply with the applicable ethical standards of AR 27-26,<sup>337</sup> and may mediate any dispute involving one or more eligible legal assistance clients.

## **XV. Ethical Standards**

The primary source on the rules of professional conduct is AR 27-26, not AR 27-3.<sup>338</sup> A conscious effort was made, whenever possible, not to restate any of the rules of professional responsibility, or the comments thereto, in AR 27-3. To the extent that any restatement appears, the wording of AR 27-26 governs.<sup>339</sup>

AR 27-26 indicates that "Army lawyers working in the same Army law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so" because of a conflict of interest.<sup>340</sup> The comment to this rule, however, indicates that "Army policy discourages representation by one legal assistance office of both spouses involved in a domestic dispute."<sup>341</sup> Although this comment correctly stated legal assistance policy at the time of publication--1 May 1992<sup>342</sup>--that policy is modified by AR 27-3. AR 27-3 now "discourages attorneys from the same legal office from providing legal assistance to both spouses involved in a domestic dispute."<sup>343</sup> Supervising attorneys, however, are given broad discretion to authorize exceptions if approved by the client and if precautions are followed in using different clerical personnel and separate records and file locations.<sup>344</sup> This change is based on the fact that AR 27-3 authorizes all Army attorneys to provide legal assistance and little reason exists to distinguish attorneys in a legal assistance office from those elsewhere in an Army legal office.<sup>345</sup>

Finally, AR 27-3 provides particular guidance to RC attorneys.<sup>346</sup> RC attorneys may not receive a fee for performing legal assistance duties or later represent a legal assistance client in a private capacity for a fee for the same general matter previously discussed with the client.<sup>347</sup> AR 27-3 defines "the same general matter" to include "one or more types of cases within any one of the ten categories of cases listed within paragraph 3-6, or which arises out of the same factual situation or course of events."<sup>348</sup> This means



that an RC judge advocate who provides legal assistance to a client on a divorce cannot later charge the same client for legal services provided on a child custody or support issue related to that divorce.<sup>349</sup> The prohibition is designed to ensure that no one providing legal assistance receives any actual or constructive compensation or benefit from performing official Army duties.<sup>350</sup>

## **XVI. Records and Statistics: Legal Automation Army-Wide System--Legal Assistance**

A great deal of time and effort is devoted by attorneys and support staff at each Army installation and at HQDA in maintaining client cards, collecting data from these cards, consolidating these data into reports, publishing these reports, and reviewing and analyzing these reports. Unless these reports produce meaningful and useful data however, any analysis is not going to result in any meaningful findings, and the energy involved in collecting these data will be wasted.

Why does AR 27-3 require offices to collect statistics? One reason is to be able to answer questions accurately--particularly from those at the installation or at HQDA who may wish to cut back or provide resources to the legal assistance program. Having statistics to answer the following three questions is essential: Whom did legal assistance attorneys serve? What problems did these clients have? What did legal assistance attorneys do for these clients? In addition, statistics are indicative of staffing and training requirements. Finally, statistics assist in evaluating the performance of individual attorneys and legal offices. Unfortunately, the statistics collected in the past have not been of much value.<sup>351</sup>

One of the goals in revising the previous legal assistance regulation was to bring some sense and order to the statistics collected and published through the Army Legal Assistance Program. Much of the legal assistance data previously collected and published best can be described as a "garbage-in, garbage-out" process from a statistical point of view.

The previous legal assistance regulation failed to discuss, or even mention, the old "Legal Assistance Operations" report, much less provide any guidance on how cases and services should be counted.<sup>352</sup> This report reflected the number of "visits" made by clients, as opposed to the number of cases handled by clients. For example, an attorney assisting a client over the course of several weeks on a continuing marriage problem in which the attorney answers questions on divorce, child support, child custody and visitation, and service of process might count each "visit" by that client as a "divorce/separation" visit, or as one of the following five types of visits: "divorce/separation," "adoption/custody,"<sup>353</sup> "nonsupport," "civilian court matter," and "SSCRA."

The more "visits" the client has to make to get his or her legal problem or need resolved, the higher the statistics for that attorney and the command to which the attorney is assigned--as well as an exaggeration of the number of clients of that particular military grade or other category. Because published guidance existed, an attorney also might count a telephone call as a visit, or a telephone call as a number of visits, depending on the subjects discussed. On the other hand, if the attorney prepared a separation agreement or provided pro se assistance or in-court representation for the client, no separate place on the report was made to reflect this. Therefore, much of the data collected were useless. The number of visits made by clients means very little in the absence of data--much of which was not collected--as to the number of clients being assisted, the number and type of legal problems being handled, and the type of legal services being provided.

The new "client card"<sup>354</sup> and "legal assistance report"<sup>355</sup> were designed during the course of drafting AR 27-3 and were coordinated as to both content and format with LAAWS personnel and the United States Army Publications and Printing Command, which is responsible for printing and publishing DA forms and regulations. The coordination occurred over the course of several weeks and was designed to ensure that the forms, the LAAWS-LA program, and the draft copy of AR 27-3 were consistent in every respect and, with regard to LAAWS-LA, that the data being collected were capable of being reported in the formats desired.

LAAWS-LA implements the record-keeping and reporting requirements of AR 27-3 throughout the active Army.<sup>356</sup> AR 27-3 contains explicit directions on how cases and services are to be counted and tabulated on both the client card and legal assistance report.<sup>357</sup> Individual two-letter codes are used to designate each possible reason for legal assistance--office setting, readiness exercise, deployment--each possible type of "case" that may be handled, and each possible type of legal assistance service that may be provided.<sup>358</sup> These codes are used to record data on the client card, either manually or by using LAAWS-LA. Both the client card and the legal assistance report can be printed manually or computer generated. An example of a manually completed client card is reproduced at figure B-1 of AR 27-3.

Using LAAWS-LA, supervising attorneys now can produce computer-generated legal assistance reports that provide the following information:

- a. Data on all legal assistance "cases" by category of client, broken down by military rank, when applicable.<sup>359</sup>
- b. Data on all preventive law and client services.<sup>360</sup>
- c. A break-down of legal assistance cases, including client categories and client services, by time period; by attorney; or by unit (assuming a standard code or name is used to designate each unit--

preferably large unit or subinstallation--tracked in block 10 of the DA Form 2465).

The guidance provided in AR 27-3, as incorporated in LAAWS-LA, will facilitate the collection of meaningful legal assistance data and the production of better legal assistance reports. This, in turn, will help supervising attorneys at every level to provide more accurate answers to the three important questions mentioned above: Whom did we serve? What problems did they have? What did we do for them? These answers should be available in the future, whether the questions are focused on a particular attorney, a certain unit, a particular legal assistance office, a major command, or the Army as a whole.

## **XVII. Conclusion**

The world, like the Armed Forces, is in a period of transition. The Army, faced with budget and manpower reductions, is undergoing a so-called "build-down." Fortunately, the build-down process likely will not have considerable adverse effect on long-standing, relatively inexpensive, but necessary programs such as legal assistance.

SJAs and commanders, however, must continue to place emphasis on the importance of legal assistance. They must continue to provide a wide range of quality legal services to great numbers throughout the world, often on short notice, taking into account all the laws of the various jurisdictions in which clients are domiciled or reside. At the same time, their records and reports accurately must depict what their attorneys are doing for soldiers and their families, and they must keep commanders informed about the accomplishments and needs of their legal assistance programs.

The new AR 27-3 provides additional flexibility to AC and RC commanders and supervising attorneys in providing legal assistance services in their commands. The differences between the old AR 27-3 and the new one are significant compared to past regulatory changes made to the Legal Assistance Program. The basic structure of the Legal Assistance Program, however, has endured. Although great changes have occurred in the world and in the Army over the last fifty years, the Army Legal Assistance Program continues to be a commander's program; a program mandated not by law, but by military needs; and a program in which judge advocates and civilian attorneys provide valuable legal services, free of charge, to soldiers and their families.

1. DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Oct. 1992) [hereinafter AR 27-3]. While the final draft of this regulation was being briefed to The Judge Advocate General (TJAG), the decision was made to drop the acronym "ALAP" from AR 27-3. Although the Army Legal Assistance Program was the first Army activity to use the acronym "ALAP," the acronym lately has been used more widely to designate the Acquisition Law Assistance Program.

2. Id. para. 2-1a.

3. DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE (10 Mar. 1989) [hereinafter AR 27-3 (1989)], superseded by AR 27-3, supra note 1.

4. Operation Desert Shield began shortly after Iraqi military forces invaded Kuwait on 2 August 1990. That operation ended and Operation Desert Storm began upon the commencement of the air campaign by United States and other members of the coalition forces against Iraq on 16 January 1991. Operation Desert Storm also included the ground war against Iraq, which began on 24 February, and was successfully concluded five days later when Kuwait was liberated by United States and other members of the coalition ground forces.

5. The LATF was established on 29 January 1991 by the then Acting The Judge Advocate General, Major General John L. Fugh. He directed the author of this article to form a task force of Reserve component judge advocates to coordinate the delivery of legal assistance services to the surviving families of soldiers who might be killed during the land war that was then expected to begin at any moment. Following the war, the LATF also coordinated the delivery of legal assistance services to United States Army Reserve (USAR) and Army National Guard (ARNG) soldiers being demobilized. The LATF consisted of one active component (AC), one ARNG, and thirteen USAR judge advocate officer, warrant officer, and enlisted personnel. The author acknowledges the drafting assistance on AR 27-3 provided by Lieutenant Colonel Stephan K. Todd (USAR), Lieutenant Colonel John F. Bender (USAR), and Major Michael T. McCabe (ARNG). The LATF completed its mission on 27 September 1991.

6. Office of The Judge Advocate General, U.S. Army, Desert Storm Assessment Team Report (22 Apr. 1992) [hereinafter DSAT Report], is a comprehensive report that covers all aspects of judge advocate operations--such as legal assistance, military justice, and claims--provided during Operations Desert Shield and Desert Storm. Although judge advocate operations during the Gulf War were tremendously successful, the DSAT Report lists many areas of concern that call for review, analysis, and possible correction. Legal assistance is listed as the functional proponent in 133 of the 659 "issues" in the DSAT Report and in 57 of the 144 "lessons learned" in the DSAT Report. The LATF addressed many of the issues and lessons learned in the DSAT Report, as well as several that were not listed, such as liability concerns and the scope of legal assistance in the Reserves. AR 27-3 addresses all the legal assistance issues and lessons learned from Desert Storm that are appropriate for incorporation in an Army regulation.

7. Examples of such recent conflicts include the United States Army deployments to Grenada in 1983 and Panama in 1989.

8. The Gander crash refers to the crash of a DC-8 aircraft at Gander, Newfoundland, Canada, in which 248 soldiers from the 101st Airborne Division were killed. The soldiers were returning to Fort Campbell, Kentucky, following the completion of a six-month tour of duty with the Multinational Force and Observers in the Sinai Desert, Egypt. The number of soldiers killed in this one crash exceeded the 213 soldiers who died during Desert Storm from both combat and noncombat causes alike.

9. Unless otherwise indicated, "RC" includes both the USAR and the ARNG. Also, unless otherwise indicated, the term "RC judge advocate" refers to a USAR or ARNG judge advocate.

10. The term "Army legal office" is used in lieu of "legal assistance office" because legal assistance services frequently are provided by attorneys assigned to small legal offices that do not have a separate legal assistance division or full-time legal assistance attorneys. Additionally, legal assistance services frequently are provided by other attorneys in an Army legal office--such as a staff judge advocate (SJA), deputy SJA, or trial counsel--when the occasion or need arises. The glossary of AR 27-3 defines an Army legal office as "[a] legal office within the active or one of the reserve components of the Army in which one or more attorneys provide legal assistance on a full or part-time basis." AR 27-3, supra note 1, glossary; see also Headquarters, Dep't of Army, Gen. Orders No. 26, para. 3 (15 May 1960) (providing that "Army legal offices . . . operate under the professional guidance of TJAG and in accordance with directives promulgated by TJAG in coordination with the General Counsel of the Army" on matters under the jurisdiction of the Army staff).

11. AR 27-3 (1989), supra note 3, para. 2-2. For the purpose of consistency throughout AR 27-3 and this article (except in quoted material), the term "civilian lawyer" denotes a person engaged in the private practice of law, and the term "attorney" denotes a judge advocate or a Department of Army (DA) civilian attorney employed to provide legal assistance pursuant to AR 27-3. See AR 27-3, supra note 1, glossary.

12. Id. para. 2-3.

13. Id. para. 4-6.
14. Id. para. 2-2a(2). As used in the old regulation, AR 27-3 (1989), supra note 3, in the new AR 27-3, and in this article, the term "active duty," as applied to RC personnel, includes inactive duty for training, active duty for training, and annual training (AT). It also includes the full-time periods of active duty performed by RC personnel following full or partial mobilization or when serving as part of the Active Guard Reserve (AGR). Members of the USAR and ARNG assigned to the AGR serve on extended tours of active duty and are considered AC members under AR 27-3. "Active duty" for the ARNG includes periods of "active service"--service on active duty or full-time National Guard duty. See 10 U.S.C. §§ 101 (22), (24), (42) (1988). "Active duty" periods do not include times during which RC judge advocates are not serving on military duty, including periods during which they may be providing legal assistance for retirement points. See infra notes 59-60, 174-183, and accompanying texts.
15. AR 27-3 (1989), supra note 3, para. 2-10b(3).
16. MILTON J. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN: A REPORT OF THE SURVEY OF THE LEGAL PROFESSION 9 (1951).
17. Edmund R. Beckwith, Legal Assistance to Military Personnel, 29 A.B.A. J. 382, 382 (1943).
18. BLAKE, supra note 16, at 9-14.
19. Beckwith, supra note 17, at 382, 384. One checklist contained 26 topical headings and covered everything from bank deposits, leases, and mortgages, to guardianship of children.
20. War Dep't, Circular No. 74, Legal advice and assistance for military personnel (16 Mar. 43) [hereinafter Cir. No. 74]. This circular "institut[ed], for the first time in the history of the armed forces, an official, uniform and comprehensive system for making legal advice and assistance available to military personnel and their dependents in regard to their personal legal affairs." BLAKE, supra note 16, at 16-17. A similar evolution of the legal assistance program took place in the Navy during World War II. The first official recognition of the Navy program occurred with the publication of a letter from the Acting Secretary of the Navy in 1943. See Letter, JAG:JL:ac, Legal Assistance for Navy Personnel (26 June 1943), reprinted in Dep't of Navy, Navy Bulletin R-1164 (1 July 1943). The Army Air Forces recognized its own program later that year. See DEP'T OF ARMY, ARMY-AIR FORCE REG. 110-1 (23 Dec. 1943); BLAKE, supra note 16, at 19-20, 31.
21. BLAKE, supra note 16, at 48. The content of Cir. No. 74, supra note 20, was incorporated in the Army's first legal assistance regulation, WAR DEP'T, ARMY REG. 25-250, JUDGE ADVOCATE GENERAL DEPARTMENT: LEGAL ASSISTANCE (14 May 1946) [hereinafter AR 25-250 (1946)]. This regulation adopted the Army legal assistance plan as a War Department program. See id. para. 1c; BLAKE, supra note 16, at 53. Following the establishment of the Department of Defense (DOD), the legal assistance plan was adopted as a DA program. See DEP'T OF ARMY, REG. 600-103, PERSONNEL: LEGAL ASSISTANCE, para. 1c (29 June 1951) [hereinafter AR 600-103 (1951)].
22. BLAKE, supra note 16, at 9; Milton J. Blake, Legal Assistance for Servicemen: A Contribution in War and Peace, 37 A.B.A. J. 9, 9-10 (1951) [hereinafter Legal Assistance for Servicemen]. See generally AR 600-103 (1951), supra note 21, paras. 2, 6, 7, 10.
23. Legal Assistance for Servicemen, supra note 22, at 10. This is in stark contrast to the recent Persian Gulf War during which numerous bar associations provided free legal advice and assistance, regardless of financial need, to soldiers and families. This assistance also was provided to surviving family members of soldiers who died during the war effort. The provision of free legal services during the Persian Gulf War undoubtedly was the result of the increasing emphasis on pro bono work in bar associations across the United States over the past several decades. Additional factors were the patriotism of the civilian lawyers offering their legal services and the support for the war's cause among the American people. The five-month duration of the military build-up for the Gulf War also gave bar associations the necessary time to organize their efforts. Obviously, if legal assistance is an essential military program for service members and their families, it must not be entirely dependent on the popularity of a particular war or military operation, nor can it depend heavily on the volunteer efforts of civilian lawyers. These volunteer efforts naturally are less forthcoming during peacetime.
24. See generally Office of the Judge Advocate General, U.S. Army, JAGAA Bull. No. 1965-3A, Army Legal Assistance Program, sec. V (4 Mar. 1965).
25. S. 3016, 91st Cong., 1st Sess. (1969) (Carey Amendment) (amending Economic Opportunity Act, para. 222(a)(30), 42 U.S.C. § 2701 (1988)).
26. F. Raymond Marks, Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma, 56 MIL. L. REV. 1, 8 (1972).
27. These two developments gave rise to the in-court representation program. See DEP'T OF ARMY, REG. 608-50, PERSONAL AFFAIRS: LEGAL ASSISTANCE, para. 4d (22 Feb. 1974) [hereinafter AR 608-50 (1974)].

28. 10 U.S.C. § 3013(g)(1), (3) (1988).

29. Id. § 3013(b)(6)-(10).

30. Id. § 1044.

31. See Legal Assistance for the Army Materiel Command Mobile Civilian Emergency Essential Employees, Op. Admin. L. Div., Off. JAG, Army, DAJA-AL 2763 (2 Oct. 1986). The subsequent enactment of 10 U.S.C. § 1044a (Pub.L. 101-510, div. A, tit. V, § 551(a)(1), 104 stat. 1566 (1990) (codified as 10 U.S.C. § 1044a)--concerning Armed Forces' members notarial capabilities--expressly recognizes that Department of Defense (DOD) regulations may authorize legal assistance for persons other than those listed in 10 U.S.C. § 1044 (1988).

32. The provision of legal assistance services to RC soldiers, various DOD civilian employees, and other eligible clients under certain circumstances is based on 10 U.S.C. § 3013(g). See AR 27-3, supra note 1, paras. 2-5a(3), (6), (7), (10), (11). In-court representation under the Army Legal Assistance Program is more restrictive than 10 U.S.C. § 1044(c). See id. para. 3-7g(2)(d) (generally limiting in-court representation to soldiers "[f]or whom hiring civilian lawyers would entail substantial financial hardship to themselves and their families").

33. AR 27-3, supra note 1, para. 1-1.

34. Id. para. 1-4.

35. Id. para. 2-1a.

36. Id. para. 2-1b.

37. Id. para. 2-2.

38. Id. para. 2-5.

39. Id. para. 2-6.

40. Id. paras. 3-3, 3-4.

41. Id. para. 3-6.

42. Id. para. 3-7.

43. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B (7 Apr. 1992) [hereinafter AR 27-26].

44. See AR 27-3, supra note 1, para. 4-1 (professionalism); id. para. 4-2 (liaison with the civilian bar); id. para. 4-3 (liability); id. para. 4-7 (ethical standards); id. para. 4-8 (attorney-client privilege); id. para. 4-9 (conflict of interest); id. para. 4-10 (investigations and advisory opinions).

45. AR 27-3, supra note 1, para. 4-4.

46. Id. para. 4-5.

47. Id. para. 4-3.

48. Id. para. 2-1a.

49. Id. para. 2-1b.

50. Id. at 1 (Proponency and Exceptions); id. para. 1-5. These provisions were incorporated as a result of one lesson learned from Desert Storm. During the Gulf War, legal assistance was extended for a period of one year to the primary next of kin (PNOK), including parents, of all soldiers who died during Desert Storm, and to RC soldiers being demobilized for legal problems arising from, or aggravated by, Desert Storm operations. See Message, Headquarters, Dep't of Army, DAJA-ZA, subject: Legal Assistance for Desert Storm (271700Z Feb 1991) [hereinafter Message (27 Feb. 1991)]; Message, Headquarters, Dep't of Army, subject: Desert Storm/Demobilization Legal Assistance (051830Z Mar 91) [hereinafter Message (5 Mar. 1991)]. TJAG did not have authority to grant these exceptions under the old regulation. See AR 27-3 (1989), supra note 3. Precious time was lost in obtaining approval for

these exceptions from the Secretary of the Army. Such exceptions, however, are now permanent features of AR 27-3. AR 27-3, supra note 1, para. 2-5a(3)(a), (8), (9).

51. AR 27-3, supra note 1, para. 1-4d.

52. Id. para. 1-4e.

53. Id. para. 1-4c.

54. This position formerly was Chief, Army Legal Assistance Program, and Chief, Army Legal Assistance Office. The new AR 27-3 changes the designation to eliminate confusion and to emphasize that the primary responsibility of this officer in OTJAG is to recommend and carry out legal assistance policy in the Army. This officer's secondary mission to provide Army legal assistance services in the Pentagon to eligible clients.

55. Id. para. 1-4b(1).

56. For example, pursuant to this authority, the Chief, Legal Assistance Division, OTJAG, has granted exceptions by SJAs to allow certain RC officers, although not commissioned as judge advocates, to serve as legal assistance attorneys during active duty for training (ADT). He also has authorized legal assistance services to continue for the surviving wife of a soldier, even though the soldier died in an absent-without-leave status and had been dropped from the rolls. In addition, he has authorized exceptions to provide in-court representation for clients who had not fully satisfied the criteria for such assistance. But see infra note 76 and accompanying text.

57. Id. para. 1-4b(4).

58. See also id. para. 1-4g(11) (requiring SJAs to consider "recommending that RC judge advocates be called to active duty" during war and other situations that might cause "an increased need for legal assistance services from eligible clients"). During the Persian Gulf War, both AC and RC judge advocates met the increased demand for legal assistance occasioned by mobilization and deployment, and by the casualty assistance effort that followed. The latter effort, however, was a success primarily because of the small number of casualties that occurred. See supra note 8. The personnel staffing of the Casualty and Memorial Affairs Operations Center in Alexandria, Virginia, increased from a peacetime authorization of 42 on 2 August 1990, to 350 by 15 February 1991, to meet a then-anticipated soldier casualty rate of 5000 to 10,000 per week in a war that was expected to last five weeks. In contrast, efforts to establish the LATF did not even begin until 29 January 1991, which was 13 days after the air war against Iraq began. See supra notes 4 and 5. In addition, legal assistance was seriously understaffed at several installations from which large numbers of soldiers were deployed and whose units were expected to suffer many casualties. A few installations from which deployments occurred did not leave behind enough attorneys at their installations to handle even the routine legal assistance generated by the families left behind. One major overseas command, which deployed several divisions to Southwest Asia, even refused to use RC judge advocates to replace those who deployed. Had the projected level of casualties occurred, meeting the demand for legal services from the PNOK--including minor children of sole parents, particularly those living overseas with family care providers, or just neighbors--would have been almost impossible.

59. AR 27-3, supra note 1, para. 1-4b(2). Retirement points are awarded pursuant to DEP'T OF ARMY, REG. 140-185, TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS, para. 2-4b(3) (15 Nov. 1979); id. tbl. 2-1, rule 16; DEP'T OF ARMY, NAT'L GUARD BUREAU REG. 680-2, AUTOMATED RETIREMENT POINTS ACCOUNTING SYSTEM, tbl. 2-5, rule 9 (1 Mar 89).

60. AR 27-3, supra note 1, glossary.

61. Id. para. 1-4f, 2-1b. Although this was not stated specifically in the old regulation, see AR 27-3 (1989), supra note 3, or prior legal assistance regulations, it was implied. This statement represents no change in philosophy regarding the legal assistance program since its inception in 1943. Circular No. 74, supra note 20, para. 4, provided as follows:

4. Establishment and authority.--The commanding general of each service command and the commanding officer of each post, camp, and station within the 48 States and the District of Columbia will establish a legal assistance office for his respective command. . . . The commanding officer of any other installation, including an overseas command, may, if he deems it advisable, establish such an office, with such modifications as may be necessary to meet local conditions.

62. Whether the commander exercises a particular type of court-martial jurisdiction is no longer relevant. See AR 27-3, supra note 1, glossary (definition of commander).

63. Id. para. 1-4f. The new AR 27-3 eliminates the requirement, which has existed since 1946, that commanders publish orders announcing the establishment of legal assistance offices. See AR 25-250 (1946), supra note 18, para. 4c. Similarly, the old regulation, AR 27-3 (1989), supra note 3, para. 2-3, required a commander to publish an order announcing the establishment of a

legal assistance office, and forward a copy of this order to OTJAG. When a recent litigation issue arose about the authority of a particular legal office to provide legal assistance, personnel discovered that the Legal Assistance Division, OTJAG, did not maintain a file containing copies of these orders. The requirement, however, made little sense because the attorneys in a legal office undoubtedly would be providing some legal assistance even before such an order was published. This unnecessary requirement only served to call into question the authority—as well as the exposure to potential liability—of attorneys providing legal assistance in locations not designated as legal assistance offices. The new AR 27-3 simply recognizes that the existence or scope of a legal assistance program at any particular Army installation, or in the Army as a whole, is entirely dependent on resources, including the authorization and staffing of positions. It also acknowledges that decisions on resources are made by commanders; HQDA; the Office of Secretary of Defense (OSD); and Congress.

64. AR 27-3, supra note 1, para. 1-4f.

65. Id. at 1 (Applicability); id. para. 2-2. Those authorized to provide legal assistance under paragraph 2-2 may provide legal assistance "[u]nless inconsistent with superior orders or other duties or responsibilities . . . ." The existence of a legal assistance program is not a precondition to providing legal assistance. Full compliance with AR 27-3, however, still is required. For example, only authorized legal services may be provided and only eligible legal assistance clients may be assisted.

66. Id. para. 1-4f(1). The responsibilities of supervising attorneys are not dependent on the existence of a legal assistance program. See id. para. 1-4g.

67. Id. para. 1-4g.

68. Id. The glossary to AR 27-3 defines "supervising attorney" as follows:

A staff or command judge advocate, deputy staff or deputy command judge advocate, judge advocate officer in charge, chief of legal assistance, DA civilian attorney, or other AC or RC judge advocate officer exercising supervisory responsibilities over Army legal assistance services. This term also includes commanders of Legal Services Organizations within the U.S. Army Reserve and commanders of JAGC detachments specifically designated to perform legal assistance missions. Supervisory responsibilities may be limited or further delegated by competent authority. The Chief, Army Legal Assistance Division, OTJAG serves as the supervising attorney of RC judge advocate officers in the Army, who are not assigned to the ARNG or to USAR TPUs, when they are performing legal assistance work for retirement points.

69. Id. glossary; id. para. 1-4g(1).

70. Id. para. 1-4g(5), (6), (7), (8), (10).

71. Id. para. 3-2b.

72. See AR 27-3 (1989), supra note 3, para. 2-2a (requiring an SJA to designate active and Reserve officers, as well as DA civilian attorneys, as legal assistance attorneys before they could provide legal assistance); see also DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, para. 2-5a (15 Sept. 1989) [hereinafter AR 27-1] (providing that only judge advocate officers detailed or made available by their superiors can represent, advise, or enter into attorney-client relationships with individual clients) (presently under revision). The draft revision to AR 27-1 presently states that attorneys "should not provide legal advice to others when doing so may result in a conflict of interest with their primary duties." Office of the Judge Advocate General, U.S. Army, Draft Revision, Dep't of Army Reg. AR 27-1, para. 2-5a (unpublished draft revision) (forthcoming n.d.) [hereinafter DRAFT REVISION TO AR 27-1].

73. AR 27-3, supra note 1, para. 2-2a.

74. For DA civilian attorney employees whose primary duties do not include legal assistance, SJAs should include legal assistance as a secondary duty in their job descriptions to ensure greater flexibility in shifting resources in the event of mobilization, deployments, or other emergency situations. See AR 27-3, supra note 1, para. 2-4a.

75. Id. para. 2-2a.

76. See id. para. 1-4b(3) (providing that Chief, Legal Assistance Division, OTJAG, may authorize exceptions to who may provide legal assistance "if not inconsistent with the requirements set by statute"); infra notes 98-100 and accompanying text.

77. See infra notes 156-173 and accompanying text.

78. AR 27-3, supra note 1, para. 4-3a. The provision of legal assistance has not always been recognized as an official function. See, e.g., AR 600-103 (1951), supra note 21, para. 10d (legal assistance provided by a military officer was understood to be given in



the officer's "individual capacity as a lawyer, and that his acts in rendering the service are not to be construed as the official acts of an officer or agent of the Department of the Army").

79. AR 27-3, supra note 1, para. 4-3b, c.

80. The Federal Tort Claims Act, 28 U.S.C. § 2679 (1988), provides a basis for federal liability when an employee acting within the scope of employment negligently injures a third-party civilian.

81. See 28 C.F.R. § 50.15 (1992).

82. See 10 U.S.C. § 1054(f); DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 3-21 (28 Feb. 1990) [hereinafter AR 27-20].

83. See AR 27-3, supra note 1, paras. 2-2, 2-5, 3-5, 3-6, 3-7, 3-8, 4-3, 4-7 (bright-line rule); AR 27-26, supra note 43, app. B, rule 1-5.

84. AR 27-3, supra note 1, para. 4-3e.

85. Id.

86. Id. para. 4-3e(1); see also I.R.C. § 7705; Treas. Reg. § 301.7701-15 (as amended in 1980).

87. AR 27-3, supra note 1, para. 4-3e(2); see also 10 U.S.C. § 1588(b); DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE PROGRAM, para. 4-2 (27 Apr. 88) [hereinafter AR 608-1].

88. AR 27-3, supra note 1, para. 4-3e(3); see also 5 U.S.C. § 3111.

89. Because electronic income tax filing programs are licensed to Army legal offices and purchased with Army funds, client eligibility for this legal assistance service is governed by AR 27-3, supra note 1, para. 2-5.

90. See AR 608-1, supra note 87, para. 1-7 (generally limiting ACS services to military members on active duty, retired service members, DA employees, and their families); and I.R.S. Pub. 678 (Nov. 1992) (indicating that the VITA program provides free tax assistance to military members, people with basic tax returns, and persons with disabilities or special needs).

91. Volunteers working for ACS, however, may be reimbursed for incidental expenses. See AR 27-3, supra note 1, para. 4-3e(2)(c); see also DEP'T OF ARMY, REG. 215-1, THE ADMINISTRATION OF ARMY MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES, para. 3-14j (10 Oct. 1990) [hereinafter AR 215-1].

92. AR 27-3, supra note 1, para. 4-3e.

93. Id. para. 4-3e(3)(b). This regulatory provision is more restrictive than the governing statute. Compare id. with 5 U.S.C. § 3111(a) (authorizing "not less than half-time" students, including those enrolled in "high school, trade school, and vocational or technical institutes" to provide voluntary services to the federal government). Because of concerns about the maturity of younger students and the need to protect fully the confidentiality of attorney-client communications, AR 27-3 is not as expansive as the statute. Outside the Army Legal Assistance Program, this regulatory restriction does not apply.

94. AR 27-3, supra note 1, para. 4-3e(3)(c). Army legal offices have used law student volunteers to provide in-court representation to legal assistance clients in jurisdictions in which law students are allowed, by court rule, to appear under the supervision of a licensed attorney.

95. Id. para. 4-3e(3)(d).

96. 10 U.S.C. § 275.

97. AR 27-3, supra note 1, para. 4-3e(3)(e).

98. See, e.g., The Federal Tort Claims Act, 28 U.S.C. § 2679 (1988). Attorneys who provide voluntary services to the Army should be distinguished from civilian lawyers in private practice who, on occasion, provide pro bono or "no-fee" legal services to clients who are eligible for legal assistance. Members of the latter category actually are not legal assistance providers; rather, they are providing voluntary services to clients--not to the Army. If a client were to assert a malpractice claim, these lawyers presumably would be covered by their commercial malpractice insurance policies. See AR 27-3, supra note 1, para. 3-7h(8).

99. See 10 U.S.C. § 1588(b) (providing, "Notwithstanding section 1342 of title 31, [the military departments] may accept from any person voluntary services to be provided for a museum, a natural resource program, or a family support program" and that these

volunteers are to be treated as federal employees for the purposes of the FTCA). A "family support program," however, does not include a legal assistance program. The OSD and the Army take the position that the term "family support program" has a limited meaning--one limited to programs reasonably analogous to the Navy Family Service Center--such as ACS--and the Navy Ombudsman program--such as Army support groups and installation mayoral programs. See Op. Admin. L. Div., Off. JAG, Army, DAJA-AL/1087 (5 Feb. 1987); AR 608-1, supra note 83, para. 4-2. The FTCA does not apply overseas. The Army, however, takes the position that although the Military Claims Act (MCA), 10 U.S.C. § 2723 (1988), does not address volunteers specifically, the MCA would cover volunteers overseas. See Op. Admin. L. Div., Off. JAG, Army, DAJA-AL/2354 (3 Oct. 1988). Army activities that do not come within the scope of 10 U.S.C. § 1588 may be able to use volunteers if they execute gratuitous service agreements. Nevertheless, individuals who provide gratuitous services--that is, services provided that are freely and expressly given to the federal government without any expectation of remuneration of any type--are not treated as federal employees for the purposes of the FTCA or the MCA. The absence of liability protection for civilian lawyers under the FTCA and the MCA is only one issue. The real issue is whether the voluntary or gratuitous services of an attorney can be accepted in the first place. In the absence of specific legal authority, see, e.g., 15 U.S.C. § 1588 (1988), 31 U.S.C. § 1342 prohibits federal agencies from accepting voluntary services. Moreover, gratuitous services can be accepted "only when [pay] for the duties to be performed is not fixed by law or when the law permits the acceptance of service without compensation." OFFICE OF PERSONNEL MANAGEMENT, FEDERAL PERSONNEL MANUAL, chap. 300, subch. 4 (Mar. 31, 1989). This precludes the Army from accepting most gratuitous services, including legal, paralegal, and legal secretarial services. See Letter, Admin. L. Div., Office of The Judge Advocate General, U.S. Army, DAJA-AL/1869, subject: Acceptance of Voluntary Services in Legal Offices (24 May 1990); see also AR 215-1, supra note 85, para. 3-14 (related material on the acceptance of gratuitous services in the Army).

100. AR 27-3, supra note 1, para. 4-3e(1), (2). For example, an ACS or VITA volunteer who also is an attorney could provide tax assistance in or outside of a legal office. Presumably, while working in the legal office, the ACS or VITA volunteer would be under the supervision of another attorney, and the volunteer's work would be limited to tax assistance. The volunteer's performing any other legal work would require an exception to AR 27-3--an exception not likely to be granted unless the OSD and Army change their official interpretations of 10 U.S.C. § 1588(b).

101. See supra notes 30-32 and accompanying text (discussing 10 U.S.C. § 1044). This statute indicates that "[s]ubject to the availability of legal staff resources, the Secretary concerned may provide legal assistance . . ." 10 U.S.C. § 1044 (emphasis added). This statute does not create any right to legal assistance. See AR 27-3, supra note 1, para. 1-1.

102. AR 27-3, supra note 1, para. 2-5; glossary (for definitions of emergency-essential and mission-essential civilian employees, family members, military administrative matters, and PLP).

103. See Message (27 Feb. 1991), supra note 50; Message (5 Mar. 1991), supra note 50.

104. See infra notes 155-191 and accompanying text.

105. AR 27-3, supra note 1, para. 2-5a(7)(b); id. glossary. These are employees who are designated by SJAs as "mission-essential" "to ensure the success of a combat operation or to support combat essential systems," but whose positions have not yet formally been designated by their managers or supervisors as "emergency-essential." See id.

106. AR 27-3, supra note 1, para. 2-5a(8); see DEP'T OF ARMY, REG. 600-8-1, PERSONNEL--GENERAL: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS, para. 3-7 (18 Sept. 1986) (defining PNOK to include parents, in the absence of a spouse or child) [hereinafter AR 600-8-1]; AR 27-3 (1989), supra note 3, para. 2-4a(5), did not authorize legal assistance to a parent who was the PNOK of a soldier unless the parent was a dependent of the soldier; nor did it authorize legal assistance to the PNOK of a civilian employee under any circumstances. During and following the war with Iraq, legal assistance was extended to the PNOK--including surviving parents--of soldiers. This assistance covered probating of estates and appointing guardians for minor children, including in-court representation, without regard to the financial hardship of the represented party. See Message (27 Feb. 1991), supra note 50; Message (5 Mar. 1991), supra note 50. Although the Gulf War effectively was over by the end of February 1991, military and political leaders were uncertain over whether the war might resume. The Army continued to provide legal assistance after the war to the PNOKs of the 213 soldiers who died from all causes during Desert Storm.

107. AR 27-3, supra note 1, para. 2-5a(9).

108. See id. at 1 (Proponency and Exceptions); id. paras. 1-4g(3), 1-5; cf. AR 27-3 (1989), supra note 3, para. 2-4a(8)(a), (c); DSAT Report, supra note 6, issue 35; see also Message, Headquarters, Dep't of Army, DAJA-LA, subject: The Provision of Legal Assistance Services to Civilian Contractors (281200Z Dec 92). The Commander, U.S. Army Space and Strategic Defense Command, recently requested TJAG to grant an exception, pursuant to AR 27-3, allowing the legal office at Kwajalein Atoll to provide legal assistance to civilian contractors and their dependents. Because of Kwajalein Atoll's remote location (2100 miles southeast of Hawaii) and its limited communication facilities, TJAG approved this request. Legal assistance is to be provided on a space available basis, and is limited to ministerial services; legal counseling, including reviewing and discussing legal correspondence and legal documents; preparing powers of attorney; and assisting clients in retaining civilian counsel. Memorandum, Office of the Judge Advocate General, U.S. Army, DAJA-LA, subject: Request for Exception to AR 27-3, The Army Legal Assistance Program (24 Feb. 1993).

109. Id. para. 2-1a.

110. Id. glossary.

111. The only exception is military administrative cases handled by USATDS attorneys. These cases are considered USATDS cases if handled by USATDS attorneys, and legal assistance cases if handled by non-USATDS attorneys. See id. para. 3-6g(3); id. app. B-2(4); see also, AR 27-1, supra note 72, para. 2-5b; DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ch. 6 (22 Dec. 1989) [hereinafter AR 27-10].

112. AR 27-3, supra note 1, para. 3-5c(1).

113. Id. para. 2-1a(1).

114. Statistics are collected on preventive law legal assistance classes, articles, and booklets. Id. app. B-4c(1).

115. Id. paras. 3-5a, 3-5b, 3-8a.

116. Id. paras. 1-4, 1-5, 2-5a, 3-5c.

117. AR 27-26, supra note 43, app. B, rule 1.1 (comment).

118. This would include cases that a lawyer is handling on a "reduced-fee" as opposed to a "no-fee" basis. A "fee" includes the charge for professional services, but not the payment for, or reimbursement of, court costs and administrative filing fees. See AR 27-3, supra note 1, glossary.

119. Id. para. 3-5b. For example, an RC judge advocate may, in an appropriate case, meet the pro bono requirements of his or her state bar and still earn retirement points for providing legal advice or help on a no-fee basis to an eligible legal assistance client. The receipt of "double credit" is a matter of state, not federal, concern. This practice should be encouraged because it benefits legal assistance clients.

120. Judge advocates in the AC and most civilian attorneys also may assist clients on a commercial basis, with TJAG approval. See 27-1, supra note 72, para. 4-3g, f; see also AR 27-3, supra note 1, para. 4-7a, d. The new AR 27-3 prohibits both AC and RC attorneys from requesting or accepting "any benefit or gratuity . . . from any source as payment for performing official duties." AR 27-3, supra note 1, para. 4-7.

121. See also AR 27-3, supra note 1, para. 3-8b(3) (discussing prepaid legal services).

122. Although not specifically prohibited from doing so, a legal assistance attorney should be hesitant to advise a person represented by another lawyer. Differences of opinion on particular case, or on the manner in which it is being handled, should be discussed between attorneys directly--not through a client as an intermediary.

123. For example, a judge advocate may advise a civilian lawyer who represents soldiers in domestic relations matters on the amount of financial support to family members required by the Army. See DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (22 May 1987) [hereinafter AR 608-99]. A judge advocate also may advise a civilian practitioner on the enforceability of court orders and other matters within his or her area of military or legal expertise.

124. Although AR 27-3 addresses the provision of notary services, the regulation does not intend that these ministerial services constitute legal assistance. Although they often complement the provision of legal assistance services, notary services may be provided outside an Army legal office, elsewhere on the installation, if in accord with law and regulation. See also DEP'T OF ARMY, REG. 600-11, NOTARIAL ACTS (18 June 1990), also published as DEP'T OF AIR FORCE, REG. 110-6 (no restrictions on eligibility for notary services except federal and state requirements).

125. AR 27-3 (1989), supra note 3, para. 2-8, 2-9b(1)(d), 2-9b(1)(e). A judge advocate who, on behalf of an SJA, drafts or signs an administrative law opinion--such as an official interpretation of an Army regulation--that supports the legal position of one of his or her legal assistance clients, is involved in a clear conflict of interest. The new AR 27-3 does not restate this prohibition because it already is addressed adequately in the rules of professional responsibility. See AR 27-26, supra note 43, app. B, rules 1.7, 1.13.

126. AR 27-3, supra note 1, para. 3-8.

127. Advice or assistance in these cases must be provided by judge advocates assigned to USATDS, and other judge advocates made available by their supervisors to handle such cases or particular cases. Id. para. 3-6g(3), app. B-2(4); see also AR 27-1, supra

note 72, para. 2-5b (discussing duties and responsibilities of judge advocates assigned as defense counsel to USATDS); AR 27-10, supra note 111, ch. 6 (same).

128. A contingent fee case is defined as:

[t]he type of case (excluding those involving the reemployment rights of veterans under State or Federal law) where the fee for professional legal services charged by civilian lawyers customarily is dependent upon the successful outcome of the case and agreed to be a percentage of the client's recovery (e.g., actions in tort, such as personal injury, wrongful death, or property damage).

AR 27-3, supra note 1, glossary (emphasis added). If the case is not "profitable" enough for a civilian lawyer to take on a contingent-fee basis because of the small amount involved, then this limitation on a legal assistance attorney's involvement does not apply.

129. One example includes a tort case in which an insurance company contractually is required to provide legal representation. Prepaid legal representation cases also include requests to prepare amended tax returns to correct erroneous returns prepared by commercial tax preparers when such follow-on work is included as part of the initial fee arrangements with customers.

130. See United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991). In Schaltenbrand, the court held that a conversation in an Air Force legal assistance office between an Air Force Reserve officer and two judge advocates serving as deputy standards of conduct counselors for the Air Force was privileged. The case, however, highlights the problems of using such counselors as legal assistance attorneys. In Schaltenbrand, the "client" filled out a form that notified him that any disclosure he made was "privileged" and could not be disclosed to anyone without his consent. The same form was used for the legal assistance program and the standards of conduct program. The "client" also received legal advice from one of the attorneys on the information he disclosed, although the attorney claimed he told the "client" that he could not "represent" him. The court held that a finding of no privilege "would inhibit other members of the Air Force from seeking the advice of JAG attorneys in order to avoid conflicts of interest." This type of problem can be avoided by designating ethics counselors whose routine duties do not involve assisting clients, and whose duties are performed in locations clearly separated from offices that assist these clients.

131. AR 27-3, supra note 1, glossary; id. para. 3-6e(3).

132. For example, legal assistance may not be provided to family child care (FCC) providers on contractual disputes with the parents of the children for whom they provide care, or on the preparation of income tax schedules reporting their income from their child care businesses. DEPT OF ARMY, REG. 608-10, PERSONAL AFFAIRS: CHILD DEVELOPMENT SERVICES, para. 3-2, chap. 6 (12 Feb. 1990) (defining FCC providers). Parents who are eligible legal assistance clients, however, could be provided legal help on such disputes. The prohibition against helping FCC providers should not be read too broadly. FCC providers may be provided IRS income tax schedules or instructions to report income from their business activities, and their income tax returns may be filed electronically in a legal assistance office.

133. AR 27-3, supra note 1, glossary.

134. Id. para. 3-8a.

135. Id. para. 3-8a(3)(b).

136. Id. para. 3-8a(3).

137. Id. para. 3-8b(1); cf. AR 27-3 (1989), supra note 3, para. 2-8b(2) (allowing legal assistance attorneys to advise clients "on whether to accept an award, request reconsideration, or file an appeal" in claims that provided exclusive administrative remedies, such as the Foreign Claims Act). 10 U.S.C. § 2734 (1988); AR 27-20, supra note 82, chap. 10.

138. Personnel at HQDA currently have no plan to limit the scope of legal assistance services. The new AR 27-3 represents the present Army policy, and the provisions of the regulation that cover the authorized scope of legal assistance services are more expansive than prior legal assistance regulations. Nothing presently suggests that the JAGC will suffer disproportionate personnel cuts relative to the rest of the Army. Although the deactivation of Army installations and military units will result in the loss of judge advocate positions authorized for those commands, these cuts should have no effect on the commands that remain. Nevertheless, legal assistance services naturally will have to compete with other activities in each command to get its fair share of the available resources such as money, and military and civilian personnel authorizations. Likewise, because of limitations on hiring, offices also may have to compete for the authority to fill vacant civilian positions.

139. AR 27-3, supra note 1, para. 2-6a, allows commanders to limit legal assistance services "when space, facilities, or legal or supporting staff are unavailable." RC commanders may limit legal assistance services and client eligibility in any manner required by the resources available. AC commanders may limit legal assistance services to those types of legal cases and services indicated

as required under paragraphs 3-6 and 3-7, and may deny legal assistance services to clients otherwise eligible as indicated in paragraph 2-6a(1). Even when a case, service, or client otherwise requires legal assistance, an AC commander may request further authority from TJAG to limit or deny legal assistance. See *id.* paras. 1-5, 2-6c. In addition, a supervising attorney may authorize a temporary variation from policies and procedures "when necessary to ensure effective legal assistance services." In these instances, the Chief, Legal Assistance Division, OTJAG, must be notified by memorandum. See *id.* para. 1-4g(3).

140. This distinction between required and optional services is not without its downside. By setting priorities, offices arguably run the risk of losing resources for legal services that are not deemed to be required. The commanders who control those resources, however, often are the beneficiaries of those legal assistance services--whether required or optional. Accordingly, the decision on which resources to cut actually is more dependent on the value of those services than on the provisions of AR 27-3.

141. See *id.* paras. 1-4g(2)(b), 3-5c, 3-6a, 3-6j, 3-7f(1), 3-7f(2).

142. An AC commander, on his or her own authority, may deny legal assistance services to RC soldiers serving on active duty for less than 30 days and their family members. *Id.* para. 2-6a(1). An AC commander also may deny these services to AC and RC military retirees and their family members; surviving family members of AC, RC, and retired military personnel; and all DOD civilian employees serving in a foreign country and the family members who accompany them. *Id.* The basis for providing AC commanders with this denial authority is the same as the one for distinguishing between "required" and "optional" legal assistance clients and services. See *infra* notes 192-199 and accompanying text. Where a legal assistance program exists, however, an AC commander does not have the authority to deny legal services to civilian employees on reports of survey, see DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY, para. 13-38a (31 Jan. 1992). Nor may such a commander deny legal services to "mission-essential" or "emergency-essential" employees and their families on legal assistance matters relating to deployment. On the other hand, an AC commander may deny legal assistance services to the PNOKs of DOD civilian employees while serving outside the United States. See AR 600-8-1, *supra* note 106, para. 3-7a (defining PNOK). In addition, an AC commander has complete discretion in deciding which, if any, legal services authorized under AR 27-3 will be provided and the eligible clients who will receive those services. See AR 27-3, *supra* note 1, para. 2-6a(2).

143. See AR 27-3, *supra* note 1, para. 1-1a (providing explicitly that the regulation does not create a right or benefit on the part of anyone to receive legal assistance).

144. See *id.* para. 1-5 (requiring requests for exceptions to be submitted through command channels to HQDA (DAJA-LA), Washington, DC 20310-2200). Since the publication of AR 27-3, this address has been changed to Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200. All references to the old address in AR 27-3 should be changed to reflect this new address.

145. *Id.* para. 1-4g(3) (allowing SJAs, or other supervising attorneys as appropriate, to authorize temporary variations). Temporary variations are defined as deviations from the requirements of AR 27-3 that are put into effect for less than 30 days during any one calendar year. *Id.* SJAs, however, are required to provide notice of temporary variations by memorandum to Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200.

146. See AR 27-26, *supra* note 40, app. B, rule 1.2, comment ("The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the law governing the conditions under which the lawyer's services are made available to the client").

147. AR 27-3, *supra* note 1, paras. 3-7h, 3-7i.

148. *Id.* para. 1-4g(1), (2).

149. *Id.* para. 2-6b.

150. See *id.* at 1 (Proponency and Exceptions); *id.* para. 1-5. TJAG recently authorized the Commander, Army Materiel Command (AMC) to limit legal assistance within AMC Headquarters--an office building in Alexandria, Virginia--to AC soldiers assigned to AMC Headquarters and their family members and to military retirees currently employed by AMC Headquarters. TJAG granted this exception because of the limited nature of the AMC Headquarters legal assistance program, which employs only one judge advocate on a part-time basis. In addition, legal assistance services are available at other nearby Army installations within the Washington metropolitan area. Memorandum, Office of the Judge Advocate General, U.S. Army, DAJA-LA, subject: Request for Exception to AR 27-3, The Army Legal Assistance Program (24 Feb. 1993).

151. See, e.g., DEP'T OF ARMY, REG. 608-50 PERSONAL AFFAIRS: LEGAL ASSISTANCE, para. 5a (22 Aug. 1961) [hereinafter AR 608-50 (1961)]; AR 27-3, *supra* note 1, para. 2-5a, b.

152. The author is not aware of any instance in which the situation has been the reverse--that is, an Army client being referred to an Air Force or a Navy legal office for legal assistance services that the Army did not provide.

153. Id. para. 2-6b.

154. Id. at 1 (Proponency and Exceptions); see also id. paras. 1-5, 2-6d.

155. Unlike RC commanders, AC commanders do not have the authority to deny these services without requesting an exception to AR 27-3. The purpose of this procedure is threefold. First, any well-reasoned exception requires justification and consideration of alternatives. The consideration that a commander would give to the matter before he or she requests such an exception presumably results in better decisions being made on which legal assistance services will be provided and to whom. Second, this procedure, as well as other procedures required by AR 27-3, also promotes consistency among the legal assistance programs throughout the Army, thereby simplifying training requirements. Finally, TJAG needs to know the extent to which legal assistance services are being curtailed--or expanded--so that legal assistance policy, doctrine, and training can stay abreast with installation legal assistance developments. This information also allows personnel at HQDA and OTJAG to take steps to reverse unfavorable trends whenever possible. Most requests for exceptions likely will be approved.

156. See supra text accompanying note 49; see also infra notes 192-199 and accompanying text.

157. The IRR has no counterpart in the ARNG. With few exceptions, all ARNG judge advocates are assigned to ARNG units. All IMAs in the USAR IRR are assigned or designated to the AC, not to RC units.

158. See Legal Assistance Item, Reserve Components and Legal Assistance, ARMY LAW., Apr. 1989, at 62. This note discusses the provisions of AR 27-3 (1989), supra note 3, and various TJAG policy letters that generally prohibited RC judge advocates from providing legal assistance to RC soldiers and their families.

159. AR 27-3 (1989), supra note 3, para. 2-4a(1), (2).

160. Id. para. 2-4a(3)(a).

161. Id. para. 2-4a(3)(b) and (4). During the staffing of the new AR 27-3, reviewers were unable to justify affording more legal assistance services to RC personnel stationed outside the United States than to stateside Reserve personnel. The burden on legal assistance offices overseas caused by RC units training outside the United States is fairly equivalent to the burden on legal assistance offices stateside caused by RC units training in the United States. The new AR 27-3 corrects this disparity. See AR 27-3, supra note 1, para. 2-5a(2)(b).

162. AR 27-3 (1989), supra note 3, para. 2-4a(3).

163. Id. para. 4-6.

164. Id. para. 2-2a(2).

165. Many USAR TPU judge advocates provide legal assistance in SJA offices during weekend drills on Army installations across the United States. This means that at many Army installations, legal assistance attorneys are available to assist eligible clients seven days a week. This legal assistance usually is provided as a result of appointments made by the AC SJA staff during the week. The old AR 27-3 did not comport with the reality of legal assistance practice in the Reserves even during peace time. Cf. id. para. 2-2a. The problems of clients, and the advice and assistance they require, do not always fit neatly into weekend drill periods. RC judge advocates who support AC legal offices during weekend drills frequently must provide follow-up advice and assistance during the week--often from their civilian law firms--such as making or answering follow-up telephone calls and investigating the facts or researching the law. The need to provide follow-up advice and assistance now is recognized in AR 27-3. AR 27-3, supra note 1, paras. 2-2a, 2-3b.

166. See Policy Letter 88-1, Office of The Judge Advocate General, U.S. Army, subject: Reserve Component Premobilization Legal Preparation (4 Apr. 1988), reprinted in ARMY LAW., May 1988, at 3-4. Compare AR 27-3 (1989), supra note 3, para. 2-2a(2) with id. para. 2-4a(3).

167. AR 27-3 (1989), supra note 3, para. 2-2a(3). Since 1961, the Army has authorized RC judge advocates to provide legal assistance for retirement points when not serving on active duty. See AR 608-50 (1961), supra note 151, para. 4b; DEP'T OF ARMY, REG. 608-50, PERSONAL AFFAIRS: LEGAL ASSISTANCE, para. 4b (28 Apr. 1965) [hereinafter AR 608-50 (1965)]; AR 608-50 (1974), supra note 24, para. 5b(2); DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE, para. 1-6b(c) (1 Apr. 1984); AR 27-3 (1989), supra note 3, para. 2-2a(3). Since 1974, TJAG has delegated, by regulation, his authority to designate SLAAs to the Commandant, TJAGSA. See AR 608-50 (1974), supra note 27, para. 5b(2). An earlier delegation may have existed outside of the regulation. The award of retirement points in the past was processed through the Judge Advocate Guard and Reserve Affairs Department, TJAGSA. AR 608-50 (1965), supra, para. 4b, provided that SLAAs were designated "for the primary purpose of rendering legal assistance to members of the Active Army, and their dependents, assigned to units not having reasonable access to a legal assistance office of the Army, Navy, Air Force, or Coast Guard." Nevertheless, nothing indicates that geography ever played a

part in determining which Reserve judge advocates were designated SLAAs. SLAAs provided all the legal assistance services that were provided by AC judge advocates. In 1974, SLAAs and other Army attorneys also were authorized to appear in court on behalf of "soldiers and dependents unable to pay legal fees for the services involved without substantial hardship to themselves or families." See AR 608-50 (1974), supra note 27, paras. 4a(3), 5b(2). In 1984, in-court representation was limited to service members--and to family members in cases not adverse to the service member--if TJAG and the nearest SJA approved. If the court was within 40 miles of the post, however, the SLAA had to be accompanied by an AC judge advocate as associate counsel. See id. paras. 1-6b(c), 2-5b(2)(b), 2-6b. The old AR 27-3 generally continued these procedures, but dropped the mileage requirement. See AR 27-3 (1989), supra note 3, para. 2-9. It continued the requirement for SJA approval of in-court representation in any case, including SJA approval for an SLAA to act alone without an AC judge advocate as associate counsel because one is not available. It also required TJAG approval of any in-court representation program initiated by an SJA, including one in which a SLAA participated. See id. para. 2-10b. The SLAA program continued basically unchanged until Operation Desert Storm.

168. As to federal liability protection, the old AR 27-3 was more restrictive of "off-duty" legal assistance activities of RC judge advocates than 10 U.S.C. § 1054, which provides that the United States Attorney General will defend legal malpractice suits arising from "legal services" provided by

an attorney, paralegal, or other member of a legal staff within the Department of Defense (including the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32) or within the Coast Guard, in connection with providing legal services while acting within the scope of the person's duties or employment.

ARNG judge advocates, regardless of whether they are in a title 10 or title 32 status, are covered under this statute for legal malpractice claims arising from the "in scope" delivery of legal services. This coverage includes Department of Justice representation and removal to federal district court. See Policy Letter 89-2, Office of The Judge Advocate General, U.S. Army, subject: Malpractice Protection for National Guard Personnel Providing Legal Services (17 Feb. 1989), reprinted in ARMY LAW., Apr. 1989 at 4. The "in scope" delivery of legal services includes the performance of duties authorized by regulation such as the performance of legal assistance work pursuant to an authorization from the Chief, Legal Assistance Division, OTJAG. See Message (5 Mar. 1991), supra note 50, para. 5; cf. 32 U.S.C. § 502(f) (1988).

169. Compare, e.g., AR 27-3 (1989), supra note 3, para. 2-2a(2) with id. para. 2-2a(3). SLAAs provided legal assistance--and presumably, in some instances, PLP--for retirement points, but were not required to request retirement points for the legal assistance they provided.

170. To have a "good retirement year," an RC soldier seeks to earn the maximum of 50 points each year that he or she is allowed to accumulate and have credited toward his or her military retirement. Each RC soldier earns 15 points just for being in the Reserves. Therefore, they need to accumulate only an additional 35 points each year. Those assigned to the ARNG and USAR TPU's generally earn their maximum allowable 50 points each year through participation in weekend drills and AT. These judge advocates, when they perform "off-duty" legal assistance work, generally do so without applying for the retirement points they earn. Judge advocates in the IRR who are IMAs generally earn 12 of the 35 additional points they need each year by performing two weeks of AT with AC units. Judge advocates in the IRR who are not IMAs must earn their 35 additional retirement points--and IMAs their 23 additional points--through correspondence courses, paid active-duty training, and nonpaid training such as performing legal assistance or other legal work for retirement points.

171. AR 27-3 (1989), supra note 3, para. 2-2a(2). Another liability concern raised by RC judge advocates was the requirement that they be designated legal assistance attorneys before they actually provide legal assistance. See id. para. 2-2a(2)(c). This requirement, although ministerial in nature, often was overlooked both in RC and AC legal offices.

172. Clearly, they would not be covered on malpractice claims from military clients under most commercial insurance policies covering clients they served in their private legal practices.

173. See DSAT Report, supra note 5, issue 359.

174. Message, Headquarters, Dep't of Army, DAJA-ZA, subject: Designation of Special Legal Assistance Attorneys, para. 5C (191530Z Apr. 91).

175. AR 27-3 (1989), supra note 3, para. 2-2a(3).

176. Id. para. 2-2a(3), (4).

177. Id. para. 2-2a(5). The new AR 27-3 eliminates the term "SLAA." Nevertheless, the concept of authorizing RC judge advocates to perform legal assistance work for retirement points is incorporated fully in the new regulation. See 27-3, supra note 1, para. 2-2b. The authority for designating SLAAs was decentralized during Desert Storm to allow them to be designated not only by the Commandant, TJAGSA, but also by every SJA of a Continental United States Army and by the commander of each installation having a casualty assistance command. See Message (5 Mar. 1991), supra note 50, para. 5. This provided much-needed flexibility

to the SLAA designation process and facilitated the recruitment of additional RC judge advocates to assist with legal problems arising from casualty assistance and demobilization. This effort met with mixed results. One problem was that no single person knew the identity of all individuals who had been designated as SLAAs. If only from a liability concern, this had to be corrected. The liability concerns covered not only the type of guidance being given to SLAAs, but also the military status of those being appointed. For example, despite the clear guidance in the old AR 27-3 and the messages that were dispatched, one SJA appointed several retired judge advocates as SLAAs, and another SJA made designations after the authority was terminated. See Message, Headquarters, Dep't of Army, DAJA-LA, subject: New Designation Procedures for Special Legal Assistance Attorneys (SLAA'S), para. 5 (101200Z Feb 1992) [hereinafter Message (10 Feb. 1992)] (terminating, effective 31 May 1992, all SLAA appointments made by anyone other than the Chief, Legal Assistance Division, OTJAG). Since 15 February 1992, only the Chief, Legal Assistance Division, OTJAG, has had the authority to authorize RC judge advocates to perform legal assistance work for retirement points. This consolidation of authority at HQDA identified--and as appropriate, redesignated--all SLAAs; developed up-to-date and complete records on all SLAAs; facilitated direct communication between the Chief, Legal Assistance Division, OTJAG, and all SLAAs; standardized procedures for supervising all USAR IRR SLAAs and evaluating their retirement points; and, most importantly, compiled a comprehensive directory of all RC judge advocates who were willing and able to provide legal assistance to eligible clients, to assist fellow judge advocates on legal assistance cases and issues, and to perform legal research on TJAGSA legal assistance publications and the contents of LAAWS-LA computer programs. See Message (10 Feb. 1992), supra, paras. 5, 6.

178. AR 27-3, supra note 1, para. 2-2a.

179. AR 27-3 does not govern the award of retirement points for matters unrelated to legal assistance, such as administrative law work. Those who desire to perform legal work unrelated to legal assistance for retirement points should obtain guidance from the judge advocate for whom the legal work will be performed.

180. Id. para. 2-2b(2).

181. Id. paras. 2-2b(1)(b), 4-5d.

182. Id. paras. 2-2b(1)(a), 4-5d.

183. Id. paras. 2-2b(1)(c), 4-5d. The last SLAA directory published by TJAGSA contained the names of 188 RC judge advocates. See THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 267, LEGAL ASSISTANCE GUIDE: OFFICE DIRECTORY ch. 3 (Sept. 1990). The first JAGC Reserve Officer Legal Assistance Directory, published by the Chief, Legal Assistance Division, OTJAG, on 19 August 1991, contained the names of 426 judge advocates. For the first time, the Directory included each listed judge advocate's geographical and specialty areas of practice. The current Directory (1992-1993), which also is included in the LAAWS-LA software program, contains the names of 562 judge advocates: 7 in the AGR, 115 in the ARNG, and 440 in the USAR. Within the USAR, 271 are assigned to TPUs, 151 are IMAs, and 18 are non-IMAs within the IRR--63 RC judge advocates also have volunteered to update TJAGSA legal assistance publications.

184. AR 27-3, supra note 1, para. 2-2b(2).

185. Id. para. 2-2b(3).

186. See supra text accompanying notes 104-107.

187. AR 27-3, supra note 1, para. 2-5a(2)(b); see note 159 and accompanying text.

188. Message (5 Mar. 1991), supra note 50, paras. 2, 3 (extending legal assistance to each RC member for a period of one year following his or her release from active duty, and for any legal problem that arose from or was aggravated by Desert Storm operations).

189. AR 27-3, supra note 1, para. 2-5a(3). Although AR 27-3 (1989), supra note 3, did not authorize legal assistance on military administrative matters--such as helping a soldier respond to an adverse personnel action--it did not actually prohibit it. The omission probably was an oversight.

190. AR 27-3, supra note 1, para. 2-5a(3)(b).

191. Id. para. 2-5a(3)(a). PLP continues to be the only type of legal assistance authorized for family members of RC service members not on active duty. The new AR 27-3, however, authorizes both AC and RC judge advocates to provide PLP. During the staffing of the new AR 27-3 reviewers pointed out that AC units occasionally assist RC units with PLP.

192. AR 27-3, supra note 1, glossary.

193. See supra note 49 and accompanying text.



194. This breakdown between cases and services provides the basis for the new categories for the revised client data card and legal assistance report developed in conjunction with the new AR 27-3. See infra notes 349-358 and accompanying text.

195. AR 27-3, supra note 1, para. 3-5c(1).

196. Id.

197. See supra notes 141-148 and accompanying text.

198. In RC Army legal offices, all legal assistance is optional. See AR 27-3, supra note 1, para. 2-6a(2).

199. Attracting and retaining a quality force is a secondary military need met by the program. See supra note 49 and accompanying text.

200. This is one reason why assisting soldiers on matters affecting property accountability is required, but help on military driving privilege cases is optional.

201. AR 27-3, supra note 1, para. 3-6.

202. AR 608-99, supra note 123, paras. 1-7, 2-4, 2-5; id. glossary; see Alfred F. Arquilla, Family Support, Child Custody, and Paternity, 112 MIL. L. REV. 17 (1986) (discussing background and contents of AR 608-99).

203. The apparent reason for the change was to bring the age limits into general conformity with DEP'T OF ARMY, REG. 600-8-104, IDENTIFICATION CARDS, TAGS, AND BADGES, para. 6-1e, app. b (15 July 1992) (addressing family member entitlement to military identification cards).

204. AR 27-3, supra note 1, para. 3-6a(1).

205. The author personally is aware of the great difficulties that the different proponents of AR 608-99 have experienced over the past 15 years in attempting to publish a legally sufficient regulation. The current AR 608-99, first published in 1985, took five years to write. Only after Army judge advocates in Washington, D.C., and from TJAGSA got involved in the drafting project did the regulation finally get published. With similar help, it later was revised in 1987. Since then, efforts to revise AR 608-99 have met with failure. During 1991 and 1992, OTJAG found two proposed draft revisions of AR 608-99 legally insufficient.

206. Effective 26 April 1993, TJAG will be the proponent for AR 608-99. Thereafter, the Chief, Legal Assistance Division, OTJAG, will address all inquiries and other matters involving AR 608-99. A draft revision of AR 608-99 will be staffed for comment throughout the Army in late 1993.

207. Several commands indicated that preparing wills during readiness exercises without also executing wills on the spot would be inefficient. These commands also asserted that eight to ten wills could be executed simultaneously without difficulty, and that using soldiers from the same unit--who also were testators--to witness wills was not a problem as long as self-proving clauses were used. The Army's efforts at regulating the manner in which wills are drafted and executed date back almost 50 years. War Dep't, Circ. No. 74, supra note 20, prohibited commanders from actually ordering soldiers to get wills; but, if they were to get wills, commanders were to encourage their soldiers to get them as soon as possible so as to discourage "[t]he practice of large numbers of military personnel of waiting until arrival at a staging area or port of embarkation to attend to the making of wills and the arrangement of other personal affairs . . ." Id. para. 2. This circular also discouraged "[t]he use of assembly-line methods and of standardized forms in making of wills for military personnel" and discouraged using military personnel as witnesses. Id. paras. 5, 7. The circular directed judge advocates to advise each service member for whom a will was prepared "to execute (the will) with the advice of legal counsel . . . the next time he is at home on leave or furlough, in the presence of three competent civilian witnesses who are permanent residents of the community and who will not be called into military service." Id. para. 7. Experience since has taught us that giving unexecuted wills to clients is not an acceptable practice because clients cannot be trusted to execute wills correctly, or to execute them at all. One recent probate case reported to the Legal Assistance Division, OTJAG, involved a service member who apparently thought his will could be executed, without witnesses, by a notary public at a credit union. Another recent case involved a family member who apparently believed her unsigned draft will was executed because it was typed.

208. AR 27-3, supra note 1, para. 3-6b(2).

209. Id.

210. Id.

211. Putting attorneys' names and bar affiliations on the wills they drafted also raised concerns because disgruntled clients then might raise complaints directly to the bar. In addition, the practice might highlight that, in many cases, the attorney who drafted the will was not admitted to practice in the state for which the will was prepared.

212. Id. para. 3-6b(2)(a).

213. Id. para. 2-6b(2).

214. Id. para. 3-6b(2)(b).

215. One example of this type of problem, described in the LATF after-action report, involved a soldier who never knew his father and had been raised from birth by his mother. He therefore probably assumed that when he wrote "BY-LAW" on his SGLI election form that all SGLI insurance proceeds would go to his mother, the only parent he ever knew. Unfortunately, the father named on the birth certificate was located and consequently received one half of the soldier's SGLI benefits. The father even attended the funeral and bragged about his having seen his son only three times during his life, his having contributed nothing to his support, and his attending the funeral only to get his half of his son's \$100,000 SGLI benefit.

216. See 38 U.S.C. § 1970. If the service member has named no beneficiary, SGLI proceeds shall be paid to the surviving widow or widower. If no surviving spouse exists, then proceeds shall be paid to the soldier's surviving children or per stirpes to their descendants. If no surviving children or descendants exist, then proceeds shall be paid to the soldier's surviving parents; if none, then to the executor or administrator of the estate; and, if none, then to other next of kin in accordance with the laws of intestate succession for the service member's domicile at the time of death.

217. Veterans' Benefits Act of 1992, 138 CONG. REC. S173364-01 (enacted 29 Oct. 1992) (codified as 38 U.S.C. § 1967).

218. The primary action officer for this effort was Captain Laurel L. Wilkerson, Judge Advocate General's Corps, U.S. Army, currently assigned to Legal Assistance Division, OTJAG.

219. SGLV-8286, Servicemen's Group Life Insurance Election and Certificate (Mar. 1988).

220. The new form, SGLI-8286, Servicemen's Group Life Insurance Election and Certificate (Nov. 1992), advises the service member on the following matters:

- Cautions the service member about the importance of by-name designations when the service member is a stepchild or stepparent, was abandoned by one or both parents or adopted, or is separated from his or her spouse.

- Advises service members that wills or powers of attorney--as well as events occurring after the form is signed, such as separations or divorces--have no effect on changing beneficiaries designated on the form to receive SGLI proceeds.

- Informs service members of some of the potential "pitfalls" involved in designating minor children to receive SGLI proceeds. This information advises that SGLI proceeds can be paid only to a court-appointed guardian of a child. That person usually, but not always, will be the surviving parent, if any, of the child.

- Informs the service member that he or she may establish a trust, naming a trustee who would receive the SGLI proceeds and would administer them for the benefit of the children.

- Informs the service member that he or she may consult with a military attorney, at no personal expense, about any matter on the form, to include the establishment of a trust.

221. AR 27-3, supra note 1, para. 3-6b(1). In the Army, by-law designations no longer should be a problem. On 11 February 1993, the Army Chief of Staff, General Gordon R. Sullivan, approved a TJAG recommendation to prohibit "by-law" designations throughout the Army. Message, Commander, Personnel Command, TAPC-PEC, subject: Servicemen's Group Life Insurance (SGLI) Program Change (01130Z Mar. 93). Earlier, on 21 January 1993, the ABA LAMP Committee adopted a resolution that

supports and urges action by the Secretary of the Defense and with regard to Coast Guard personnel, the Secretary of the Treasury, to publish appropriate directives requiring all service members who elect to purchase (SGLI) insurance to designate beneficiaries by name, rather than 'by law' as is commonly the practice at the present time.

This resolution likely will be proposed for adoption by the ABA House of Delegates in August 1993.

222. Id. DEP'T OF ARMY, REG. 608-2, PERSONAL AFFAIRS: GOVERNMENT LIFE INSURANCE SERVICEMEN'S GROUP LIFE INSURANCE, VETERANS' GROUP LIFE INSURANCE, UNITED STATES GOVERNMENT LIFE, INSURANCE NATIONAL SERVICE LIFE INSURANCE, para. 2-23d (15 Sept. 1989) [hereinafter AR 608-2] (providing that "[a] designation or change of beneficiary will not be valid unless it is received by [the Office of the Servicemen's Group Life Insurance], the custodian of the [Military Personnel Records Jacket], or authorized representative before the soldier's death").

223. AR 27-3, supra note 1, para. 3-6b(1)(b).

224. AR 27-3, supra note 1, para. 2-5a(8); see supra note 106 and accompanying text.

225. See AR 27-3 (1989), supra note 3, para. 2-4a(7).

226. AR 27-3, supra note 1, para. 3-6b(3). The citation appearing in this subparagraph of the regulation is incomplete. It should be 38 C.F.R. ch. I, pt. 9 (Servicemen's Group Life Insurance and Veterans' Group Life Insurance) (1 July 1991). Of particular importance is 38 C.F.R. ch. I, pt. 9.1(s)(3), which basically restates 38 U.S.C. § 1965(9). That subpart covers "by-law" distributions when surviving parents are the potential beneficiaries, and provides, "No person who abandoned or willfully failed to support a child during his or her minority, or consented to his or her adoption may be recognized as a parent for the purpose of Servicemen's Group Life Insurance." This provision goes further to provide that sufficient evidence must be presented in a timely manner to show that the person could not qualify for payment by virtue of this provision, and that when payment already has been made, a duplicate payment will not be made. The principal problem with this rule is that the person in the best position to present this evidence usually is the deceased service member, and that other potential beneficiaries likely will not become aware of the rule in a timely manner. See Willis, Naming beneficiary now avoids court fight later, ARMY TIMES, 23 Nov. 1992, at 6, col. 2 (disclosing that 85 lawsuits filed by the relatives of deceased service members over SGLI beneficiary designations are pending in federal district courts). Timely advice to the PNOK on this provision may eliminate the need for some lawsuits to be filed. Unfortunately, for many beneficiaries, "by-law" often means "by-lawsuit." "By-law" distribution problems still may occur in the Army, such as when soldiers improperly execute the SGLI-8286 or designate beneficiaries who predecease them, or when soldiers--following entry on active duty--die before executing an SGLI-8286. In the latter situation, automatic SGLI coverage is limited to \$100,000.

227. The answer in almost all cases is that the soldier should be retired at 100% disability and elect the maximum amount of coverage under the Survivor Benefit Plan. See 10 U.S.C. § 1448.

228. AR 27-3, supra note 1, para. 3-6b(4). Officials of the Army-Air Force Mutual Aid Association (AAFMAA) always have been available to provide immediate assistance free of charge to the families of both its members and nonmembers. The AAFMAA, using its computer-generated programs, quickly can produce individually tailored schedules of life-time government benefits payable to the survivors of a soldier who dies on active duty or in a retired pay status.

229. Id. para. 3-6e(2).

230. 38 U.S.C. §§ 2024(c), (g); id. § 4321. A good summary of this law is contained in Legal Assistance Item, Veterans' Law Note, ARMY LAW., Dec. 1990, at 41.

231. See, e.g., Message, Headquarters, Forces Command, FCJA, subject: Home Station Demobilization Briefings (221654Z May 91).

232. Id.; AR 27-3, supra note 1, para. 3-6e(2)(a).

233. Message, supra note 232. The content of this message, as well as AR 27-3, supra note 1, para. 3-6(2), was staffed through, and discussed with, DOL officials. Officials at the DOL apparently guard the department's "turf" very jealously in VRRL cases. The DOL fully "beefed up" its enforcement division following Desert Storm to handle an anticipated stampede of VRRL cases--cases that actually never occurred. Given the size of the call-up, relatively few VRRL cases arose, but judge advocates expressed utter dissatisfaction with the way the DOL handled some of these cases. The problem is one of approach. Specifically, a legal assistance attorney naturally, and quite properly, will want to grab a VRRL case by the horns as a client's advocate. DOL officials, on the other hand, seek to enforce the law. Usually, no conflict arises between the two approaches and the client benefits from the free help provided by the DOL. Nevertheless, in enforcing the law--as opposed to justice for the client--the DOL occasionally may approach a particular VRRL case intending to develop case law that will benefit all service members in the future. The DOL will pursue relief on behalf of a service member with less than "good facts" when and if litigation should become necessary. In addition, the DOL may delay pursuing relief in one case because another pending VRRL case might establish better precedent or might have a greater chance of succeeding in the same or different federal circuit.

234. AR 27-3, supra note 1, para. 3-6e(2)(d). When the DOL's pursuit of good precedent does not serve a legal assistance client's needs for prompt legal relief, a request for an exception is more than appropriate. Attorneys in the Legal Assistance Division, OTJAG, have brought the dissatisfaction of some legal assistance clients to the attention of DOL officials in Washington.

235. Id. para. 3-6e(2)(d). In one case, an RC judge advocate received retirement points for assisting two soldiers in reacquiring part-time jobs that they had lost following AT. The RC judge advocate prevailed before an administrative law judge by citing a state antidiscrimination law. See Veterans' Law Note, Retirement Points for Legal Assistance, State Law Remedies Available for Some Reservists, ARMY LAW., Nov. 1992, at 41-42.

236. See supra text accompanying note 49.

237. AR 27-3, supra note 1, para. 3-6g(4), (5).

238. Id. paras. 3-6g, 3-8a(1).

239. The wisdom of not combining these diverse client services was recognized 50 years ago--some 35 years before USATDS was established.

A legal assistance office as such will not advise or assist military personnel in any case in which such personnel are or probably will be the subject of court-martial investigation or charges. Legal assistance officers should not be consulted by such personnel, and will refuse to receive confidences from them concerning such matters unless authorized by competent orders to defend them.

Cir. No. 74, supra note 20, para. 10b.

240. One proposal would combine all "client services" --legal assistance, trial defense, and claims--under the authority of one judge advocate at each installation. Claims, however, would not be included under this category. See generally, AR 27-20, supra note 82. The field-grade judge advocate who formerly occupied the position of deputy SJA on an installation, or deputy command judge advocate for a command, typically would occupy this new position. The officer occupying this position, and his and her staff of military and civilian personnel, would report directly to a Washington-based headquarters, through a structure similar to the system established by USATDS. The SJA, and his or her remaining staff, would continue to advise the commander on military justice, administrative law, international and operational law, labor law, environmental law, contract law, and other legal matters. The feasibility of this proposal is questionable because it would require more manpower and other resources at a time when the Army is decreasing in size. It also would remove the flexibility that supervisors presently possess to shift resources in and out of claims and legal assistance. If more manpower is not provided, the scope and quality of legal assistance services likely would suffer throughout the Army because trial defense and claims--unlike legal assistance--are services that are required by law. In the other military departments--and in the Army before the USATDS formally was established--personnel providing legal assistance generally worked in offices separate from attorneys who processed claims or defended soldiers at court-martial. The one exception is the Air Force, in which legal assistance typically is an extra duty for most judge advocates assigned to base legal offices, where supervising attorneys usually designate times when judge advocates are to perform these services each duty day.

241. AR 27-3, supra note 1, para. 3-6g(c), (e).

242. Id. para. 3-6g(4).

243. Id. para. 3-6g(4)(q) (physical evaluation boards); id. para. 3-6g(4)(r) (flying evaluation boards); id. para. 3-6g(4)(t) (medical evaluation boards); id. para. 3-6g(4)(w) (military driving privileges).

244. Id. para. 3-6g(4)(m), (x). The correction of military records is governed by DEP'T OF ARMY REG. 15-185, BOARDS, COMMISSIONS, AND COMMITTEES: ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977) [hereinafter AR 15-185].

Attorneys providing legal assistance will counsel and assist clients on correcting their military records and, with the approval of supervising attorneys, may represent clients before the Army Board for Correction of Military Records (ABCMR) if the ABCMR grants a hearing in the case. "No expenses of any nature whatsoever voluntarily incurred by the applicant, his/her counsel, his/her witnesses, or any other person in his/her behalf will be paid by the Government." Id. para. 28. This does not, however, prohibit representation before the ABCMR by an attorney during the course of providing legal assistance duties--when representation has been approved by a supervising attorney in accordance with AR 27-3, para. 3-7g(1). Nor does it prohibit an Army command from paying a legal assistance attorney any necessary travel or per diem required when representing a client before the ABCMR. AR 15-185, supra, para. 28. Because legal assistance is an official duty, having an eligible client pay these expenses--if a command refused to do so--would be inappropriate. In cases in which TJAG approval previously had been required for a legal assistance attorney to represent clients before the ABCMR, AR 27-3, para. 3-7g(1), now delegates this authority to supervising attorneys.

245. AR 27-3, supra note 1, para. 1-1a.

246. Id. para. 3-7g(1) (requiring supervising attorney to approve in-court representation by a legal assistance attorney); id. glossary (defining in-court representation as including "[a]ppearing . . . as counsel on behalf of a client in a military . . . proceeding").

247. Id. para. 3-6g(2) (emphasis added).

248. Id. para. 3-6g(2); id. para. 3-6g(4)(f), (i), (j).

249. Id. para. 3-6g(3).

250. In conjunction with planned military budget cuts during the 1993 and 1994 fiscal years, 36 authorized USATDS judge advocate positions are being eliminated. Because USATDS counsel are dispersed, USATDS field offices at some Army installations will be closed, and USATDS attorneys will be forced to limit their legal work to military justice cases only. In contrast, both the Air

Force and the Navy take the view that military administrative cases are not legal assistance and should be handled by military defense counsel. The Air Force, however, does not have a separate military defense service. Accordingly, the organization under which Air Force attorneys provide legal assistance gives supervising judge advocates greater flexibility in assigning their attorneys as defense counsel in these cases. See supra note 224. The Navy, on the other hand, which has a separate defense service, concentrates its legal services at several large Naval bases throughout the world. The Army's legal services, however, are far more decentralized, operating from numerous legal offices located on installations worldwide.

251. Id. para. 3-6g(e).

252. Id. para 3-6g(3)(d). AR 27-3 clarifies the distinction between legal assistance cases and USATDS cases for reporting purposes. Any case relating to military personnel administrative proceedings or military justice handled by a USATDS attorney is a USATDS case; any other type of case handled by a USATDS attorney and any client service case handled by a non-USATDS attorney is a legal assistance case. See id. paras. 1-4c, 3-6g(3); id. apps. B-2a(4), B-4d(7).

253. Id. para. 3-6g(3)(b).

254. Id. para. 3-6g(3)(a).

255. Id. para. 1-4c.

256. See supra notes 139-156 and accompanying text. Because legal assistance is a commander's program, the term "supervising attorney" does not include a USATDS regional or senior defense counsel. See AR 27-3, supra note 1, glossary.

257. AR 27-3, supra note 1, para. 3-6f.

258. Id. para. 3-7b, c, e, f, h.

259. Unlike the previous legal assistance regulations, AR 27-3 does not mention tax programs, preventive law programs, expanded legal assistance programs, and other such programs. For the purpose of logical consistency, only one program appears in AR 27-3-- that is, the Army Legal Assistance Program. Everything else in this program is either a legal assistance case or a legal assistance service. Compare AR 27-3 (1989), supra note 3, para. 2-5a(5) with AR 27-3, supra note 1, para. 3-5f.

260. AR 27-3, supra note 1, para. 5-4a.

261. AR 27-3 (1989), supra note 3, para. 2-5a(5).

262. During the 1992 tax season (during which 1991 tax returns were prepared and filed) the commanders on nine Army installations did not authorize H&R Block to provide commercial tax assistance services. Although this number continues to grow smaller each year, many conscientious commanders continue to place the interests of their soldiers above the increased revenue they could derive for their installation morale, welfare, and recreation (nonappropriated) funds by permitting commercial tax assistance services to operate on their installations. Of particular concern is the promotion of so-called refund anticipation loans. See Alfred F. Arquilla, Income Tax Assistance in the Army, in ABA Standing Committee on Legal Assistance for Military Personnel, 4 THE LAMPLIGHTER, no. 1, at 1 (Fall 1992).

263. AR 27-3, supra note 1, para. 1-4f(2). Although this author knows of no plans by AAFES or anyone else to promote the establishment of commercial legal services on Army installations, this is included as an additional topic for consultation, should such plans be developed in the future. Any shortfalls in legal assistance, or in USATDS staffing or services, could result in a move to authorize the provision of commercial legal services on Army installations. During the 1992 Army Family Action Plan (AFAP) conference, one proposal recommended that the Army establish a "civilian legal affairs program" patterned after the installation child care services. Soldiers would pay fees on a sliding scale, based on income, for legal representation on nonmilitary legal actions that presently cannot be provided because of shortfalls in judge advocate staffing and membership in appropriate bars. The proposal was tabled based on input from the Legal Assistance Division, OTJAG, that the Army Legal Assistance Program provided a full range of legal services including, at some installations, pro se assistance and in-court representation. This input also pointed out that most legal matters are resolved without going to court and, most importantly, that "referral procedures and guidance presently in effect are the best and most cost-effective way to assist soldiers and families in finding civilian lawyers who will represent them in a competent manner for reasonable fees." Information Paper, Office of the Judge Advocate General, U.S. Army, DAJA-LA, subject: AFAP Issue Paper on Judge Advocate General (JAG) Representation of Soldiers in Civilian Legal Actions (15 Oct. 1992).

264. AR 27-3, supra note 1, para. 1-4g(7).

265. Id. para. 2-1.

266. AR 27-3 (1989), supra note 3, para. 2-8a.
267. AR 27-3, supra note 1, para. 3-7g(2)(c). This was not authorized under the previous legal assistance regulation. See AR 27-3 (1989), supra note 3, para. 2-9b(f).
268. See AR 27-3, supra note 1, para. 7g(2)(c), (d), (3). Some practitioners could interpret the guidance on limiting in-court representation in civil proceedings to "financial hardship" cases as not applying to civilian criminal proceedings before a United States magistrate. This interpretation, however, does not reflect the regulatory intent.
269. Id. paras. 1-4g(5), 3-7g(1).
270. Id. ch. 3, secs. II, III.
271. DEP'T OF ARMY, REG. 600-14, PERSONAL GENERAL: PREVENTIVE LAW PROGRAM (30 Sept. 1965).
272. AR 27-3 (1989), supra note 3, chap. 4.
273. Preventive law is no longer a program within a program. Cf. id.
274. Although AR 27-1, supra note 72, para. 5-3, suggests that preventive law is limited to legal assistance, DRAFT REVISION TO AR 27-1, supra note 69, para. 5-3, clearly indicates that it is not so limited.
275. AR 27-3, supra note 1, para. 1-4f(3).
276. Id. para. 3-3a.
277. Id. para. 1-4g(8).
278. Id. paras. 1-4g(9), 3-3b.
279. Id. para. 3-4a(1), (5).
280. Id. para. 3-4b.
281. Id. para. 3-7.
282. Id. para. 3-7a.
283. Id. para. 3-7b.
284. Id. para. 3-7c.
285. Id. para. 3-7d.
286. Id. para. 3-7e.
287. Id. para. 3-7f.
288. Id. para. 3-7f(1).
289. Id. para. 3-7f(2).
290. Id. glossary.
291. Id. para. 3-7f(2)(a). As a practical matter, pro se assistance does not occur outside of the United States, although AR 27-3 does not preclude it. See id. glossary. Nor does it occur in civilian criminal proceedings or in military justice or military personnel administrative proceedings.
292. Id. glossary. The term "in-court representation" replaces the term "court representation," which was used in the previous legal assistance regulation for grammatical reasons--that is, a legal assistance attorney "represents" a client, not a court. "Court representation" was not specifically defined. See AR 27-3 (1989), supra note 3, paras. 2-9, 2-10.
293. See also AR 27-3, supra note 1, para. 3-7f(2) (providing, "Pro se assistance is not in-court representation"). In other words, if the legal assistance provided goes beyond pro se assistance, then it constitutes in-court representation. This broad definition is

designed to prevent the disingenuous interpretations of an attorney who may have crossed the bounds of authorized assistance to a client. For instance, one legal assistance attorney claimed that he was not providing "court representation" in a particular divorce case because, although he filed an appearance and participated in a pretrial conference with opposing counsel and the judge, the judge never conducted an in-court hearing or trial at which the legal assistance attorney actually "represented" his client as counsel. See Professional Responsibility Notes, Professional Responsibility Opinion No. 91-1, ARMY LAW., Sept. 1992, at 50-53.

294. Id. glossary.

295. Id. para. 3-8g(1).

296. Id. para. 3-6j; supra notes 265-269 and accompanying text.

297. AR 27-3, supra note 1, para. 3-6g(4), (5); supra text accompanying note 244.

298. SJAs located outside the United States may, if the requirements of AR 27-3 and applicable treaties and local laws are satisfied, authorize pro se assistance and in-court representation in foreign courts. For example, some German attorneys employed by Army legal assistance offices occasionally would like to represent a soldier in German court to obtain experience, or to provide enhanced legal assistance services for a particular client or category of cases. Regardless of the jurisdiction involved, the training derived from actually handling a case in court to its conclusion is invaluable. For example, the law governing divorce in a particular jurisdiction provides only a hint as to how divorces actually are handled by lawyers and judges in that jurisdiction.

299. See id. para. 3-7g(1) (in-court representation).

300. Few complaints about either of these legal services have arisen over the past several years. Recent complaints, however, have been limited to problems with pro se assistance. Accordingly, the restrictions on pro se assistance have been tightened and the limitations on in-court representation have been relaxed.

301. Id. para. 1-4g(5). For the first time, this requirement also covers pro se assistance. Cf. AR 27-3 (1989), supra note 3, para. 2-5b (directing compliance with "limits established by local court rules and practices"). Of course, given the nature of pro se filings, these "rules and practices" would not govern the activities of lawyers. In military communities where civilian "paralegals" and others perform services tantamount to the unauthorized practice of law, local judges and lawyers may raise fewer objections over military attorneys helping clients with pro se filings.

302. AR 27-3, supra note 1, para. 3-7f(2)(a), g(1). The old AR 27-3 required SJA approval to accompany a client to court, but did not require such approval for other aspects of pro se assistance. See AR 27-3, supra note 3, paras. 2-5a(1), 2-6b. The previous regulation, however, required TJAG approval of any in-court representation service or "program." See id. para. 2-10a(2), a(3), b(2)(b), c(2).

303. AR 27-3, supra note 1, para. 1-4g(5).

304. Id.

305. Letters complaining about local legal assistance policies usually are addressed to local congressmen, the Secretary of the Army, or the Secretary of Defense. The absence of a record to support the local coordination that occurred prior to a challenged pro se or in-court representation could be embarrassing to TJAG and the responsible SJA, and could jeopardize those services throughout the Army.

306. AR 27-3, supra note 1, para. 3-7g(2)(d).

307. Id. para. 3-7g(3).

308. Id.

309. Id. para. 1-4g(5)(a).

310. Id. para. 3-7f(2)(d). These exceptions are an outgrowth of legal assistance policies implemented during and following the Gulf War. See Message (5 Mar. 1991), supra note 50; supra notes 106, 227-233, and accompanying text. An RC soldier trying to recover the job he or she lost during deployment almost always will encounter some financial hardship. See AR 27-3, supra note 1, para. 3-5g(2) (the Chief, Legal Assistance Division, OTJAG, retains sole authority for authorizing in-court representation in a reemployment rights case pursued under federal law).

311. AR 27-3, supra note 1, para. 3-7f(2)(d); see Message (5 Mar. 1991), supra note 50 (authorizing legal assistance, including in-court representation, to appoint guardians for minor children who were without parents following the Gulf War). The financial

hardship of a minor in an abuse or neglect case is presumed. See DEP'T OF ARMY, REG. 608-18, PERSONAL AFFAIRS: THE ARMY FAMILY ADVOCACY PROGRAM, para. 1-6j(13) (1987) (authorizing SJAs to appoint legal counsel to represent the interests of abused and neglected children, and "[w]hen local practice permits[,] . . . interface with local authorities, to include court appearances").

312. AR 27-3, supra note 1, para. 3-7f(2)(a).

313. Id. para. 1-4g(5).

314. Compare id. para. 3-7g(2)(d)1 with AR 27-3 (1989), supra note 3, para. 2-9b(1)(b), (c) ("limit[ing]" in-court representation to "qualified active duty clients" and to other eligible clients as allowed by the SJA on a "case-by-case" basis).

315. AR 27-3 (1989), supra note 3, para. 2-9b(1)(b).

316. Id. para. 2-1b.

317. The certainty of complaints in such cases is a check against a legal assistance attorney exceeding the limits of pro se assistance on behalf of a family member.

318. AR 27-3, supra note 1, para. 3-7f(2)(a); id. glossary.

319. Id. para. 3-7g(1).

320. See supra notes 261-264 and accompanying text.

321. Compare AR 27-3, supra note 1, para. 3-7h, i with AR 27-3 (1989), supra note 3, para. 2-7b(2) (indicating that "[legal assistance attorneys] can significantly benefit their clients by assisting them in obtaining the best-qualified [sic] counsel at the most reasonable cost").

322. AR 27-3, supra note 1, para. 3-7h(1), (6). Although subparagraph h(6) can be interpreted to mean a referral includes providing a client the telephone number of a lawyer referral office, it actually does not. Providing a telephone number of a lawyer referral office is counted, for statistical purposes, as "providing lists." See id. para. 3-7i(2); id. app. B-4c(2)(l).

323. Id. para. 3-7h(6), h(7), i.

324. Id. para. 3-7i.

325. Id. para. 3-7h(2).

326. Id. para. 3-7h(3).

327. Id. para. 3-7h(7).

328. Id. para. 3-7h(8).

329. Id. para. 3-7h(3)(e), h(9).

330. Id. para. 3-7h(9). Referrals, like other legal assistance services, raise some concerns about the government's exposure to liability for legal malpractice. The malpractice of a civilian lawyer to whom a referral is made, however, is not likely to expose the government to liability because no agency relationship has arisen. Liability on the part of the government arising from a referral is a remote possibility given the exercise of care that AR 27-3 requires in making a referral and, more importantly, the absence of any fee being earned by the government as a result of the referral. See generally Rolwes, Avoiding the Pitfalls in Attorney Referrals, 80 ILL. BAR J. 242 (1992).

331. AR 27-3, supra note 1, paras. 3-7h(8), 4-5e.

332. Id.

333. Id. para. 3-7h(4).

334. Id. para. 3-7h(8).

335. Id.

336. Id. para. 3-7j.



337. Id.; AR 27-26, supra note 40, app. B, rule 2.2.
338. See AR 27-3, supra note 1, para. 4-7a.
339. Compare id. para. 4-7 (ethics); id. para. 4-8 (attorney-client privilege); and id. para. 4-9 (conflict of interest) with AR 27-26, supra note 40, app. B, rule 1.1 (competence); id. rule 1.2 (scope of representation); id. rule 1.5 (fees); id. rule 1.6 (confidentiality of information); id. rules 1.7 to 1.9 (conflict of interest); and id. rule 1.10 (imputed disqualification).
340. AR 27-26, supra note 43, app. B, rule 1.10.
341. Id. comment (emphasis added).
342. AR 27-3 (1989), supra note 3, para. 2-5a(1).
343. AR 27-3, supra note 1, para. 4-9c (emphasis added).
344. Id.; AR 27-26, supra note 43, app. B, rule 1.10, comment.
345. Id. app. B, rule 1.2, comment ("Formation of attorney client relationships and representation of clients by Army lawyers is permissible only when authorized by competent authority"). As to legal assistance, AR 27-3 provides that authority. See supra notes 71-75 and accompanying text.
346. This guidance is not limited to RC judge advocates because AC judge advocates and DA civilian attorneys may request TJAG approval to engage in the private practice of law while off duty. See AR 27-1, supra note 72, para. 4-3e.
347. AR 27-3, supra note 1, para. 4-3d.
348. Id. para. 4-3d(2).
349. Id.; id. para. 3-6a; cf. id. para. 3-6b (will and subsequent probate action); id. para. 3-6c (lease and subsequent sale of the same property).
350. AR 27-26, supra note 43, app. B, rule 1.5, comment. An RC judge advocate also is prohibited from referring such "follow-on" cases to members of his or her own law firm or accepting a referral fee from another law firm. See AR 27-3, supra note 1, para. 3-6d(2).
351. One indication of the lack of value of past legal assistance statistics is that, although Army Legal Assistance Program statistics for calendar year 1991 were collected and consolidated, they never were published. Moreover, no one ever asked where they were or why they were not published.
352. The report was computer generated using the LAAWS-LA, but never published as an official DA form.
353. Even the grouping of the categories did not make sense. A major command recently inquired about the number of soldiers in that command who received assistance on adoptions. The answer to this simple question could not be answered--not even an educated guess could be made. The statistics showed only the number of times clients "visited" attorneys to seek legal assistance on adoptions or child custody matters--two areas that are not closely related.
354. Dep't of Army, DA Form 2465, Client Legal Assistance Record (July 1992); AR 27-3, supra note 1, para. 5-2, app. B, tbl. B-1, fig. B-1.
355. Dep't of Army, DA Form 4944-R, Report on Legal Assistance Services (July 1992); see AR 27-3, supra note 1, para. 5-3, app. B, tbl. B-1 (Reproducible Forms).
356. AR 27-3, supra note 1, para. 5-3b. RC legal offices are not required to submit a DA Form 4944-R to HQDA; however, if they submit any reports, this form--and no other--will be used. See id. ("local forms and reports on legal assistance matters are prohibited without approval from HQDA"). The purpose of these provisions was to address DSAT issue 189, which indicated that RC judge advocates were burdened by duplicitous reporting requirements during Desert Storm--requirements that often asked for the same information in different formats. Although no requirement to do so yet exists, RC Army legal offices and individual RC judge advocates who provide legal assistance for retirement points are encouraged to use these forms. Actually, DA Form 4944-R was designed with this purpose in mind, and implementing a requirement to submit them only has been delayed to review the results of using the form in the active Army.
357. AR 27-3, supra note 1, app. B.

358. Id. tbl. B-1.

359. The directions in the appendix to AR 27-3 and in the LAAWs program should prevent "each visit" from being counted as a separate case. For example, the DA Form 2465 of "Private First Class (PFC/E-3) Johanne Coleman" portrayed at figure B-1 of AR 27-3 reflects that she made 13 "visits" to a legal assistance office over two calendar years--nine in 1993 and four in 1994. Note that the two "mode" entries of 13 September 1993 pertain to only one "visit" and would be counted as only one visit in Part II of the DA Form 4944-R when using the LAAWS-LA program. The 1993 report, however, would reflect only five cases involving an E-3: (1) income tax, (2) wills/SGLI, (3) divorce/separation, (4) real property for tenant, and (5) report of survey. The 1994 legal assistance report would reflect only two cases involving an E-3: (1) civilian criminal and (2) change of name. A particular type of case carried from one year to the next does not become a "new" case with the turn of a calendar page. In the example, PFC Coleman's assistance over two years on income tax is not reported as two E-3s assisted on income tax. Rather, only one E-3 was assisted on income tax. The same would be true for other categories of cases, such as bankruptcy or adoptions.

360. See id. During the 13 "visits" to a legal assistance office, PFC Coleman received 34 separate legal services--26 in 1993, and eight in 1994. Each legal service would appear on the legal assistance report for the calendar year in which that particular legal service was provided. In the example given, the 34 legal services would be reported as follows:

<u>Legal Service</u>	<u>1993</u>	<u>1994</u>
Legal counseling	10	3
Federal income tax prepared	2	1
State income tax prepared	2	1
Federal return		
electronically filed	1	1
Power of attorney	2	
Assistance on a will	2	
Assistance on a SGLI form	1	
Negotiation on behalf		
of client	1	1
Assistance on a		
separation agreement	1	
Referral to a civilian		
lawyer on a fee basis	1	
Provided a list of		
civilian lawyers	1	
Assistance on other		
legal documents	2	
<u>Pro se</u> assistance		1
TOTAL	26	8

Because almost every legal service is accompanied by legal counseling, the figures reported for legal counseling should closely approximate what formerly were reported as "visits."

APPENDIX A

RESPONSIBILITIES OF STAFF JUDGE ADVOCATES AND OTHER SUPERVISING ATTORNEYS  
UNDER AR 27-3, ARMY LEGAL ASSISTANCE PROGRAM

AR 27-3 PARAGRAPH NUMBERS	RESPONSIBILITIES
	<u>Relating to the Commander</u>
1-4f(2) & g(7)	Consult with commander regarding commercial tax services on the installation.
1-4g(6)	Invite commander to view legal assistance facilities.
1-4g(8)	Seek command support on legal assistance initiatives.
3-3h & 3-4a	Assist commander on preventive law responsibilities.
3-6i(1)	Seek command support to appoint unit tax advisors and to recruit volunteers for preparing and filing income tax returns for soldiers and other eligible legal assistance clients.
4-6a	Act on behalf of a command or a legal office in pursuing relief for a particular legal assistance client when the commander and client so authorize.
	<u>Relating to Management</u>
1-4g	Exercise responsibility for the operation of the Army Legal Assistance Program.
1-4g(1)	Establish local legal assistance policies.
1-4g(2)	Establish limitations, when appropriate, on who may provide legal assistance.
1-4g(3)	Authorize temporary variations from <u>AR 27-3</u> policies and procedures, and provide notice of same to HQDA.
1-4g(4)	Supervise legal assistance, and review office procedures and correspondence.
1-4g(5)	Coordinate legal assistance policies, including <u>pro se</u> assistance and in-court representation, with local authorities and bar.
1-4g(9) & (12)	Encourage innovation and automation in legal assistance services.
1-4g(10) & 2-4a	Provide training on <u>AR 27-3</u> , <u>AR 27-26</u> , and local legal assistance policies.
1-4g(11)	Use a "total Army approach" in providing legal assistance during war and national emergencies
2-2a(7)	Supervise attorneys qualified under foreign law to provide legal assistance outside the United States.
2-2b(4)	Perform the initial certification of legal assistance work for retirement points. (RC supervising attorney and Chief, Legal Assistance Division, only)
2-4c	Use RC judge advocates to provide legal assistance.
3-6i(2)	Supervise all tax services on the installation except those provided by commercial tax preparers.
3-7h(4)	Monitor referrals to determine the need, if any, for additional training, or for the need to discontinue or consolidate legal assistance programs.
3-8a & 1-4g(3)	Authorize, when appropriate in a particular case, legal advice on a matter outside the scope of legal assistance.

AR 27-3  
PARAGRAPH NUMBERS

RESPONSIBILITIES

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- 3-8a(3)(b) Request TJAG approval before authorizing in-court representation in a civil lawsuit arising from a legal assistance case in which the United States has an interest.
- 4-3e Provide clear guidance to all volunteers on the need to protect from disclosure all the communications and records protected by the attorney-client privilege.
- 4-7d Take appropriate action on any report received regarding the receipt of any benefit or gratuity relating to the performance of AR 27-3 duties.
- 4-8c Review all office administrative activities and procedures and, as appropriate, incoming and outgoing legal assistance correspondence.
- 4-9b Establish procedures to screen clients to avoid inadvertent conflicts of interest; to provide full explanations to, and referral procedures for, clients who cannot be assisted because of a conflict of interest; and to protect the confidentiality of attorney-client communications.
- 4-9c Provide guidance on domestic relation cases and issues involving imputed disqualification, and, when appropriate, authorize exceptions to the policy in accordance with AR 27-3 procedures.
- 5-1c Establish procedures to dispose of temporary client files and determine what other matters are filed, saved for future reference, or destroyed.

Relating to Client Services

- 1-4g(2), 3-5c & 3-6g(1) Determine the limitations, if any, to impose on cases and services in which legal assistance is "optional"--that is, when legal assistance may be declined because available resources, personnel, or expertise are insufficient to provide the assistance needed.
- 1-5 & 2-6 Request authority, when necessary, from or through the commander responsible for legal assistance services, to limit or deny legal assistance to certain clients or categories of clients, or to limit legal assistance to certain types of cases or certain types of services.
- 2-5a(2)(b) Determine the limitations, if any, to impose on the legal assistance provided to--  
--RC members who are on active duty for periods of 29 days or less.  
2-5a(3) --RC members by RC attorneys (RC supervising attorneys only).  
2-5a(7) & glossary --DA civilian employees designated as "mission essential" or "emergency essential." (The former are so designated by the SJA.)
- 3-7f(2)(a) Determine whether to authorize pro se assistance and, if so, whether to do so on a case-by-case basis or for certain categories of cases.
- 3-7g(1)(a) & (3) Determine whether to authorize in-court representation and, if so, whether to do so on a case-by-case basis or for certain categories of cases. If authorized, also determine whether a client satisfies the financial hardship test on a case-by-case basis. (RC judge advocates not on active duty also must receive approval from the Chief, Army Legal Assistance Division.)

APPENDIX B

LEGAL ASSISTANCE CASES AND SERVICES

<u>CASE CATEGORY</u>	<u>REQUIRED</u>	<u>OPTIONAL</u>	<u>OUTSIDE THE SCOPE OF LEGAL ASSISTANCE</u>
Family law	Marriage Legal separation Annulment Divorce Financial nonsupport Paternity Child custody	Adoption	
Estates	Wills Testamentary trusts for minors Guardianships Designations of life in surance and SGLI bene ficiaries Health care directives -Living wills -Powers of attorneys -Anatomical gift designations	<u>Inter vivos trusts</u>	
Real property	Lease issues and disputes on principal residence	Purchase and sale of principal residence	Private business activities
Personal property	All consumer affairs issues	Sale or leasing of client's property	
Economic	Bankruptcy Debtors on loans Banking problems Credit cards Insurance SSCRA VRRL	Creditors on loans	Government and civil- ian employment -Hiring -Adverse personnel actions -Unemployment benefits -Workers' compensation
Civilian administrative	Notarizations	Name changes Immigration Naturalization Welfare assistance Civilian driving privileges	
Military administrative	Line of duty Reports of survey OERs/NCOERs Reliefs for cause Memoranda of reprimand Article 138 complaints IG and other investigations Hardship discharges Compassionate reassignments Corrections of military records	Bars to reenlistment Waivers to allow reenlistment Security clearance revocations on military personnel Suspensions of favorable person- el actions Expungements of military records Physical evaluation boards Flying evaluation boards Quality accreditations for doctors Medical evaluation boards Qualitative Management Program Military driving privileges	USATDS cases -Officer eliminations -Enlisted separations -Reductions in grade -Recruiter misconduct
<u>CASE CATEGORY</u>	<u>REQUIRED</u>	<u>OPTIONAL</u>	<u>OUTSIDE THE SCOPE OF LEGAL ASSISTANCE</u>

Torts	Invoking SSCRA protections		Contingent legal fee cases Litigation against the United States
Taxes	Real estate Personal property Federal income State income	Electronic filing of income tax returns Inheritance taxes Estate taxes Gift taxes Appealing tax rulings	Private business activities
Civilian criminal matters	No requirements	In-court representation before U.S. Magistrate on a military installation	All other in-court representation
<u>SERVICE CATEGORY</u>	<u>REQUIRED</u>	<u>OPTIONAL</u>	<u>OUTSIDE THE SCOPE OF LEGAL ASSISTANCE</u>
Ministerial services	Witnessing signatures Notarizations		
Legal counseling	Whenever necessary in required cases		
Legal correspondence	Whenever necessary in required cases		
Legal negotiation	Whenever necessary in required cases		
Legal document preparation	Whenever necessary in required cases	Prenuptial agreements Separation agreements <u>Inter vivos</u> trusts	
Legal document filing	No requirements	Electronic filing of income tax returns <u>Pro se</u> assistance	<u>Pro se</u> assistance not authorized by a supervising attorney
In-court representation authorized	No requirements		In-court representation not authorized by a supervising attorney
Legal referral	Whenever necessary or appropriate in required or optional cases		
Providing a 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



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ARMY LEGAL ASSISTANCE: UPDATE, INITIATIVES, AND FUTURE  
CHALLENGES

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Opinions and conclusions in articles published in the Army Lawyer are solely  
those of the authors. They do not necessarily reflect the views of the Judge  
Advocate General, the Department of the Army, or any other government agency.

Introduction<sup>1</sup>

The Legal Assistance Division, Office of The Judge Advocate General (OTJAG), is now the proponent for three Army regulations, all of which have been revised during the past two years. Army Regulation 27-3, The Army Legal Assistance Program,<sup>2</sup> which contains Army policy on legal assistance services, was revised in 1995 to update the complete 1992 revision of Army Regulation 27-3.<sup>3</sup> Also, Army Regulation 27-55, Notarial Services,<sup>4</sup> another legal assistance regulation, was completely revised in 1994, and contains Army policy on notarial services in the Army. Finally, Army Regulation 608-99, Family Support, Child Custody, and Paternity,<sup>5</sup> formerly a personnel regulation under The Adjutant General (TAG) as the proponent agency, was completely revised during 1994. Army Regulation 608-99, contains Army policy governing the financial support of family members, child custody, and paternity.

In addition to discussing the more significant changes made to these regulations, this article also addresses Army legal assistance statistics and surveys, joint legal assistance efforts, Army tax assistance services, some recent changes in the law and other regulations affecting legal assistance services, and future challenges for the Army legal assistance program.



## Legal Assistance Statistics

Before looking at the future, it might be useful to examine Army legal assistance statistics collected over the past five calendar years by the Legal Assistance Division, OTJAG.<sup>6</sup> A lot of time and effort is devoted to collecting and reporting legal assistance data throughout the Army. However, prior to the 1992 revision of Army Regulation 27-3, the collected statistics were of little value. The 1992 revision of Army Regulation 27-3 modified DA Form 4944-R, Report on Legal Assistance Services, to create a new procedure for recording legal assistance statistics that makes the information more meaningful.

Before the 1992 revision, the reports reflected the number of "visits" made by clients as opposed to the number of cases handled for clients; therefore, each time a client was assisted in a single matter, the statistics reflected an additional case. The more visits that clients had to make to get their legal problems resolved, the higher the number of total clients assisted, as well as the number of clients for those categories of cases. The only numbers from the old reports that presumably were not exaggerated by this practice were the personnel staffing statistics and document preparation statistics. Those numbers, therefore, are used in this article and are compared to similar data collected from the new reports.

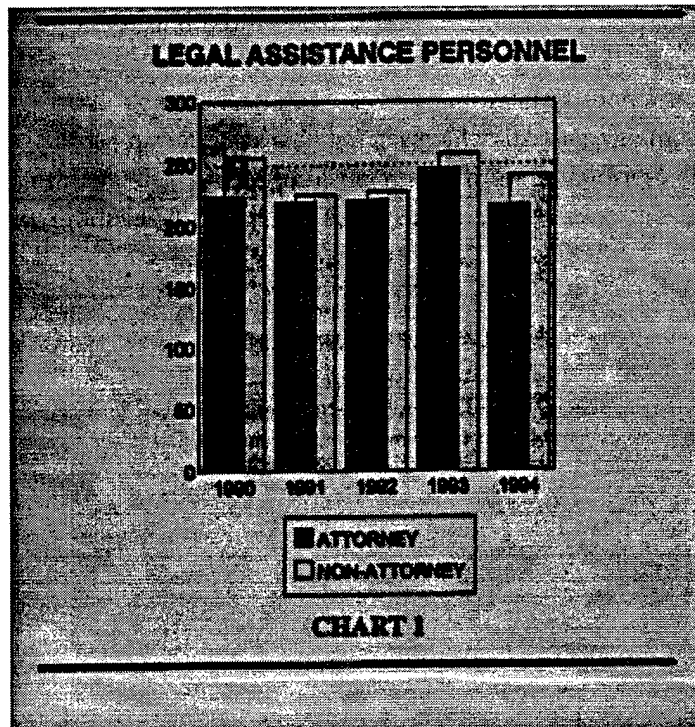
Another problem with the old report was the category breakdown depicting the type of visit. For example, the old form combined adoption cases with child custody cases. The revised form separates adoption and child custody cases and provides data on the category of client assisted, type of case involved, and type of legal service provided. The new guidance provided in Army Regulation 27-3<sup>7</sup> facilitates the collection of more meaningful data that can be used to determine legal assistance training and automation requirements and the allocation of judge advocate resources to better meet client needs.

In addition to the statistics collected by OTJAG, the Army Personnel Survey Office (APSO), United States Army Research Institute for the Social Sciences (ARI), conducts the Survey of Military Personnel (SMP) and the Survey of Army Family Members (SFM). The questions asked in those surveys include questions submitted by OTJAG on the use of, and client satisfaction with, legal assistance services. Results from the 1994 survey were published in *The Army Lawyer*.<sup>8</sup> The results from the 1995 survey are included in this article with the meaningful data compiled from DA Forms 4944-R submitted throughout the Army over the past five calendar years.

## Legal Assistance Personnel

Legal assistance personnel include all attorneys, paralegals, and administrative and clerical staff providing legal assistance on a full or part-time basis.<sup>9</sup> As of 1 July 1995, 1890 military and civilian attorneys were under the administrative supervision of The Judge

Advocate General (TJAG).<sup>10</sup> Of these attorneys, 11.5% provided legal assistance on a full time basis.<sup>11</sup> Chart 1 below shows the number of full-time legal assistance attorneys and nonattorneys for the past five calendar years (1990-1994).<sup>12</sup>

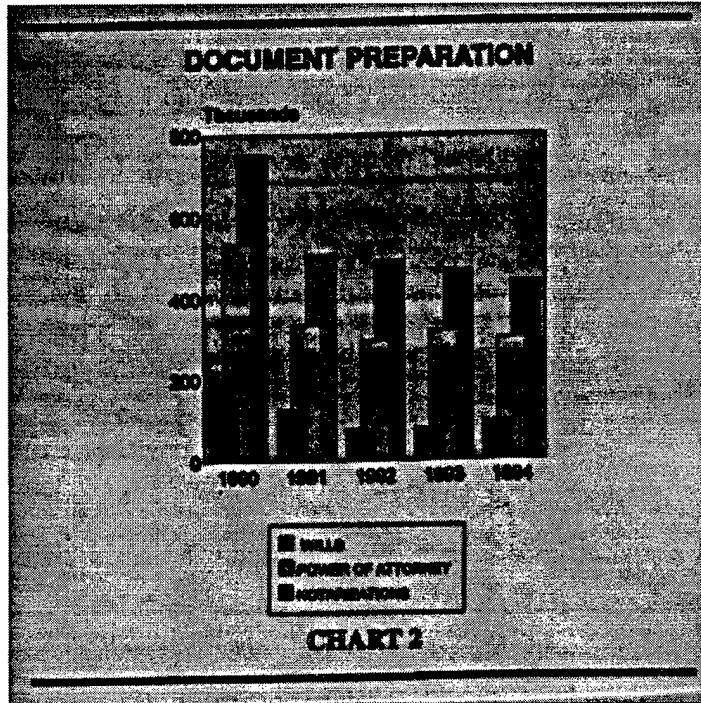


As Chart 1 shows, the number of attorneys providing full-time legal assistance ranged from 217 to 246 over this five year period. During the same period, between 226 and 256 nonattorneys provided full-time support to legal assistance attorneys.<sup>13</sup> One of the surprises in reviewing these statistics is the fact that the number of full-time legal assistance attorneys and nonattorneys has remained fairly constant despite the large downsizing of the Army and The Judge Advocate General's Corps during this period. This may be attributed to a gradual shifting of personnel from military justice to legal assistance duties as the number of court-martial cases tried in the Army continues to decline.<sup>14</sup>

It is apparent, however, that the demand for legal assistance services has remained fairly constant although the number of eligible clients continues to decline. One reason for this is that legal assistance offices are able to handle more legal problems for clients as the number of eligible clients declines. Another reason is that the decline in eligible clients is not proportionate to the downsizing within the active Army because military retirees continue to be eligible for legal assistance services. Finally, as discussed later, more and more Air Force, and to a lesser extent, Navy active duty and retired service members and their families are seeking legal assistance services from Army legal offices.<sup>15</sup>

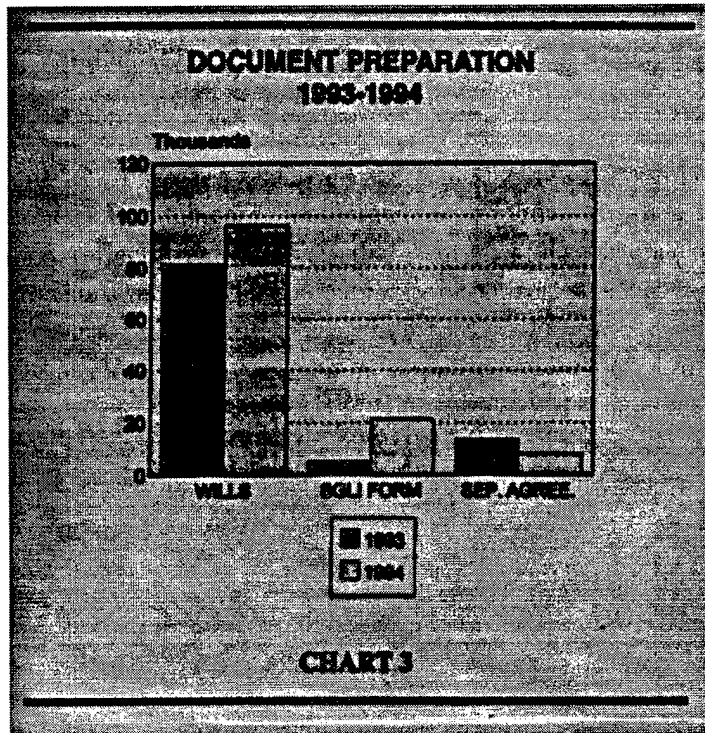
## Document Preparation

Legal document preparation is an integral part of the services provided by legal assistance offices. Almost every type of case involves some form of document preparation. The legal documents most frequently prepared include powers of attorney, wills, Servicemen's Group Life Insurance (SGLI) forms, and separation agreements. Chart 2 below shows the number of wills and powers of attorney prepared over a five year period. The number of legal documents notarized by legal assistance attorneys and staff are also shown.



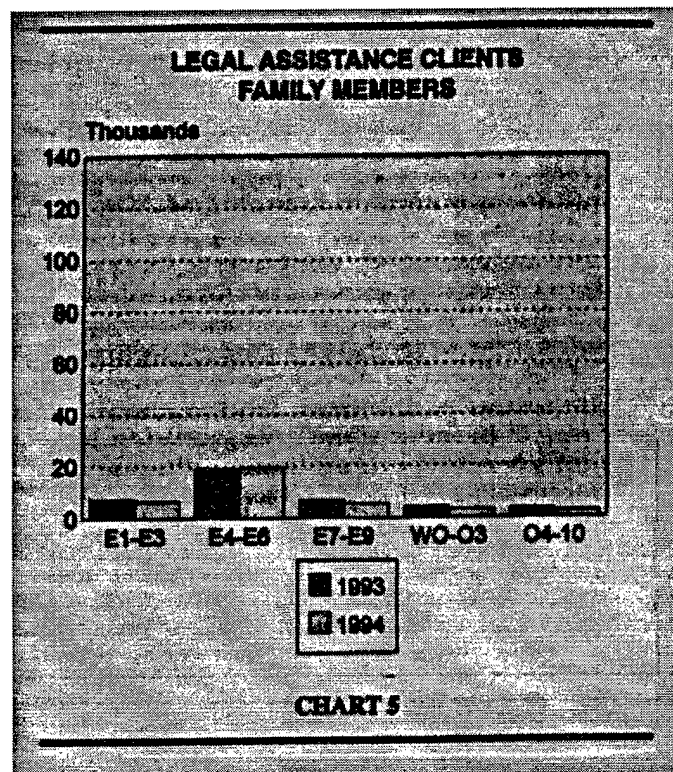
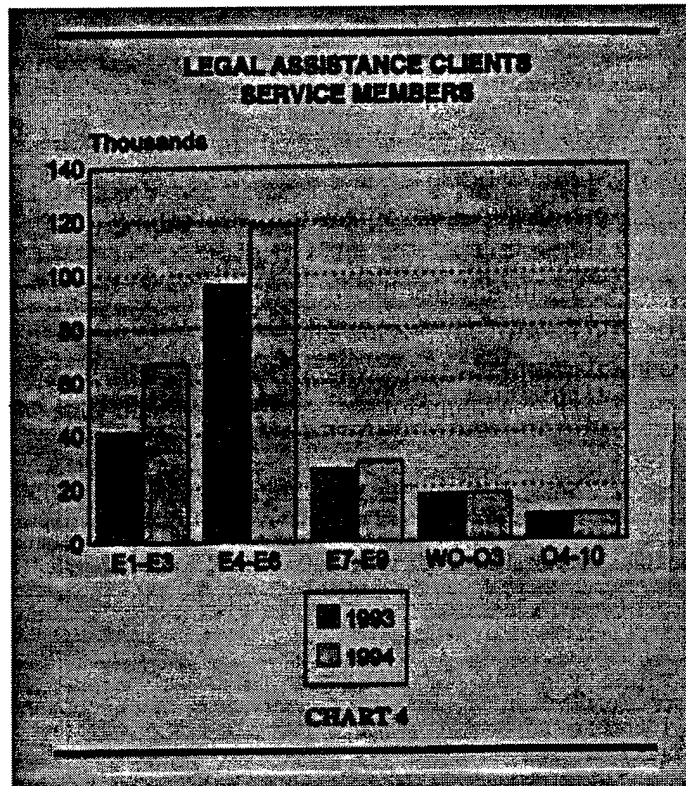
The substantially greater numbers of wills and powers of attorney prepared in 1990 reflect the mobilization and deployment for Operations Desert Shield/Storm. During that year, 537,505 powers of attorney and 224,965 wills were prepared, and 753,878 documents were notarized.

Chart 3 below provides a comparison of the number of wills, SGLI forms, and separation agreements prepared over the last two years.



Legal Assistance Clients by Rank and Type of Client

Service members and their family members are eligible to receive legal assistance; however, as Charts 4 and 5 below show, substantially fewer family members use legal assistance than service members. Service members are our primary clients because many of them are provided wills and powers of attorney during readiness exercises and deployments. They also are more likely to be aware of the services offered by the legal assistance program, and to be referred to legal assistance by officers and non-commissioned officers in their chain of command. Service members are physically closer to the Army lawyers who serve them and, by virtue of their military service, encounter more military related legal problems than their family members. It is possible, however, that the comparatively smaller number of family members using legal assistance may also indicate a need to better inform family members of available legal assistance services.

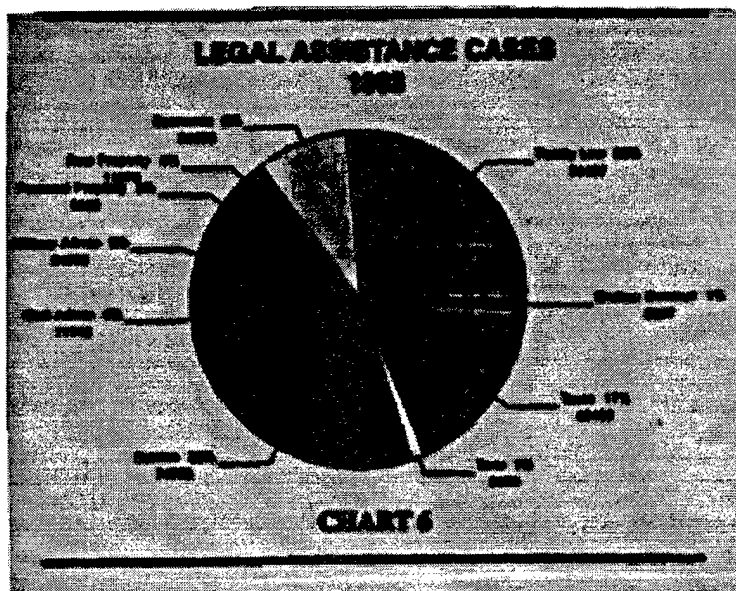


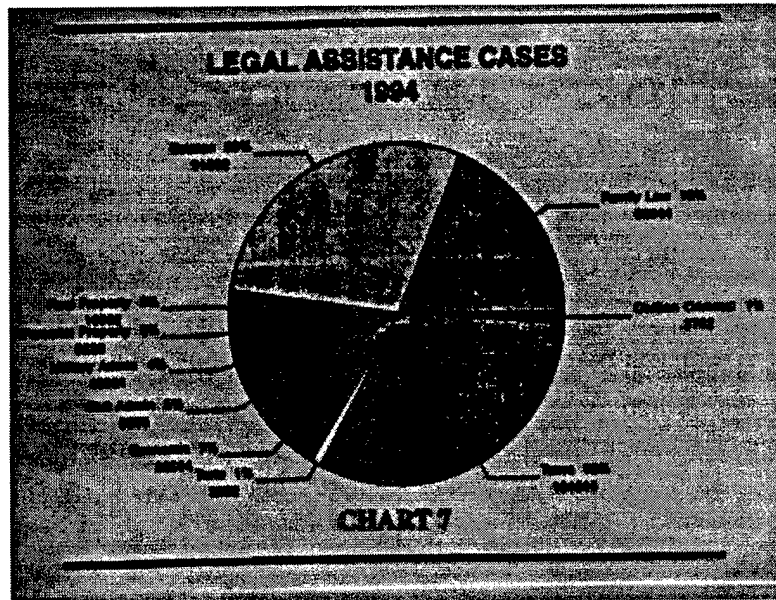
As Charts 4 and 5 indicate, the largest group of family members and service members using legal assistance in 1993 and 1994 were in the pay grade E4 through E6 (38,223 family members and 214,483 service members). These statistics reflect the greater number of E4 through E6s in the Army and the fact that they are generally of an age group more likely to have legal problems and require assistance.

Another interesting trend depicted by the charts is the overall increase in clients in 1994. All rank categories showed an increase in legal assistance use despite the continued military cutbacks. Family members showed a slight decrease in all categories, except those whose sponsors were in pay grades E-4 through E-6.

### Legal Assistance by Type of Case

Charts 6 and 7 below break down the type of legal assistance cases handled by Army lawyers during 1993 and 1994, respectively. The charts reflect the numbers compiled from the second page of the DA Forms 4944-R submitted by Army commands worldwide. The charts reflect the ten major categories recorded by DA Forms 4944-R.





The number of cases reflected on these charts between years is less significant than the percentages noted because of the transition to the Legal Automated Army Wide System-Legal Assistance (LAAWS-LA) method of tabulating legal assistance cases began in 1993 following the 1992 revision of Army Regulation 27-3. The cases reported in any one year include only legal assistance cases not previously reported in a prior year.<sup>16</sup> However, because all cases reported during 1993 were new cases to the new LAAWS-LA reporting system, the 1993 reported cases also included old cases from 1992 and earlier in which legal assistance services continued to be provided. The 1994 report included only cases that arose during 1994. The number of cases reported during 1995 and the following years will be more indicative of any trends that may develop in the number and type of cases reported.

Charts 6 and 7, however, reveal more accurately than in the past that estates (such as, wills, casualty assistance), family law, and taxes<sup>17</sup> are the three major areas of legal assistance practice in the Army. During 1994, these three areas constituted 80% of all legal assistance cases handled in the Army. Following far behind in fourth place are economic cases (such as, bankruptcy, debts), constituting only 7% of the legal assistance cases in 1994. The remaining 13% of legal assistance cases were split fairly evenly among military administrative, real property, civil administrative (such as, citizenship, name change), personal property, and torts.

As legal assistance attorneys well know, the number of cases handled in a particular area of the law does not necessarily reflect the amount of time and effort devoted by attorneys and staff. One might expect, at least in the Army, that much more time may be devoted to handling the needs and problems of a client in a typical family law case than in the usual estate case where often only a simple will is drafted and executed during the course of one or two visits. With more sophisticated automation programs, the Army soon will begin to record how much time is spent on handling each type of legal assistance case.<sup>18</sup>



## Survey of Family Members

The 1995 Survey of Army family members included questions that measured Army spouses<sup>19</sup> use of legal assistance and their satisfaction with legal assistance services. The survey, which was conducted in late 1994, drew samples from approximately 24% of married officers and 9% of married enlisted personnel.<sup>20</sup>

Unlike the 1994 survey of soldiers, ARI only allocated a limited number of questions on legal assistance services for inclusion in its survey of Army families. Nevertheless, the limited data obtained reflects favorably on the Army legal assistance program, and the Army lawyers and the staff members responsible for client services.

Army spouses were asked about their use and satisfaction with the Army legal assistance program. Of those surveyed, 38.9% answered that they "used" the Army legal assistance program during the last two years. Of those who used the legal assistance program, 78.9% indicated that they were either satisfied or very satisfied with the legal services they received.<sup>21</sup>

Army spouses were also surveyed as to their readiness to handle family responsibilities in the event their spouses were deployed or other emergency- type situations arose. Of those spouses surveyed, 72% answered that they held a power of attorney for their soldier spouse and 6.3% stated that someone else held a power of attorney for their soldier spouse. However, 49.5% of the spouses stated that they had the equivalent of two weeks pay on hand or in savings in case of an emergency. The absence of cash on hand foretells the type of legal problems that may arise when soldiers deploy or other emergencies arise.<sup>22</sup>

Finally, Army spouses were surveyed on whether they and their spouses had "current, up-to-date last wills and testaments." According to the survey, 67.2% of married soldiers, and 31.3% of their spouses have current, up-to-date wills. As indicated elsewhere in this article,<sup>23</sup> legal assistance will drafting efforts primarily should be targeted at married soldiers, particularly those with children.<sup>24</sup>

The Army legal assistance statistics compiled from the annual submission of the DA Forms 4944-R by Army installations, and the periodic surveys of soldiers and their family members, illustrate the accomplishments of Army legal assistance over the past several years. More importantly, this data provides a basis to chart the future direction of the Army legal assistance program.

## Joint Legal Assistance Efforts

Smaller defense budgets dictate that Army judge advocates make more efficient use of their limited legal resources in meeting the competing demands for all legal services. As the United States Armed Forces continue to decrease in size, the continued growth and development of legal assistance services within the military will depend more and more on



exploiting all available opportunities for joint cooperation. To this end, joint legal assistance offices should be developed where the military bases of different services are collocated. Also, computer software programs for producing legal assistance documents, such as wills and separation agreements, and for compiling client databases and legal assistance statistics, should be jointly procured or developed. Finally, efforts to expand joint legal assistance training should continue. In this regard, it is heartening to observe that the majority of students attending the biannual legal assistance courses at The Judge Advocate General's School, United States Army (TJAGSA), in Charlottesville, Virginia, are from military services other than the Army.

### The Pentagon Legal Assistance Office

In an effort to conserve money, manpower, and space, a memorandum of agreement (MOA) was negotiated among the Departments of Army, Navy, and Air Force establishing the Pentagon Legal Assistance Office (PLAO) on 22 March 1994. The PLAO is a jointly operated office providing legal assistance primarily to active duty and retired military personnel and their families assigned for duty, or employed by the military, in the Pentagon and at nearby locations lacking on-site legal assistance services. The PLAO also provides all legal assistance services authorized by applicable military department regulations to all persons eligible for legal assistance under those regulations.

The governing MOA requires each of the participating departments to provide one judge advocate and one paralegal. The senior officer assigned, according to the MOA, is the PLAO officer-in-charge, but it is understood that the responsibility for filling the officer-in-charge position is to be rotated among the military departments on an annual basis. Two Air Force majors filled this position in succession until the summer of 1994 when an Army major took over. Although not required by the MOA, the Army has also assigned a noncommissioned officer to serve as the noncommissioned officer-in-charge of the PLAO.

The PLAO has been an unqualified success to date. It has also been a laboratory to share ideas among the military services on how best to provide legal assistance services to clients. All attorneys assigned to the PLAO found themselves providing assistance on separation agreements, which has primarily been an area that only Army lawyers handled, but lately, Navy lawyers have begun to handle as well.

Also, all assigned attorneys decided that the commercial program used by the Navy and Air Force to draft wills was superior to the wills program used by the Army. As a result, the LAAWSLA is used only to compile statistics, as required by the MOA. The data in support of these statistics primarily are entered by individual clients through use of a "user friendly" client operated computer located in the PLAO waiting room. Efforts to provide the program supporting this client operated computer to all Army legal assistance offices continue, but unfortunately this is not a high priority item on the list of JAG Corps automation goals.

## Joint Service Committee on Legal Assistance

On 27 April 1995, the Staff Judge Advocate to the Commandant of the Marine Corps, the Chief Counsel of the Coast Guard, and the Judge Advocate Generals of the Army, Navy, and Air Force, formally established the Joint Service Committee on Legal Assistance (JSCLA). The chiefs of legal assistance for each of the military departments are appointed as members of this committee. Pursuant to the committee charter, the JSCLA will identify areas where joint efforts may improve the availability and quality of legal assistance to service members and their families on their personal legal problems and needs. The members of the JSCLA will also work closely together to develop and procure legal assistance software for drafting wills and other legal documents, and will encourage commands and installations closely located to each other to develop cooperative arrangements on the delivery of legal assistance services in their localities.

Although it is not envisioned that jointly operated legal assistance offices like the PLA0 will be established at other military installations, greater communication and cooperation among collocated installations of different military departments could improve legal assistance services.

### Joint Legal Assistance Study

The Army recently completed a thorough study examining Army legal assistance services provided to clients affiliated with other military departments. The study also looked at the extent to which soldiers and their families receive legal assistance services from nonArmy military installations. The study was designed to identify geographical sites where joint legal assistance offices or efforts will improve client services and make more efficient use of limited legal resources.

The study concluded that a large percentage of Army legal assistance clients include Air Force service members and their families, both active duty and retired. Thirty-nine of fifty-seven Army installations reported that over 5% of their clients were nonArmy clients and listed Air Force members, both active duty and retired, and their families as their primary nonArmy clients.

This study provided the impetus for the Army proposal to create the JSCLA, and to begin negotiations on the wording of its charter. The Army's initial proposal for the wording of the JSCLA charter generally reflected Army legal assistance policy as stated in the 1992 publication of Army Regulation 27-3<sup>25</sup>--specifically, that no eligible legal assistance client seeking help should be turned away because of his or her military service or installation affiliation. Except for the Air Force, all the military departments, including the Coast Guard, agreed with the proposed wording. The Air Force disagreed based on the unique policies and methodology followed by the Air Force in providing legal assistance services.<sup>26</sup>

The Air Force views legal assistance as an extra duty for almost all lawyers assigned to Air Force legal offices. Although procedures vary from office to office, generally legal assistance is provided only one to three hours a day, two to three days per week. No full-time legal assistance attorneys are available.<sup>27</sup> Generally, Air Force legal assistance is limited to wills, powers of attorney, and notarial services. Although legal assistance on other matters varies from legal office to legal office and from attorney to attorney, the general scope of legal assistance services is significantly less than that provided by other military services. Finally, the Air Force generally restricts its legal assistance services to Air Force service members and their families only,<sup>28</sup> and often imposes additional limitations on providing legal assistance to its military retirees and their family members. Not surprisingly, a large number of Air Force service members, both active duty and retired, and their family members seek legal assistance from Army legal offices--often as a result of "referrals" from Air Force lawyers. Army legal offices have continued to provide legal assistance to Air Force and other service members,<sup>29</sup> although Army Regulation 27-3 permits commanders to limit or deny legal assistance to nonArmy clients where it adversely affects the scope or quality of legal assistance provided to Army clients.

One Army staff judge advocate (SJA) reported that he discontinued help to Army clients on separation agreements because of the large number of nonArmy clients seeking assistance on separation agreements. Although Army Regulation 27-3 then authorized limiting help on separation agreements to non Army clients in such cases,<sup>30</sup> this was not the local policy adopted to solve this problem. As a result of such reports, and the Army study, Army Regulation 27-3 was modified to provide SJAs greater authority, and encouragement, to adopt local legal assistance policies that strive toward joint cooperation with the other military services, but without adversely affecting the quality and scope of legal assistance services to Army clients.<sup>31</sup>

To achieve consensus on the charter establishing the JSCLA, the Army and the other military services agreed to accommodate the Air Force in deleting the proposed nondiscrimination policy from the draft charter. With that change, the proposed charter was quickly signed by the TJAG or chief legal officer of each of the five military services. The first meeting of the JSCLA occurred on 21 July 1995, at which time all participants agreed that a joint approach in procuring legal assistance computer software needed to be adopted.

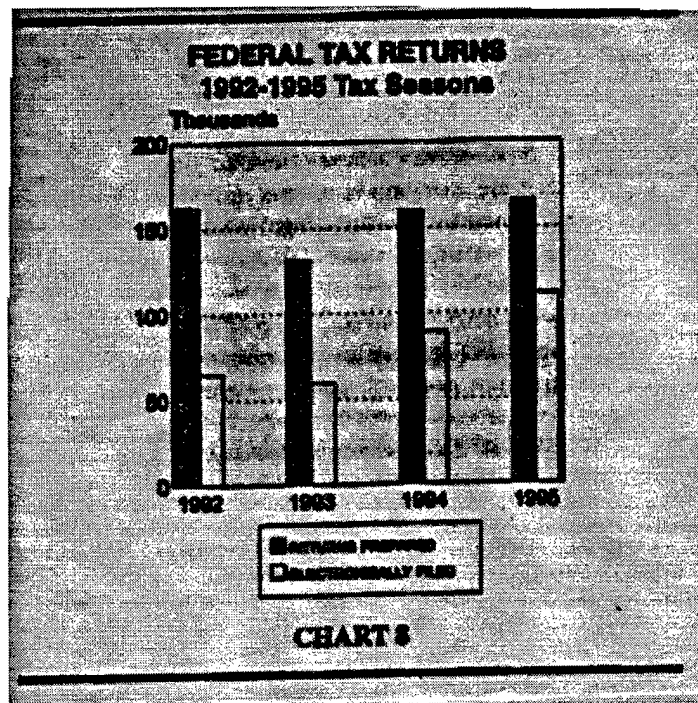
The JSCLA is an important first step in expanding joint cooperation in legal assistance. The joint legal assistance study helped identify similarities as well as differences among the various military services in providing legal assistance. The important thing is that the lines of communication among the military services have been opened. As a result of increased communication, legal assistance policies are changing in several important areas. The establishment of the PLAO, joint legal assistance training at TJAGSA, and possible joint efforts of collocated field offices are the top areas of concern. Also, the Navy, following the lead of the Army and the Marine Corps, is now encouraging its attorneys to prepare separation agreements, and both the Navy and the Air Force, following the Army's lead, are more active than ever before in providing tax assistance services to their service members.

As the various military services' legal assistance policies change, each of the military services should be better prepared to capitalize on future opportunities for cooperation.

### Tax Assistance Services

#### Electronic Tax Filing

The Army has had great success in providing free electronic filing of federal income tax returns. Assistance with the preparation of personal income tax returns has been one of the most popular services provided by Army legal assistance personnel to soldiers, retirees, and their family members. Chart 8 below indicates the trend in the increasing numbers of returns electronically filed from 1992 to 1995. The only year in which the number of returns electronically filed did not increase was 1993, but the number filed in that year was not a significant decrease from the previous year.



Although these numbers reflect only federal returns filed, some installations also offer electronic filing for state returns. Electronic filing for state income tax returns depends on several factors, most notably whether the state requires the filing of an income tax return and whether the state has approved the use of electronic filing for its tax returns. Therefore, this service is not available at all Army installations.

Interest by SJAs and commanders in the availability of electronic filing for the military community has increased dramatically over the last several years. Many commanders see this service as something "positive" provided to everyone. Additionally, no stigma attaches

"going to JAG" for help on taxes because of the requirement for virtually all soldiers to file a federal income tax return regardless of rank or location. Many commanders regard this free service as part of the effort to enhance the morale of the military community.

The Legal Assistance Division, OTJAG, does not mandate that each legal assistance office provide electronic filing for income tax returns. This service, as well as other legal assistance services, is offered by legal assistance personnel according to available resources. For electronic filing, this most often means financial and personnel resources at the installation level. Without Department of the Army (DA) level funding to support electronic filing, each installation must purchase software.<sup>32</sup> Some installations found that the "tax program"<sup>33</sup> was the first to go when money became tight, especially if the money came directly out of the SJA office budget. Other installations found that the needed automation support to run the software programs was not available.

To make electronic filing software more available, the Legal Assistance Division began a concerted effort to explore the possibilities of an Army-wide contract for the software. After some investigation--and frustration--in this effort, an alternative solution was discovered: ask the Internal Revenue Service (IRS) to help the Army with this problem. The IRS is very interested in expanding the number of taxpayers who use electronic filing. Each year, the IRS assists the military services by providing Volunteer Income Tax Assistance (VITA) classes taught by IRS instructors throughout the United States and overseas.

The Army proposal originally presented to representatives of the IRS, was to have the IRS provide software for installations located outside the United States. In presenting this proposal, the Army was eventually joined by representatives from the Navy and Air Force Legal Assistance Divisions. The data compiled from the Army's After Action Report on Tax Assistance<sup>34</sup> was the most convincing evidence used to demonstrate the sincerity of the Army's efforts regarding its assistance to soldiers on electronic filing. This report, which reflected all annual statistics reported to the Legal Assistance Division by legal assistance offices providing income tax assistance, showed how many VITA classes were conducted, how many federal "paper" returns were filed, how many federal returns were filed electronically, and how many people were involved in the effort to provide this service. Ultimately, the IRS agreed to provide the software at no cost to the military services through a contract the IRS uses to provide software to IRS offices worldwide. Although the Navy and Air Force requested a limited number of copies for use at selected sites outside the United States, every Army legal assistance office outside the United States was given the opportunity to receive the free software package. Almost every office seized the opportunity.

With the expanded availability of the program, Army legal assistance offices filed more returns electronically than ever before as shown in Chart 8. The results of the 1995 tax filing season were provided to the IRS as part of an expanded Army proposal to furnish software packages worldwide to all military installations, both in and outside the United States for the 1996 tax filing season. After meetings involving IRS representatives from

several departments and representatives from the Army, Navy, Air Force, and Marine Corps Legal Assistance Divisions, an agreement was reached for the IRS to furnish software packages to all the military services, including the Coast Guard. Military service representatives were given the opportunity to present contract requirements to the IRS to ensure that the special needs of the military tax assistors were met. One suggestion, which the IRS adopted, was to use a multi year contract to maintain continuity with a vendor for several years. This also helps personnel who transfer from one legal assistance office to another by having the same software available throughout the military. With this agreement, Army legal assistance offices worldwide were afforded the opportunity to participate in receiving the software free from the IRS. As before, almost every office requested the software.

At the time of the submission of this article for publication, the contract has not been signed, the bids have been received and are pending evaluation. Because of this initiative, many installations will be able to participate in electronic filing of federal tax returns without worrying about paying for the software.

#### Tax Forms

Many legal assistance offices face the annual problem of obtaining federal and state tax forms to serve the needs of their military community. For legal assistance offices located in the United States, the most frequently used system to obtain federal income tax forms is the Bank, Post Office, and Library Program (BPOL Program) offered by the IRS.<sup>35</sup> The BPOL Program has certain "plans" which have a predetermined number and variety of tax forms. One can supplement the plans by ordering other tax forms. The BPOL Program plans do not routinely include tax forms necessary for taxpayers who have lived outside the United States for part of the tax year and they must be ordered from the supplemental list.

In the past, legal assistance offices located outside the United States faced major problems in obtaining federal income tax forms in a timely manner and often used a variety of methods to get the forms.<sup>36</sup> Offices were supposed to use the system established by the Printing and Publications Command whereby a central point of contact in Korea, Europe, and Panama collected data from each office and submitted it to the responsible individual at the Printing and Publications Command for one Army order from the IRS. The order would be filled, transported to a warehouse in Baltimore, Maryland, and then sent by ship to warehouses in Korea, Europe, and Panama for distribution. This system did not work well according to users contacted by the Legal Assistance Division.<sup>37</sup>

To improve the distribution of federal tax forms to legal assistance offices located outside the United States, the Legal Assistance Division proposed that the IRS assist in developing a solution. In 1993, representatives from the IRS and the Legal Assistance Division held meetings to discuss this issue and arrive at a solution. Eventually, they agreed that the best solution would be to use a system in place within the IRS for embassies, State Department offices, and IRS offices located outside the United States.

This program, known appropriately enough as the "Embassy Program," provided that any office would receive any tax form requested on the order form via direct shipping from the supporting IRS service center in Richmond, Virginia. To enroll, a legal assistance office submitted an "original" order to the Legal Assistance Division to coordinate with the IRS to assign that office an account number and have its order entered into the IRS computer. Every September thereafter, an account package would be mailed to the address provided by that office containing the previous year's order, information on how to update the order, and a listing of tax forms from which to select. If for some reason no one in that office responded to the September notice, the office automatically received the order used in the previous year. Unless notified directly, the IRS does not delete an office from this program without prior coordination with the Legal Assistance Division.

Another advantage of the Embassy Program is that the IRS can track shipments for a specific account. If an office has not received a shipment of IRS forms within the normal mailing time, someone from that office can send an inquiry to the IRS Richmond Service Center where a check of the computer records would show the status of the order. If the time from the shipment date to the inquiry is unreasonable, the service center will ship a replacement order for that office.

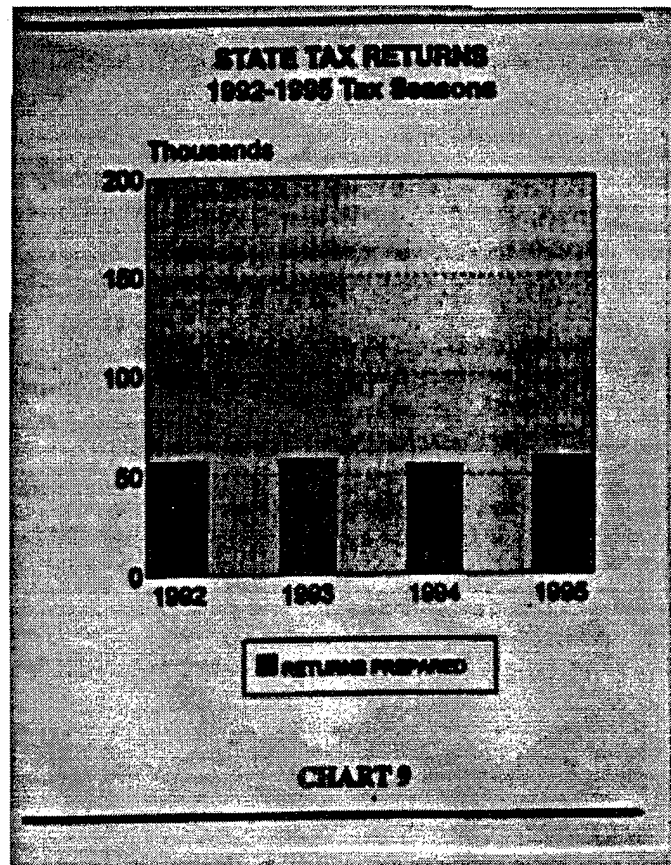
Ordering state tax forms for legal assistance offices is a separate issue not easily resolved. Some offices submit orders directly to each state's taxation department and hope that the orders are filled. Other offices order commercial publications containing state forms and photocopy each form as needed. Still others order the forms for the state in which they are located and any state in the immediate neighboring area if located near the border of that state. Finally, some offices buy commercial software packages containing some or all of the state forms and print the forms using the software program.

The way the IRS is organized is one of the reasons why the Legal Assistance Division could not set up a program similar to the Embassy Program for offices located in the United States. The IRS does not provide a central point of contact for VITA issues, electronic filing, and state tax issues in the United States. State tax issues, of course, are left to the individual states to handle. During meetings with IRS representatives in the late spring of 1995, the possibility of the IRS assisting with obtaining state income tax forms was discussed as part of the electronic filing program. The IRS agreed to explore this issue, although it probably will not be resolved in time for the 1996 tax filing season.

#### After Action Reports

Every year the Legal Assistance Division sends out a message about preparation of the Annual After-Action Report on Tax Assistance Services.<sup>38</sup> The message provides the format for the report, which reflects information about the numbers and types of returns filed and the personnel involved in providing tax assistance services.

These reports are not meant to match the numbers provided for tax assistance on the Report on Legal Assistance Services (DA Form 4944-R), which also is required to be submitted on an annual basis.<sup>39</sup> The After-Action Report focuses on those services provided during a specific time period and whether the legal assistance office is located in or outside the United States. It also reflects assistance provided by personnel other than attorneys.<sup>40</sup> The After-Action Reports, however, require that the returns be broken down into categories by the types of returns prepared and whether the return is a state or federal return. The information in Chart 9 below, which like Chart 8 is based on data from After-Action Reports, reflects the number of state income tax returns prepared from 1992 through 1995.



The After-Action Report provides very useful information to the Legal Assistance Division. This report reflects not only the amount of work done on behalf of eligible clients, but also the amount of effort by the entire military community in providing that assistance. The report also gives SJAs the opportunity to provide important feedback on such items as VITA classes, electronic filing software programs, and the effect, if any, of commercial tax preparers, located on and off the military installation, and on Army tax assistance services. Over the past several years, the data compiled from each report has been very useful during negotiations with the IRS on the number of VITA classes that should be held outside the United States and for obtaining electronic filing software throughout the Army.



## Commercial Tax Preparers

Questions have arisen about the authority of installation commanders to impose conditions beyond those imposed by H&R Block's contract with Army-- Air Force Exchange Service (AAFES). The legal authority to impose conditions on H&R Block beyond those in the contract with AAFES is questionable. Although the Legal Assistance Division encouraged an aggressive preventive law effort, installation legal assistance handouts should emphasize the positive aspects of Army tax assistance services instead of "blasting the competition." Legal assistance attorneys would never do this, at least not so openly, to lawyers in private practice with whom they arguably "compete."<sup>41</sup> Imposing appropriate rules on H&R Block should be part of the contract process. An installation commander who does not like the contract under which H&R Block operates on Army installations should notify AAFES in a timely manner that H&R Block is not going to be granted permission to operate on the installation--period. Doing this during the tax season, or trying to impose additional restrictions as a condition to operating on the installation, is not wise.

At the time of the submission of this article for publication, AAFES had no contract with H&R Block for the 1996 tax filing season. If a contract is not negotiated for the 1996 season, much of the guidance provided above would still apply to legal assistance preventive law efforts for off-post commercial tax preparers.

Of note, however, is the emergence of another commercial tax preparer already present on many installations--financial institutions, such as banks and credit unions. If they are involved in the tax preparation business, it is not under a contract with AAFES. Thus, no money generated by those businesses benefits the installations' morale, welfare, and recreation services like the AAFES contracts. Any legal assistance office located on an installation with financial institutions providing tax preparation services should include that information in the after-action report on tax assistance services and contact the Legal Assistance Division, OTJAG, about the operating rules for those institutions.

### Related Legal Assistance Legislation

#### Military Powers of Attorney--10 U.S.C. § 1044b

A power of attorney is a very useful legal document that allows a person to appoint another to act on his or her behalf about certain matters. Soldiers frequently use powers of attorney to authorize others, often their family members, to handle certain matters in their absence. The need for a power of attorney to handle even service related family tasks allows soldiers to protect their legal rights concerning their property and privacy, particularly when they are absent from home during training exercises, while mobilized or deployed, or while serving on unaccompanied tours. The power of attorney has a more direct relationship with readiness than perhaps any other legal assistance service.

During and following the 1991 Persian Gulf Conflict, legal assistance attorneys became aware that powers of attorney were not always honored because noncompliance with the technical provisions of some state and territorial laws. Puerto Rico was one of the more troublesome jurisdictions. This problem was once again identified in the 1992 Desert Storm Assessment Team Report.<sup>42</sup>

As a result of these problems, the Army Legal Assistance Division proposed federal legislation, that was later enacted, authorizing military powers of attorney.<sup>43</sup> This law exempts powers of attorney prepared on behalf of legal assistance clients "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."<sup>44</sup>

Following passage of this law, the chiefs of legal assistance for the five military services agreed to a common preamble to all powers of attorney prepared on behalf of legal assistance clients throughout the services. The preamble is designed to enhance the acceptance of military powers of attorney throughout the United States by providing a concisely worded description of the law's purpose on the face of each power of attorney. Army Regulation 27-3 implements this agreement and contains the required wording of the preamble.<sup>45</sup>

#### Military Advance Medical Directives--10 U.S.C. § 1044c

Advance medical directives (AMD), also known as directives to physicians, living wills, and health care proxies, allow individuals to control some aspects of their medical treatment, or to direct that it be withdrawn, even if death will occur. The AMDs address the legitimate fears of many individuals that, should they become seriously injured or terminally ill, they may be unable to communicate their wishes about last resort life saving techniques and extreme medical measures under modern medical technology. The AMDs record an individual's wishes about such treatments, and may appoint a proxy if the patient is incapacitated to make decisions on issues that the patient did not anticipate and address in the AMD.

The Army Legal Assistance Division, OTJAG, proposed legislation to federally recognize any AMD prepared for eligible legal assistance clients notwithstanding state laws to the contrary. This proposed legislation is modeled after similar legislation on military powers of attorney.<sup>46</sup> The chiefs of legal assistance for each of the five military services agreed with the Army's legislative proposal, which was also endorsed by the American Bar Association (ABA) Standing Committee on Legal Assistance for Military Personnel (LAMP). The ABA House of Delegates formally endorsed the Army's legislative proposal in August 1994. At the time of the submission of this article for publication, this proposed legislation was pending before Congress as part of the National Defense Authorization Act for Fiscal Year 1996.<sup>47</sup>

The Patient Self-Determination Act (PSDA)<sup>48</sup> requires medical facilities receiving Medicaid and Medicare funds to have procedures for handling patients' AMDs, and to inform patients about their rights to make AMDs under state laws. The PSDA left the substance of the law to the states. The states have adopted different forms and procedural requirements, making it extremely difficult for military lawyers to prepare AMDs for legal assistance clients that will be effective in all jurisdictions. Unlike a testamentary will, an AMD is not governed by the law of the maker's domicile, rather, it is governed by the law of the state where the hospital is located and the AMD is used.

When an AMD prepared in one state is not honored by a hospital in another state, military families may be forced to endure the very pain and suffering they intended to avoid by preparing an AMD. It is important that service members, their spouses, and other persons eligible for military legal assistance be able to rely on their AMDs regardless of where they receive medical treatment.

Military personnel are not alone in this area, but the exigencies of military service greatly compound the problem for them. The problem of AMDs for military personnel is further complicated by the very nature of the military profession. Many military training activities are inherently dangerous. With the exception of police officers and fire fighters, no other category of public servant, as a matter of course, faces death or serious bodily injury as a fundamental part of daily service.

The legislation proposed by the Army, if enacted, will provide federal recognition of AMDs prepared for legal assistance clients, thereby eliminating the requirement for these clients to use the separate forms or formats required by various states. This legislation will allow legal assistance clients to obtain AMDs with the comfort of knowing that their directives, if needed, will be honored. It will also enhance the ability of military lawyers to address the legitimate concerns of their clients who wish to plan for such eventualities, especially during short notice military deployments involving potential hazardous duty. Finally, the proposed legislation will allow hospitals in any state, including military hospitals outside the United States, to honor a patient's wishes as declared in the military AMD.

#### Legal Assistance Regulations

##### Army Regulation 27-55, Notarial Services

Army Regulation 27-55 is a complete revision of the of a joint Army-Air Force regulation.<sup>49</sup> Army Regulation 27-55 outlines the authority of all United States Army military and civilian personnel to administer oaths; to witness affidavits, sworn statements, depositions, and acknowledgments; and to provide other notarial services as part of their official duties. Army Regulation 27-55 applies to members of the United States Army while serving on active duty, and to all members of the United States Army Reserve (USAR) and

the Army National Guard (ARNG) when serving on active duty or performing inactive duty for training (IDT), and to all Department of Army (DA) civilian employees.<sup>50</sup>

The Judge Advocate General is responsible for all policies involving the administering of oaths and the provision of notarial services throughout the Army. The Chief, Legal Assistance Division, OTJAG, has authority to grant exceptions to this regulation.<sup>51</sup>

Army Regulation 27-55 recognizes that federal notarial authority is legally effective for all purposes without geographic limitations. In implementing this authority, Army Regulation 27-55 preempts contrary state law.<sup>52</sup> Army Regulation 27-55 also, for the first time, clearly establishes command and SJA control over, and delineates their responsibilities concerning, notaries acting under federal or state authority.<sup>53</sup>

Federal law provides authority for certain designated individuals in the Army to provide notarial services.<sup>54</sup> Army personnel providing notarial services under federal law are referred to as military notaries throughout Army Regulation 27-55.<sup>55</sup> This authority is separate from, and additional to, that authority provided by state or foreign law. Army personnel performing notarial services by virtue of state or foreign law are referred to as civil notaries throughout Army Regulation 27-55.<sup>56</sup>

There are two types of state laws providing notarial authority to Army personnel. The first type is by statute--without the need for a separately issued notarial commission. The laws of most states authorize certain members of the United States Armed Forces, by virtue of their military grade or position, to provide notarial services within the boundaries of those states.<sup>57</sup> The primary beneficiaries of these state laws usually are the United States Reserve and state national guard units located within the states, although these laws also generally apply to active military units within the states. Army Regulation 27-55 only mentions these state laws in general terms. Nothing in Army Regulation 27-55 limits the application of those laws to Army personnel in any way.

The second type of civil notaries recognized in Army Regulation 27-55 are those who provide notarial services pursuant to state issued notarial commissions.<sup>58</sup> As revised, Army Regulation 27-55 restates the federal prohibition<sup>59</sup> that bars commissioned officers serving on active duty under a call to duty in excess of one hundred and eighty days from accepting commissions as state notaries public.<sup>60</sup> Also, unlike the military instructions of other services, Army Regulation 27-55 authorizes appropriated fund reimbursement for the cost of obtaining state notarial commissions and places some restrictions on who may use of state notarial commissions to perform official duties in the Army.

One of the goals in drafting Army Regulation 27-55 was to make whatever restrictions that applied to military notaries consistent with civil notaries. At the time Army Regulation 27-55 was being drafted, the Legal Assistance Division had a request from United States Army Europe to allow all NCOs, including corporals who were serving as NCOICs of small legal offices, to serve as military notaries. At that time, only soldiers in the grade E-5 and above

could serve as military notaries.<sup>61</sup> At the same time that this request was pending, it was apparent at several Army installations within the United States that legal specialists of all grades were being authorized to obtain state- issued notarial commissions. Certainly, if it made sense to place grade restrictions on military notaries, it made equally good sense to place those same restrictions on civil notaries as well.

Those who possess notarial authority, civil or military, possess awesome power that, if put to the wrong use, could destroy lives and reputations, and empty the bank accounts and pockets of those who might be victimized. A single misuse of notarial authority could greatly discredit the Army and the JAG Corps. Therefore, the Army must ensure that all notaries receive adequate training and supervision so that they perform their notarial duties in strict compliance with the law and without interference from others.<sup>62</sup> However, even more importantly, is the need to ensure that lawyers supervise the many military and civil notaries who notarize, and often draft, the thousands of powers of attorney each year. All too often, these important documents are issued casually, if not carelessly, both in and outside the military.<sup>63</sup>

In light of the foregoing, the decision was made to limit military and civil notaries in the enlisted grades to NCOs, corporals and higher, and warrant officers "who are serving under the immediate supervision of a judge advocate or [DA] civilian attorney employee."<sup>64</sup> Military notaries also include all judge advocates, adjutants, and DA civilian attorney employees.<sup>65</sup> All DA civilian employees in the pay grade GS-4 or higher are authorized to become civil notaries in carrying out their official Army duties.<sup>66</sup> Army Regulation 27-55 provides some flexibility as to the eligibility requirements for civil notaries. Staff judge advocates may request exceptions from the Chief, Legal Assistance Division, OTJAG, to authorize legal specialists who are not NCOs to apply for civil notarial commissions,<sup>67</sup> or to serve as military notaries, based on mission requirements and needs.<sup>68</sup>

Army Regulation 27-55 also provides military and civil notaries regulatory authority to refuse to perform any notarial act when circumstances would diminish the legal efficacy of the notarial act or otherwise violate Army Regulation 27-55. In effect, Army Regulation 27-55 prohibits Army personnel from ordering a military or civil notary to notarize a document that the notary knows or believes to be false or that is unsigned or that is pre or postdated.<sup>69</sup> Finally, the responsible commander or SJA may revoke or suspend the authority of those authorized to provide notarial services for failure to comply with Army Regulation 27-55 or other notarial services laws.<sup>70</sup>

#### Army Regulation 608-99, Family Support, Child Custody, and Paternity

In the past, Army Regulation 608-99 was always a personnel regulation. The Office of The Judge Advocate General assumed proponent responsibility for this regulation in May 1993 as a result of lengthy negotiations between the Chief, Legal Assistance Division, and the Deputy The Adjutant General (Deputy TAG) for the Army. The negotiated conditions

governing the transfer of proponent responsibility from the personnel to the legal community are restated in detail in chapter 1 of Army Regulation 608-99.<sup>71</sup>

The Judge Advocate General decided to assume proponent responsibility for Army Regulation 608-99 because of the importance of the regulation in the day- to-day work of legal assistance attorneys throughout the Army.<sup>72</sup> Also, as had been the case in the early 1980s, the TAG had twice failed to revise the existing version of Army Regulation 608-99.<sup>73</sup> On both occasions, the proposed revisions failed to survive OTJAG legal review. In short, TAG gave up trying and asked TJAG to take over responsibility for Army Regulation 608-99.

The newly revised Army Regulation 608-99 strengthens Army policy over the most common cases handled by legal assistance attorneys in the family law area. The clear cut, unambiguous, and punitive requirements of this regulation save much time and effort on the part of commanders, legal assistance attorneys, SJAs, and inspector general (IG) personnel in responding to financial nonsupport complaints and paternity claims and child custody disputes.

Army Regulation 608-99 continues to require soldiers to obey court orders on paternity claims and financial support to family members.<sup>74</sup> The regulation requires soldiers to comply with an existing court order or with the financial support provisions of a written financial support agreement in the absence of a court order or with the financial support provisions of the regulation in the absence of a court order or agreement.<sup>75</sup> The regulation generally requires soldiers to pay an amount equal to their basic allowance for quarters at the with dependents rate to their family members.<sup>76</sup>

Army Regulation 608-99 generally continues prior Army policy about paternity claims. A male soldier may voluntarily provide financial support to a child born to him out of wedlock. He may also have had his paternity confirmed with a blood test, either voluntarily or in response to court order. He may also have formally or informally acknowledged the child as his own. Regardless of the soldier's past words or deeds, Army Regulation 608-99 does not require him to provide financial support to a child born out of wedlock in the absence of a court order identifying him as the father and directing him to provide financial support.<sup>77</sup> The reason for what some may deem to be a harsh policy, at least from the child's perspective, is that the Army does not have the legal authority to make paternity determinations and order a soldier to support someone who may not be related to him. Such matters are best left to the civilian courts to resolve.

Army Regulation 608-99 continues to require soldiers to obey court orders on child custody. Army Regulation 608-99 prohibits a soldier from wrongfully taking or detaining a child under the age of fourteen years from the child's lawful custodian.<sup>78</sup> The regulation defines a lawful custodian as one who has been granted physical custody of a child by court order.<sup>79</sup> A soldier who has joint custody of a child or who is authorized visitation with the child by court order may still be in violation of Army Regulation 608-99 for wrongfully

taking or detaining the child. Army Regulation 608-99 does not prohibit a soldier from taking or detaining his or her own child from the child's other parent in situations where a court has granted "joint physical custody" to the parents, or where no court order on child custody exists.<sup>80</sup> As with paternity, the punitive provisions of Army Regulation 608-99 do not apply to soldiers wrongfully taking or detaining a child age fourteen or older where no court order exists because the Army has adopted the policy that such cases are best left to the civilian courts to resolve.<sup>81</sup> Army Regulation 608-99 no longer authorizes commanders to order soldiers to provide additional financial support beyond that required by Army Regulation 608-99. This provision<sup>82</sup> of the 1987 regulation was seldom used.

At the insistence of the Army IG, the rules regarding "support in kind" were broadened. Previously, Army Regulation 608-99 allowed a soldier to meet his or her financial support obligation in other than a monthly cash payment only if the supported family member agreed.<sup>83</sup> The reason for this provision was that many soldiers, under previous versions of Army Regulation 608-99, avoided paying financial support to distant family members altogether by just paying off--or by just asserting that they were paying off--family debts. Army Regulation 608-99 now authorizes a soldier in a situation with no court order or financial support agreement to credit payments made toward nongovernment housing expenses if the housing is then occupied by the supported family member.<sup>84</sup> The consent of the supported family member to this arrangement is not required. Housing expenses that can be credited toward the financial support requirements of Army Regulation 608-99 are limited to rent payments or to payments made toward principal, interest, real estate taxes, and property insurance.<sup>85</sup>

The revised Army Regulation 608-99 does not envision a change in the responsibilities or role of installation IGs regarding nonsupport, paternity, or child custody inquiries.<sup>86</sup> An IG's role is critical in many cases involving financial nonsupport inquiries for family members who are geographically separated from the soldiers responsible for their support. This is particularly true in cases where a commander, for whatever reason, does not respond--or responds improperly--to a family's pleas for help. In such instances, there is very little a legal assistance attorney can do, but IGs, given their mission in the Army, are usually successful in obtaining full compliance with Army regulations.

Army Regulation 27-3 discusses the IG's role in enforcing the requirements of Army Regulation 608-99. Army Regulation 27-3 also indicates that legal assistance attorneys should first seek to resolve issues involving the interpretation of Army Regulation 608-99 at the installation level before seeking assistance from the Legal Assistance Division, OTJAG. The pertinent provision provides as follows:

In exceptional cases, after efforts to resolve Army Regulation 608-99 matters with the responsible commander(s) have failed to produce the desired results, attorneys providing legal assistance may contact the appropriate command or installation inspector general, SJA, or other staff officer for help. Staff Judge Advocates may contact the proponent of Army Regulation 608-99 on legal issues involving the interpretation of Army Regulation

608-99 that cannot be resolved locally. Inspector General assistance is provided on financial nonsupport cases pursuant to Army Regulation 20-1, paragraph 6-6a.<sup>87</sup>

As before, Army Regulation 608-99 continues to be a punitive regulation with offenses punishable as a violation of a lawful general regulation under Article 92, Uniform Code of Military Justice.<sup>88</sup> Offenders are subject to the full range of statutory and regulatory sanctions, including trial by courts-martial and nonjudicial punishments.<sup>89</sup> Although there have been very few prosecutions involving Army Regulation 608-99, the punitive nature of the regulation, and the clear and unambiguous requirements of the regulation, have undoubtedly persuaded most soldiers, who might be tempted otherwise, that providing continuous financial support to their family members and obeying all court orders on financial support, child custody and paternity is the best path for those who value their Army careers.

Army Regulation 608-99 also requires all commanders and those on their staffs at every level, before recommending approval of requests for, or extensions of, military assignments outside the United States, to consider whether a soldier's assignment or continued assignment outside the United States will adversely affect the legal rights of others in pending or anticipated court actions against the soldier, or against the soldier's family members, or will result in a repeated or continuing violation of an existing state court order or Army Regulation 608-99. Most importantly, Army Regulation 608-99 provides legal authority for terminating a soldier's military assignment outside the United States, consistent with other military requirements, when the assignment adversely affects the legal rights of others seeking to obtain financial support or child custody, or to establish paternity.<sup>90</sup> The assignment restrictions represent a strengthening of command, SJA, and other staff enforcement of Army Regulation 608-99. In this, as in other areas, Army Regulation 608-99 is particularly effective with soldiers stationed outside the United States, many of whom, for all practical purposes, are beyond the service of process of state courts.<sup>91</sup>

Army Regulation 608-99, for the first time, gives commanders exercising summary courts-martial convening or field grade nonjudicial punishment authority limited power to release soldiers from certain requirements of the regulation.<sup>92</sup> This authority is limited to the following situations, which the appropriate commander, after obtaining legal advice from his or her legal advisor, must find to exist by a preponderance of the evidence:

a. Any Army Regulation 608-99 requirement based on the order of a court without jurisdiction over the soldier.

b. Any BAQ financial support requirement of Army Regulation 608-99:

(1) Where a court having jurisdiction over the parties has issued one or more orders without a financial support requirement.

(2) As to a supported spouse whose income exceeds the military pay of the soldier.



(3) As to a supported spouse who has physically abused the soldier (if substantiated by a finding made by a family advocacy case management team, by a conviction, or by a court restraining order then in effect).

(4) As to any supported family member who is in jail.

(5) As to any supported child in the custody of another who is not the child's lawful custodian.<sup>93</sup>

Army Regulation 608-99 establishes specific responsibilities for battalion commanders regarding soldiers involved in repeated or continuing violations of this regulation. When a second complaint is received, the soldier's immediate commander must forward the complaint to the battalion commander for action.<sup>94</sup> The purpose of this requirement is to ensure that unresolved complaints are not allowed to languish without action or appropriate action by an immediate commander, who perhaps may also be too sympathetic to the plight of the soldier concerned.

Chapter 4 of Army Regulation 608-99 implements Department of Defense Directive 5525.9<sup>95</sup> (DOD Directive) which requires the military services to assist federal and state law enforcement and court officials regarding service members and Department of Defense employees and their family members outside the United States. Army Regulation 608-99, however, only implements this directive where the request for assistance is based on a court order arising from financial support, child custody and visitation, paternity, or related cases.<sup>96</sup> If a soldier or family member has been charged with, or convicted of, a felony, or has been held in contempt for failing to obey a court order, or required to show cause why he or she should not be held in contempt for failing to obey a court order, then Army Regulation 608-99 requires the responsible general courts-martial convening authority (GCMCA) to take prompt action<sup>97</sup> in returning the soldier or family member to the United States or taking other measures to resolve the matter locally. The detailed provisions of Army Regulation 608-99 are based on the language of the DOD Directive. The Chief, Legal Assistance Division, OTJAG, plays a large role in resolving these cases to the satisfaction of the courts or the law enforcement officials involved because these cases are closely monitored by the General Counsel, Office of the Secretary of Defense.<sup>98</sup>

Appendix B of Army Regulation 608-99 contains numerous examples applying the requirements of the regulation.<sup>99</sup> Although this appendix was mistakenly entitled "Examples of paternity cases" by the editor, the examples cover most of the requirements of the first three chapters of Army Regulation 608-99.

#### Army Regulation 27-3, The Legal Assistance Program

The changes made to Army Regulation 27-3<sup>100</sup> are highlighted in the text with the new material underlined and the deleted material lined through.<sup>101</sup> As already discussed, Army

Regulation 27-3 provides new guidance to legal assistance attorneys on powers of attorney, and on the new policies on handling family law cases involving Army Regulation 608-99<sup>102</sup> and on those resulting from the joint legal assistance study.<sup>103</sup> As part of the emphasis on joint efforts between the services, Army Regulation 27-3 eliminates most eligibility distinctions between soldiers and other service members for legal assistance services from Army legal offices. It also removes all eligibility distinctions between DOD and DA civilian employees within the United States for legal assistance services in conjunction with their acceptance of employment, or pending deployment, outside of the United States.<sup>104</sup>

As revised, Army Regulation 27-3 mandates a minimum level of legal assistance throughout the Army. In the past, statutes and regulations have made the delivery of legal assistance services an optional program entirely dependent on the availability of personnel and other resources at each Army installation.<sup>105</sup> Army Regulation 27-3 now requires all commanders having one or more attorneys, military or civilian, assigned to their staffs to provide legal assistance in conjunction with mobilization and deployment and, at the very minimum, to assist eligible legal assistance clients seeking help on legal problems or needs to find an Army lawyer, or a lawyer in private practice, who can assist them.<sup>106</sup> This change, for all practical purposes, only describes what conscientious Army lawyers have been doing. By requiring a minimum level of legal assistance throughout the Army, the program is now mandated by regulation, and hence a little safer from budget and personnel reductions in the future.<sup>107</sup>

Army Regulation 27-3 now authorizes Reserve Component judge advocates to earn retirement points for legal assistance work by combining periods of less than two hours in a single day with periods in other days to accumulate the two hours required for the award of a single retirement point.<sup>108</sup> This provision is the outcome of successful discussions over the past two years between the Legal Assistance Division, OTJAG, and the United States Army Reserve Personnel Center (ARPERCEN).<sup>109</sup>

The issue as to whether legal assistance is authorized for DOD contract personnel working outside the United States has arisen from time to time. When the 1992 publication of Army Regulation 27-3 deliberately excluded them as being eligible for legal assistance services,<sup>110</sup> three separate memoranda requesting an exception to authorize legal assistance services for contract personnel were forwarded to the OTJAG. These exceptions pertained to contractors located in Kwajalein, Kuwait, and United States Army Europe. The two requests pertaining to Kwajalein and Kuwait were approved with limitations identical to the language now inserted in Army Regulation 27-3. Action on the United States Army Europe request was delayed pending publication of the revised Army Regulation 27-3. Under Army Regulation 27-3, legal assistance to DOD contractors outside the United States and to their family members who accompany them, if not prohibited by host nation authorities, is limited to notarial services, legal counseling, review and discussion of legal documents, the drafting of powers of attorney and AMDs, and assistance on retaining a lawyer in private practice to help them with these and other legal needs.<sup>111</sup>

Army Regulation 27-3 also implements a decision made on 11 February 1993 by then Army Chief of Staff General Gordon R. Sullivan to abolish "by-law" beneficiary designations under the SGLI program.<sup>112</sup> General Sullivan made this decision following a briefing by the Legal Assistance Division, OTJAG, which placed the initiative as an issue to be formally resolved as part of the Chief's Soldier Issue Forum.<sup>113</sup> Army Regulation 27-3 now prohibits both "by-law" and "by-will" designations,<sup>114</sup> and requires Army lawyers to advise and assist soldiers on filling out their Veterans Administration (VA) Forms SGLV-8286, Servicemen's Group Life Insurance Election and Certificate.<sup>115</sup> Army Regulation 27-3 also contains detailed guidance on the various ways in which beneficiaries may be designated on the VA Form SGLV 8286, giving the advantages and disadvantages of each particular method.<sup>116</sup> Finally, Army Regulation 27-3 prohibits the use of "home made" SGLI forms or continuation forms unless specifically approved by the proponent of Army Regulation 600-8-1.<sup>117</sup>

On a related readiness issue, Army Regulation 27-3 also, for the first time, provides criteria for prioritizing the drafting and execution of wills during mobilizations and deployments.<sup>118</sup> Like the prohibition of "by-law" SGLI beneficiary designations, these requirements are the result of another Operation Desert Shield/Storm lesson learned. Of the two hundred and thirteen soldiers who died in the Persian Gulf, only the survivors of six soldiers found it necessary to introduce their wills in probate proceedings.<sup>119</sup> Equally apparent is the fact that way too much emphasis is placed on the need for every soldier to have a will.<sup>120</sup> This emphasis may benefit the JAG Corps in that it reinforces the need for lawyers in preparing soldiers for mobilization and deployment and is a service that can be easily tabulated--often in large and impressive numbers. However, the overemphasis on wills (and the desire to generate numbers) means that Army lawyers spend most of their time during mobilization and deployment doing wills for the soldiers who need them least, while oversimplifying or deferring until later the more complicated wills for those with children or complicated family situations, or not doing them at all for those with substantial property who may be referred to lawyers in private practice for assistance. Secondly, this means that insufficient attention is paid to the myriad of other legal problems and needs that adversely affect soldier readiness and morale. Areas that might benefit from greater attention include helping mobilizing and deploying soldiers with ongoing child care and custody problems, pending divorces and other legal actions, current legal problems with existing leases and purchase contracts, and SGLI and other life insurance beneficiary designations.

Army Regulation 27-3 provides that during mobilization and deployment, legal assistance resources should be allocated based on need, and that the absence of a will does not make a soldier nondeployable.<sup>121</sup> The regulation cautions that the need for a routine will must be weighed against the needs of other soldiers for other legal services, such as resolving ongoing consumer law problems.<sup>122</sup> As to prioritizing wills, Army Regulation 27-3 provides the following:

When legal resources are limited, the priority for drafting and executing wills should be given to service members to whom 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 nonprobate property) is valued at more than \$10,000 (or 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.<sup>123</sup>

Army Regulation 27-3 also modifies the previous guidance on the eligibility of clients for in-court representation by expanding eligibility for this legal service to all service members, and by relaxing the financial test for determining "financial hardship." The latter is accomplished by eliminating any reference to the financial hardship test that may be used by the state or local government adjoining a particular Army installation.<sup>124</sup>

For the first time, Army Regulation 27-3 provides guidance on detailing Army lawyers who provide legal assistance under the Victim/Witness Assistance Program.<sup>125</sup> Army Regulation 27-3 clarifies that help rendered as a victim/witness liaison is outside the scope of the legal assistance program, and that the attorney-client privilege does not apply to communications between a victim-witness liaison and the victims and witnesses being served under the Victim/Witness Assistance Program. Although there is no inherent conflict of interests in serving as both a legal assistance attorney and a victim witness liaison, there is a conflict of interests when the same person is both a client and a victim and/or witness.<sup>126</sup>

Army Regulation 27-3 also clarifies that providing legal services to persons on private and government employment issues, such as hiring and firing decisions, other adverse personnel actions, discrimination complaints and workers' compensation are outside the scope of the legal assistance program.<sup>127</sup> However, as a change from past legal assistance policy, Army Regulation 27-3 now authorizes legal assistance on tax matters relating to an eligible client's business activities as a family child care (FCC) provider.<sup>128</sup> The policy reason behind this change is that FCC providers, although engaged private business activities and which has traditionally been outside the scope of legal assistance, are heavily regulated by the Army in performing work on Army installations in the very important work of providing child care for soldiers and their families. Also, for the most part, FCC providers are the spouses of soldiers and are eligible for legal assistance and generally file joint income tax returns with their soldier spouses.

Finally, in an effort to further encourage the resolution of conflict of interest cases with minimum expense or inconvenience to clients, a change to Army Regulation 27-3 indicates that referring such clients to other lawyers should not be considered as a last resort."<sup>129</sup> This option, with proper precautions, may be utilized more in the future as the draw down makes legal assistance referrals to lawyers assigned to the United States Army Trial Defense Service (USATDS) or within the Reserve components less viable options than in the past.

#### The Army Chief of Staff Award for Excellence in Legal Assistance

The Army Chief of Staff Award for Excellence in Legal Assistance is an annual award designed to recognize those legal assistance offices providing the highest level of services to eligible clients. The application process is managed entirely by the Legal Assistance Division. The award application is usually sent out to Army legal offices in late spring or early summer. The award application is due to the Legal Assistance Division by 7 March of the following year. The application process is voluntary, with no requirement for any office to apply for the award.<sup>130</sup>

The award is based on legal assistance activities and initiatives during the calendar year. No set "quota" for the number of winners or the size of categories in which an office must participate have been established. This award should not be confused with the Army Communities of Excellence Program (ACOE), which is run separately by an ACOE office at the Department of the Army. For the Chief of Staff Award, offices of similar size are compared against each other, but there is no limit to the number of offices of a certain type or size that are eligible to win the award.

Because the award is given annually, applications are compared on that basis. In other words, just because an office won the award in one year does not mean that the same office will win the award the following year. Legal assistance attorneys and support staffs are continually finding innovative ways to assist clients, and what was excellent one year may be the norm for the following year because other offices are doing the same thing. For example, during the evaluation of applications for calendar year 1994, several installations reported as an initiative for 1994 the provision of walk-in hours for powers of attorney and notarial services. Obviously, the first year this is done would be an initiative; however, the succeeding years should not reflect this as an initiative unless one can show an improvement in how the services were provided. For example, by expanding the hours these services were provided by adding two nights a week to accommodate clients who could not come to the office during the duty day. The lesson here is to strive for improvement every year rather than relying on what was good enough in the past to win the award.

#### Former Spouse Payments from Retired Pay

The Uniform Services Former Spouses' Protection Act<sup>131</sup> (FSPA) recognizes the right of state courts to order the distribution of military retired pay to a spouse or former spouse

incident to a final decree of divorce, dissolution, annulment, or separation, and provides a method for enforcing these orders. While a state court may award a portion of a service member's retired pay to a spouse married to the member for only a short period of time, the FSPA does not authorize enforcement of the order through the Defense Finance and Accounting Service (DFAS) unless the parties were married to each other for at least ten years during which the member performed at least ten years of creditable military service, in addition to other requirements.

For legal assistance attorneys and lawyers in private practice, the problem with the FSPA in application was how to determine, during the course of negotiations with the other spouse, or in a petition before a court, the appropriate percentage of military retired pay that should go to the civilian spouse on divorce. With members who were already divorced, calculating this percentage was a matter of simple arithmetic. The problem arose with determining the appropriate percentage for a member still on active duty; particularly when, as in most cases, it was not known when the member would retire and at what rank.<sup>132</sup>

The problem for calculating this percentage for members still on active duty when they got divorced was exacerbated by DFAS's refusal, based on policy concerns and a strict reading of the statute, to refuse to honor for direct payment any court decree that did not divide military retired pay as fraction of disposable retired pay at the retired grade.<sup>133</sup> The DFAS policy made negotiating a fair division of military retired pay on behalf of an active duty service member exceedingly difficult when a civilian spouse was insisting on a direct payment from DFAS on his or her share of the member's retired pay. The inflexibility of DFAS on this issue also made it difficult for the civilian spouse who desired direct payment but feared that the courts might force a division based on a formula that would not be honored for direct payment by DFAS.

In light of the foregoing concerns raised by both the Army legal assistance attorneys and the civilian bar, the Legal Assistance Division, OTJAG, formally requested DFAS officials to change its policy. As a result, the DFAS officials agreed to honor divorce decrees that ordered direct payment to former spouses based on a division of a service member's military retired pay on the pay grade stated in the decree or, in its absence, the pay grade upon retirement. The DFAS also agreed to honor the following formula<sup>134</sup> for service members who obtain divorces prior to retirement:

$$\begin{array}{ccccccc}
 \text{50\% (or} & & \text{Number of Months Married} & & \text{Retired pay} & & \text{Former} \\
 \text{percent} & & \text{During Creditable Service} & & \text{of service} & & \text{spouse's} \\
 \text{provided} & \text{X} & \text{toward Military Retirement} & \text{X} & \text{member at} & \text{=} & \text{dollar share} \\
 \text{in the} & & \text{Number of Months of Credit} & & \text{retired grade} & & \text{of the} \\
 \text{decree)} & & \text{able Service toward Military} & & \text{or grade stated} & & \text{member's} \\
 & & \text{Retirement (inserted by DFAS} & & \text{in decree} & & \text{retired-pay} \\
 & & \text{upon retirement} & & & & \text{upon} \\
 & & & & & & \text{retirement}
 \end{array}$$

This change will benefit both service members and their spouses by allowing divorcing couples greater flexibility on negotiating favorable terms during property settlement negotiations. The DFAS began honoring this formula in early 1995, even before the proposed policy change was published in the Federal Register for public comment.

### Future Challenges

The highest calling for a lawyer is to help another in legal difficulty. Legal assistance attorneys respond to that calling by helping those, who like themselves, are serving their country. Most of our clients are young, and many are often thousands of miles away from family or friends on whom they might otherwise seek counsel or guidance in their day-to-day lives. Our clients frequently have only a high school education and, like most people their age and older, are unfamiliar with the intricacies of the laws that affect their daily lives. They also usually lack the money to hire a lawyer when they get in legal trouble, and some even lack the sophistication, when legal problems arise, to recognize them as such, or to seek the free legal help available to them from the Army.

In helping soldiers and their families with their personal legal problems and needs, Army legal assistance attorneys eliminate many of the major and minor distractions that might otherwise adversely affect their morale and readiness to deploy. Army legal assistance attorneys also improve their quality of life, particularly if, through preventive law measures, we are able to keep them out of legal difficulty in the first place. All this effort helps the Army recruit and retain a quality force.

Most judge advocates serve as legal assistance attorneys during their initial tour of duty in the Army. For the many judge advocates without prior military experience, it is an excellent way for them to learn about soldiers and the Army we serve. Also, because they are new lawyers, who have recently graduated from law school, they will likely be familiar with at least the terminology regarding many legal assistance practice areas like estate planning, family law and consumer law.

The major challenges facing the Army legal assistance program include the following. First, our leaders within the JAG Corps, from SJAs on up, must do more, by word and deed, to improve the stature of legal assistance attorneys in the Army. Because legal assistance is often an initial duty assignment for judge advocates, this duty assignment is often viewed by Army lawyers as lacking the prestige attached to other legal assignments, such as military justice.<sup>135</sup> This is a leadership problem. Nothing can do more to dampen the enthusiasm of legal assistance attorneys than to hear their supervisors tell them that they must first prove themselves in legal assistance before they can "move on" to "more important duties" in the office, such as military justice.

Denigrating the importance of legal assistance not only reflects poor leadership, but also is an approach to supervision that is based on a false premise. The general high quality and exceptional capabilities of judge advocates throughout the Army does not vary among the

different fields of the law in which they practice, either at the installation level, or at higher headquarters. Also, given the attorney-client privilege and the nature and volume of the work involved, legal assistance attorneys are more on their own, and not as closely supervised as other judge advocates of their grade performing duties elsewhere in the Army. Finally, the potential for a legal oversight or mistake to do legal harm to another, or to cause an embarrassment to the Army or the JAG Corps is as much, if not greater, in legal assistance as in other areas of the law in which judge advocates practice.

A second challenge facing our JAG Corps leadership is putting more experienced officers in charge of legal assistance offices. The relative inexperience of our junior legal assistance practitioners coupled with the increasingly sophisticated nature of legal assistance practice emphasizes that management of legal assistance is a critical function. Despite this fact, first or second term officers are routinely assigned as chiefs of legal assistance offices, even in larger offices. This trend is at least in part a reflection of the perception that only the newest judge advocates can work in legal assistance without negatively affecting their careers. The JAG Corps leadership must recognize the significant management challenges associated with legal assistance practice not only by assigning some of the best and most experienced managers to legal assistance, but by rewarding those who excel with ratings consistent with their contributions. There is no reason why our best senior captains and majors should not seek the demanding and exciting leadership and management challenges found in legal assistance.

A third challenge facing the JAG Corps leadership at all levels is to heighten awareness in the Army that legal assistance is not only essential in maintaining readiness and high morale, but it is also an important Army quality-of-life and family program. All too often within the DOD and the Army, legal assistance is omitted from surveys, statistics, or articles on the Army's quality-of-life and family programs. The primary cause of this oversight is our failure as lawyers to publicize the legal assistance program and the services it provides, as well as its initiatives and accomplishments.<sup>136</sup> We must ensure that, before surveys and articles are done, legal assistance is included.<sup>137</sup>

Finally, not unrelated to the foregoing challenges, is our continuing inability to provide the lack of priority and resources devoted to providing up-to-date, state-of-the-art automation equipment to legal assistance attorneys and staff. As previously discussed, there is a need for joint cooperation in this area. Unless an all-service commitment to developing and fielding software "in house" can be fostered in the very near term, the Army should seriously consider joining sister service initiatives and purchase integrated legal assistance software from a commercial source. Any decision to retain this function "in house" must include an expanded commitment of manpower to both programming and substantive updating functions. While the former has been an ongoing although somewhat problem-plagued effort, the latter has been handled on a largely ad hoc basis with no formal proponent assigned to ensure that programs are current.<sup>138</sup> Of course, even if the Army purchased the latest in integrated legal software, this would be meaningless unless legal



assistance attorneys throughout the Army were also provided the modern computer hardware to handle this software.

Patients in an Army hospital expect that the doctors treating them will have the latest and best in medical technology and research facilities to treat their ailments. Indeed, military patients demand nothing less--and they get it. As a result of patient demand and expectations, and undoubtedly a certain amount of skill, commitment, and leadership on the part of the Army medical community, Army hospitals are generally equipped with the latest in medical technology. We might ask ourselves why so many judge advocates, with a far, far smaller budget, are still stuck with antiquated word processing programs and computer equipment. In the Army legal assistance program, we will have to move out of the 1980s in legal assistance computer hardware and software before we move into the twenty-first century.

Regardless of the demands, the legal assistance program will continue to prosper--as it has for the past fifty-three years--because of the exceptional quality and dedication of the Army lawyers, paralegals, legal specialists, and others providing legal assistance services throughout the Army. Their strong commitment in providing expansive and high quality legal assistance services truly sets the Army program apart from those of the other military services. The challenges discussed in this article, and others that may arise in the future, will be met. This fifty-three year old program has a proud history of accomplishment and will continue to be the model for the other military services to emulate.

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<sup>1</sup> This article updates previous articles written on the Army legal assistance program, addresses the recent developments, and discusses the future challenges for the program. For previous articles, see Colonel Alfred F. Arquilla, Family Support, Child Custody, and Paternity, 112 Mil. Law Rev. 17 (1986) (discussing background and content of Army policies and regulations on financial support and paternity); Lieutenant Colonel Alfred F. Arquilla, Changes in Army Policy on Financial Nonsupport and Parental Kidnapping, Army Law., June 1987, at 18; Colonel Alfred F. Arquilla, The New Army Legal Assistance Regulation, Army Law., May 1993, at 3; and Colonel Alfred F. Arquilla, The Survey of Soldiers on Legal Assistance, Army Law., June 1994, at 44 [hereinafter Survey of Soldiers].

<sup>2</sup> Dep't. of Army, Reg. 27-3, Legal Services: The Army Legal Assistance Program (10 Sept. 1995) [hereinafter AR 27-3].

<sup>3</sup> *Id.* (30 Sept. 1992) [hereinafter AR 27-3 (1992)].

<sup>4</sup> Dep't. of Army, Reg. 27-55, Legal Services: Notarial Services (21 Jan. 1994) [hereinafter AR 27-55].

<sup>5</sup> Dep't. of Army, Reg. 608-99, Personnel Affairs: Family Support, Child Custody, and Paternity (1 Nov. 1994) [hereinafter AR 608-99]. The regulation remains numbered in the 608 series of Army regulations, personal affairs, rather than the 27 series solely to ensure distribution of the regulation to Army Commanders, who are responsible for enforcement of this regulation.

<sup>6</sup> No comprehensive set of Army legal assistance statistics prior to 1990 are available within the OTJAG. All that exists is just one file folder containing a few scattered reports for various years. Although the Army legal assistance program is now fifty-three years old, collecting, consolidating, and, most importantly, preserving legal assistance statistics has not been one of its hallmarks. What few statistics do exist are of questionable reliability. In any event, these statistics do not indicate any substantial change in the overall makeup of our client base (primarily lower enlisted) or case composition (primarily domestic relations, wills, and powers of attorney).

<sup>7</sup> AR 27-3, *supra* note 2, at 41.

<sup>8</sup> Survey of Soldiers, *supra* note 1.

<sup>9</sup> For the purpose of clarity, paralegals and administrative or clerical staff are referred to as nonattorneys hereinafter.

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<sup>10</sup> Conversation with Mr. Roger Buckner, Personnel, Plans and Training Office, OTJAG. The figures show that, as of 1 July 1995, 314 civilian and 1576 military attorneys were under the administrative supervision of The Judge Advocate General.

<sup>11</sup> The compilation of the DA Form 4944-Rs submitted by Army commands worldwide showed that 54 civilian and 163 military attorneys providing full-time legal assistance at the end of calendar year 1994.

<sup>12</sup> The lack of a definition for "part-time" legal assistance attorneys or nonattorneys makes that statistic meaningless, so this information is not included in this article. To correct this problem, the following definition of "part-time" legal assistance personnel was added to Army Regulation 27-3, Appendix B, paragraph B-4a: "A person is a part-time legal assistance attorney, paralegal, or clerk if he or she on average performs legal assistance duties one or more hours per duty day, but less than on a full-time duty basis."

<sup>13</sup> These figures do not include Reserve personnel, nor, for the most part, the large number of United States Army Reserve and National Guard judge advocates and legal specialists who performed full-time legal assistance duties in an active duty or reserve status during the 1990-1991 Operations Desert Shield and Desert Storm.

<sup>14</sup> Mr. William S. Fulton, Jr., Clerk of Court, United States Army Court of Criminal Appeals, reports, based on estimated figures for fiscal year 1995, that the total number of general courts-martial and special courts-martial (both authorized or not authorized to adjudge a bad conduct discharge) declined forty percent over the past five years--from a total of 1855 trials during fiscal year 1991 to an estimated 1106 trials during fiscal year 1995. The combined general and special court-martial rate also declined from 2.3 trials per thousand soldiers during fiscal year 1991 to an estimated 2.1 trials per thousand soldiers during fiscal year 1995.

<sup>15</sup> As a result of the growing use of legal assistance services by nonArmy personnel, The Judge Advocate General has directed the Chief, Information Management Office, OTJAG, to develop an automated program for use by legal offices to break down the annual legal assistance statistics reported by the clients' military service affiliation.

<sup>16</sup> AR 27-3 (1992), supra note 3, app. B-2a. A legal assistance case reported in one year is not counted as another legal assistance case in the following year even though the case remains open. Regardless of how many times the same legal services may be provided in the same case, the type of legal assistance services provided (such as, legal counseling, preparing correspondence or documents, making legal referrals) is reflected on the DA Form 4944-R each time a particular type of legal assistance service is provided.

<sup>17</sup> The increase in number of tax cases from 1993 to 1994 may be primarily attributed to a change in the 1994 LAAWS-LA program that recorded income tax assistance provided by Army lawyers, supporting staff, and volunteers in tax centers even though, in most instances, a DA Form 2465, Client Legal Assistance Record, was not prepared. See AR 27-3, supra note 2, app. B-2a(5).

<sup>18</sup> The goal is to count hours spent in each case throughout a staff judge advocate office, not just in legal assistance. The amount of time spent on all non Army legal cases and matters will also be reported.

<sup>19</sup> Of those spouses surveyed, 79.8% were in their first marriage; 18% were remarried following a divorce; 0.5% were remarried widows or widowers; 0.6% were "legally separated" from their soldier spouses; and 1.1% were in the midst of filing for divorce.

<sup>20</sup> The samples are randomly selected from the Standard Installation/Division Personnel System (SIDPERS) by using the final one or two digits of the sponsor's social security number. In this survey, 6787 of the spouses of officers selected for the sample completed the questionnaire and were included in the data file. Of the spouses of enlisted personnel sampled, 5709 completed the questionnaire and were included in the data file. The sampling error for each of the sponsors' rank groups varied from only + 1% to + 3%.

<sup>21</sup> This figure compares favorably with the responses obtained on a similar question regarding use of, and satisfaction with, the Army Claims Service. Of the spouses surveyed, 38.9% answered that they used the Army Claims Service during the last two years, and, of those who used it, 57.1% were satisfied or very satisfied with the claims services.

<sup>22</sup> For example, landlord-tenant, consumer debt, and financial support legal problems likely will occur in many families, even in the absence of an emergency, when no money is available to pay bills.

<sup>23</sup> See infra note 41 and accompanying text.

<sup>24</sup> The results of the 1991 ARI survey of Army families, when compared to the 1995 results of this survey, reveal almost identical percentages as to the number of married soldiers possessing up-to-date wills, powers of attorney, and two weeks pay on hand.

<sup>25</sup> AR 27-3 (1992), supra note 3, para. 2-6b.

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<sup>26</sup> See Deborah Suchenski, *Legal Assistance in the Air Force*, 5 *The LAMPLighter* 3 (1994) for a general overview of legal assistance in the Air Force. According to the author, who was the chief of the Air Force legal assistance program at the time, the Air Force classifies legal assistance not having a direct impact on the "effectiveness of command" or the "efficiency of readiness and deployment" as "non-mission-related legal assistance." This category of legal assistance is left to the discretion of Staff Judge Advocates and the availability of resources. The very name of this type of legal assistance is perhaps indicative of the low priority it generally receives--yet it includes, by definition, all legal assistance provided to those not assigned to the command, including Air Force retirees and all non-Air Force military personnel and their families, as well as much of the type of legal assistance work that Army lawyers routinely do for legal assistance clients, including Air Force clients (such as, family law matters, not just those involving deploying personnel and dependent child care issues).

<sup>27</sup> The Air Force recognizes the existence of only one full-time Air Force legal assistance attorney. This is the officer assigned for duty in the PLAO.

<sup>28</sup> Some Air Force legal offices deny legal assistance services to non-Air Force service members assigned within their command or to Air Force service members assigned to other Air Force installations.

<sup>29</sup> The unofficial but high level Air Force response to the Army's generosity in continuing to provide legal assistance to Air Force and other service members is that the Army policy only benefits those Air Force service members and their families who are stationed or reside near an Army installation and that a discontinuation of the Army policy would have no impact on most Air Force service members and their families.

<sup>30</sup> AR 27-3 (1992), *supra* note 3, para. 2-6b.

<sup>31</sup> AR 27-3, *supra* note 2, para. 2-6b. Army Staff Judge Advocates whose offices are within 100 miles of legal offices of another military service are directed to work with their counterparts in those legal offices to resolve any legal assistance problems because of differences in the scope of each other's legal assistance programs. Army Staff Judge Advocates may limit or deny legal assistance services to clients affiliated with the other military installations, or military departments, only if joint or cooperative efforts to resolve problems have failed. However, the scope of legal assistance services denied to eligible clients should be limited to that necessary to address the problem that is adversely affecting the quality or scope of Army legal assistance services. For example, if an inordinate number of Navy clients are seeking legal assistance on marital separation agreements from an Army legal assistance office because a nearby Navy base does not provide such assistance, then the Army legal assistance office may deny such assistance to all Navy personnel.

<sup>32</sup> Most installations have dealt directly with a software vendor in negotiating the price and the features of the program. To improve its negotiating posture, the Judge Advocate for the United States Army Europe (USAREUR) decided to use a contract to provide electronic filing software packages to fourteen sites for the 1994 tax filing season. This contract included technical support, training presented in USAREUR by the vendor, telephonic support, and the software packages. This contract cost approximately \$25,000.

<sup>33</sup> Tax assistance is one of several types of cases, like family law and estates, handled under the legal assistance program. It is not a separate program. See AR 27-3, *supra* note 2, para. 3-6i.

<sup>34</sup> *Id.* para. 5-4a.

<sup>35</sup> The IRS does not charge any fees to legal assistance offices enrolled in the BPOL Program. Contact the IRS at 1-800-829-2765 for more information about the BPOL Program.

<sup>36</sup> During a conversation with one of the installation tax officers in Korea in 1993, Lieutenant Colonel (then Major) Webster asked the tax officer how he got his federal tax forms. The reply was "any way and from any place I can." This tax officer used the Army system that was in place at that time to order federal tax forms for offices located outside the United States, the BPOL Program, and the direct order program from the IRS service center in California. Because United States military units in Korea used "APO-SF," indicating a California address, as part of their mailing address, the IRS service center processed the order for forms. Even with these multiple sources, the tax officer still had problems getting enough forms to serve the military community where he was located.

<sup>37</sup> During a conversation with several legal assistance attorneys at the USAREUR Tax Conference in 1993, Lieutenant Colonel (then Major) Webster asked them how the tax distribution system was working. The three attorneys present represented three different commands and none were happy with the way the system worked and complained that they routinely received forms late and often did not receive all of what they ordered.

<sup>38</sup> See AR 27-3, *supra* note 2, para. 5-4a.

<sup>39</sup> *Id.* para. 5-3.

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<sup>40</sup> *Id.* para. 5-4a. However, in response to requests from Army legal assistance attorneys, the computer generated LAAWS-LA DA Form 4944-R has been modified to allow recording of tax center numbers for returns prepared and electronically filed. See *supra* note 24 and accompanying text.

<sup>41</sup> Most of the complaints against H&R Block were directed at the high interest "loans" H&R Block used to entice the unwary to immediately "cash in" on the tax refunds they anticipated would be forthcoming. For further discussion of this problem, see Alfred F. Arquilla, *Income Tax Assistance in the Army*, 4 *The LAMPLighter* 1 (1992).

<sup>42</sup> Office of The Judge Advocate General, United States Army, *Desert Storm Assessment Team Report* (22 Apr. 1992). This is a comprehensive report that covers all aspects of judge advocate operations provided during Operation Desert Shield and Operation Desert Storm.

<sup>43</sup> 10 U.S.C. § 1044b (1988).

<sup>44</sup> *Id.*

<sup>45</sup> AR 27-3, *supra* note 2, para. 3-7e(1).

<sup>46</sup> Lieutenant Colonel George L. Hancock, Jr., then the chief of the Administrative and Civil Law Division, TJAGSA, first proposed the concept and initial draft for this legislation.

<sup>47</sup> Following a series of discussions between Colonel Alfred Arquilla and staffers on the Senate Armed Service Committee in June and September 1995, the wording of the Army legislative proposal was modified before it was inserted in the Senate Bill, and again when it became part of the National Defense Authorization Act for Fiscal Year 1996. This legislation was passed by Congress and is expected to be approved by the President not later than 10 February 1996. The wording of this legislation is as follows:

§ S1002/H555. State Recognition of Military Advance Medical Directives

(a) Requirement For Recognition By States.

(1) Chapter 53 of title 10, United States Code, is amended by inserting after section 1044b the following new section:

§ 1044c. Advance medical directives of members and dependents: requirement for recognition by States.

(a) Instruments to be Given Legal Effect Without Regard to State Law. An advance medical directive executed by a person eligible for legal assistance:

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for advance medical directives under the laws of a state; and

(2) shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned.

(b) Advance Medical Directives. For purposes of this section, an advance medical directive is any written declaration that:

(1) sets forth directions regarding the provision, withdrawal, or withholding of life prolonging procedures, including hydration and sustenance, for the declarant whenever the declarant has a terminal physical condition or is in a persistent vegetative state; or

(2) authorizes another person to make health care decisions for the declarant, under circumstances stated in the declaration, whenever the declarant is incapable of making informed health care decisions.

(c) Statement to be Included.

(1) Under regulations prescribed by the secretary concerned, an advance medical directive prepared by an attorney authorized to provide legal assistance 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 an advance medical directive that does not include a statement described in that paragraph.

(d) States not Recognizing Advance Medical Directives. Subsection (a) does not make an advance medical directive enforceable in a State that does not otherwise recognize and enforce advance medical directives under the laws of the State.

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(c) Definitions. In this section:

(1) The term 'state' includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

(2) The term 'person eligible for legal assistance' means a person who is eligible for legal assistance under section 1044 of this title.

(3) The term 'legal assistance' means legal services authorized under section 1044 of this title.

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 1044b the following:

1044c. Military advance medical directives of members and dependents; requirement for recognition by States.

(b) Effective Date. Section 1044c of title 10, United States Code, shall take effect on the date of the enactment of this Act and shall apply to advance medical directives referred to in that section that are executed before, on, or after that date.

The Army Legal Assistance Division, in comments submitted to Senate staffers, indicated that the critical time as to eligibility for legal assistance is when the AMD is executed. The AMD should be given effect regardless of when the incapacity occurs. This argument carried the day. Also, the Army Legal Assistance Division pointed out that the coverage of the law should not be limited to AMDs prepared by legal assistance attorneys since many AMDs are prepared within the military by paralegals and clerical staff, not attorneys. The significant point is not "by whom" the AMD is prepared, but "for whom" it is prepared. Therefore, the statute should also encompass an AMD prepared for a service member by an attorney in private practice. The language appears to encompass all AMDs prepared for eligible legal assistance clients, regardless of who prepared them. However, if they are prepared "by an attorney authorized to provide legal assistance" (a phrase repeatedly used throughout Army Regulation 27-3), then the required statement of subsection c must be included in the AMD. Finally, the Army Legal Assistance Division argued that the definition of an eligible legal assistance client should not be limited to those clients who are eligible by virtue of 10 U.S.C. § 1044 alone, but should also include those who are eligible under various service regulations because many of the people for whom AMDs are prepared, such as military reservists and deploying civilian employees and defense contractors, are not included within the list of eligible clients under 10 U.S.C. § 1044. This argument failed, not because the Congressional intent was otherwise, but rather because the staffers did not view the language in the Act precluding its application to those authorized legal assistance pursuant to legal assistance regulations and instructions.

<sup>48</sup> 42 U.S.C. § 1395cc(f)(1) (1988).

<sup>49</sup> Dep't of Air Force, Reg. 110-6/Dep't of Army, Reg. 27-55, Authority of the Armed Forces to Perform Notarial Acts (18 June 1990) [hereinafter, AFR 110-6/AR 27-55]. Although joint efforts are encouraged whenever possible, efforts to revise Air Force Regulation 110-6/Army Regulation 27-55 in a timely manner proved unsuccessful. This joint regulation was abolished for two reasons. First, the Air Force, which had taken the lead in revising this regulation, failed to produce a draft of the revision between 1991 and 1993. Secondly, by 1993, the Air Force decided to eliminate all Air Force regulations and replace them with Air Force instructions. The new Air Force format for instructions would not likely have been compatible with Army regulation requirements.

<sup>50</sup> AR 27-55, *supra* note 4, para. 1-1.

<sup>51</sup> *Id.* paras. 1-4a, 1-4b.

<sup>52</sup> *Id.* para. 2-1a.

<sup>53</sup> *Id.* paras. 1-4c, 1-4d.

<sup>54</sup> Title 10 U.S.C. §§ 502, 936, 1031 grant certain designated individuals authority to administer oaths in the performance of their duties and for military administration, including, but not limited to, military justice, legal assistance, and claims. Title 10 U.S.C. § 1044a, the most recent law implemented for the first time by Army Regulation 27-55, grants certain designated individuals general powers of a notary public and of a consul of the United States.

<sup>55</sup> AR 27-55, *supra* note 4, para. 2-1a(1).

<sup>56</sup> *Id.* para. 2-b. Army Regulation 27-55 does not specifically address foreign law in this area. However, the intent behind Army Regulation 27-55 is to regulate, for example, the notarial authority a foreign national employee of the United States Army might use outside the United States in the performance of official Army duties where the employee's notarial authority is based on foreign law or a commission issued by a foreign government. This article will only address the effect of Army Regulation 27-55 on state laws providing notarial authority to Army personnel.

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<sup>57</sup> *Id.* para. 2-4.

<sup>58</sup> *Id.* para. 2-3.

<sup>59</sup> *Id.* para. 2-3a; 10 U.S.C. § 973b (1988).

<sup>60</sup> At the time Army Regulation 27-55 was published, at least one Staff Judge Advocate had authorized his judge advocates to serve as state notaries public.

<sup>61</sup> AFR 110-6/AR 27-55, *supra* note 49, para. 1a(1)(g).

<sup>62</sup> The situation sometimes encountered is a superior noncommissioned officer or commissioned officer attempting to get a notary to notarize a signature on a document of an absent spouse. When such attempts are made it is extremely helpful to have an Army lawyer nearby to explain to the client why this cannot be done.

<sup>63</sup> See Mark E. Zumdahl, Preventing Power-of-Attorney Abuses, 83 Ill. Bar J. 537 (1995) (for a discussion of various means that may be employed in educating the principal and agent of a power of attorney, and avoiding agents with conflicts of interest).

<sup>64</sup> AR 27-55, *supra* note 4, paras. 2-2a, 2-3b.

<sup>65</sup> *Id.* para. 2-2a.

<sup>66</sup> *Id.* para. 2-3b.

<sup>67</sup> *Id.* para. 1-4b. The requests for exception have been few in number, but they have always been granted for legal specialists in the pay grade of E-4. The requests have been routinely denied for legal specialists below this pay grade.

<sup>68</sup> *Id.* para. 2-2. Although the use of military notaries within the active Army is restricted as a matter of legal assistance policy to those serving outside the United States, an exception was granted at one installation to authorize the use of military notaries where obtaining state issued civil notarial commissions was not possible. Because most people are not familiar with federal law providing notarial authority to military personnel, legal documents notarized by a civil notary are much less likely to be questioned.

<sup>69</sup> *Id.* para. 3-4.

<sup>70</sup> *Id.* para. 3-7a.

<sup>71</sup> AR 608-99, *supra* note 5, paras. 1-4a, 1-4c, 1-4d(2), 1-4g. The reasons for Staff Judge Advocates not assuming a larger enforcement role in AR 608-99 cases are addressed in paragraph 1-4d(2). *Id.*

<sup>72</sup> See Alfred F. Arquilla, Family Support, Child Custody, and Paternity, and Changes in Army Policy on Financial Nonsupport and Parental Kidnapping, *supra* note 1 (discussion in this article as to Army financial support, paternity, and child custody policies, and the interest and involvement of legal assistance attorneys in these policies, still apply to the revised Army Regulation 608-99—the policies, and the reasons behind them, remain basically unchanged).

<sup>73</sup> Dep't of Army, Reg. 608-99, Family Support, Child Custody, and Paternity (22 May 1987) [hereinafter, AR 608-99 (1987)]. The Commander, Community and Family Support Center, Alexandria, Virginia, had proponent responsibility for Army Regulation 608-99 from January 1985 through March 1987. Before and after this period, TAG had proponent responsibility.

<sup>74</sup> FN74. AR 608-99, *supra* note 5, para. 2-5a(1).

<sup>75</sup> *Id.* para. 2-5a.

<sup>76</sup> *Id.* para. 2-6.

<sup>77</sup> *Id.* para. 2-2.

<sup>78</sup> *Id.* para. 2-9a.

<sup>79</sup> *Id.* Glossary, I, Terms. The term "lawful custodian" also includes the mother of a child born out of wedlock, even in the absence of a court order. Therefore, a male soldier would violate this regulation if he unlawfully took or detained his child (under fourteen years of age) born out of wedlock in the absence of a court order granting him physical custody of the child, even if no court order on custody exists.

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<sup>80</sup> *Id.* para. 2-9b, Glossary, I, Terms.

<sup>81</sup> See *supra* note 72 and the referenced article for a general discussion of the child custody policy considerations behind Army Regulation 608-99.

<sup>82</sup> AR 608-99 (1987), *supra* note 73, para. 2-10. The authority of a commander to order additional support was limited to situations where no court order or financial support agreement existed.

<sup>83</sup> *Id.* para. 2-8.

<sup>84</sup> AR 608-99, *supra* note 5, para. 2-7d.

<sup>85</sup> *Id.*

<sup>86</sup> AR 608-99 (1987), *supra* note 73, para. 2-11, as well as prior versions, briefly addressed the responsibilities of the Inspector General in the enforcement of Army Regulation 608-99. The initial draft of the current Army Regulation 608-99 also contained a statement of the Inspector General's role and responsibilities. This statement, however, was deleted at the request of the Inspector General because the Inspector General responsibilities should be governed by its own regulation, Dept of Army, Reg. 20-1, Inspector General Activities and Procedures (15 Mar. 1994) [hereinafter AR 20-1]. Nevertheless, when Army Regulation 27-3 was revised in 1995, the Inspector General specifically requested amending paragraph 3-6 to mention the Inspector General's role in the enforcement of Army Regulation 609-99.

<sup>87</sup> AR 27-3, *supra* note 2, para. 3-6a(2). This policy of resolving Army Regulation 608-99 issues at the local installation level as much as possible reflects the fact that the Legal Assistance Division, OTJAG, has a smaller staff than almost all Staff Judge Advocate offices and many installation legal assistance offices. For the same reason, Army Regulation 608-99 provides that The Judge Advocate General's authority to approve exceptions under Army Regulation 608-99 "will not be applied in individual cases to release soldiers or their family members from their obligations" under Army Regulation 608-99. AR 608-99, *supra* note 73, para. 2-10.

<sup>88</sup> 10 U.S.C. § 892 (1988).

<sup>89</sup> AR 608-99, *supra* note 5, paras. 1-6, 2-5, 2-9

<sup>90</sup> *Id.* paras. 1-4c, 1-4d(5), 1-4e(8), 1-4f(7), 1-5e, 3-10b.

<sup>91</sup> In a case handled by the Legal Assistance Division, OTJAG, an Army major who had avoided resolution of a paternity claim by being assigned and reassigned for four continuous years in three different foreign countries, voluntarily submitted to the jurisdiction of a Midwestern state when he received orders, later rescinded, curtailing his third tour of duty overseas and reassigning him to the same city in which the mother of his child resided. The mother had been unable to obtain jurisdiction over the paternity claim in either his or her state of domicile, or in the state where the child was conceived. The Army took the position that the issue in such a case was not whether the parties could work out their differences regarding the paternity claim and the demand for past and future financial support, but whether the soldier would agree to submit to the jurisdiction of a state court to resolve this matter, or would the Army, in accordance with Army Regulation 608-99, assign him to a duty station within the United States so that a support order could be obtained. Until a state court assumed jurisdiction, the mother seeking to establish paternity or obtain financial support would be negotiating from a position of extreme weakness.

<sup>92</sup> AR 608-99, *supra* note 5, paras. 2-10; 1-11; Glossary, I, Terms.

<sup>93</sup> *Id.* (glossary defines the terms court order, family member, financial support, income, lawful custodian, military pay, personal jurisdiction, preponderance of the evidence, and Staff Judge Advocate).

<sup>94</sup> *Id.* paras. 1-4e(5), 1-4f(6).

<sup>95</sup> Dept of Defense, Dir. 5525.9, Compliance of DoD Members, Employees, and Family Members Outside the United States with Court Orders (27 Dec. 1988) [hereinafter DOD Dir. 5525.9].

<sup>96</sup> AR 608-99, *supra* note 5, para. 4-1a.

<sup>97</sup> *Id.* paras. 4-2, 4-4 (providing that a general courts-martial convening authority may request a delay not to exceed ninety days if the request for delay is made within thirty days of receiving the request for assistance).

<sup>98</sup> *Id.* para. 4-4.

<sup>99</sup> *Id.* app. B.

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<sup>100</sup> AR 27-3, supra note 3 (publication of changes is designated as Change 1 (C1)).

<sup>101</sup> The United States Army Publications and Printing Command indicates that Change 1 to Army Regulation 27-3 is the last change to an Army regulation that will highlight the change material with underlines and strike throughs.

<sup>102</sup> See supra note 80 and accompanying text.

<sup>103</sup> See supra note 23 and accompanying text.

<sup>104</sup> AR 27-3, supra note 2, para. 2-5a(6).

<sup>105</sup> See 10 U.S.C. § 1044 (1988); AR 27-3 (1992), supra note 3, para. 1-4f. The statute makes legal assistance with the DOD "[s]ubject to the availability of legal staff resources." Army Regulation 27-3 (1992) only required commanders to establish a legal assistance program in their command if "one or more attorneys ... assigned to their staffs or under their commands who are providing legal assistance on either a full or part-time basis as part of their duty or job description."

<sup>106</sup> AR 27-3, supra note 2, para. 1-4f(1) (underlined—because of a printing error, another subparagraph (1), not underlined, should have been renumbered as (2)). See also *Id.* para. 1-4g(2), which requires Staff Judge Advocates to provide the same minimum legal assistance services even if a full or part-time legal assistance attorney is not available. Referring legal assistance clients to those who can assist them is one of the most important services provided under the Army legal assistance program. *Id.* para. 3-7h, 3-7i.

<sup>107</sup> Every time there are reductions within the Army, at the headquarters and installation level, those responsible for various programs are asked to respond whether what is being done is required by law, DOD instruction or Army regulation, or voluntarily undertaken. The Army legal assistance program is now required by Army regulation.

<sup>108</sup> FN108. AR 27-3, supra note 2, para. 2-2b(4).

<sup>109</sup> The day-to-day legal assistance work performed by Reserve judge advocates, for example, providing advice to clients or talking to Army lawyers over the telephone, seldom ever exceeds two hours in any one day.

<sup>110</sup> See AR 27-3 (1992), supra note 3, para. 2-5a(9); Alfred F. Arquilla, *The New Legal Assistance Regulation*, supra note 1, at 15.

<sup>111</sup> AR 27-3, supra note 2, para. 2-5a(7).

<sup>112</sup> *Id.* para 3-6b(1).

<sup>113</sup> Earlier, in January 1993, the American Bar Association LAMP Committee adopted a resolution to abolish "by-law" designations throughout the military. This resolution was adopted by the American Bar Association House of Delegates in August 1993. Eventually, the Navy and Marine Corps followed the Army's lead in abolishing "by-law" beneficiary designations. The tragic consequences that sometimes arose from "by-law" designations became apparent following the 1985 crash of a DC-8 aircraft at Gander, Newfoundland, Canada, in which 248 soldiers were killed, and then again, in the 1991 Persian Gulf War in which 213 soldiers died. See Alfred F. Arquilla, *Servicemen's group Life Insurance (SGLI)*, 4 *The LAMP Lighter* 3 (Winter 1992); Jim Tice, *Earmarking insurance benefits: Naming beneficiaries recipe for prevention of costly lawsuits*, *Army Times*, December 7, 1992, at 24.

<sup>114</sup> "By-will" designations are prohibited on the basis that passing insurance proceeds through a will may subject the proceeds to the claims of creditors from which, by law, they are otherwise exempt. Also, "by-will" designation may necessitate probate of a will. Although these disadvantages may also accompany a designation made via a testamentary trust, unlike a testamentary trust, there are no off-setting advantages.

<sup>115</sup> See Dep't of Army, Reg. 600-8-1, *Army Casualty Operations/Assistance Insurance* (20 Oct. 1994) [hereinafter AR 600-8-1]. Because a service member may elect up to \$200,000 in life insurance coverage under the SGLI program, for many service members, their insurance proceeds far exceed the value of property conveyed by will.

<sup>116</sup> AR 27-3, supra note 2, app. C. At the request of the Legal Assistance Division, OTJAG, almost identical guidance was placed in Army Regulation 600-8-1. See AR 600-8-1, supra note 115, para. 11-30. The methods addressed in both regulations include beneficiary designations by name, by relationship, by the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act, by testamentary trust, and by inter vivos trust.

<sup>117</sup> As a practical matter, no such form is going to be approved. The Veterans Administration (VA) is the proponent agency of the SGLV-8286, and the Army is not going to authorize substitute or continuation forms without VA approval. The VA officials endorse the use of "by-law" designations and simple one page forms because this enhances smooth administration of the SGLI program (continuation forms get lost), regardless of what may have been the true wishes of the deceased service member.



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<sup>118</sup> AR 27-3, *supra* note 2, para. 3-7g(3).

<sup>119</sup> This information was obtained during 1991 by members of the Legal Assistance Task Force--Desert Storm/Demobilization, who contacted the survivors of each soldier who died in the Persian Gulf War to ensure that they were afforded legal assistance services.

<sup>120</sup> The emphasis for every soldier to have a will generates frequent public affairs announcements on the Armed Forces Radio and Television and other media, that, in an effort to be overly simple, are usually misleading about the benefits of a will.

<sup>121</sup> AR 27-3, *supra* note 2, para. 3-6b(2)(b).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* This criteria was coordinated with the legal assistance instructors at The Judge Advocate General's School, United States Army. The response of some commands during the staffing of the draft revision of Army Regulation 27-3 was that the state specific criteria on small estates and the laws of intestate succession are not readily ascertainable. State specific laws can be readily accessed in the Martindale Hubble Law Digest.

<sup>124</sup> *Id.* para. 3-7g(3).

<sup>125</sup> *Id.* para. 3-8b(5); Dep't. of Army, Reg. 27-10, Legal Services: Military Justice, ch. 18 (8 Aug. 1994) (I01, 16 Dec. 1994).

<sup>126</sup> AR 27-3, *supra* note 2, para. 3-8b(5). For example, advising a legal assistance client to fully cooperate as a witness in a pending court-martial may be against the client's best interests.

<sup>127</sup> *Id.* para. 3-8a(4). For example, the United States Army should not be involved in initiating legal action against a service station owner who terminates, perhaps unjustly, the employment of a soldier's spouse. Assisting DOD civilian employees on certain government related problems, such as reports of survey, is specifically authorized by Army Regulation 27-3. *Id.* para. 3-6g. Assistance on government employment related matters not listed should be on an exceptional basis. *Id.* paras. 1-4g(2)(c); 1-5.

<sup>128</sup> *Id.* paras. 3-6i; 3-8a(2); Dep't of Army, Reg. 608-10, Personal Affairs: Child Development Services, ch. 6 (12 Feb. 1990) (I01, 30 Dec. 1994).

<sup>129</sup> AR 27-3, *supra* note 2, para. 4-9c. The words "as a last resort" were deleted in a sentence that indicates that supervising lawyers may resolve conflict-of-interest cases by referring clients elsewhere within the same legal office. This change makes this provision consistent with Army Regulation 27-3, paragraph 3-7h, which indicates that referring a client to another lawyer is appropriate, with the first preference to refer the client to another lawyer within the same legal office.

<sup>130</sup> The high interest and keen competition for this annual award provides one of the most effective methods for advancing legal assistance program objectives; such as, training, automation, and preventive law initiatives. It also helps ensure full compliance with Army legal assistance regulations. A detailed questionnaire developed in 1991 that is updated annually notifies legal assistance attorneys about important objectives of the program.

<sup>131</sup> 10 U.S.C. § 1408 (1988).

<sup>132</sup> For example assume a major retires from active duty and divorces his wife to whom he was married during fifteen years of the twenty years he served on active duty. The wife, under the laws of most states, would argue that she was entitled to 37.5%,  $50\% \times 15/20$ , of her husband's military retired pay. But how does one calculate the percentage of retired pay to go to the wife if the member still on active duty divorces after twenty, fifteen, or ten years of military service, and at what rank is the military retired pay calculated?

<sup>133</sup> The statute also allowed a dollar amount in a divorce decree to be honored, but a dollar amount seldom would ever be inserted in a divorce decree because of inflationary concerns. Also, a decree that provided for a dollar amount augmented each year by changes in a consumer price or other index would not be honored for direct payment by the DFAS.

<sup>134</sup> The provision authorizing this type of formula to be honored by DFAS will be inserted in the revision of DOD Financial Management Regulation (Volume 7, Part B). 32 C.F.R. § 63 (1995).

<sup>135</sup> This problem is not peculiar to the Army. The American Bar Association, through its LAMP Committee, has done much to address this problem throughout the military by endorsing legal assistance related legislation, sponsoring legal assistance continuing education programs on military installations throughout the United States, and by periodically presenting awards for excellence in legal assistance to deserving lawyers and Staff Judge Advocate offices.

<sup>136</sup> Within the Pentagon, it is surprising how many Army general and other senior officers are not aware of the legal assistance program or the services it provides. Part of the problem is the very name of the program itself. Many officers and enlisted personnel consider any help they get from a lawyer to be "legal assistance." They are not likely to distinguish "legal assistance" from the legal services and

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advice they receive on filing a household-goods-damage claim or in taking an adverse personnel action against a subordinate. Like medical care from doctors, lawyers provide "legal assistance" in numerous ways. However, given the fifty-three year tradition of the legal assistance program and the different approaches to legal assistance among the military services, it is not likely that a consensus could ever be reached on a more descriptive name for the program, such as "military family legal services" or "military legal aid."

<sup>137</sup> A major part of the problem here, in addition to the "name confusion" mentioned above, legal assistance is not a family program separately funded by Congress like medical care and the family advocacy program or by nonappropriated funds like childcare, and morale, welfare, and recreation programs.

<sup>138</sup> Colonel Mark Sullivan, a judge advocate in the United States Army Reserve, after years of effort, developed a first class marital separation agreement for the LAAWS-LA program in 1993. Unfortunately, the database program being used within LAAWS-LA at that time, which was supposed to be the program by which all legal assistance programs were to be assembled in the future, proved to be inadequate despite a significant effort from information management and legal assistance personnel. The LAAWS-LA program also failed to produce wills in an acceptable manner. Colonel Mark Sullivan also developed a will format for Louisiana wills, which was never incorporated in the LAAWS-LA program. As a result, efforts to complete work on developing a will format for Puerto Rico wills were halted.



## CHAPTER 2

### CLIENT INTERVIEWING AND COUNSELING

#### I. REFERENCES.

- A. U.S. DEPT' OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (10 Sept. 1995).
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## STAGES OF INTERVIEWING AND COUNSELING

"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...."

"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.

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

- A. Put the client at ease. Many clients will be intimidated and nervous about their appointment. Oftentimes you out-rank the client and that adds to the uneasiness of speaking frankly to you about their problems. It is incumbent upon you to relax that client and create a receptive environment - how do you do that?
  - 1. When you are notified that your client has arrived for the appointment, walk down the hall to the waiting room, shake hands, introduce yourself and show him to your office. Do not just have your receptionist point the way.
  - 2. Show the client his seat and have the client sit down before you. This normally would not occur in the usual military situation, as usually the higher ranking person sits first. In the legal assistance arena, inviting the client to sit first is appropriate.
  - 3. Should you start the interview with small talk? Some attorneys recommend that you do, but I have found that the first thing most clients like to hear is "How can I help you?"

- B. At what point should you explain your role as a legal assistance attorney?
1. Probably when you both sit down. You may want to reintroduce yourself and explain that you are a licensed attorney who is there to help. Some clients do not realize that you are in fact a lawyer. These clients see you as another officer who may or may not have their best interests at heart and who may tell their commanders what you talk about during the session.
  2. Hang your law school diploma in a prominent place in your office where the client can see it as they sit.
- C. Discuss attorney-client confidentiality to put them at ease.
1. Our Rules of Professional Conduct provide that, when representing a legal assistance client, you represent that client not the Army.
  2. 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.
    - a. Get the client's permission to discuss a difficult case with your boss and/or fellow attorneys.
    - b. If at all possible exclude third parties from the interview. Many clients will bring with them their neighbor, parent, or even children. Not only does the presence of third parties interfere with attorney-client confidentiality, it also inhibits conversation. Oftentimes parents bring their children to the office and discuss marital problems in front of them; avoid this at all costs, even if it means setting up another appointment for them alone or providing coloring books or toys for the children to use in the waiting room.
- D. Avoid interruptions. Office policy should provide that when an attorney is with a client, the receptionist will take phone messages that are not urgent. Nothing upsets a client more than to have his conversation with you repeatedly interrupted. Have a small sign that you can put on your door when you are interviewing to let others know not to disturb you.



- E. Most legal assistance offices will have a maximum amount of time allotted for each interview. For example, you may have 6 to 8 appointments in the morning to last no longer than 20 minutes each. How do you get through the interview on time while making sure your client knows he has your undivided attention? This takes practice!
1. Some attorneys suggest you tell the client up front how much time you can spend with them. I do not recommend this. You want to make the client feel like the most important person in the world to you for the time that you have. When you immediately set up a time schedule with them, you have let them know they are worth only 20 minutes.
  2. With experience, you will know how to focus on the clients' problems, get from them the important information to help them, and send them on their way on time. Remember that you want to get the basic information you need to work on the problem out in the first interview; you can always schedule a follow-up appointment.
- F. 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. Find out what the attorney told the client before you hear his full story. Sometimes clients attorney-shop to find someone who will tell them what they want to hear or to get a valid second opinion.
  2. Also, hearing what the other lawyer advised can help you focus rapidly on the issues or spot ones not addressed.
- G. Some attorneys think you should advise the client of an interview agenda. Generally, it is not advisable to tell them of the time they have with you unless you are pressed to cut short an interview because of pressing business or a backed up waiting room full of other appointments. In such cases, you can simply tell the client that his problem is more complex than time allows at the moment and schedule a follow-up appointment.
1. Be sure that you have gotten out the basic information.

2. Let the client know that you want more time to fully discuss issues. Ensure that you work that person into your schedule at the earliest possible convenience. Do not let the client dangle for a week or two.
- H. Should you tell the client of how the interview will be structured? Usually no. Do this in your own mind as you talk with the client. When you develop your own style of asking questions to focus the interview, you will see that structuring an interview becomes almost second nature.
1. To explain how an interview will progress is almost like a surgeon explaining to a patient the technical aspects of how he will use instruments during surgery. The patient does not want to hear about that. He simply expects the doctor to use the tools of the trade in a competent manner.
  2. It is the same way with clients, they do not want to hear how you will structure an interview. They just want you to do it in an effective and competent way.
- I. Explain the “supporting cast” and those members of the legal assistance office that may play a role in the client's case (paralegals, legal specialists, clerks, other attorneys, etc.).

### **III. IDENTIFY THE REASON FOR THE CLIENT'S VISIT.**

- A. We have talked about setting the stage for the interview. Now we must identify the reason for the client's visit by ascertaining the nature of the problem.
  - 1. Be mindful that what you perceive as the problem, may not be what the client thinks it is. You need to get this out in the open.
  - 2. Often the client will think he has a certain problem. You may discover that they have another. For example, a client may think that he has a problem with only one debt. In fact, he may have a serious financial problem.
  
- B. You must also determine the nature of relief sought.
  - 1. 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 wants a divorce. There may be underlying problems that can be cured through other means, such as financial counseling.
  - 2. A Missouri Bar study indicated that there was only a 20% correlation between what a client wanted and what the attorney thought the client wanted.

### **IV. DEVELOPMENT STAGE OF THE INTERVIEWING PROCESS.**

- A. After finishing the preliminaries, we must rapidly move on to the developmental stage of the interviewing process.
  - 1. This part of the interview consumes the most time.
  - 2. The goal of the development stage is to learn as much as possible about the facts and the client's feelings concerning the case in the limited time we have.

B. At first blush it might appear easy to get the facts: just ask the client to tell you. Unfortunately, there are inhibitors that may block full disclosure from the client.

C. What are some of the inhibitors to full development of the facts? (\* categories taken from Binder and Price, *Legal Interviewing and Counseling: A Client-Centered Approach*, West Publ. Co. (1977) pp.9-14).

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.
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. Therefore, 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 communicate openly.
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 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.

- D. To offset these inhibitors there are some techniques we can employ called facilitators which can help in getting the information we need. Facilitators to full development of the facts include (\* categories taken from Binder and Price, *Legal Interviewing and Counseling: A Client-Centered Approach*, West Publ. Co. (1977) pp.14-19):
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, when the client is reluctant to talk about an unhappy marriage, the attorney should not only acknowledge how difficult it is to talk about an unhappy marriage, but also let the client know that the information is important and that the attorney needs 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 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 how helpful they are being.

## V. TECHNIQUES FOR DEVELOPING FACTS.

- A. Now that we have an idea of the psychological factors involved interviewing, what are some of the techniques for developing the facts?
1. Have client tell a story. Most often, this is the best method of getting information. It lets you clue into the client's feelings and see if there are gaps in the story. You must still guide the story with appropriate questions so as not to get off the track.
    - a. As the client talks, you will be tempted to think of legal theories and formulate a plan of attack. Try to avoid doing this too early.
    - b. Let the facts come out first. Your first goal is to listen. Premature "lawyering" can waste time and disrupt the client's train of thought.
  2. Adopt an empathic approach. Clients need someone to listen. Sit back, take notes sparingly, if at all during the first telling of the facts, and concentrate on what they are saying.
  3. Use questions effectively. You will have to use questions during the interview to get a complete picture of the case. Some questions work better than others. A lawyer who understands when to ask the right type of question is well on the way to becoming a successful interviewer.
    - a. There are two forms of questions you can use or a combination of them.
      - (1) Open ended questions. Invite the client to broaden his perceptual field: "How did you feel after the collision?" "Tell me what happened." When interviewing clients, we generally do not want to control their answer. Rather we want to determine all of what he knows and feels; the open ended question does this best. The disadvantage, however, is that it is sometimes easy to lose control of the interview and have the client going off on irrelevant tangents.

- (2) Closed ended questions. Actually suggest an answer: "You feel terrible about this, don't you?" You would be better off with a divorce, wouldn't you?" These questions narrow the information we get and may make the client feel invaded. There may be times, however, when this type question is very appropriate, such as when the client is very uncomfortable in giving any information. In such a case you may want to explore the possibility of referral to another attorney with whom the client may feel more comfortable.
- b. 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.
  - c. Avoid confusing your client by asking double questions. Keep it simple.
  - d. Also avoid bombarding the client. Let the client talk without having to respond to you all the time.
  - e. Try not to ask the "Why" question. We have been conditioned to regard this as threatening. The question carries a negative connotation.
  - f. Use responses to show client you are actively listening.
- (1) Restatement - This shows the client you listened and understood what he said. Just rephrase what they said.
  - (2) Reflection - This shows the client you are empathetic and relate to his feelings about the case.
  - (3) Explanation - This is a descriptive statement used to orient a client in a particular way. "I need to understand this about the case because..."

- (4) Encouragement - This is merely supporting and strengthening the client's feelings toward the case.
- (5) Assurance and reassurance - This is used to indicate that we believe the client can face up to his situation.
- (6) Suggestion - This is a mild form of advice, but leaves leeway for the client to make the decision.

**B. Other techniques.**

- 1. Wait out silences. Learn when to keep quiet. Often periods of silence from the client will lead into a discussion or admission in a sensitive area.
- 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 about your role and the confidentiality of the interview.
- 3. Spot tension and emotional issues that develop. Try to help the client through these.
- 4. Be sure to ask clients if there is anything else you should know ... if anything important has been left out.
  - a. This puts the responsibility back on the client for the extent of your knowledge of the case.
  - b. If you don't ask it, he can later claim he didn't provide this information because you didn't ask.



- C. Problem areas during the development stage.
1. The rambling client. Remember, you have a very limited time in which to elicit information from the client. You will have to guide the client through the interview and reschedule another appointment if necessary.
  2. The deceptive client. Some clients are not motivated to tell you the truth and it is easy to get misled by them early on. You have to be alert and in the appropriate case, double check what he has told you. For example, Client X tells you that his wife left him and he changed the locks on their home to keep her from coming in and stealing his personal items as she has done in the past. Later, you get a call from a commander who has Mrs. X crying in his office because your client threw her out in the cold last night and locked her out.
    - a. Be careful in domestic situations especially. Seldom will one party give the whole story and often it is shaded in his favor.
    - b. Tell the client if you find out inconsistent information. This often prompts them to be more truthful.
- D. Taking notes. If you take notes during the interview, wait to do it after the client talks a while and you explain to him that it is important for you to jot down some facts. Extensive note-taking can be very distracting to a client and inhibit his conversation with you. You can always take more notes after the client leaves the office.
1. 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.
- E. Use "plain language" and avoid the overuse of legal jargon.

## **VI. THE COLLABORATION AND COUNSELING STAGE.**

- A. Now that you've gotten all the information out of the client, you start thinking how to solve their problem. This gets you into the collaboration and counseling stage.
1. It will be your job to apply the law to the facts and give competent advice to the client.
  2. Consider the full range of alternatives and analyze probable outcomes.
  3. You must also consider the impact of nonlegal factors. Rule of Professional Conduct For Lawyers, 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 . . ."
    - a. Telling a client he can sue for child custody without talking about the high costs involved in the suit would do an injustice to your client.
    - b. 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.
  4. Don't overlook using consultation with other attorneys to help work out a solution for the legal problem. Oftentimes other attorneys in the office will have dealt with similar problems in the past.
  5. Teach the client about compromise.
    - a. A case should not always go to court or even be resolved in favor of only one party.

- b. Many problems can be solved with common sense and compromise.
- 6. Don't rush into a battle when there does not need to be one. One of a lawyer's greatest tools is the ability to negotiate for clients.
- 7. You need to advise the client of the law and the risks completely and competently.

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).

- 8. Know your capabilities and limitations. This is the competence aspect of rendering advice to the client. If you are unsure of the law in a particular area, explain to clients that you want to research the issue and that you will get back to them. Don't guess at the law.
- 9. Be honest with clients. If they have a loser of a case, tell them. Conversely, don't make promises that they will win. Clients must understand that all cases have weaknesses. This is why clients must be encouraged to disclose all the facts. You never know how a case will play before a judge or jury.
- 10. Explain the "time line" or the pace of the case to reach the possible remedy. Make it clear to the client what will be involved and how long it will take to reach the goal. Many clients walk into a legal assistance office expecting instant results (e.g., receipt of support money immediately).
- 11. Allow the client to make the final determination (Rule of Professional Conduct For Lawyers, Rule 1.2).
- 12. 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.

**B. Problems in Counseling.**

1. Clients may possess a negative attitude toward you, the attorney. If you sense this, ask the client if he would feel more comfortable with another attorney.
2. A big problem, especially for new attorneys, is using terms and concepts that are not understood by the client. Speak plain English to your client. Don't bog them down with legalese.
3. What if the client is unreceptive to your proposed solution or alternatives offered and resists counseling?
  - 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.

**VII. THE TERMINATION STAGE.**

**A. How do you end an interview?**

1. By all means, end the interview session on time.
2. Perhaps the most important thing is to ask clients if they have any questions before you let them leave the office.
3. 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).

4. Ensure client understands what will be done about the problem. For example:
  - a. Tell the client that you will write a letter to the creditor outlining your agreed upon position;
  - b. That you will call the spouse's divorce lawyer and see if a settlement can be reached on property division without going to court.
  
5. Also, tell the client what you expect him to do. For example:
  - a. Get more paperwork and bring it back the next day, or
  - b. Go to financial counseling services on post and work up a budget for the family.
  
- B. 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.
  
- C. 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.
  
- D. Keep the client informed and conduct all necessary follow-up actions (Rule of Professional Conduct For Lawyers, Rule 1.4).

If you are toward the end of your assignment in legal assistance, don't just pack your bags and leave one day without closing your cases or referring them to other attorneys with the client's permission.

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

"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).

- A. 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.
  5. 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 clients to elaborate on answers.
    - a. 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.

- b. 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?"
  - 6. 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.
    - a. Involving the legal assistance staff in analyzing the results is useful and encourages total commitment to the goal of improving services.
    - b. Extend the "useful" suggestions you receive into an action plan that contains concrete proposals and assignments of responsibility.
- B. 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).

"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..."

C. A survey of legal client satisfaction taken by the Missouri Bar and Prentiss Hall indicated the following:

1. Why would the client hire that attorney again? Because he
  - a. Was friendly,
  - b. Was prompt and business-like,
  - c. Was courteous,
  - d. Was not condescending, and
  - e. He kept me (the client) informed.
  
2. Why would the client **not** hire that attorney again? Because he
  - 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).

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

1. Commitment from the leadership. The boss must practice and communicate a policy that excellent service is expected **and** rewarded by such things as internal awards and recognition (for example: "Law Clerk of the Week" award based on client and attorney feedback).
2. Service training. Establish a system of training and reinforcement in how to provide good service. (For example, improving telephone skills or methods of interviewing and counseling; arranging offices to facilitate open client-attorney communication; methods of interviewing and counseling; and recognizing the special talents of each office worker and putting them into use).
3. Recognition of the factors clients use to judge quality of service.

E. Practical ways to keep clients happy.

1. Return phone calls by the end of day the were received. If the legal assistance attorney cannot return the call, have someone call the client to determine if it is an emergency.
2. Periodically write status reports. Send the report to the client and put one in the file (serves a dual purpose).
3. If the attorney-client relationship is terminating or the legal assistance attorney is not going to perform any further action, consider sending a letter to the client. This is very important in cases if there is a statute of limitations issue.
4. Learn to listen and take notes.

## INTERVIEWING AND COUNSELING RECAP

### Interview Stages

Stage	Goal	Comments
I. Initiation	Place client at ease and establish rapport. Ensure client understands your role. Learn nature of client's problem and what client wants done.	Show client to office. Be polite. Ask how you can help the client. Explain role of legal assistance attorney and the attorney-client privilege. Determine if client has seen another attorney.
II. Interview Stage	Learn as many relevant facts as you can. Determine client's feelings about the case.	Use open-ended questions (how and what) to develop story. Listen to answers. Follow up to probe for details. Do not inquire into irrelevant matters.
III. Collaboration/ Counseling Stage	Make sure client understands all possible solutions and the consequences, legal and otherwise, for solving problem. Render competent legal advice. Final decision should be made by client.	Explain all available options for resolving problem and consequences with each. Offer your suggestion on the best solution but permit the client to make final decision. Fully explain advantages and disadvantages of solution selected.

IV. Termination-

Ensure client fully understands his problem, the solution adopted, and the agenda set for achieving desired result. End interview on time.

Ask for and answer all client's questions. Summarize solution decided upon. Explain intended plan of action and give an idea of the timetable for achieving results. Follow up as necessary and keep the client informed.

## PROFESSIONAL RESPONSIBILITY

### AR 27-26 - RULES OF PROFESSIONAL CONDUCT FOR LAWYERS

"A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."

Comment, Rule 1.6.

#### **RULE 1.6, Confidentiality of Information.**

(a) A lawyer **shall not reveal** information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer **shall reveal** such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(c) A lawyer **may reveal** such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

(d) An Army lawyer may reveal such information when required or authorized to do so by law.

#### **RULE 1.13: Army as Client** (or: When is the Army not the client).

(a) Except when representing an individual client pursuant to (g) below, an Army lawyer represents the Department of the Army acting through its authorized officials....

(f) A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide **civil legal assistance to an individual, has, for those purposes, a lawyer - client relationship with that individual.\***

\* (But see: Rule 1.2, Scope of Representation, for limits on representation).

## CLIENT SATISFACTION SURVEY

DEPARTMENT OF THE ARMY  
HEADQUARTERS, V CORPS AND FORT BLANK  
FORT BLANK, WASHINGTON 98400

SUBJECT: Client Satisfaction Survey

Dear Legal Assistance Client:

To help us serve you better, please take a few minutes to complete this Client Satisfaction Survey. 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 on the waiting room counter.

Thank you for your assistance.

Sincerely,

(Signature Block)

- 
- |  | GREAT | GOOD | O.K. | FAIR | POOR |
|--|-------|------|------|------|------|
| 1. To what extent did the receptionist treat you courteously?                          |       |      |      |      |      |
| 2. To what extent were you satisfied with the waiting time to see an attorney?         |       |      |      |      |      |
| 3. To what extent did the attorney make you feel comfortable and at ease?              |       |      |      |      |      |
| 4. To what extent did the attorney show interest and concern for you and your problem? |       |      |      |      |      |

GREAT      GOOD   O.K.   FAIR   POOR

- 5.    How clear was the attorney's advice to you?
- 6.    To what extent did the attorney answer your questions fully and clearly?
- 7.    What was the name of the attorney who assisted you? \_\_\_\_\_
- 8.    What was the name of the receptionist who assisted you? \_\_\_\_\_
- 9.    How many times during the past twelve months have you been seen at the Fort Blank Legal Assistance Office? \_\_\_\_\_

10.   Remarks/Suggestions: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

11.   When appropriate, a follow-up response to your comments will be made. If you desire, leave your name and number.

\_\_\_\_\_  
\_\_\_\_\_



## CHAPTER 3

### STANDARD OPERATING PROCEDURES (SOP)

The key to running a successful office is not only having top-notch personnel, but also having an established policy, or standard operating procedure (SOP), of how the office operates and how routine problems are handled. An SOP captures institutional memory, quickly orients new personnel, and ensures everyone is working towards the same goal. As a general rule, if it is policy, procedure, form or recurring routine, put it in the SOP. The SOP must be workable, flexible, and well known to all who work in the office.

The Chief of Legal Assistance should oversee the SOP, ensuring it is current and reflective of SJA/Legal Assistance Office policy. It should be in computerized format to update as needed. All attorneys and staff members should have a hard copy of the SOP at their desks - and be required to read it immediately upon joining the office. New members need time during the work day to read the SOP and go over important parts with the Chief/NCOIC to ensure their understanding.

The sample SOP that follows is just that, a sample SOP. It is to be used as a framework to develop an SOP that will meet the needs of your office. It is primarily designed for a larger legal assistance in which the Chief, Legal Assistance will rate the other attorneys in the office. The SOP can be easily modified to meet the needs of any legal assistance office. If you have any suggestions for improvement in the sample SOP, please send them to The Judge Advocate General's School, ATTN: Legal Assistance Branch, 600 Massie Road, Charlottesville, VA 22903. Your suggestions will be considered in drafting future updates of this publications. Special thanks to the legal assistance office at Fort Bragg for its input, which greatly improved the current version of this SOP.



# SAMPLE CONTENTS OF STANDARD OPERATING PROCEDURES (SOP)

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### Table of Contents

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- C. List of LA Personnel.
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- I. Professional Responsibility.
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## LEGAL ASSISTANCE SOP

### I. LEGAL ASSISTANCE - PURPOSE, SCOPE AND POLICY STATEMENT

#### A. Statement of Policy and Goals.

1. The Legal Assistance Office (LAO) is responsible for providing legal advice and service on civilian and military matters. The LAO prepares and executes a full range of documents for all active duty, retirees, and family members. The LAO assists Trial Counsel with the deployment of units and their personnel during Soldier Readiness Checks (SRC) and real-world missions.
2. First and foremost, legal assistance is a client service operation. Success will be measured by client satisfaction. This SOP and all other operations are implemented to ensure the best services possible to our clients.

#### B. Statement of Command and SJA Support.

Statement(s) signed by the installation commander and/or the SJA should be inserted at this point. Another alternative is for the letter signed by the installation commander to be used as a cover letter for the SOP. Sample language for a letter to legal assistance attorneys from the installation commander follows:

1. Legal Assistance is one of the most important functions performed by the Office of the Staff Judge Advocate. This function has a direct and profound impact on soldier health, welfare, and morale. No operation in your office touches more lives, and you will be a critical component of the operation. How well you perform your mission is reflected in both client satisfaction, and the continued efficiency of our units.
2. This Standard Operating Procedure is a good starting point for you to use to ensure success during your tenure in Legal Assistance. Your presence here will make a difference. Personally and professionally, I expect your experience to be one of the most positive in your career. Thank you in advance for your decision to serve the soldiers and family members of this fine installation.

C. Responsibility for SOP.

1. The Chief, Legal Assistance (C,LAO) is responsible for keeping this SOP accurate and current.
2. All legal assistance attorneys, NCOs, civilian personnel, and enlisted personnel are responsible for complying with this SOP.

## II. OFFICE ADMINISTRATION.

A. Conflicts.

1. References:
  - a. AR 27-3, The Army Legal Assistance Program.
  - b. AR 27-26, Rules of Professional Conduct for Lawyers.
2. The terms "client," "prospective client," "spouse," "ex-spouse," "opposing spouse," and "opposing party," as used in this SOP all refer to personnel who qualify for legal assistance service according to AR 27-3, para. 2-5.
3. The LAO must avoid conflicts of interest. Individual attorneys are responsible to ensure that prospective clients present no conflict of interest as defined by regulation and this SOP. The attorney who gives a particular briefing or who has an appointment will make the final decision on whether a case poses a particular conflict. An attorney deciding to counsel a prospective client despite an articulable conflict, or an attorney who chooses not to counsel a client for reasons not articulated in this SOP must inform the C, LAO or the senior attorney present, of this decision before attempting any representation of that client.

4. Any change in status of any former LAO attorney (i.e., PCS, reassignment within this office, etc.) shall not be considered in evaluating whether a particular client poses a conflict. Thus, if client has been seen by a former attorney in this office, he has been seen by this office.
5. All prospective clients posing a conflict of interest will be referred to \_\_\_\_\_. Prior to referral, this office will coordinate with \_\_\_\_\_ to ensure the availability of that office to provide the requested service.
6. The LAO will not counsel any prospective client on any issue when the prospective client's spouse or ex-spouse has received counseling from the LAO on any domestic case as defined in paragraph 7a.
7. Domestic Cases:
  - a. Domestic cases include any counseling on non-support, paternity, custody/visitation, divorce/separation, adoption, or other family law related matter. Anyone attending the Divorce and Separation briefing is considered a domestic case client of the LAO.
  - b. No LAO attorney will counsel on domestic case issues, or allow into the Divorce and Separation briefing, any spouse whose opposing spouse, or other party, has previously been counseled by the LAO on any legal issue.
  - c. Legal advice on domestic cases may be given over the phone only by an attorney, and only when a previously established attorney-client relationship exists.

B. Automated Telephone Messages.

1. You have reached the \_\_\_\_\_ Legal Assistance Office. Office hours are from 0900 to 1600 on Mondays through Fridays. The LAO is located at \_\_\_\_\_. A valid Department of Defense identification card is required for all services.

2. For information regarding Powers of Attorney or Notarizations, press two:

Powers of Attorney and Notarizations are issued on a walk-in basis from 0900 to 1600, Monday through Friday. General powers of attorney, durable powers of attorney, which remain in effect during the person's incapacity or incompetence, and special powers of attorney are available.

If you require additional information or have a legal emergency, press eight.

To hear this recording again press nine.

3. For information regarding Wills, Living Wills, and health Care Powers of Attorney, press three:

Wills, Living Wills, and Durable and health Care Powers of Attorney are provided on an appointment basis on Mondays and Tuesdays.

If you wish to make an appointment now, press zero.

4. For information regarding Divorce, Separation, Alimony, Child Support and Child Custody, press four:

Divorce, Separation, Alimony, Child Support, and Child Custody briefings are offered on a walk-in basis every Wednesday morning at 0930. Sign in is between 0900 and 1030. Following the briefing, an attorney is available to answer questions. Attendance at the briefing is mandatory for domestic matters. Separation agreement worksheets are only distributed following the briefing. Counseling by an attorney for divorce, separation, etc., is only available after the individual has attended the briefing. The \_\_\_\_\_ LAO can only counsel one spouse, the other spouse must call \_\_\_\_\_ at xxx-xxxx.

To hear this recording again press nine.



5. For information regarding contracts, leases, on- and off-post housing, landlord/tenant complaints, debt collection practices and debt problems, press five:

Unsigned contracts or leases are reviewed by an attorney on a walk-in basis during office hours. Clients should be seen within twenty minutes of signing-in.

On-post housing complaints are handled by the Housing Division. Call xxx-xxxx.

For off-post housing or landlord complaints, debt collections practices, and debt problems, press zero to make an appointment.

6. For information regarding bars to reenlistment, OER and NCOER appeals, and reports of survey appeals, press six:

Soldiers requiring assistance concerning bars to reenlistment, evaluation report appeals, rebuttals to letters of reprimand, or reports of survey must visit this office prior to their appointment and pick up the read-ahead materials. Soldiers must prepare a written response to the action and bring it to their appointment. Soldiers will not be seen without the proper documentation.

To hear this information again, press nine.

If you require additional information or have a legal emergency, press zero.

7. If you wish to make an appointment now, press zero.

8. To hear this recording again press nine.

C. Office Hours of Operation.

1. The legal assistance office is open from 0900-1630, Monday through Friday.

2. The civilian paralegal or attorney on duty will open the office doors at 0900. The NCOIC will make a schedule to ensure there is a notary available throughout office hours. Lunch for paralegals will be from 1130-1230. The NCOIC is responsible for establishing a workable lunch schedule for the legal specialists. The NCOIC will close the door at 1600 hours every duty day.

D. Appointment/Walk-in Policy.

1. One (1) hour appointments will be scheduled for:

Taxes	NCOER Appeals
Reports of Survey	OER Appeals
QMP	Casualty Assistance

2. 30 minute appointments will be made for all other clients.
3. Appointments for Reports of Survey, QMP, OER Appeals, and NCOER Appeals generally require that the individual come into the office and pick up the appropriate "Take One" packet before the appointment is scheduled.
4. In most other cases, appointments can be made over the phone. The client will be notified what time the appointment is, with whom, and that if they are more than 10 minutes late, they will be considered a no show. A client can cancel or reschedule at least one day prior to their scheduled appointment.
5. Walk-in service is available for powers of attorney, notary, unsigned contract review, and Wednesday Divorce and Separation day.
6. Appointments will not be made for profit making businesses, criminal cases, drafting contracts, or codicils to wills.
7. Appointments will be made no more than 2 weeks in advance. The C,LAO will release new schedules on Monday mornings.

E. Procedure for Handling.

1. Telephone Inquiries.

- a. Answer the phone with office name, your rank, and "How may I help you?" Clients that are in the office have priority over phone calls. All phone calls to the attorneys and paralegals will be thoroughly screened. Clients should be advised to come into the office for assistance. Ensure the office services and times are given and thoroughly explained and understood. Be courteous at all times. If a client loses his composure, you will maintain yours.
- b. Non-attorneys will not render any form of legal advice. They may screen calls and determine the appropriate area or agency the caller needs to contact.
- c. As a general rule, legal advice should not be given over the telephone. This does not preclude general information being given. Tell the caller to come in for an appointment or to mail whatever documents might be in question.
- d. Transfer of calls to other offices such as housing, transportation, and finance will be given with some information about the client's problem.

2. Emergencies.

- a. The C, LAO, or ranking LAA, will decide when an emergency warrants special attention.

3. No-shows.

- a. If a client fails to show for a scheduled appointment or leaves while legal assistance is being provided, he will be considered a no-show. A client is also considered a no-show when he is more than 10 minutes late for an appointment. AR 27-3 authorizes the Staff Judge Advocate to suspend legal assistance privileges for up to 30 days. In accordance with AR 27-3, the no-show policy is as follows:
- b. Due to the limited number of available appointments, and out of respect for other soldiers and family members needing legal assistance services, failure to cancel your appointment, or to make your scheduled appointment, will result in the suspension of your privilege to legal assistance services for a period of thirty days. Soldiers may request an exception to this policy. The C, LAO will make the determination whether the exception will be granted.

4. Referrals.

- a. When the assistance sought by a client is beyond the scope of the legal assistance program or beyond the capabilities of currently assigned attorneys, that client will be referred to a civilian attorney.
- b. Referrals will comply with AR 27-3.

5. Complaints.

- a. Client survey cards may be used for complaints. All clients will be provided with a survey card.
- b. The C, LAO or NCOIC will be immediately informed of all complaints and will resolve them as quickly as possible.

6. Soldier Readiness Checks, Mobilizations, and/or Deployments.

- a. Any command that has a question about deployment legal assistance will be directed to the C, LAO. The Trial Counsel and his legal specialist will not be primarily responsible for this assistance. They will, however, be notified and utilized when a unit requests pre-deployment legal assistance.
- b. All deployments or unit SRCs will be provided legal services and support.

F. Reporting Requirements.

1. Client Records - Complete a card for any client requiring assistance from an attorney or paralegal. It is the attorney or paralegal's responsibility to enter data into the database.
2. Time Records - Attorneys will keep track of the hours that they work and report them to the C, LAO at the end of each month.
3. Required Reports (See AR 27-3, paragraph 5-3 and 5-4).
  - a. The C,LAO will prepare DA Form 4944-R (Report on Legal Assistance Services) and submit it to the Legal Assistance Plans and Policy Division no later than 1 February each year.
  - b. An after-action report on tax services will be provided to the Legal Assistance Plans and Policy Division no later than 1 June of each year.

G. Confidential Reading File.

1. All attorneys and paralegals will make a copy of all correspondence and other items and include them in the confidential reading file.

2. The C,LAO will review the confidential reading file to ensure effective client representation. Such review should ensure that the attorneys have accurately reflected the law and are effectively written.

H. Confidentiality.

1. Obviously, all communications between a client and an attorney are completely confidential.
2. Other office personnel will also ensure that client confidences are maintained. No information about clients may be given out without prior approval by the C,LAO.

I. Client Satisfaction Survey.

1. All clients will be issued client survey cards.
2. The C,LAO will review all client surveys and take any action he deems appropriate.

J. Office Appearance and Security.

1. The LAO is a legal office. As such the office will be appropriately maintained. The office will be kept neat and clean at all times.
2. Disorderly or disruptive conduct will not be tolerated within the office. Parents should be discouraged from bringing small children to the LAO.

### III. PERSONNEL.

A. Organizational Chart.

B. Civilian Working Hours - 0800 to 1700 with one hour for lunch (1200 - 1300).

- C. Leave Policy - Leave is liberally granted; however, for the smooth flow of operations, the number of personnel on leave at any one time may need to be limited. It is best to plan ahead as much as possible.
  
- D. Training.
  - 1. Technical - Attendance at the Legal Assistance short course at TJAGSA is encouraged.
  
  - 2. Professional CLE.
    - a. Military/Government sponsored CLE. Occasionally the opportunity to attend military sponsored CLE will arise. If you need to attend for your state, tell the C,LAO.
  
    - b. State requirements. Individual JAs are responsible for their state bar requirements. Inform the C,LAO of your requirements.
  
  - 3. Officer Professional Development (OPD) - All officers will attend the SJA's weekly OPD at 0630 - 0730 on Thursday morning.
  
- E. OERs/EERs/Performance Reports.
  - 1. Shortly after your arrival, you will be counseled by the C,LAO concerning his expectations of you as a soldier and attorney. Officers will complete a DA Form 67-8-1, OER Support Form, within 30 days of their assignment to this office. The officer will then schedule an office call with the C,LAO to review the support form. Periodically, the C,LAO will review your progress with you. These sessions are to help you succeed. To meet this goal it is important to seek the advice of the C,LAO when problems arise and to be completely candid regarding any matters affecting the office.
  
  - 2. The C,LAO will schedule an appointment with the NCOIC and civilian paralegals for their performance counseling within 30 days of their arrival at the office.

#### **IV. RESERVE JAS.**

- A. Memorandum of Understanding.
- B. Roster.

#### **V. RESPONSIBILITIES.**

- A. The C,LAO will be responsible for overall operations. He will ensure that the Legal Assistance operation is customer oriented and measures success by customer satisfaction. He will run the best legal assistance program in the Army. His specific duties include:

1. Supervise and train members of the section.
2. Provide scheduling/support for Soldier Readiness Checks (SRC).
3. Maintain overall quality control.
4. Implement local command policies and directives.
5. Ensure compliance with legal, ethical, and regulatory requirements.
6. Act as liaison with the civilian legal community.
7. Determine the number of clients that will be seen during each briefing.
8. Maintain and respond to Customer Comment Cards.
9. Perform special duties as assigned.
10. Provide guidance on the law and the Army for members of the section.



11. Utilize volunteers and interns in a way that helps the office, provides accurate client assistance, and challenges the intern/volunteer.
  12. Review and improve management systems.
  13. Standardize reporting systems.
  14. Win Chief of Staff Award for Excellence in Legal Assistance.
- B. The NCOIC has the overall responsibility, in conjunction with the C,LAO, for the day-to-day running of the office. His specific duties will include:
1. Train the legal specialists.
  2. Monitor the scheduling of appointments.
  3. Assist in disseminating INS forms.
  4. Perform special duties as assigned.
  5. Acquire office supplies.
  6. Maintain volunteer records and schedules.
  7. Screen all questions before they are brought to the C,LAO attention.
  8. Ensure the office is set up for the next day's activity.
  9. Ensure the proper paperwork is available for clients and attorneys.
  10. Tactfully and courteously maintain order and control of the waiting room area. Handle problems that arise that the legal specialists are not able to handle.

11. Brief clients in mass before specific briefings (i.e., length of time, what process will take place, who to ask if they have questions).
- C. Legal Assistance Attorneys (LAA) - To succeed professionally a LAA needs to be client oriented and know what his supervisors expect. Knowledge of the law is only part of what it takes to be a good LAA. Most mistakes made by LAA's have little or nothing to do with the law. Too often LAAs are thrown into the practice of legal assistance without any clear guidelines on office policy. A few minutes spent studying this SOP and the New Attorney Training Packet will help the newly-assigned LAA avoid many mistakes. LAAs will perform those functions as prescribed by AR 27-3, local command policies, and those directives issued by the Staff Judge Advocate and the C,LAO.
1. Schedule appointments.
  2. Input client card information into the database and properly file the client cards.
  3. Answer the telephones.
  4. Perform briefings as assigned by the C,LAO.
  5. Provide legal assistance for scheduled appointments.
  6. Perform special duties as assigned.
  7. Determine conflict status of each client.
  8. Maintain client confidentiality.
  9. Produce flawless correspondence. Secure peer review of same. Use AR 25-50.
  10. Exhaust local resources before calling higher HQ.

11. Hang diplomas and other legal/military achievements/momento.
  12. Observe military courtesy.
  13. Maintain office security. If you are the last one leaving, be sure all of the LAO is secure.
  14. Write diplomatic letters. Never threaten criminal prosecution or litigation.
- D. Legal Specialists have basic, but very important tasks, including:
1. Answer the telephones; take complete phone messages.
  2. Screen and schedule appointments.
  3. Maintain office.
  4. Provide appropriate documents to clients and attorneys.
- E. Civilian Paralegals - responsibilities will be consistent with local law, the capabilities of the paralegal, and the needs of the LAO.

## **VI. CLIENT ELIGIBILITY**

- A. Priority - Most services are provided on a first-come first-serve basis, including appointments. Senior ranking individuals may be given priority if, in the judgment of the C,LAO, their position limits the time they may spend in the LAO. Also, clients needing immediate attention (i.e., a client who has recently signed a contract with a door to door salesman) will be seen immediately.
- B. Screening - Active duty military, retirees, and family members are eligible to receive legal assistance services.

- C. ID Cards - All clients must have a valid identification card. Ensure that the card has not expired.

## **VII. AVAILABLE SERVICES.**

### **A. Appointment Based.**

1. Wills.
2. Advanced Estate Planning.
3. Consumer issues.
4. Adoptions.
5. Name Changes.
6. Bars to Reenlistment.
7. OER and NCOER Appeals.
8. Reports of Survey.
9. Security clearance revocations.
10. Taxation.
11. Quit Claim Deeds.
12. Domestic relations, but only after attending the briefing.

- B. Briefings will be provided for all clients needing assistance with domestic relations.
  
- C. Walk-Ins.
  - 1. Unsigned contract review.
  
  - 2. Immigration and Naturalization.
  
  - 3. Powers of Attorney.
  
  - 4. Notarizations.
  
  - 5. Armed Forces Disciplinary Control Board.
  
  - 6. Bills of Sale.
  
  - 7. Affidavits.

### **VIII. ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB).**

- A. Each attorney is responsible for a designated topic-area for AFDCB. If an attorney deals with a case that appears to be appropriate for an AFDCB complaint, he will notify the action attorney with that area of responsibility. The action attorney will determine whether an AFDCB complaint is warranted. If so, the action attorney will handle the complaint and its processing, and will notify the C,LAO.
  
- B. Once the complaint is made, the action attorney inputs the complaint into the AFDCB book. The book will be kept behind the front desk. The action attorney keeps the original complaint and gives a copy to Military Police Investigators (MPI), if necessary. A file should be opened for businesses complained about for the first time. As new complaints come in on a business, the action attorney can evaluate the file to determine if a pattern is emerging.

- C. Handle the complaint like a normal case. Try to resolve it. If it looks like something other than a simple consumer complaint, send a copy to MPI, then coordinate with them about the investigation.
- D. Try to resolve complaints as quickly as possible because they build up and get out of hand. Keep a personal log of the actions you take on a case. Also, update the AFDCB book with your actions. Once a complaint is resolved, note it in the AFDCB book and send a copy to MPI, if you have already involved them.

## **IX. POWERS OF ATTORNEY & NOTARIZATIONS.**

- A. Notarizations and powers of attorney represent the bulk of our business in legal assistance. Since most of this business is handled by legal clerks and enlisted soldiers, however, LAA's often know less about these services than they should. The United States Code and AR 27-55 empower JAG officers and others to perform notarial acts.
- B. Notary service will be provided during normal office hours on a walk-in basis. The notary public that is providing the service will have final say as to whether or not he will notarize a particular document. A notary public can not be ordered nor influenced to notarize a document with which he does not feel comfortable. All notaries will be annotated on the notary log. Powers of Attorney may not be notarized if the expiration date is longer than one year from the current date. General Powers of Attorney may not be notarized unless it is given to a family member. Exceptions to this policy may be granted by the C,LAO.
- C. A practice note: Be careful what you sign. The temptation during a hectic business day to sign your name and move on is hard to resist. Make sure the document is properly filled out, and ensure that clients understand what they are signing. If the form calls for the client to be sworn, swear him to it. You may think you are doing a client a favor by dispensing with the swearing ceremony, but you are really just inviting his contempt and a possible malpractice complaint. If it was worth the client's time to bring the document to you for a notarial act, it should be worth your time to perform the entire act. Also, be sure to fill in the date when you sign your name. The date is just as important as your signature for legal purposes, and you as the notary are responsible if the date is accidentally left blank.

- D. Refer to AR 27-55 (April 1997).

## **X. WILLS SOP.**

- A. Wills are prepared on an appointment basis.
- B. Clients will be told to arrive 15 minutes prior to their appointment so that they can fill out a will worksheet.
- C. The preparer of the will talks the client through the wills program as he prepares the will.
- D. When the will is complete, the client is sent to the waiting room to review his will. When he is finished, he turns it into the front desk.
- E. The client then meets with an attorney, who reviews the will and ensures that it complies with the wants and needs of the client.
- F. The goal is to have the client leave with a completed will in 1 1/2 hours.
- G. This process eliminates the office having wills go unsigned because clients fail to return for the execution of their wills. It also increases client satisfaction because clients need only make one visit to our office.

## **XI. WILL EXECUTIONS.**

- A. Standard Operating Procedure for Executing a Will.
  - 1. 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. Usually, this page numbering should not include the self-proving affidavit, which is generally not part of the will.

2. 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.
3. The testator and three 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.
4. 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 three 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.
5. The testator should initial or sign on the margin of each page of the will. (New York wills should only be signed at the end of the entire 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 three can see the testator sign.
6. 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.
7. 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.
8. One of the witnesses should then read aloud the attestation clause.



9. Each witness should declare that the attestation clause is a correct statement.
10. 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.

**B. Post Execution Speech.**

1. As of this moment, you have probably discovered that creating a will involves a very formal, complex process. There is a reason for all the formalities. Courts take wills very seriously. Courts recognize that you work all your lives to accumulate what is known as your estate, and with these few simple pieces of paper, you give that all away. Therefore, courts require perfect compliance with their rules, to ensure that each will represents the intentions of its creator.
2. The formalities associated with creating a will do not end when you leave our office today. It is important that you continue to safeguard your will. Namely, you must store it in a safe place. A safe place, however, is not a bank safety deposit box. When someone dies, the bank seals that person's safety deposit box. No one will be allowed access to the contents of the safety deposit box without a court order.
3. This office recommends that you store your will in a fireproof box in your home. If you do not have a fireproof box, you should obtain one in which to store all of your important documents (deeds, birth certificates, social security cards, enlistment papers). In the alternative, you may want to store your will where a lot of lawyers store theirs, in a freezer bag in their freezer. This may sound strange, but if you ever watched the news and have seen footage of a house that burned down, you can always see the refrigerator among the rubble.

4. No matter where you decide to store your will, you must remember to tell your personal representative where they will be able to find your will. If your personal representative does not know where to find your will, you have wasted your time here today.
5. In addition to the other formalities of the will process, you will see that we are placing three staples at the top of your will. These staples must not be removed. If the staples are removed, your will may not be probated, because it will appear as if someone has tampered with it.
6. Similarly, do not write on your will. If a court sees handwriting on your will, it will assume that someone tried to tamper with your will. If you wish to make a change to your will, come back and see us. We will be happy to make a new will.
7. Do not photocopy your will. There is no good reason to copy your will. If, however, you feel that for some reason you must copy your will, label all copies with the word "copy" on every page. As previously mentioned, do not break the staples at the top of the will. Moreover, cover up all of the signatures, so that the copies cannot be confused with the original.
8. If a major change occurs in your life come back and see us. If you have another child, marry, divorce, someone you have named in your will passes away, or you win the lottery, we will be happy to make you a new will. In fact, some changes in your life may make this will no longer valid. It's important to keep your will current.
9. If your net worth (including life insurance) exceeds \$600,000 (\$625,000 in 1998), you must see a civilian estate planner. Our wills are perfect for folks with assets less than \$600,000 (\$625,000 in 1998).
10. If you have created a Trust for your children in your will, you must change your SGLI. I am providing you with an example of how to properly fill out your SGLI form.

11. If you noted on your worksheet that you are interested in creating a non-binding memorandum of instruction, I will be happy to furnish you with a non-binding memorandum of instruction worksheet. You may either use this form as a guide, or use the form as provided. The memorandum may be used to notify your personal representative of the location of your assets, and to direct the distribution of particular belongings. Be sure to store the document with your will.

## **XII. PROCEDURE FOR CLOSING CLIENT CASES.**

- A. After receiving services, clients should be advised that their relationship with this office and this attorney are complete. This is necessary to ensure that clients understand that they should return to see us (or another legal assistance office if they should PCS) when they encounter additional legal issues relating to the same or other matters.
- B. Wills clients need to understand that they should have their wills periodically reviewed because the LAO is not in a position to keep track of all clients and advise them of any changes in the law that may effect them.

## **XIII. PREVENTIVE LAW PROGRAM.**

- A. This office will maintain an aggressive preventive law program.
- B. Consumer law violations by local businesses will be recorded and monitored through the Armed Forces Disciplinary Board process.
- C. Articles will appear weekly in the \_\_\_\_\_, the installations local newspaper. This articles will address areas that will not only be of interest to our clients, but will help them to avoid legal pitfalls.

#### **XIV. TAX PROGRAM.**

- A. The tax program should be set out in a separate SOP.
- B. See JA 275, Model Tax Assistance Program for a suggested format for a tax program SOP.

#### **XV. DEPLOYMENT SOP.**

- A. The Deployment SOP should be set out in a separate SOP.
- B. See JA 272, Legal Assistance Deployment Guide.

#### **XVI. PARALEGAL SOP.**

- A. A paralegal SOP, if necessary, should set out the scope of the paralegal's duties. It should specify what a paralegal can and cannot do within the office.
- B. State law should be consulted to ensure that the paralegal is being properly utilized.

#### **XVII. APPENDICES.**

- A. Legal Assistance Regulation (AR 27-3).
- B. DAJA-LA Messages/OTJAG Policy Letters.
- C. List of LA Personnel.
- D. List SJA Office Personnel.

- E. Referral List.
- F. Forms/Letters.
- G. Professional Responsibility.
- H. Computer Instructions.

## CHAPTER 4

### PROFESSIONAL RESPONSIBILITY

#### I. REFERENCES.

##### A. Primary.

1. AR 27-26, Rules of Professional Conduct for Lawyers (1 May 1992).
2. Air Force Rules of Professional Responsibility, TJAG Policy Number 26 (1 July 1994).
3. Coast Guard Attorneys - Follow licensing jurisdiction.
4. Navy Rules of Professional Conduct, JAG Inst. 5803.1A (1992).
5. American Bar Association Model Code of Professional Responsibility (1970).
6. American Bar Association Model Rules of Professional Conduct (1993 ed.).
7. AR 27-3, The Army Legal Assistance Program (10 Sep 95).
8. AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs (1 May 1996).

##### B. Secondary.

1. AR 27-1, Judge Advocate Legal Service (3 Feb. 1995).
2. Ingold, An Overview and Analysis of the New Army Rules of Professional Conduct for Lawyers, 124 Mil. L. Rev. 1 (1989).

3. ABA/BNA Lawyers' Manual on Professional Conduct (1984).
4. OTJAG Standards of Conduct Office, Professional Responsibility Notes (published periodically in The Army Lawyer).

## **II. INTRODUCTION.**

## **III. APPLICABLE STANDARDS.**

### **A. Rules of Professional Conduct.**

1. The Army rules apply to all judge advocates and civilian attorneys working under approval authority of The Judge Advocate General.
2. The Army Rules also apply to civilian attorneys practicing before tribunals conducted pursuant to the UCMJ and the Manual for Courts-Martial.
3. Army Rules apply to all Reserve Judge Advocates while performing duties under the cognizance of TJAG.
4. The Navy Rules apply to civilian counsel representing members of the service in any matter under the cognizance of TJAG.
5. The Air Force Rules apply only to civilian and military attorneys employed by TJAG, USAF and to foreign national attorneys employed by the USAF overseas.

### **B. Scope of the Rules.**

1. Provide a basis for taking action should a lawyer fail to comply or meet the standard. Do not provide a basis for a civil cause of action against either the Army or an attorney.
2. Comments are nonbinding guidance.

3. The Army Rules are only one source of rules governing the conduct of judge advocates (See, e.g., UCMJ, Joint Ethics Regulation, JAGC Personnel Policies).

C. Other Applicable Standards.

1. ABA Standards for Criminal Justice.
2. Regulatory and statutory standards (e.g., UCMJ, Joint Ethics Regulation, JAGC Personnel Policies).
3. Ethics opinions and standards promulgated by State Bar and TJAG.
4. Another state's ethical standards if the attorney is licensed to practice or practicing within another jurisdiction.

D. Resolving Ethical Conflicts.

1. Army Rule 8.5 provides that although attorneys remain subject to the Rules in effect in their licensing jurisdictions, the Military Rules supersede in case of a conflict. The Air Force has a similar policy stated in the cover memorandum of their rules. Navy Rule 8.5 states that the Navy rules supersede for any other rules when conducting Navy/Marine Corps legal functions, but that local rules may supersede only while attorneys are conducting proceedings in those courts.
2. ABA Model Rule (old approach in comment to Model Rule 8.5).
  - a. Apply principles of conflicts of laws.
  - b. Most significant relationship test.
3. ABA Model Rule 8.5 as amended August 1993. Disciplinary Authority must make a choice of law:
  - a. For conduct in connection with a court action - apply the rules of the jurisdiction where the court sits.



- b. For other conduct - apply the rules of the jurisdiction in which the lawyer principally practices.
  - c. What about practice in a military setting?
- E. Practical Approach.
- 1. Follow the most restrictive rule.
  - 2. Seek alternate solutions.
    - a. Request that a different attorney be appointed to the case.
    - b. Request an opinion or waiver from the state ethics review panel.  
CAUTION: Coordinate with your service's professional responsibility office beforehand!
    - c. If the conflict is irreconcilable - follow your service's rule regarding conflicts.

#### **IV. WHO IS THE CLIENT?**

- A. General Rule - The department you serve with (e.g. Dept of the Army)(Rule 1.13)
- B. However, each department establishes exceptions to that rule for individual client services like legal assistance.
  - 1. Army - Rule 1.13(g) - a lawyer has an attorney-client relationship with an individual if he is assigned to represent an individual
    - a. Who is subject to disciplinary action or administrative proceedings; OR
    - b. Being provided *civil* legal assistance

2. Navy/Marine Corps
  - a. Similar to the Army, except the language is in Rule 1.13(f).
  - b. The Navy does NOT qualify legal assistance with the term "civil."
3. Air Force: Has an exception identical to the Army's in Rule 1.13(f).

## **V. DUTIES TO THE CLIENT.**

### **A. Scope of Representation. (Rule 1.2)**

1. A lawyer must abide by a client's decisions concerning the objectives of representation and must consult with the client as to the means by which the objectives are to be pursued (Rule 1.2(a)).
2. A lawyer should assume responsibility for technical and legal tactical issues.
3. A lawyer may not counsel a client to engage in criminal or fraudulent conduct.
4. Scope of representation may also be limited by a non-ethics regulation. In the Army, AR 27-3 limits the areas of practice under the Army Legal Assistance Program. In the Air Force, AFI 51-504 similarly limits the areas of practice under the Air Force Legal Assistance Program. These regulations also have sections discussing professional responsibility issues.

B. Competence (Rule 1.1).

1. Competence requires legal knowledge, skill, thoroughness, and preparation to the extent reasonably necessary for representation.
  - a. The required proficiency is that generally afforded to clients in similar matters.
  - b. SUPERVISOR makes the initial determination as to competence for a particular assignment
2. Lawyers may give advice and assistance even if they do not have skill ordinarily required if referral or consultation with another lawyer is impractical.

C. Diligence. (Rule 1.3)

1. Lawyers must act with reasonable diligence and promptness (Rule 1.3).
2. A lawyer must carry through to conclusion all matters undertaken.

D. Communication. (Rule 1.4)

1. Rule 1.4 imposes a duty on a lawyer to keep clients reasonably informed about the status of a matter and to comply with client requests for information.
2. Lawyers also must explain matters to clients to permit them to make "informed decisions" (Rule 1.4(b)).

E. Confidentiality (Rule 1.6).

1. General rule. A lawyer shall not reveal any information relating to the representation of a client.
  - a. No distinction between confidences and secrets.

- b. Applies to information obtained prior to formation of attorney-client relationship.
- c. The duty of confidentiality continues after the lawyer-client relationship has terminated.

2. Exceptions to confidentiality.

- a. A client may consent to disclosure of confidences (Rule 1.6(a)).
- b. Disclosure may be impliedly authorized in order to carry out the representation (Rule 1.6(a)).
- c. Disclosure is permitted to establish a claim or defense in a controversy with a client (Rule 1.6(b)).
- d. Intention to commit a crime. Army Rule 1.6(b)(1) and Navy Rule 1.6b mandate (Air Force Rule 1.6 has the same exception, but it is discretionary -- the lawyer MAY disclose) disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to--
  - (1) result in imminent death or substantial bodily harm, or
  - (2) impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.
  - (3) There is no authority for revealing information of other potential offenses under the Army Rules.
- e. Compare to Mil. R. Evid. 502 - Lawyer-Client Privilege.
  - (1) Protects against disclosure of privileged communication between attorney and client.
  - (2) Does not protect against other disclosures (*e.g.*, information gained from sources other than the client).

(3) Narrower protection than Rule 1.6 (*e.g.*, future crimes are not privileged).

f. Client authorizes disclosure - AR 27-3, para. 4-8a strongly suggests having authorization in writing. *See also* AFI 51-504, para. 1.6.2 (Information received for legal assistance will be release “only with the client’s express permission. . . .”)

F. The Lawyer as Advisor.

1. Lawyers Should Provide Complete Advice.

- a. A lawyer may refer to moral, economic, social, and political factors when rendering advice to clients (Rule 2.1).
- b. Rule 2.1 sets forth a permissive standard.

2. Lawyers Must Provide Independent Advice.

- a. When advising individual clients, lawyers are required to exercise unfettered loyalty and professional independence (Rules 2.1 and 5.4).
- b. A lawyer who cannot provide independent advice must seek to withdraw from the representation of an individual client.
- c. LAAWS-LA software represents Army policy on the proper form of documents, but is not a substitute for an attorney's independent professional judgment. AR 27-3, para. 4-4a.

G. Terminating the Relationship. (Rule 1.16)

- 1. Notwithstanding any other provision of the rule, a lawyer shall continue the representation when ordered to do so by a tribunal or other competent authority.

2. A lawyer SHALL seek withdrawal (or not commence representation) if -
  - a. the representation will violate the rules
  - b. the lawyer's physical or mental condition materially impairs his ability to represent the client; OR
  - c. the lawyer is dismissed by the client.
3. A lawyer MAY seek withdrawal if it can be accomplished without material adverse affect to the client's interests AND -
  - a. the client persists in a course of action which the lawyer reasonably believes to be criminal or fraudulent;
  - b. the client has used the lawyer's services to perpetrate a crime or a fraud;
  - c. the client persists in pursuing an objective which the lawyer considers repugnant or imprudent; OR
  - d. other good cause for withdrawal exists.
4. A lawyer must take reasonable steps to protect a client's interests upon termination of the relationship (Rule 1.16).
5. Steps should include giving notice to the client, allowing time for employment of other counsel, and surrendering all papers and property.
6. Good cause exists to withdraw upon transfer to a new assignment. (Comment to Rule 1.16 (Army & Navy only)).

## VI. OBLIGATIONS TO THIRD PARTIES.

### A. Truthfulness in Statements to Others.

1. A lawyer shall not make a false statement of law or fact to third parties (Army Rule 4.1(a)).
  - a. Knowledge of falsity generally required.
  - b. Misrepresentations can occur if a lawyer affirms a false statement of another person.
2. A lawyer may not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act, unless disclosure is prohibited by Rule 1.6 (Army Rule 4.1(b)).
3. A lawyer also has an obligation to disclose prior misstatements.

### B. Respect for the Rights of Third Parties (Army Rule 4.4).

1. A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third party or use methods of obtaining evidence that violate the rights of third parties (Army Rule 4.4).
2. Other obligations to third parties:
  - a. A lawyer has a duty of candor when dealing with third parties. *People v Berge*, 620 P.2d 23 (Colo. 1980).
  - b. A lawyer is forbidden from engaging in illegal, dishonest, and fraudulent conduct. *Office of Disciplinary Counsel v Kissel*, 442 A.2d 217 (Pa. 1982).

- c. Lawyers must not make derogatory remarks about opposing counsel or opposing parties. Professional Responsibility, *The Army Lawyer* (Sept. 1978) ("lowly, dishonest, welsher"). See also *State v Turner*, 538 P.2d 966 (Kan. 1975).

C. Communications with Opposing Parties.

1. A lawyer shall not discuss a case with another party who is represented by an attorney (Army Rule 4.2). See also ABA Code DR 7-104.
  - a. A lawyer may not accomplish communication indirectly through an agent or encourage clients to contact opposing parties.
  - b. Communication with a party concerning matters outside the representation is permissible.
  - c. A lawyer may communicate with the commander of an opposing party even if the party is represented by counsel.
2. A lawyer is not precluded from communicating with an unrepresented party (Army Rule 4.3).
  - a. Lawyers may not state or imply that they are disinterested.
  - b. Lawyers should refrain from giving advice to unrepresented persons (Comment to Army Rule 4.3). See also ABA Code DR 7-104(A)(2).

D. Threatening Criminal Prosecution.

1. Under ABA Code DR 7-105, lawyers could not present, participate in presenting, or threaten to present criminal charges "solely to gain an advantage in a civil matter." See *Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); TJAG Opinions, *The Army Lawyer*, March 1993 and May 1977.



2. There is no parallel provision in the Army Rules (or ABA Model Rules). Threatening or filing criminal charges may, however, violate narrower provisions of Rules 3.1, 3.3, 3.4, 3.5, 3.8, 4.4, 8.4(b), or 8.4(e).
3. Practical application.
  - a. Attorneys should exercise caution when writing to collect support payments or debts on behalf of clients. See *Iowa State Bar v. Michelson*, 345 N.E.2d 112 (Iowa 1984); TJAG Ethics Opinions, *The Army Lawyer*, March 1993 and May 1977.
  - b. Complaints to the opposing party's commander are permissible.
  - c. Lawyers should avoid making threats of initiating criminal charges. A lawyer may not circumvent this rule by encouraging clients to make threats. *In re Charles*, 618 P.2d 1281 (1980).
  - d. Neutral statements of fact concerning criminal penalties are permissible. See TJAG Professional Responsibility Opinion 89-01.

## VII. DUTIES OF SUPERVISORS AND SUBORDINATES.

- A. Supervisors Must Ensure Subordinates Comply With Rules (Rule 5.1).
  1. Includes non lawyers under supervision. See Rule 5.3 and volunteers in legal offices, AR 27-3, para. 4-3e.
  2. Staff Judge Advocates should provide practice-oriented classes on professional responsibility. See AR 27-3, para 1-4g(2)(j), 2-4a. Three hours of training annually is mandatory for Army attorneys. AR 27-1, para. 7-2c.

3. A Supervisor Assumes Imputed Responsibility for Acts of Subordinates if he:
  - a. Orders or ratifies a subordinate's violation, or,
  - b. Fails to take remedial action to avoid or mitigate the consequences of a violation.
  
- B. Subordinates Are Bound by the Rules of Professional Conduct (Rule 5.2).
  1. Subordinate may rely on ethical judgment of a supervisor if the issue is subject to question. The Navy requires this resolution to be in writing.
  2. If the ethical question can be answered only one way, subordinate must comply with the Rules even if supervisor directs a contrary course of conduct.
  3. When representing individual clients, subordinates are required to exercise unfettered loyalty and professional independence (Rule 5.4).

## **VIII. CURRENT ETHICAL ISSUES.**

- A. Fees and Self-Referral (Rule 1.5). The Navy and Army rules are similar. The Air Force omitted Rule 1.5 "as inapplicable to military practice."
  1. A lawyer shall not accept a gratuity, salary or other compensation from a client for services performed as an officer of the U.S. Army.
  2. A lawyer shall not receive compensation for making a referral of a client to a private practitioner.

3. An RC Legal Assistance Attorney shall not receive any actual or constructive compensation or benefit for referring to a private-practitioner (including himself) a matter the lawyer first became involved with in a military legal assistance capacity. Comment to Rule 1.5, see also, AR 27-3, para. 4-5 and 4-7.
  - a. Does not subsequently prohibit a reserve component lawyer from representing military personnel or dependents in a private capacity concerning new matters.
  - b. Prohibits lawyer from using official position to solicit or obtain clients for private practice.
  - c. An RC Judge Advocate may accept a fee referral from active component LAA if,
    - (1) The fact that the referral is for fee is acknowledged at the outset of representation,
    - (2) The client fully understands the referral is for fee at the outset of representation, and,
    - (3) The client consents to such representation.

B. Conflict of Interest Rules.

1. Representation adverse to existing or former clients.
  - a. Rule 1.7(a) prohibits a lawyer from representing a client if the representation of the client will be adverse to another (present) client unless:
    - (1) the lawyer reasonably believes the representation will not adversely affect the other relationship, and
    - (2) the client consents.

- b. Rule 1.9 prohibits a lawyer, who has formerly represented a client in a matter:
  - (1) from representing another person in the same or substantially related matter unless the client consents after consultation, or
  - (2) from using information to the disadvantage of the former client.
- 2. Representation adverse to lawyer's own interests or to lawyer's responsibility to a third party.
  - a. A lawyer is precluded from representing a client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests. (Rule 1.7(b)).
  - b. A possible conflict does not absolutely preclude representation.
  - c. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest and the client consents after consultation.
- 3. Lawyers shall not enter into business transactions with clients. (Rule 1.8).

## **IX. PROFESSIONAL RESPONSIBILITY COMPLAINTS.**

- A. Reporting Requirements.
  - 1. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness, must report the violation (Rule 8.3).
  - 2. Rule 8.3 does not require disclosure of information protected under Rule 1.6. (confidentiality).

3. Professional Misconduct Defined (Rule 8.4).
  - a. Professional misconduct includes a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness to practice law.
  - b. Not all criminal offenses constitute professional misconduct.
  - c. Concept of offenses involving moral turpitude is rejected under Rule 8.4.
  - d. Professional misconduct, however, does not have to consist of a criminal act. For example, conduct prejudicial to the administration of justice or conduct involving dishonesty, fraud, deceit, or misrepresentation violates Rule 8.4.

B. Processing Complaints (AR 27-1, Chap. 7; Navy JAGINST 5803.1A).

1. New Army system implemented in AR 27-1, dated 3 Feb 1995.
  - a. Allegations are reviewed by several supervisory JAs up to and including TAJAG before a formal preliminary screening inquiry (PSI) is ordered.
  - b. Increased due process protections for the accused attorney.
  - c. Designed to protect the interests of both the Army and the attorney.
  - d. TJAG determines whether to report violation to state bar.
2. Navy/Marine Corps
  - a. Complaints are handled by JAG (Code 13).

- b. Review is conducted by a Rules Counsel for probable cause. Orders preliminary inquiry if necessary. Determines whether to forward the case to a formal ethics investigation.
- c. Subject attorney is provided copies of actions throughout.
- d. JAG makes the final decision on the case. All other decisions are recommendations.

## **X. LEGAL ASSISTANCE ISSUES.**

- A. Representing multiple parties in legal assistance (See AR 27-3, para 4-9).
  - 1. Imputed disqualification (Rule 1.10). Lawyers working in the same military law office are not automatically disqualified from representing a client. A functional analysis is required. (Compare ABA Model Rule 1.10.).
  - 2. Army policy discourages attorneys from the same legal office from providing legal assistance to both spouses in a domestic dispute.
  - 3. Practically speaking, may represent both sides in estate planning or in preparation of bill of sale provided conflicts are resolved before undertaking representation.
  - 4. Dual Representation in Estate Planning.
    - a. Client confidences - Husband and Wife request estate counseling together.
      - (1) Must consent to joint interview.
      - (2) Recommended - sign consent memorandum for case file.

b. Conflicts of Interest.

- (1) Spouse with children of former relationship. AR 27-3, para. 4-9d.
- (2) Child of testator present for interview.

B. Competence.

1. Individual Responsibility. (Rule 1.1)
2. Supervisor's role (Comment, Rule 1.1, Rules 5.1, 5.2)
3. Competence of attorneys assigned to handle conflict cases.

C. Deployment/SRP Issues.

1. Competence. How to integrate the following into the POR process:
  - a. Other OSJA Assets (Criminal Law, Administrative Law, Claims).
  - b. TDS.
  - c. Reserve Component Attorneys.
    - (1) IMA's.
    - (2) Members of TPU's.
  - d. Assistance from, or referral to, the civilian bar.
2. Confidentiality.
3. Follow up.

D. Automation. The proper role of forms in legal practice. "Lawyers practice law, computers do not."

1. Professional Independence vs. Department guidance.

2. Competence.



