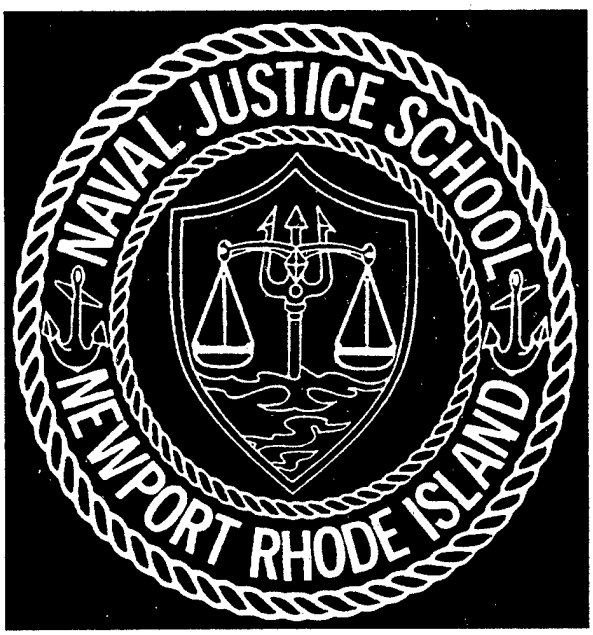
CIVIL LAW LEGAL ASSISTANCE LAWYERS STUDY GUIDE

CIVIL LAW
LEGAL ASSISTANCE

LAWYERS
STUDY GUIDE

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LEGAL ASSISTANCE STUDY GUIDE

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CHAPTER I

PART A - LEGAL ASSISTANCE OVERVIEW

0101 REFERENCES

A. 10 U.S.C. § 1044

B. Manual of the Judge Advocate General (JAGMAN), Chapter VII, Legal Assistance

C. JAGINST 5801.2 (Legal Assistance Manual)

D. Legal Assistance Program, COMDTINST 5801.4B

0102 INTRODUCTION

The legal assistance program of the Navy has been in operation since 1943. Firmly established in 1954 by the Secretary of the Navy Instruction 5801.1, it continues to serve the Navy in improving the morale of its personnel and in reducing disciplinary problems. Through it, members of the Navy and their dependents are able to obtain required legal services from judge advocates in the naval service and civilian DoD employees.

Legal Assistance Mission. To enhance the readiness of active duty and Reserve members of the naval service, and to protect and enhance their morale and promote their welfare, by providing quality legal services regarding personal civil legal matters to eligible persons; and to educate eligible persons regarding their personal legal rights and responsibilities.

This mission will be accomplished by direct client assistance services afforded to eligible persons; and a vigorous preventive law program that educates and informs the military community through a variety of creative and stimulating outreach efforts.

0103 AUTHORITY TO PROVIDE LEGAL ASSISTANCE. 10 U.S.C. § 1044 provides legal assistance and delineates those persons eligible for legal assistance.

10 U.S.C. 1044 states: (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 or equivalent 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 ... under the jurisdiction of the Secretary is responsible for the establishment and supervision of legal assistance programs under this section.

JAGMAN § 0706 implements 10 U.S.C. § 1044 and further defines who is eligible for legal assistance. Legal assistance is intended primarily for active duty personnel and may be provided to members of the armed forces of the U.S. on active duty, including reservists (and members of the National Guard) on active duty for 30 days or more.

As resources permit, legal assistance may also be provided to the following categories of personnel in the order listed:

(1) Dependents of active-duty personnel and dependents of personnel who died while on active duty;

(2) Retired military personnel;

(3) Dependents of retired members and dependents of deceased retired members;

(4) Reservists on active duty for single periods of 29 days or less and their dependents may be provided legal assistance as authorized by the legal assistance area coordinator, in emergency cases. ... ;

(5) Civilian personnel who are United States citizens, other than local hire employees, employed by, serving with, or accompanying the Armed Forces of the United States, when they are assigned to a foreign country or to a vessel or unit of the Armed Forces of the United States deployed in excess of 30 days;

(6) Dependents living in a foreign country accompanying authorized civilians listed in subsection (5) above;

(7) Members of allied forces and their dependents in the United States, serving with the Armed Forces of the United States; and

(8) Other persons authorized by the Judge Advocate General.

Section 583 of the National Defense Authorization Act of 1997 amended 10 U.S.C. § 1044(a) to specifically include PHS commissioned officers, both active duty and retired, and their family members in the list of individuals eligible for legal assistance services. This authorization does not affect their placement in order of priority. PHS officers still fall into JAGMAN 0706(b)(8), which receives the lowest priority.

0104 LEGAL ASSISTANCE PROVIDERS. Designated legal assistance attorneys at NLSO (Naval Legal Service Office), NLSO Det's and Branch Offices are the primary providers of legal assistance services. Depending on workload and office size, prosecutors, defense attorneys and staff judge advocates may be assigned legal assistant duties not conflicting with their cases. However, no attorney/client relationships may be formed and no representation of clients **unless** authorized to do so by competent authority. Absent authorization to represent an individual client, a judge advocate's client is the Department of the Navy. JAGINST 5803.1A, Rule 1.2, Establishment of Representation.

0105 LEGAL ASSISTANCE SERVICES

A. **Assistance will be provided on personal legal problems in the following areas:**

1. ***Powers of attorney and notarizations.*** Powers of Attorney are usually drafted by nonlawyer assistants. Notarizations also generally performed by nonlawyer assistants.

2. ***Basis will and trust drafting and estate planning.***

3. ***Domestic relations.*** Divorce; annulment; separation agreements; property division; child custody and visitation; child and spousal support; and paternity disputes.

4. ***Adoptions and name changes.***

5. ***Nonsupport and indebtedness.*** Negotiation on behalf of a client with another party or lawyer is permitted.

6. ***Taxes.*** Advice on Federal, State and local taxes. Many offices are also equipped to perform electronic tax filing (ELF) during tax season, generally January through April.

7. ***Landlord-tenant relations.*** Review of leases, advice and assistance.

8. ***Civil suits.*** Advice and appropriate assistance will be given. No in-court representation unless the Command has established an authorized Expanded Legal Assistance Program (ELAP) or requests JAG permission in a particular case.

9. ***Soldier's and Sailors' Civil Relief Act.*** Advice on protection and effect of the Act on the client. Assistance exercising rights under the SSCRA.

10. ***Other services.***

a. Consumer law problems such as time-share agreements; door-to-door sales; mail order offers; used cars; so-called "free gifts;" jewelry and photo sale scams.

b. Housing and real estate such as (evictions; security deposits; interpretation of leases; housing codes; review of real estate purchasing agreements).

c. Bankruptcy, insurance, immigration, naturalization, insurance, and other areas not inconsistent with legal assistance regulations.

d. Expanded Legal Assistance Program (ELAP) Allows in-court representation to Active duty E-3 without dependents, E-4 with dependents who can not afford an attorney and other personnel who cannot afford an attorney without substantial financial hardship.

Note: JAGINST 5803.1A, Rule 5.3
(Responsibilities Regarding Nonlawyer Assistants)

"... (2) a judge advocate having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that person's conduct is compatible with the professional obligations of the judge advocate."

0106 LIMITATIONS ON SCOPE OF LEGAL ASSISTANCE SERVICES. JAGMAN 0709 states that advice will be rendered on personal legal matters only. No legal advice and assistance regarding "business ventures" or other matters not of a "personal" nature.

A legal assistance attorney may not assume defense counsel functions for legal assistance clients. Members accused or suspected of offenses or conduct that may result in NJP, administrative discharges, or judicial proceedings under the UCMJ, will be referred to defense counsel.

Additionally, a LAA may not advise or assist in, or become involved with, individual interests opposed to or in conflict with the interests of the United States without the specific approval of the Judge Advocate General. A LAA will not provide assistance in filing claims for monetary damages against the United States, file a restraining order against the United States, pursue CHAMPUS claims or file Article 138, UCMJ, petitions/complaints.

0107 MANAGEMENT OF LEGAL ASSISTANCE

A. ***OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE NAVY-CODE 36.*** Supervision of legal assistance by the Judge Advocate General (JAG) is required by 10 U.S.C.

§ 1044(b) and 32 CFR Part 727. The primary mission of Code 36 is to act for and assist the JAG in discharging this duty. Code 36 personnel formulate, promulgate and review legal assistance policy.

Code 36 drafts and updates directives such as JAGMAN Chapters VII (Legal Assistance) and IX (Authority of Armed Forces Personnel to Perform Notarial Acts), and JAGINST 5801.2 (Legal Assistance Manual.

Code 36 provides field support and acts as an information clearinghouse for more than 300 Navy legal assistance attorneys, alerting and advising on legal assistance issues. Look for Legal Assistance Practice Advisories (LAPAs) as a source of information on current changes.

Code 36 develops and distributes legal assistance publications and software like DL Wills and the LA Laws Powers of Attorney software. It also coordinates preventive law activities that educate naval personnel about personal legal rights and responsibilities.

Code 36 is the source of headquarters tax expertise with a Tax L.L.M. attorney. The Head, Tax Branch, provides opinions on Navy/organizational tax issues and is the Functional Manager for the Navy's Electronic Tax Filing.

B. ***HEADQUARTERS MARINE CORPS-CODE JAL.*** Code JAL serves as the Marine Corps equivalent to Code 36. JAL develops legal assistance policy for Marine Corps Judge Advocates. JAL provides support to legal assistance attorneys and issues legal assistance information updates on a regular basis. JAL also provides retail legal assistance to Headquarters Marine Corps (HQMC) personnel.

C. **COMMANDANT COAST GUARD DIRECTOR OF LEGAL ASSISTANCE.** The Chief, Office of Policy and Program Development, (G-LPD) is the Coast Guard Director of Legal Assistance, and is responsible for the overall management of the Coast Guard Legal Assistance Program. This responsibility includes furnishing information about current developments in the law, model programs and suggested procedures to Legal Assistance Offices. The Coast Guard Director of Legal Assistance maintains such liaison with the American Bar Association, other civilian bar associations and the other Armed Service's Directors of Legal Assistance as deemed advisable.

Code 36:

Phone: (703) 325-7928; DSN 221-7928
Fax: (703) 325-3410; DSN 221-3410
WANMail: JAG36 (General Account);
JAG36DD (Division Director).

Naval Justice School
Legal Assistance:

Phone: (401) 841-4437; DSN 948-4437
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USMC - CODE JAL

Phone: (703) 614 - 3880 DSN 224 - 1266

FAX: (703) 697 - 4386 DSN 227 - 4386

USCG – COMDT (G-LPD)
Phone: (202) 267-0068

PART B - PREVENTIVE LAW PROGRAM

0108 REFERENCES

A. 10 U.S.C. § 1044.

B. 10 U.S.C. § 3013g.

C. ***Navy and Marine Corps***

1. Manual of the Judge Advocate General (JAGMAN), Ch. VII, Legal Assistance

2. Navy Legal Assistance Manual, JAGINST 5801.2

D. ***Army***

1. Deployment Guide, TJAGSA Publication JA 272

2. Preventive Law Series, TJAGSA Publication JA 272

0109 INTRODUCTION. The more educated our service members are about estate planning, family support obligations, divorce and separation, the less likely they are to need our service. Preventive law handouts, and news articles are the most effective means of providing that education. Legal assistance attorneys should be aggressive and innovative in disseminating information to service members and their families that is responsive to potential legal problems and issues. Supervising attorneys should ensure that preventive law services are provided by attorneys performing legal assistance duties, as well as other under their supervision.

0110 PREVENTIVE LAW PROGRAM The legal assistance mission is accomplished by direct client assistance services, and a vigorous preventive law program that educates and informs eligible persons through a variety of creative and stimulating outreach efforts.

JAGINST 5801.2, Legal Assistance Manual

A. **Policy.** Preventive law activities are an integral part of the Navy Legal Assistance Program, informing and training servicemembers about their legal rights, privileges and responsibilities. All legal assistance providers are encouraged to have vigorous programs of preventive law activities.

B. **Preventive law objectives**

1. To improve the overall readiness, efficiency, and performance of naval personnel. Naval personnel are members of a routinely deploying military force. Insofar as possible, they must maintain their personal legal affairs in order at all times. Personal legal difficulties undermine readiness by detracting from high morale and creating the potential for disciplinary problems. A vigorous preventive law program enhances readiness by educating the military community on personal legal issues, as well as services available from legal assistance providers. Effective preventive law activities require full communication and cooperation among Navy judge advocates and civilian attorneys, and coordination with appropriate operational commanders and civilian officials.

2. To decrease the number of personal legal problems confronting military units, bases and localities. A preventive law program recognizes and anticipates noncriminal legal issues, and helps prevent the recurrence and proliferation of problems that may affect entire commands or installations. When a legal problem with widespread implications for morale or discipline arises, vigorous preventive efforts are necessary to highlight and resolve the problem.

3. To encourage persons to anticipate potential legal problems and seek professional legal counsel before problems arise. The importance of considering the legal consequences of one's actions prior to signing documents such as contracts, leases, and separation agreements, must be stressed repeatedly to servicemembers. Once a potential problem is identified, personnel should understand how and where to seek assistance, as well as the perils of choosing to ignore the issue.

4. To provide commanding officers and their personnel with a broad channel of communication on legal assistance matters. An active preventive law program advertises the availability, breadth and limitations, of legal assistance services to commanders and their personnel. In addition, preventive law activities facilitate the exchange of information between legal assistance providers and the client population, and may provide a mechanism by which attorneys can learn early about legal problems affecting personnel and their dependents.

JAGINST 5801.2, Legal Assistance Manual

C. **Program responsibilities.** NLSO commanding officers and senior staff judge advocates shall oversee and coordinate preventive law activities within his or her authority. Attorneys and paralegal personnel are encouraged to dedicate time during each working day for these activities.

D. **Typical activities.** Initiative, creativity and perseverance are vital ingredients of effective programs, which must be tailored to local needs and conditions. Typical activities include:

1. Informational lectures and seminars. Attorneys and paralegals should advise area commands of their availability to participate as a "guest lecturer" for general military training and similar unit education programs. Likewise, attorneys and paralegals are encouraged to sponsor and participate in other lectures, seminars, forums and meetings that seek to inform servicemembers, dependents and retirees about legal problems and issues. Participating lecturers should maximize the effective use of handouts, audio-visual aids, and other innovative means to reinforce their message.

2. Publications. Legal assistance attorneys are encouraged to write regular columns and periodic articles in base or local newspapers, on legal assistance topics of current interest. Additionally, legal assistance providers should develop and make available to area commands a collection of ready-to-use notes suitable for publication in a *Plan of the Day*.

3. Videotaped presentations. Where resources permit, compiling a library of videotapes that can be checked out or duplicated for area commands will enhance unit education programs and enable legal assistance providers to reach a wider audience more quickly.

4. Involvement with other service organizations. Legal assistance attorneys and paralegals are encouraged to be active on committees and in programs established at other base service organizations, such as hospitals and Family Service Centers. Coordination with quality of life programs of other activities ensures that the "legal assistance angle" is considered.

0111 METHODS OF DISSEMINATION OF PREVENTIVE LAW INFORMATION. A Legal assistance officer can be assigned to provide an article for the base newspaper. Preventive law handouts can be made available to the housing office, PSD and clients in waiting areas on base. Reminders can be published in the Plan of the Day at some commands. Attending a commander's call, newcomer's orientation briefing and pre-deployments briefings are also customary means to spread the word.

Additionally, videotapes of general information concerning legal assistance topics can be made and shown to interested groups or as general military training. Topics such as family support, divorce and SSCRA are good topics for use in the video format.

0112 TOPICS FOR PREVENTIVE LAW. Almost every topic in legal assistance can be a topic for preventive law handouts or presentations. Legal assistance attorneys should be especially aggressive in sponsoring preventive law programs to educate service members and their families before a deployment. The lecture and a handout should include:

1. Who is eligible for legal assistance? Where is the office located? When are the hours of operation?

2. Legal Services provided by the local legal assistance officer.

3. SGLI designations.

4. Wills for both spouses.

5. Powers of Attorney.

6. Consumer law issues.

0113 MEASURES TO IMPROVE LEGAL ASSISTANCE. Legal assistance attorneys and nonlawyers assistants should be trained to screen all legal assistance "emergency" cases. Publish office, location, hours and services. Clients should be provided with satisfaction surveys to identify any weak points or recurring problems.

The office should conduct local CLE (use Reservists) training. Also the office should tap into the use of Reservists as mentors or to directly provide legal assistance.

0114 PRE-DEPLOYMENT PREVENTIVE LAW. At times readiness exercises and rapid deployments will be conducted on no-notice and short-notice basis. A Deployment Standard Operating Procedure (SOP) should be developed to prepare for pre-deployment and deployment operations. The office supervisor of the legal assistance attorneys should dedicate adequate resources to meet the deploying command's legal assistance needs prior to deployment.

The office should provide or designate the LAA to provide a pre-deployment preventive law briefing to service members and their families. It may be necessary to reschedule office hours of office operation. If necessary ensure close coordination with local CO's for logistical support and full unit participation.

Pre-deployment briefings should follow a standard outline for presentation – examples are in the Army's Deployment Guide, JA 272. If an outline exists, don't re-invent the wheel, instead update the pre-deployment outline.

You should conduct pre-deployment briefings well in advance of a "scheduled" deployment in order to provide service members and their families with sufficient time to address their legal concerns.

Make available pertinent handouts to service members and their families. Important topics include:

1. SSCRA;
2. Wills;
3. Powers of Attorney;
4. SGLI;
5. Landlord & Tenant; and
6. Legal checklists for service members and families.

PART C - INTERVIEWING AND CLIENT COUNSELING

0115 MANAGING THE CLIENT LOAD. Demanding job, but one of the most satisfying because often times you can really help people. We have the luxury to focus on clients, not billable hours. Job requires dedication, patience, empathy, professionalism, and speed.

A. Develop efficient methods of processing cases/clients.

B. Make notes on the prior case before the next client comes in.

C. Use standard questionnaires, orientation tapes, pamphlets and checklists where appropriate.

D. Have standard forms/letters on computer.

E. Develop binders for types of client problems, include reference material, sample letters, POCs, and pertinent Instructions.

F. Have list of installation/community resources.

G. Realize you can't be an expert in everything.

1. Don't be afraid to say: "I don't know, but I'll try to find out."

2. Don't be afraid to ask for help, after you've tried to solve the problem.

H. Continue Learning:

1. Attend military or civilian sponsored CLE.

a. Legal Assistance for Military Personnel - a committee of the ABA has a quarterly CLE session focusing on military legal assistance.

b. The Army offers a week long Legal Assistance Course in Charlottesville, Virginia - normally in March and October each year for the military legal assistance attorney.

c. Your own state or local state bar CLEs.

0116 LEGAL ASSISTANCE IS STRESSFUL

A. Take care of yourself, as well as clients.

1. Regular exercise/PT. Most commands (three times a week).

2. Do work as it comes; don't let it pile up.

3. Remember: It takes two willing participants to communicate.

B. Know when you work most efficiently.

1. Do hard projects then.

2. Save routine jobs for other times.

C. Observe Ethical Obligations

1. Attorneys don't try to do bad things, they just happen.

2. Remain vigilant to the requirements of confidentiality, competency, and zealous advocacy.

0117 PREPARE FOR CLIENTS

A. Make your office personalized and professional.

B. Insure the waiting area is comfortable.

C. Be pleasant - laughter helps.

D. Hang up diploma, bar admission certificate and awards.

E. Check daily schedule calendar.

F. Get copy and know name of next client.

G. Locate your binder dealing with that type problem.

H. Clean off your desk.

I. Go get and greet client. Be Professional - don't use first names.

J. Try not to be late for your next appointment -- if you are running late - reschedule, if possible.

0118 BEGINNING THE INTERVIEW

A. Break the ice - put the client at ease.

B. Treat the client like you would want to be treated if you had a legal problem.

C. Make the interview confidential, close door, and avoid interruptions.

D. Don't allow friends, children (if at all possible) to sit in.

E. Set tone, be understandable.

F. Tell the client who you are, an attorney.

G. Explain attorney-client confidentiality.

H. Get permission to discuss a complex case with other attorneys.

I. Ask if the client has seen another attorney.

J. Explain you will help them solve their problem; tell them what you can and cannot do.

K. Explain to the client that the attorney and client are a team, and what will be expected of the client.

0119 GATHER INFORMATION FROM CLIENT - THE DEVELOPMENT STAGE

A. Hardest part of interviewing clients.

B. Use client card to get basic subject matter.

C. Identify the core problem. What is root of problem?

D. Try to get all information out of the client during the first interview.

E. The most effective technique is to let the client tell the story in full first.

F. Do not be bashful in asking relevant questions.

G. Consider using check lists. Develop checklists for common legal problems.

H. ***Dig, dig, dig for the relevant facts.*** For example:

1. ***Bad debt case.*** Find out about income, debts, client's ability to pay; any assets; ability to make periodic payments less than amount demanded; willingness to work out repayment plan/budget/get rid of some assets, etc.

2. ***Marital problem.*** How many, if any, children; fault involved (adultery is relevant to alimony); abuse; chances at reconciliation; property at issue; prior marriages and support obligations; awareness of military support regulations; expectations after divorce (i.e. awareness that dependent spouse cannot stay in government housing/kids can not go to base school), expenses of divorce, etc.

3. ***Contract dispute.*** Names of all parties; subject of contract; oral agreements; written agreements; witnesses; prior efforts at negotiation; other party's side of story, etc.

I. ***Be aware of the many possible inhibitors to full communication***

1. Ego threats
2. Case threats
3. Role expectations
4. Etiquette barriers
5. Trauma
6. Perceived irrelevancy

J. ***The following are some useful techniques, called facilitators, which can help in getting information during the interview.***

1. Empathetic understanding
2. Fulfilling expectations
3. Altruistic appeals
4. Extrinsic rewards
5. Recognition

Don't jump to conclusions about what you think the client wants; ask the client what the goal is; if you are not sure, restate it to the client and ask for clarification. We miss the target sometimes.

0120 TECHNIQUES FOR DEVELOPING FACTS. The following are some of the techniques for developing the facts:

A. As the client talks, avoid concentrating on legal theories and formulating a plan of attack too early. Listen and take notes.

B. Don't start asking questions or giving advice before you hear the full story.

C. Adopt an empathic approach.

D. Use questions effectively.

1. ***There are two general forms of questions***

   a. ***Open ended questions***. Which Invite the client to broaden his or her perceptual field.

   b. ***Closed ended questions.*** actually suggest an answer.

2. ***Combinations of the two can be used in interviewing***. You use open-ended to get a general picture of the problem, then closed questions to focus.

3. Avoid confusing your client by asking double questions.

4. Also avoid bombarding the client.

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

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

1. Restatement or rephrasing

2. Reflection

3. Explanation

4. Encouragement

5. Assurance and reassurance

6. Suggestion

F. ***Other techniques***

1. Wait out silences.

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

   a. Probing is a necessary part of your job.

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

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

4. Be sure to ask client 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 or she can later claim they didn't provide this information because you didn't ask.

c. Remember, even though it's important to ask, you may not elicit much of a response from this question.

0121 CLIENTS ARE BIASED AND SOME MAY NOT BE FORTHRIGHT. Don't rush to write nasty letters, you may get burned. Be professional in letters. State in your letter that according to my client, the following facts occurred....Golden rule: Use the tone that would work best on you.

0122 THE COUNSELING STAGE

A. Apply the law to the facts and, give competent advice to the client.

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

C. Consider and discuss the impact of nonlegal factors. JAGINST 5803.1A, Rule 2.1 (ADVISOR), 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 to the client's situation."

D. Consider consultation with other attorneys to help work out a solution for the legal problem.

E. Educate the client about compromise.

F. Don't rush into a battle when there doesn't need to be one.

G. Completely and competently advise the client of the law and the risks.

H. A judge advocate shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. JAGINST 5803.1A, Rule 1.4 (Communication).

I. Be honest with your advice.

J. Allow the client to make the final determination. JAGINST 5803.1A, Rule 1.2 – "A judge advocate shall follow the client's well-informed and lawful decisions concerning case objectives, choice of counsel, forum, pleas, whether to testify, and settlements."

0123 THE SOLUTION

A. Try to solve the problem while the client is there.

B. Use the telephone - it's quick. Follow with letter.

C. Let the client make client decisions.

D. Insure the client understands your advice.

E. It is the client's decision whether or not to follow your recommendation.

F. Keep good notes of your advice.

G. Keep a tickler system to follow up on the case.

0124 THE TERMINATION STAGE

A. Ending the interview.

B. Make sure the client understands the nature of problem.

C. Ensure the client understands what will be done about the problem.

D. Tell the client what you expect him or her to do. Give the client a written "to do" list.

E. Give the client a timetable for achieving results.

F. Ask clients if they have any questions before you let them leave the office.

0125 KEEP THE CLIENT INFORMED

A. A lawyer must keep a client reasonably informed about the status of a matter (JAGINST 5803.1A, Rule 1.4).

0126 WHEN YOU OR THE CLIENT TRANSFERS

A. Close out cases.

B. Refer to another attorney, with the client's permission.

0127 FILE MAINTENANCE. See paragraph 5-3 of JAGINST 5801.2 for detailed information regarding file maintenance. In general, legal assistance providers shall maintain only those official records and files essential to the operation of the office.

A. ***Card files.*** Records reflecting client contact and the general nature of assistance will be maintained by each office for administrative and statistical purposes. This information may be used to contact clients and former clients, to ensure against conflicts and to develop statistical analyses of services rendered.

Card files contain privacy information that is not accessible except as provided by the Privacy Act. The information may be revealed to persons involved in the preparation of productivity reports. Thus, legal assistance attorneys should not include privileged information on card files.

Closed card files generally will be retained for two years and disposed of as required by SECNAVINST 5212.5(Series) (Disposal of Navy and Marine Corps Records). Files may be maintained indefinitely if a future legal dispute or inquiry is reasonably foreseeable.

B. ***Case files.*** Case files contain personal and privileged information including documents related to the case. Case files are government records. They must be stored to protect the information therein.

Access to case files is normally restricted to the attorney and other personnel directly assisting the client, and supervisory authority. *See* JAGMAN 07007b. Additional limitations may become necessary, especially when the client so requests. The client will be provided access to the case file and documents in accordance with the applicable ethical rules and the Privacy Act.

Case files may be consulted for specimen forms and for training within the office to the extent that privileged information is not compromised.

Upon termination of representation of the client, all papers and property belonging to the client will be returned. The provider may retain copies of the files to the extent permitted by law and ethical rules. Closed case files generally will be retained for two years and disposed of as required by SECNAVINST 5212.5(Series) (Disposal of Navy and Marine Corps Records). Files may be maintained indefinitely if a future legal dispute or inquiry is reasonably foreseeable.

C. ***Chronological file.*** Each provider shall maintain a monthly chronological reading file, not indexed by personal identifiers, of all documents and correspondence prepared for clients. This file may be reviewed from time to time by appropriate supervisory authority for quality assurance purposes. As this file is likely to contain privileged information, measures shall be taken to safeguard the confidences of the client.

D. ***Individual attorney files.*** Individual attorneys are encouraged to maintain,

distinct from case files, their own personal copies of documents, notes and material from their cases. Each attorney shall be permitted to copy at Government expense all case files upon which he or she works. These files are private property rather than government records.

PART D - OATHS, NOTARIZATIONS, AND POWERS OF ATTORNEY IN THE MILITARY

0128 REFERENCES

A. 10 U.S.C. §§ 936, 1044, 1044a and 1044b

B. Manual of the Judge Advocate General (JAGMAN), JAGINST 5800.7C, Chapter IX, Authority of Armed Forces Personnel to Perform Notarial Acts

C. DoD authorization Act for FY 1997, § 574: Recognition by States of Military Powers of Attorney

D. JA 272, Deployment Guide (Feb. 1994)

E. JA 268, Notary Guide

0129 AUTHORITY OF U.S. MILITARY PERSONNEL TO ADMINISTER OATHS AND PERFORM NOTARIAL ACTS. 10 U.S.C. § 1044a grants named individuals general powers of a notary public and of a consul of the United States. The authority to perform notarial acts under 10 U.S.C. § 1044a is separate and apart from any authority provided by state law. JAGMAN § 0902a.

Federal notarial authority may be exercised without regard to geographic location. State notarial authority, on the other hand, may only be exercised within the state concerned. The validity of notarial acts performed pursuant to 10 U.S.C. § 1044a is a matter of Federal law. A listing of military personnel authorized to perform notarial acts per § 1044a is found at JAGMAN § 902a. Section 1044 was amended by the DoD Authorization Act for FY 1997 to provide that Reservists with the authority to perform notarial acts, while serving on active duty, retain that authority when not on active duty. JAGMAN § 0902 still controls when reserves may administer oaths and perform notarial acts.

10 U.S.C. § 936 grants named individuals power to administer oaths and take acknowledgements necessary for military administration (to include military justice) and necessary in the performance of their duties.

Oaths administered pursuant to 10 U.S.C. § 936 are legally effective for the purposes for which they are administered (e.g., military administration).

0130 OATHS. Oaths and affirmations are pledges whereby the individual taking the oath swears or affirms the truth of statements made by them. Oaths and affirmations are used when taking affidavits or sworn instruments.

The authority to administer oaths with regard to military administration and military justice is discussed in JAGMAN § 0902b. Under the authority of 10 U.S.C. § 936(a), the following persons on active duty or performing inactive duty training may administer oaths for purposes of military administration, including military justice;

a. **Judge Advocates;**
b. Summary courts-martial;
c. Adjutants, assistant adjutants, acting adjutants, and personnel adjutants;
d. Commanding officers of the Navy, Marine Corps, and Coast Guard;
e. Staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers;
f. Officers of the grades O-4 and above;
g. Executive and administrative officers;
h. Marine Corps officers with a Military Occupational Specialty (MOS) of 4430, while assigned as legal administrative officers;
i. All limited duty officers (law), **all legalmen E-7 and above, all independent duty legalmen, and all legalmen assigned to legal assistance offices or staff judge advocates providing legal assistance**; and
j. Persons empowered to authorize searches for any purpose relating to search authorization.

Under the authority of 10 U.S.C. § 936(b), the following persons on active duty or performing inactive duty training may administer oaths necessary in the performance of their duties:

a. President, military judge, trial counsel and assistant trial counsel, for all general and special courts-martial;
b. President and counsel for the court of any court of inquiry;
c. Officers designated to take depositions;
d. Persons designated to conduct investigations;

e. Recruiting officers;

f. Officers designated and acting as a Casualty Assistance Calls Program Officer; and

g. The president and recorder of personnel selection boards.

The Court of Appeals for the Armed Forces (called the Court of Military appeals at that time) held in *U.S. v. Lansford,* 34 M.J. 268 (CMA 1992) that the language of 10 U.S.C. § 936(b) authorizes a person conducting a criminal investigation to administer oaths. The issue on appeal was whether a member could be convicted of an article 134 violation of false swearing based on a sworn statement made to an investigating officer.

Any U.S. Armed Forces commissioned officer of any Regular or Reserve component, whether or not on active duty, may administer an oath of enlistment (10 U.S.C. § 502) or appointment or commission of any person in the Armed Forces (10 U.S.C. § 1031).

0131 NOTARIAL ACTS

A. ***Notary public.*** A notary public is a person legally authorized to administer oaths, take depositions, take and certify acknowledgments, and perform other similar services which can expedite the handling of an individual's legal affairs. Put simply, the notary's signature and seal on a document give assurance to the person examining the document that it really is what it appears to be.

B. ***Duties and responsibilities of the notary.*** Notaries **may not** engage in the practice of law and, accordingly, may not prepare legal documents, such as wills, contracts, mortgages, and deeds.

Notaries may not sign their names to blank instruments or certify the authenticity of public, registered, or court records or documents, or issue certified copies of such documents or records.

Notaries should only witness an affidavit or an acknowledgment when the person who signed the instrument is actually in their presence. Notaries **must** administer oaths, if an oath is authorized or required, in person. Notaries may not **falsely execute** certificates, such as predating or postdating the document. Notarial authority **may not** be delegated to another person.

C. ***Identifying the person requesting the notarial act.*** In witnessing or attesting a

signature, the notarial officer must determine that the person appearing before the officer is the person named in the document to be signed. A notarial officer has satisfactory evidence of the identity of the person whose signature is on a document and that the person is within the class of persons for whom the notarial act may be performed, when that person is either personally known to the notarial officer, identified upon the oath or affirmation of a credible witness personally known to the notarial officer, or identified by identification documents.

Notaries may be subject to civil and criminal liability, including fines and imprisonment, for misconduct, negligence, malpractice, or other breach of official duties.

0132 AUTHORITY TO ACT AS NOTARY (JAGMAN § 0902c). Authority to administer oaths and perform notarial acts may be based on state or federal law. The authority granted by federal statutes (10 U.S.C. § 1044a and § 936) to administer oaths and perform notarial acts is separate and apart from, and additional to any authority provided by state law.

Under the authority of 10 U.S.C. § 1044a, the following persons may perform notarial acts **[may administer oaths, acknowledgments, affidavits, and affirmations; certify copies as true]** for persons eligible to receive legal assistance as defined in JAGMAN § 0706, and for others as authorized in 10 U.S.C. § 1044a:

a. Civilian attorneys serving as legal assistance officers;

b. the following military members whether on active duty or reserves;

(1) Adjutants, assistant adjutants, and personnel adjutants;

(2) Officers of the grade O-4 and above;

(3) Commanding, executive and administrative officers;

(4) Legal and assistant legal officers;

(5) Marine Corps officers with MOS 4430 while assigned as legal administrative officers;

(6) Judge Advocates;

(7) **All limited duty officers (law), all legalmen E-7 and above, all independent duty legalmen, and all legalmen assigned to legal assistance offices or staff judge advocates providing legal assistance; and**

(8) **Marine Corps legal services specialists E-5 and above, while serving in legal assistance billets, when authorized by the cognizant commander.**

The National Defense Authorization Act of 1997 amended 10 U.S.C. § 1044a(b) to allow Reserve judge advocates, Reserve adjutants and other authorized Reserve members to act as legal assistance notaries public even when not in any kind of duty status. This change will allow Reserves to provide 1044a notary services to any eligible legal assistance beneficiary at any time and location. This grant of notary authority to Reserve judge advocates enhances their prestige through tangible recognition of the increasingly important contributions they make to force readiness. This provision does not modify 10 U.S.C. § 936. Per JAGMAN 0902b, Reserve judge advocates must be either on active duty or performing inactive duty training to exercise military justice/administration notary powers under 10 U.S.C. § 936.

Notarial acts performed under 10 U.S.C. § 1044a are legally effective as notarial acts for all purposes in all states (pursuant to the Supremacy Clause). In the past, however, not all states agreed; consequently, § 1044b was adopted in 1993. Section 1044b enhances the acceptability of general and special powers of attorney prepared Military by legal assistance attorneys on behalf of their clients.

It provides as follows:

§ 1044b. Military powers of attorney: requirement for recognition by States

(a) Instruments to be given legal effect without regard to State law. A military power of attorney --

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and
(2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

(b) Military power of attorney. For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal Law.

(c) Statement to be included.

(1) Under regulations prescribed by the Secretary concerned, each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

(d) State defined. In this section, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

In implementation 10 U.S.C. § 1044, all military service adopted the below stated preamble. All legal assistance providers should ensure that this preamble is inserted at the beginning of each general and special power of attorney in CAPITAL letters:

THIS IS A MILITARY POWER OF ATTORNEY PREPARED PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 1044b AND EXECUTED BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS THIS POWER OF ATTORNEY FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY OR RECORDING THAT IS PRESCRIBED FOR POWERS OF ATTORNEY UNDER THE LAWS OF A STATE, THE DISTRICT OF COLUMBIA, OR A TERRITORY, COMMONWEALTH, OR POSSESSION OF THE UNITED STATES. FEDERAL LAW SPECIFIES THAT THIS POWER OF ATTORNEY SHALL BE GIVEN THE SAME LEGAL EFFECT AS A POWER OF ATTORNEY PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

0133 NOTARIAL CERTIFICATIONS AND CONTENTS OF OATH

A. ***10 U.S.C. § 936.*** The signature of any person administering an oath or acting as a notary under the authority of 10 U.S.C. §§ 936 or 1044a together with the title of his or her office, is prima facie evidence that the signature is genuine, that the person holds the office so designated, and that he or she has the authority to so act.

B. ***Acknowledgment.*** Is a formal declaration or admission before a properly authorized official, by a person who has executed an instrument, that such instrument is his act or deed. It includes the certificate or written evidence of the act of acknowledgment made by the officer, as well as the act itself.

Acknowledgments relate primarily to written instruments affecting land, or granting or creating legal rights. Some statutes may require that deeds, mortgages, leases (particularly those over a certain length of years), or powers of attorney be acknowledged.

1. ***How to take an acknowledgment.*** An acknowledgment must be made in the presence of the notary, who must identify both the person and the person's military status/relationship.

If a signature has been affixed outside the notary's presence, the signer must verify, affirm, and acknowledge the signature on the acknowledgement or affidavit. The notary

should compare the signature affixed to the document to be acknowledged with a signature made & affixed in the notary's presence and on the signer's identification. Notaries must decline to take the acknowledgment if identification is impossible. Notaries may not take their own acknowledgments. Notaries should ensure the correct dates are properly inserted for any certificate verified or acknowledged before them. Changes, cross outs, and erasures in the body of the acknowledgment are to be avoided. If unavoidable, they should be initialed by both the notary and affiant wherever they appear.

C. ***Sworn instruments.*** A sworn instrument is a written declaration signed by a person who declares under oath before a properly authorized official that the facts set forth are true to the best of his/her knowledge and belief. Sworn instruments include affidavits, sworn statements, and depositions.

D. ***How to take a sworn affidavit or instrument.*** An affidavit is a sworn statement, made by a person known as the affiant or deponent. The facts in the affidavit are sworn or affirmed to be true by the affiant before the notary.

1. The notary should sign his/her name, rank/rate, office, title, and name of command. The notary must have authority in the venue/place the affidavit is signed.

a. The venue is the name of the State, and the county, or other territorial subdivision to which jurisdiction is limited. Federal notarial authority may be exercised without regard to geographic location; however, venue should be noted on the document being notarized:

(1) Notarizations performed overseas should include the city and country.

(2) Notarizations performed onboard naval vessels should state "ONBOARD USS NEVERSAIL AT (PLACE) OR (AT-SEA)," for venue as the case may be.

2. ***The notary need not be concerned with the affiant's veracity.*** The notary is not required to independently verify the truth of the facts stated in the affidavit. The affiant may be subject to prosecution for perjury if the facts are willfully misstated.

a. In taking a verification upon oath or affirmation, the notarial officer must identify, either from personal knowledge or satisfactory evidence, that the person appearing before the officer and making the verification, is the person whose signature appears on the statement being verified.

b. The notary is obliged to decline notarial services when it is evident to the notary that the affiant or deponent is lying or otherwise fraudulently seeking the notarial service. The

supervising legal assistance attorney should be immediately notified in this instance.

E. ***How to take an oath.*** Oaths and affirmations are pledges whereby an affiant swears or affirms the truth of statements made by the affiant. Oaths and affirmations are used when taking affidavits or sworn instruments. Persons administering the oath should tell the affiant to raise his right hand and say the following:

> "Do you swear that the information contained in this document is the truth to the best of your knowledge so help you God?"

Affirmation may be administered in the following form:

> "Do you solemnly, sincerely, and truly declare or affirm the information contained in this document is the truth to the best of your knowledge?"

Obviously, the reply should be "I do" or similar words of assent to both the oath and affirmation.

F. ***Seals of person and notary.*** Although most jurisdictions no longer distinguish between sealed and unsealed instruments, some require certain instruments be executed under seal. When a seal is required, insert the statement "witness the following signature and seal," immediately preceding the signature of the person executing the document.

In most jurisdictions, typing, printing, or writing "(SEAL)" or the symbol "(LS)" after the signature completes the sealing of the instrument. Others also require that the intention to create a sealed instrument be reflected in the body of the instrument.

Only use a seal if specifically required by statute or other law. Seals should be used cautiously, since in some States instruments under seal create special legal consequences or have a unique status.

10 U.S.C. § 1044a authorizes the performance of notarial acts without an impressed or raised seal. If a seal is available, however, it should be used to enhance the official appearance and acceptance of federally notarized documents.

If one is not available the words "SEAL NOT REQUIRED" should be typed in the signature block.

G. ***Witnesses required.*** Acknowledgment of instruments that may affect title to real property must be witnessed by three persons. The name, rate/rank, branch of service, and permanent home address of each witness should be typed or neatly printed below the signature of the witness.

H. ***Procedure for certifying a copy of a document.*** In certifying or attesting a copy of a document or other item, the notarial officer must determine that the copy is a full,

true, and accurate reproduction of the original document by carefully and personally comparing the copy and the original. Documents cannot be certified as true copies based upon the assertion of the requester, or without inspection of the original document. Certified true copies cannot be made from other "certified true copies."

Notaries may not certify the authenticity of public, registered, or court records or documents, or issue certified copies of such documents or records.

I. ***Notary logs.*** Notaries must be able to confirm specific notary acts they performed many years after the act. A notary log, therefore, should be maintained and kept indefinitely by each notary, even after release from active duty. JAGMAN § 0909.

The log should include signer's name and signature, document, date, and location. These personal logs may not be made part of any Navy system of records and are not to be passed to other Navy personnel.

An electronic search of all reported cases, both federal and state, yielded only four cases on point regarding the importance of a notary log. In *Hall v. Warden, N.H. State Prison*, 1995 U.S. Dist. LEXIS 5030 (1995), the plaintiff, a prison inmate, claimed he was denied procedural due process at a disciplinary hearing and was denied access to his various legal papers and religious materials. In seeking discovery in his case, plaintiff filed a request for documents that included the notary log showing legal papers that the plaintiff had notarized during the month. The court opined that the documentation sought appeared reasonably calculated to lead to the discovery of admissible evidence. The court compelled the defendants to produce the requested documents including the notary log.

In *American College Of Obstetricians And Gynecologists, Pennsylvania Section, et al. v. Thornburgh, et al.*, 656 F. Supp. 879; 1987 U.S. Dist. LEXIS 1854 (1987), the plaintiffs challenged the constitutionality of the Pennsylvania Abortion Control Act. The relevant issue for notaries regards the plaintiffs' challenge of the section that required the minor's petition be "verified by notarized affidavit." Their concern is that the notary log, which is by law open to public inspection, would contain the name of the minor. They argue that, in small communities, anti-abortion groups could obtain these logs and, through them, learn the identity of minors seeking abortions. The court concurred and continued to enjoin enforcement of the section.

Pacific Indemnity Company V. J. E. Wyrembek, A/K/A Joseph E. Wyrembek, Sr., 183 F. Supp. 252 (1960) illustrates the critical role the notary can play in verifying the authenticity of a document. This is an action on a contract of indemnity executed by defendant as indemnitor and plaintiff as surety. After default on the construction contract, the plaintiff carried through all the arrangements for completing the job, paid the bills, and settled all claims. Plaintiff seeks indemnification from defendant. Defendant denied the execution of the indemnity contract but admitted that he signed various papers in blank. The notary who took the acknowledgment did not recall the specific instrument in question. She could not remember whether the instrument was filled in or was in blank. She stated that she was not familiar with the signature of J. E. Wyrembek and that she would not notarize a

person's signature in his absence unless she were familiar with his signature. She was unable to locate her notary log for the time in question. The court found that the testimony of the notary as to the loss of her notary log and her practice of notarizing signatures known to her in the absence of the signer does not suffice to impeach the acknowledgment taken before her. The court ultimately held for the plaintiff however a more competent notary could have certainly aided the plaintiff's case.

Finally, *In Re: Glen D. Bell, Aka Glen Bell, Debtor. Michael D. Mcgranahan, Trustee, Plaintiff, Vs. Glen D. Bell, Defendant. John L. Reisinger, Plaintiff, Vs. Glen D. Bell, Defendant. Glen D. Bell, Plaintiff, Vs. United States Of America, Defendant.* 1991 Bankr. LEXIS 1743 (1991) deals with forged documents. Shortly after the subject bankruptcy action was filed, Bell called a meeting and explained to the persons present that they will need to backdate some documents so that it would appear that the transfer took place prior to the bankruptcy filing. Joan Camezon who was employed as a title officer ostensibly notarized the property transfers. The initial transfer of one property contained an incorrect legal description that was not detected until after the bankruptcy action was filed. Dr. Bell caused to be drafted a corrected deed which was supposedly notarized on November 3, 1987. The notary stamp reflects that the parties appeared before the notary and signed the corrected deed. The notary log maintained by Ms. Camezon does not reflect any notary activity from October 29, 1987 to November 19, 1987. The notary signature on the corrected deed was not Ms. Camezon's as she was on vacation in Hawaii during the time that she supposedly notarized the corrected deed. One of the parties did not appear before Ms. Camezon on the November 3, 1987 date as he was on an annual hunting trip to Colorado.

A grant deed was entered into evidence which deed was purportedly dated July 6, 1987 and signed by Dr. Bell and Jeanette Bell. Joan Camezon purportedly notarized the grant deed but the notary block was not completed. The notary log maintained by Joan Camezon did not reveal any notary transactions relating to Dr. Bell, Jeanette Bell, Robert Davis, or John Reisinger during the period of time from July 6, 1987 to July 15, 1987.

The court found that Dr. Bell in order to conceal his involvement in the Silver Creek enterprise and to prevent himself and his property from being drawn into the Silver Creek bankruptcy forged or caused to be forged the signature of Joan Camezon.

0134 POWERS OF ATTORNEY. A Power of Attorney is a written instrument executed by one person, the principal, which designates another individual, the agent or "attorney-in-fact to perform specified acts on the principal's behalf.

The purpose of the document is to evidence to third parties the authority of the agent. Powers of attorney are usually designated as either "special" or "general" depending on the specified act(s) or kind(s) of act(s) for which authority to act on behalf of the principal has been given.

There is no law requiring third parties to recognize the authority of the agent to act on the principal's behalf as set forth in the power of attorney; however, the vast majority of persons, businesses, and institutions will do so.

A LAA should advise his client to execute a POA only when a reasonable or

immediate need for the instrument exists. Personnel should be fully advised of the inherent dangers involved in granting to another the authority to act in their stead and the potential misuse.

A. ***Special powers of attorney.*** Any power of attorney can be dangerous to the grantor if improperly used. To reduce the risk, a special power of attorney can be narrowly drawn and should be used whenever it can fulfill the needs of the client, because the power or authority given is limited to the specific act or acts described in the instrument.

B. ***General powers of attorney.*** General powers of attorney giving broad powers and authority to the attorney-in-fact can be dangerous instruments in the hands of persons inexperienced in business matters, persons of unstable temperament, or anyone in whom the grantor does not have the utmost trust and confidence. A LAA should warn of the possibility of strained marital relations during deployment.

General powers of attorney should not be drawn until a legal assistance attorney or a civilian attorney has counseled the prospective grantor on the dangers of executing such a document and has ascertained that a special or limited power would not accomplish the purpose for which the general power was requested.

Under no circumstances should an unrestricted general power of attorney be used or produced unless it contains a specific termination date or other provisions for revocation.

C. ***Termination or revocation.*** In the absence of a statutory provision, a power of attorney not expressly or impliedly limited as to duration is regarded as continuing until the power is revoked by operation of law (i.e., death, or incapacity of the principal or agent) or by an act of the principal or agent evidencing an intent to revoke the power.

It is always advisable to insert a termination clause in all powers; for example, the principal may want the power to expire on or about the date of his or her expected return from an overseas tour of duty. Thus, the power will not be indefinite in duration but will terminate on the date indicated, unless sooner revoked.

If no termination date is inserted in a power of attorney or if the principal wishes to revoke the power prior to its stated termination date, notice of the revocation must be given to the agent. Such notice preferably should be in writing, although it may be made orally, and the agent then should be requested to acknowledge receipt of such notice.

Ordinarily, the revocation takes effect as soon as it is communicated to the agent. As to third persons who have dealt with the agent, the revocation takes effect when they receive notice of the revocation. Where a statute provides for the recording of powers of attorney and revocation of powers of attorney, third parties who do not have notice of an unrecorded revocation may be justified in relying on the continuance of the authority as recorded.

Additionally, in some states, the power of attorney will terminate upon the incapacity

of the grantor, notwithstanding that the power of attorney has no termination date or the termination date is subsequent to the date upon which to incapacity occurs.

D. ***Durable powers of attorney for health care.*** A durable power of attorney is a special agency relationship that remains valid and operative despite the disability or incapacity of the principal. Under the common law, a power of attorney becomes inoperative upon the disability of the principal. The answer to this problem has, of course, been state statutory law giving powers to agents to act even during the incapacity of the principal.

Guardianship and conservatorship are a separate legal status which can and may conflict with the durable power of attorney. Each state's separate rules will control as to the relationship between these powers. The lack of federal law dealing with durable power of attorney is a large problem. Since there is no federal law on the subject, one has to rely on state law. State law can be in the form of either state common law or state statutes.

Some state statutes require the word "durable" to create a power that is capable of surviving the disability or incapacity of the principal. The problem of having several different states involved is a conflict of laws question. The Restatement of the Conflict of Laws 2d § 291 states:

> The rights and duties of a principal and agent toward each other are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties in the transaction...

Another possible conflict of laws problem is the validity of the agent's acts. According to the Restatement on Conflict of Laws 2d § 292, the validity of the agent's acts is determined by the law of the state which has the most significant relationship to the parties and the transaction. In any case, a choice of laws clause should be included.

E. ***Extension of powers of attorney if POW-MIA.*** The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix § 591 provides for extensions of powers of attorney for a service member in a POW-MIA status. Public law 102-12 amended this section of the SSCRA to extend protection for service members in a POW-MIA status if they had executed a power of attorney whose expiration date is after July 31, 1990.

§ 591. Power of Attorney

(a) Extension for person in missing status. Notwithstanding any other provision of law, a power of attorney which--

(1) was duly executed by a person in the military service who is in a missing status...;
(2) designates that person's spouse, parent, or other named relative as his attorney in fact for certain specified, or all, purposes; and
(3) expires by its terms after that person entered a missing status, and before or after the effective date of this section [October 24, 1972];

(b) Limitation on extension. No power of attorney executed after the effective date of this section by a person in the military service may be extended under subsection (a) if the document by its terms clearly indicates that the power granted expires on the date specified even though that person, after the date of execution of the document, enters a missing status.

(c) Extension of power of attorney protection. This section applies to the following powers of attorney executed by a person in military service or under a call or order to report for military service (or who has been advised by an official of the Department of Defense that such person may receive such a call or order):

(1) A power of attorney that is executed during the Vietnam era (as defined in section 101(29) of Title 38, United States Code).
(2) A power of attorney that expires by its terms after July 31, 1990.

CHAPTER 2

SOLDIERS AND SAILORS CIVIL RELIEF ACT

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CHAPTER 2

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (SSCRA)

0201 REFERENCES.

A. 50 U.S.C. Appendix § 501 et seq.
B. SSCRA Guide JA260

0202 BACKGROUND. It has long been recognized that a person's entry into the armed services carries with it a potentially burdensome disruption of personal affairs. The servicemember's assignment far from home and occupation with military duties may impair his ability to attend to personal, financial, and legal matters. His financial situation may be affected by a substantial reduction in income. The member's presence in states other than that of his domicile could subject him to multiple taxation of income and property.

During the Civil War period, many states enacted "stay" laws that imposed an absolute moratorium on enforcement of legal rights against servicemembers. Experience soon taught, however, that such arbitrary and rigid prohibitions of suits against servicemembers had a negative effect resulting in individuals denying credit to servicemembers and families when credit was most needed. Most servicemembers can, if given time and opportunity, attend to their affairs and meet their obligations.

The first nationwide legislation designed to protect the servicemember, the Soldiers' and Sailors' Civil Relief Act of 1918, Act of Mar. 8, 1918, ch. 20, 40 Stat. 440, rejected the absolute prohibition approach of the early states' "stay" laws. This Act provided protection in the form of ***suspension of legal proceedings and transactions which may prejudice the "civil rights"*** of a servicemember during the time that a person is in the military service, when, and if, the opportunity and capacity to perform personal obligations are materially impaired by reason of being in the military service. The Soldiers' and Sailors' Civil Relief Act of 1918 expired six months after the conclusion of World War I.

However, this general approach of suspending proceedings and transactions based upon the determination of material impairment is carried forward into the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501-591 [hereinafter SSCRA] which is largely a reenactment of the Soldiers' and Sailors' Civil Relief Act of 1918. Except for specific relief provisions deemed necessary to the Act's objectives, this approach is embodied in most of the remedies afforded by the SSCRA. Additionally, criminal penalties are added for actions evading or frustrating the relief provisions of the SSCRA. The focus on the 1940 act was relief for those drafted or "called to arms" during World War II. The SSCRA did not consider the "all volunteer force" of today.

The SSCRA was most recently amended in 1991 following Operation Desert Storm [SSCRA Amendments of 1991, Pub. L. 102-12 (18 March 1991)]. These amendments addressed the problems encountered by recalled Reservists and National Guard personnel.

Constitutional authority for the SSCRA falls within Congress' power "to declare war" and "to raise and support armies" pursuant to Art. 1, § 8, clauses 11 and 12 of the U.S. Constitution. A line of cases supports this view, *e.g. Radding v. Ninth Federal Savings & Loan Assoc.,* 55 F.Supp. 361 (D.C. N.Y. 1944); *Clark v. Mechanics' American Nat. Bank,* 282 F.2d 589 (8th Cir. 1922); *Konkel v. State,* 168 Wis. 335, 170 N.W. 715 (1919).

0203 ARTICLE I: GENERAL PROVISIONS

A. ***Purpose of the Act.*** The purpose of the SSCRA is to "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner,* 319 U.S. 561 (1943), *reh'g denied,* 320 U.S. 809 (1943). The act should be read "with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers,* 333 U.S. 1, at 6 (1948). It is intended to enable persons on active duty and **activated** Reservists to devote their attention exclusively to the defense needs of the nation by providing for the ***temporary*** suspension of **civil** proceedings that might prejudice the civil rights of such persons. 50 U.S.C. App. § 511. SSCRA ***does not extinguish any liabilities or obligations***, but merely suspends action and enforcement until such time as the ability of the servicemember to answer or comply is no longer materially impaired by reason of military service.

B. ***Persons entitled to benefits and protections of the Act:***

1. ***Persons in the military service defined.*** Members of the U.S. military establishment, whether officer or enlisted, volunteer or inductee (from the date of receipt of the induction order), who are on active duty with any armed force, or who are in training or education under supervision of the United States preliminary to induction, are entitled to the protections and benefits of the SSCRA. 50 U.S.C. App. § 511. It does ***not*** cover retired personnel not on active duty or Reserve personnel not on active duty, personnel in a unauthorized absence status for more than 29 days, deserters, those in civilian confinement, or personnel serving a court-martial sentence involving total forfeitures of pay and allowance. *U.S. v. Hampshire,* 95 F.3d 999 (10th Cir. 1996), wherein an AWOL soldier is not absent due to "sickness, wounds, leave, or other lawful cause" and may not avail himself of the benefits under the SSCRA. Persons "missing in action" are also afforded certain safeguards under the SSCRA. 50 U.S.C. App. § 581.

Merchant seamen, civilian employees, contract surgeons, and others accompanying one of the services have been held **not** to be "persons in the military service" and hence **not** entitled to the benefits of the Act. 50 U.S.C. App. § 511. *Osbourne v. U.S.,* 164 F.2d 767 (2nd Cir.1947) and *Abbattista v. US,* 95 F. Supp. 679 (D. N.J. 1951).

Public Health Service (PHS) officers qualify if they have been detailed by proper authority for duty either with the Army or the Navy. *Wanner v. Glen Ellen Corp* 373 F. Supp. 983 (D. Vt. 1974), wherein a Lieutenant Commander in PHS assigned for duty with USCG is "person in the Military Service" within meaning of 50 U.S.C. App. § 511.

The SSCRA does not directly cover National Guard or Reserve Component members performing annual duty for training (ADT) or individual training (IT). However, *Mouradian v. John Hancock*, 1989 WL 225052 (1st Cir. 1989), remanded, 751 F. Supp. 272 (D. Mass. 1990), aff'd, 930 F. 2d 972 (1st Cir. 1991) may extend statute of limitation protection. The Court of Appeals stated in dicta that a reservist-plaintiff who argued that the statute of limitations should be tolled for weekends and two-week duty he spent training may be covered by the SSCRA. On remand, the District Court sidestepped the issue by stating that another statute of limitations—the armed services tolling provision in the Labor Management Relations Act which required a showing of material effect—applied in this collective bargaining case, instead of the general tolling provision of SSCRA. Affirming in 1991, the Circuit Court said that the choice of which statute of limitations to apply would be dispositive in this case, because if the SSCRA applied, then the appellant would be entitled to relief.

2. ***Persons secondarily liable.*** The enforcement of any liability or obligation against any person primarily or secondarily liable with a servicemember may be subject to the same delays and vacations available to the servicemember. Courts enjoy considerable discretion in granting stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, co-makers, and others depending upon the contractual relationship between the servicemember and the civilian co-party. The SSCRA further provides that, whenever the military service of a principal on a criminal bail bond prevents the sureties from enforcing the servicemember's attendance, the court shall not enforce the provisions of the bond during the principal's military service and may even, either during or after said service, discharge the sureties and exonerate the bail. 50 U.S.C. App. § 513(3). In the codefendant situation, however, the SSCRA provides that as to stays "where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others." 50 U.S.C. App. § 524.

3. ***Dependents of servicemembers.*** Dependents of military personnel may apply to a court for limited protections of the SSCRA concerning rent, installment contracts, mortgages, liens, assignments, and leases. 50 U.S.C. App. §§ 530-536.

4. ***U.S. citizens serving with allied forces.*** Persons serving with an allied force who were, prior to that service, citizens of the United States, are entitled to the benefits and protections of the SSCRA unless dishonorably discharged therefrom. 50 U.S.C. App. § 572.

5. ***Misconduct***. A servicemember's misconduct can terminate SSCRA protections. In *Mantz v. Mantz*, 69 N.E. 2d 637 (Ohio C.P. 1946), the soldier serving a sentence for a violent assault divested himself of SSCRA protections. Whether protections are suspended during a period of unauthorized absence depends upon the nature of the absence. A soldier who "extended" his furlough to attend his child's birth retained SSCRA protections. *Shayne v. Burke*, 27 So.2d 751 (Fla. 1946). Unauthorized absence with whereabouts unknown terminates SSCRA protection. *Harriott v. Harriott*, 511 A.2d 1264 (N.J. 1986) and *U.S. v. Hampshire*, 95 F.3d 999 (10th Cir. 1996). A Marine with a self-inflicted gunshot wound was not entitled to an SSCRA stay of judicial proceedings. *Burbach v. Burbach*, 651 N.E.2d 1158 (Ind.App., 1995)

C. ***Scope and Operation***. The Act applies within the United States, in all states and territories subject to U.S. jurisdiction, and to proceedings in all courts—Federal, state, and municipal. Except as discussed below concerning the statute of limitations, the SSCRA contains no reference to administrative proceedings. 50 U.S.C. App. § 525. This will have significant repercussions in the coming years as welfare reforms make paternity, child support and other related domestic matters administrative hearings. Also, the SSCRA has ***no effect in criminal cases***. *Commonwealth v. Shimpeno*, 160 Pa Super 104, 50 A.2d 39 (1946).

Courts will generally grant a **temporary** delay, a stay of proceedings, in **civil** actions where a member's military service has "materially affected" the member's ability to appear to "defend" or "prosecute" an action. Additionally, there are protections available for a member whose ability to pay certain specified "debts" has been "materially affected" by the member's military service.

The SSCRA was not meant to provide immunity from lawsuits. Further, the act is not meant to shield a servicemember or provide them otherwise unfair "breaks." The intent is to counteract the adverse effects of military service. The act does not relieve a member of the obligation to pay just debts. It does not apply in foreign cases.

That the SSCRA applies to those on active duty is obvious. What about Reservists and National Guard? Together sections 511 & 516 state that a "person in military service" any member of a reserve component of the Armed Forces who is ordered to report for military service. National Guard are covered only if order to federal service. Duty ordered by the state does not trigger SSCRA protection. Louisiana and Pennsylvania have a SSCRA-type statute to cover state service.

D. ***Waiver of benefits***. An exception to the SSCRA enables servicemembers to waive, in writing, the protections given them in other provisions of the Act in the case of contracts and security agreements ***executed during their military service***. 50 U.S.C. App. § 517. This provision was ***not*** meant to prohibit servicemembers or their duly authorized representatives from entering into any oral agreements when such agreements do not waive any rights guaranteed by the Act. Waiver of one provision does not waive other provisions.

The court in *Harris v. Stem*, 30 So.2d 889 (LA Ct. App. 1947) held that waiver of rights against seizure of property did not affect the tolling of the statute of limitations.

E. ***Future financial transactions.*** 50 U.S.C. App. § 518. Retaliatory action against those who invoke the SSCRA is prohibited. An application under the provisions of the SSCRA for a stay, postponement, or suspension of any tax, fine, penalty, insurance premium, or other ***civil obligation or liability*** cannot be the basis for lenders then determining that the servicemember is unable to pay an obligation or liability. With respect to a credit transaction between servicemembers and creditors, creditors cannot then deny or revoke credit, change the terms of an existing credit arrangement, refuse to grant credit in the terms requested, submit adverse credit reports to credit reporting agencies, or, if an insurer, refuse to insure a servicemember. This section does not prevent an institution from reporting a failure to comply with the underlying obligation.

What may a service member do if he wrongly receives an adverse credit report because he asserted the SSCRA stay or 6% interest cap provisions? Enforcement is through the Fair Credit Reporting Act (FCRA) provisions for "adverse actions", handling disputed information involving "adverse actions", and consumer remedies for "wilful or negligent noncompliance by credit reporting agencies upon consumer showing of casusal connection between inaccurate credit report and denial of credit or other consumer benefit." A service member who is refused further credit by the lending institution, or has his credit limit downgraded because of asserting the SSCRA 6% interest cap on a loan, may also seek relief under this section. A failure of a lender to forgive interest above 6% may be the basis for a private cause of action against the lender, pursuant to Section 518 (2)(B).

0204 ARTICLE II: GENERAL RELIEF

A. Default judgments

1. ***General.*** In "any action or proceeding commenced in any court" where there is a "default of **any appearance** by the defendant, the plaintiff, before entering judgment, shall file in the court an affidavit setting forth facts showing that the defendant is not in military service." 50 U.S.C. App. § 520. "Any appearance" includes special as well as general appearances. The affidavit must state that the defendant is not in the military service, or that the defendant is in the military service, or that the plaintiff is unable to determine whether or not the defendant is in the military service. Filing a false affidavit subjects the affiant to misdemeanor prosecution with a maximum punishment of one-year imprisonment, a fine of $1000, or both. Without an affidavit showing that the defendant is not in the military service, no default judgment may be entered without an order of the court. The court concerned must first appoint an attorney to represent and protect the interests of any servicemember-defendant. The attorney may not waive any of the servicemember's rights nor bind the member through the attorney's actions. The attorney is, in effect, appointed to locate and notify the servicemember of the action. This section protects servicemembers

from default judgments being entered against them without their knowledge. The SSCRA does not prevent entry of such a judgment when there has been notice of the action and adequate time and opportunity to appear and defend.

2. ***Reopening judgments.*** If a court enters a default judgment, a servicemember must move to reopen that judgment while on active duty or within 90 days after leaving military service. 50 U.S.C. App. § 520. Judgments will only be reopened if the servicemember has made **no appearance** and demonstrates that his / her:

a. military service materially affected the ability to appear and defend the action (or prejudiced his / her rights); and

b. there is a meritorious defense to part or all of the underlying action.

When originally drafted in 1917, the default judgment provision was designed to protect the servicemembers from no-notice actions. If the servicemember does receive notice, then the appropriate remedy is to request a stay. In other words, the stay provision and default judgment provisions appear mutually exclusive.

3. ***Avoiding an appearance when making a request for a stay.*** Does a request for a stay constitute an "appearance" which may result in the court obtaining in personam jurisdiction? Could this request result in loss of default judgment protection? *Blankenship v. Blankenship*, 82 So.2d 335 (Ala. 1955), and *O'Neill v. O'Neill*, 515 So.2d 1208 (Miss. 1987), *Reynolds v. Reynolds*, 134 P. 2d 251 (Cal. 1943), *Vara v. Vara*, 171 N.E. 2d 384 (Ohio 1961), *Skates v. Stockton*, 683 P. 2d 304 (Ariz. Ct. App. 1980) (legal assistance attorney) and *Case v. Case*, 55 Ohio Ops 317, 124 NE2d 856 (Ohio 1955).

When considering requesting a stay, first determine whether state law will consider this an appearance. Next, examine the consequences if the member takes no action and the default judgment is entered. If a written request is appropriate, it should include details regarding the material effect of military service, e.g. no leave available, leave denied, military duties prevent returning, or overseas duty with significant expenses to return to CONUS. The duration of the stay should be reasonable in length. A letter signed by someone in the chain of command and not a judge advocate provides the greatest protection against a claim of appearance through counsel. See *Cromer v. Cromer*, 278 S.E.2d 5518 (N.C. 1981). It may also be useful to send the letter to opposing counsel instead of the court. Request that the opposihg counsel notify the court in his / her capacity of an officer of the court.

B. ***What is material effect?*** Servicemembers are required to demonstrate that their ability as a plaintiff to prosecute an action or as a defendant to conduct a defense is "materially affected" by reason of military service. There is no bright line standard. However, courts focus on two main concerns.

The first is the geographical inability to return to prosecute or defend the civil action because of deployments, field exercises, out of locale training, etc. Has the member suffered a geographic disadvantage due to military assignment or would the member's rights be adversely affected by his absence? *Hackman v. Postel*, 675 F. Supp. 1132 (N.D. Ill. 1988) and *Palo v. Palo*, 299 N.W. 2d 577 (S. D. 1980).

The second is the financial inability resulting from decreased standard of living and income compared to what the servicemember experienced prior to military service. Many individuals experience a significant decrease in income when they enter the military. The courts examine whether the member has suffered economic impairment due to transition from civilian to military life. *Federal Nat'l Mortgage Ass'n v. Deziel*, 136 F. Supp. 859 (E.D. Mich. 1956).

The material effect is also judged by the servicemember's exercise of "due diligence" and "good faith." The SSCRA must not be used to obstruct or prevent otherwise valid proceedings. Upon showing material effect, the court must grant a stay. The courts in *Underhill v. Barnes*, 288 S.E.2d 905 (Ga. Ct. App. 1982) and *Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981) addressed the issues of "due diligence" and "good faith."

C. ***Stay of proceedings and executions***

1. ***General.*** The general stay provision of the SSCRA declares that "[a]t any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not **materially affected** by reason of his military service." 50 U.S.C. App. § 521 (emphasis added).

2. ***Special provisions allowing for stays of specific proceedings.*** In actions on certain installment contracts, mortgages, trust deeds, and other secured obligations entered into by the servicemember prior to his entering the military service, the grant of a stay is discretionary with the court depending upon a finding that the servicemember's ability to comply with the terms of the transaction or obligation is materially affected by reason of military service. 50 U.S.C. App. §§ 531-532.

3. ***Stays or vacations of judgments, orders, etc.*** The execution of judgments or orders against a servicemember may be stayed, and attachments or garnishments against property, money, or debts may be vacated or stayed at the discretion of the court depending upon its opinion as to whether the servicemember's ability to comply with the judgment or order is materially affected by reason of military service. 50 U.S.C. App. § 523.

In *In re: Brazas*, 662 N.E.2d 559 (Ill. 1996), the appellate court held that the trial court abused its discretion by holding a hearing on divorce case issue when judge and opposing counsel were aware the defendant was on Reserve Active Duty for Training (ADT) status. See also, *U.S. v. Stephan*, 490 F.Supp. 323, 325 (W.D. Mich. 1980)

4. ***Duration and terms of stays.*** Ideally, a servicemember can obtain a stay based on the foregoing provisions for the entire period of military service plus three months thereafter. 50 U.S.C. App. § 524. The actual duration of stays allowed, when less than this permissible maximum, may depend upon the equities of each case. In most cases, the stay should be only until such time as the servicemember is unhampered by military duties, e.g. conclusion of a deployment, return from field exercises.

When a Service member requires leave on the basis of need to attend hearings to determine paternity or to determine an obligation to provide child support, leave shall be granted, unless a. the member is serving in or with a unit deployed in a contingency operation or b. exigencies of military service require a denial as such request. The leave shall be charged as ordinary leave. Commands failing to grant leave should be reminded of the 10 Sep 97 amendment to Department of Defense Directive 1327.5, "Leave and Liberty," which directs that leave be granted as noted herein.

D. ***Maximum rate of interest protection.*** Individuals entering active duty are entitled to invoke the 6% maximum interest rate per year for debts and obligations incurred **prior to** military service. It is the Department of Defense's [DoD] position that any interest exceeding 6% is forgiven and the loss incurred by the creditor and not the servicemember. This protection applies to interest on mortgages, car loans, and credit cards. It does not apply pursuant to 20 U.S.C. §1078(d) to federal Guaranteed Student Loans. The Department of Education has interpreted 20 USC App. § 1078(d) to prohibit the SSCRA from reducing the interest on federally insured student loans to 6%. Department of Education memorandum, GSL Borrower's Adversely Affected by the Recent U.S. Military Mobilization, (August 29, 1990).

The DoD recommended procedure during Desert Shield/Storm for servicemembers to invoke the interest cap was to write a letter to the creditor claiming protection under § 526 of the SSCRA and include a copy of military orders showing entry date and period of service and legal authority for call-up. Creditors who resist granting the interest rate cap should be reported to the member's service legal assistance division. Additionally, the local installation Armed Forces Disciplinary Control Board has authority to place the business off-limits to military personnel. And, the Department of Justice is authorized to represent individuals when such representation is in the interests of the United States.

One issue invariably arising when a service member invokes this provision of the SSCRA pertains to interest above six percent. What happens when a loan agreement provides that the debtor will pay interest at an annual rate of 14 percent? Is the difference of eight

percent forgiven or accrued? Some creditors will likely attempt to accrue it. For example, some bank loan servicing rules may allow a six percent cap during active service, but consider the excess to be a delinquency that must be paid within three months of leaving service. Another common ploy is for a lender to agree to reduce the interest rate to six percent, but increase the payments on principal to the point that they equal the pre-service payment amount, thereby paying off the loan early. This approach also violates the intent of the legislation. Another clever ploy by creditors is to agree to reduce the loan to the six percent cap, but to charge a series of new finance charges for "refinancing" the loan. Another variation of this approach is for the lender to agree to the six percent interest cap, but then "refinance" the loan based upon the remaining years left on the mortgage, rather than on the number of years of the original mortgage contract. This approach also violates the intent of section 526, in that the "refinanced" mortgage loan will have higher monthly payments at the six percent rate than a service member would pay if the new mortgage was based upon the original term of years.

As a consequence of this section, when a service member owes money and the interest rate is more than 6 percent per year, the rate must be reduced to 6 percent when the debtor enters military service. The protection ends, however, if the creditor convinces a court that the service *member's* ability to pay is not materially affected by military service. What if your client comes to see you to assert the six percent interest cap, after they have been on active duty for over a year, or they are back from deployment. Does a creditor have to backdate any interest cap and credit the service member? Arguably, the recent *Moll v. Ford Consumer Finance Company, Inc.,* 1998 U.S. Dist. Lexis 3638, n.d. ilc. E.d. (16 Mar 98) case provides service members with a means to privately sue creditors and lenders that wrongly refuse to credit service members with the six percent interest cap. One can argue that the law would still apply, and the creditor still has the burden to prove no material effect. The creditor has a very strong argument in such cases that the service member must not have been materially affected if the servicemember has paid the full amount owed for the past year or deployment. In such cases, legal assistance attorneys need to argue the intent of the law to protect service members "with an eye friendly to those who dropped their affairs to answer their country's call."

The 6% interest rate continues until the creditor petitions a court and alleges that the servicemember's ability to pay the higher interest is not "materially affected" by the member's military service. If in the opinion of the court, the ability of such person in military service to pay interest upon such obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of such service, the court may make such order as in its opinion may be just. 50 U.S.C. App. § 526.

A Reserve Component call-up, such as Operation Desert Shield in 1990 – 1991, demonstrated this anomaly. Many Reserve Component soldiers during Desert Storm duty experienced financial difficulties because their military pay and benefits did not match their Civilian pay. Nearly all of the Reserve financial commitments were pre-service. Although the Reserve Component members may have entered these commitments while members of the

Reserve Components, they nevertheless will have entered the commitments before entry on active duty.

Legal assistance attorneys should be aware of the "exhaustion of assets principal." In sum, *Florida Home Loan Mortgage Corp. v. Sincaban,* (W.D. Wis. 1993) stands for the proposition that a servicemember must exhaust all financial resources before "ability" to pay will be materially affected by military service. In this case, Dr. Sincaban was called to 20 weeks active duty during Desert Storm as a Medical Corps Lieutenant Colonel. She suffered a salary cut between $41,000 and $52,000 during this time. She owned real estate valued at $1.2 million and jewelry worth in excess of $1 million. Her debts totaled $410,000. To meet her indebtedness payments, she cashed in vacation, sabbatical, and comp time, and sold a motel. She maintained a cash balance in her bank accounts of $22,000 during the entire period. She requested an SSCRA 6% rate cap on three FHLMC mortgages that would have reduced her payments by $870 per month. The total amount in dispute was $4,349. Although equities favored the servicemember, the law did not agree that her "ability" to pay was materially affected. By accumulating assets over her career, she ensured her ability to meet her financial obligations even with the salary cut.

E. ***Statute of limitations.*** 50 U.S.C. App. § 525 tolls the statute of limitations. Time spent in active military service shall not be used in computing any period of limitations prescribed for the bringing of any action or proceeding in any court, by or against a servicemember or his heirs, whether the action occurred prior to or during military service. This suspension also applies to administrative proceedings. In *Detweiler v. Pena,* 38 F.3d 591 (D.C. Cir.1994) the court held that the SSCRA does in fact toll the Coast Guard Board for the Correction of Military Record's (BCMR) three-year statute of limitations. It does not apply to IRS statutes of limitation under IRS regulations and 50 U.S.C. App. § 527. There is no requirement to demonstrate "material effect." This may however be used as a two-edged sword as it applies to both when the member is a plaintiff and a defendant. The doctrine of laches may still be raised as a defense despite this suspension. In *Conroy v. Aniskoff,* 507 U.S. 511 (1993) an Army officer failed to pay local real estate taxes on property he owned in Maine. The town acquired the property and sold it. In his suit, Conroy claimed that § 525 tolled the redemption period while he was in military service, and federal law therefore prevented the town from acquiring good title to the property. The Maine District Court rejected his claim, holding that the redemption period could not be tolled unless the taxpayer could show that military service resulted in hardship excusing timely legal action, and that it would be absurd and illogical to toll limitations periods for career service personnel who had not been handicapped by their military status. The State Supreme Judicial Court affirmed. The U.S. Supreme Court held that a member of the Armed Services need not show that his military service prejudiced his ability to redeem title to property before he can qualify for the statutory suspension of time.

In *Anderson v. Dalkon Shield Claimants Trust*, 996 F.2d 716 (4th Cir.1993) the court held that the tolling provisions do apply to bankruptcy matters.

0205 SPECIFIED TRANSACTIONS AND OBLIGATIONS

A. ***Generally***. Articles III, IV, and V of the 1940 Act, 50 U.S.C. App. §§ 530-574, contain extensive provisions conferring certain benefits, protections, and status for enumerated specific transactions and both private and governmental (tax) obligations.

B. ***Article III: Leases termination and rental eviction***

1. ***Lease termination***. Individuals called to or entering upon active duty have the right to terminate a lease for a family dwelling, business or agricultural purposes, provided the lease was entered into prior to entry upon active duty and the leased premises were occupied by the servicemember or ***dependents***. Written notice must be provided to the landlord along with a copy of induction orders. Generally, a monthly lease will terminate 30 days after the first date on which the next payment is owed, after notice is delivered (i.e. notice give 10 Aug, next payment due, 1 Sept, least terminates 1 Oct –30 days after 1 Sept). All other leases terminate on the last day of the month following the month in which notice is given. The servicemember is entitled to return of any security deposit and prorated refund of any advanced rent. 50 U.S.C. App. §§ 534, 536.

2. ***Prohibition against eviction***. A servicemember or dependents may not be evicted from a dwelling the rent for which does not exceed $1200 per month, except upon a court order. 50 U.S.C. App. § 530. This provision does not apply to business premises. Courts must order a stay of eviction for a period of 3 months if the tenant's ability to pay rent is materially affected by military service. The Secretary of Defense or Secretary of Transportation is also empowered "to order allotments in reasonable proportion to discharge the rent of premises occupied for dwelling purposes" by the dependents of a servicemember. 50 U.S.C. App. § 530(d).

C. ***Article III: Mortgage Foreclosure Protection.*** The SSCRA protects servicemembers and dependents against foreclosures of mortgages, trust deeds or similar security if the four following conditions are met:

1. the relief is sought on financial obligations secured by real or personal property, examples - security agreements on automobiles or mortgages on real estate;

2. the obligation originated before active duty by the servicemember **or dependents**;

3. the property is still owned by the servicemember **or dependents**; and

4. the member's / dependents' ability to make the loan payment is "materially affected" by member's military service. 50 U.S.C. App. § 532.

In foreclosure actions where the servicemember's ability to pay is "materially affected", the court shall either stay the foreclosure proceedings or order other equitable relief; (e.g. extension of the loan maturity date, decreased payments).

Engstrom, et al. v. The First National Bank Of Eagle Lake, 47 F.3d 1459 (5th Cir. 1995) discusses an agent continuing with a foreclosure sale in the member's absence.

D. ***Article III: Installment Contracts.*** 50 U.S.C. App. § 531 also protects servicemembers from creditors repossessing property, rescinding contracts, or imposing penalties absent a court order for members who signed an installment contract for the purchase of real or personal property if the following three conditions are met:

1. the installment contract originated **prior to** active duty;

2. the servicemember paid a deposit or installment payment **prior to** service; and

3. the member's ability to make payments is "materially affected" by the member's military service.

Courts will stay repossession or rescission, or provide other equitable relief where ability to make installment payments is "materially affected" by military service. The measure of "materially affected" is judged by the member's earnings prior to and after entering military service. For example, the Marine Corps issues no pay to recruits during the first 74 days of boot camp.

E. ***Article IV: Insurance.*** Servicemembers may have certain types of commercial life insurance contracts guaranteed by the Veteran's Administration. There is no need to demonstrate the member's ability to pay is materially affected by service. 50 U.S.C. App. §§ 540-548. A servicemember may apply to the Department of Veterans Affairs for a government guarantee of premium and interest payments on life insurance policies for a total not to exceed $10,000 face value in order to prevent lapse or forfeiture. This protection covers the duration of the servicemember's military service and two years beyond termination of that military service. During the effective period of the protection, unpaid premiums are treated as policy loans. If, at the expiration of the time allowed, the unpaid amount of the policy exceeds the cash surrender value of the policy, the policy lapses and the government pays the difference to the insurer, collecting in turn from the insured. 50 U.S.C. App. §§ 540-548.

50 U.S.C. App. § 593 protects health insurance in a manner similar to professional liability insurance discussed below. In short, a servicemember's health insurance which (1) was in effect on the day before such service commenced, and (2) was terminated effective on a date during the period of such service must be reinstated under the original

terms and conditions. An exclusion or a waiting period may not be imposed unless certain exceptions apply.

F. ***Article V: Taxes.*** Military income and a servicemember's personal property will only be taxed by the member's state of domicile. For personal property taxation, the property will be deemed to be located in the member's state of domicile. 50 U.S.C. App. §§ 513, 574. Payments of Federal income taxes may be deferred if the member's ability to pay such tax is "materially impaired" by such service. 50 U.S.C. App. § 573. Additionally, the sale of property owned by the servicemember ***prior*** to military service for the purpose of enforcing the collection of unpaid taxes or assessments is restricted by 50 U.S.C. App. § 560.

The above protections do not apply to nonmilitary income earned in the nondomiciliary state, for example, teaching, craft sales, etc. Also, the protections do not apply to family members. Moreover, several states have used the servicemember's military income to increase the tax liability of the nonmilitary spouse. See *U.S. v. Kansas*, 580 F. Supp. 512 (D. Kansas 1984) aff'd 810 F. 2d 935 (10th Cir. 1987) where Kansas devised a state tax scheme that calculated the tax bracket of the nonmilitary spouse who earned income in state by adding the servicemember's military income if the couple filed a joint federal return. Even though this increased the couple's tax burden, the appellate court held it did not violate SSCRA protection. For in-depth discussion on this issue see Captain Robert L. Minor, USA, *Inclusion of Nonresident Military Income in State Apportionment-of-Income Formulas: Violation of the Soldier's and Sailor's Civil Relief Act?*, 102 Mil. L. Rev. 97 (1983).

G. ***Article VII: Professional Liability Protections.*** Doctors and other professionals designated by SECDEF with liability insurance who are ordered to active duty may make a written request to their insurance carriers to suspend insurance coverage. 50 U.S.C. App. § 592. During the suspension period, no premiums will be charged, refunds will be made for prepayments, and members will have 30 days after the completion of active duty to reinstate the policy. The insurance carrier **must** reinstate the policy, and the premiums may not be increased. Additionally, malpractice actions are stayed. The period of suspended insurance coverage is excluded from statute of limitations calculations for malpractice actions.

0206 CONCLUSIONS AND KEY CONCEPTS. "Material affect" is a prerequisite that a servicemember must demonstrate to invoke most SSCRA protections. The SSCRA exists to allow members to protect their rights, not avoid their liabilities. The rights protected sometimes include those of dependents as well as the servicemember. Article III provides specific protections for dependents with regard to eviction protection, installment contract termination, early lease termination, and mortgage foreclosure.

Retaliation against those who invoke the SSCRA protections is prohibited. Additionally, no adverse credit report entries may be made. 50 U.S.C. § 518. A

servicemember may lose SSCRA protection by not being diligent in protecting his / her rights, acting in bad faith, or waiving SSCRA protection in writing.

Criminal sanctions may be imposed if a plaintiff files a false affidavit regarding a defendant-servicemember's duty status; a landlord knowingly evicts a member's family wrongfully, or wrongfully rescinds an installment contract or repossesses the underlying goods. The maximum criminal penalty is a misdemeanor conviction with up to one year in jail, a $1,000 fine, or both. 50 U.S.C. App. §§ 520(2), 530(c), 531(2), 534(3), 535(3).

CHAPTER 3

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CHAPTER 3

PART A – ESTATE PLANNING

0301 REFERENCES

A. JAGINST 5801.2 Section 7-2

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0302 WILL DRAFTING AND ESTATE PLANNING

A. ***Every client has an estate plan.*** The primary objective of drafting a will for a client is to arrange for disposition of his/her worldly possessions at the individual's death. However, without a will and/or coordination of other forms of ownership and transfer of property one cannot guarantee the proper disposition of the client's property. A client cannot depend upon intestate distribution.

Estate planning should permit the client to use and enjoy his property during his lifetime and to pass the property to his/her chosen beneficiaries in the manner he wishes with the least shrinkage in value. To ensure this, estate planning has to consider the client's wishes, state law of the client's domicile, state law where real property is located, type of property ownership, Federal and state taxes, including the Federal Estate and Gift Tax, Federal income tax and state estate, inheritance and income taxes and other considerations the attorney may consider relevant.

B. ***Purpose of wills.*** A will is a legal document that takes effect when you die. The main purpose of a will is to dispose of property per the testator's desires, after his/her death. A will allows the testator to make important decisions regarding:

1. to whom his/her property will be distributed;
2. how his/her estate will be shared among beneficiaries;
3. who will serve as executor of his/her estate; and
4. who will serve as guardian(s) of any minor children.

When a person dies without a will ("intestate"), ownership of property is determined by the laws of descent and distribution ("intestate succession") of the state of the deceased's domicile or where real property of the deceased is located. Unless the estate is minimal and all property is owned with survivorship or has named beneficiaries, probate will be required to pass title and clear creditor claims.

C. ***Advantages to avoiding intestacy.*** The state of domicile's statute of descent and distribution rarely coincides with a decedent's actual intent. A client may move to a state with different intestate scheme or state law may change before the client dies. Property owned in more than one state may be subject to different intestate schemes.

The cost of administering an intestate estate may be significantly greater. Additionally, the drafting of a will allows a testator to minimize Federal and state estate tax liability.

1. ***Proceedings require court approval.*** The estate administrator is usually required to post bond. A will provides the client the opportunity to nominate an executor and a successor. The requirement to post a bond may be waived in a will. No waiver provision can be provided for in an intestate estate. Passing property to minor children may require appointment of a guardian not only for the children but also a custodian/guardian for the property passed to the minors. A will can provide for disposition of property to minors through a trust or to appoint guardians of the persons and property of the child on the death of the surviving parent without the requirement of a court-appointed guardian.

D. ***Purpose of probate.*** The probating of a will permits a court to supervise the transfer of assets from the decedent to his heirs. The probate process transfers title in property from the decedent to his/her heirs and beneficiaries. A typical probate lasts about one year (six months if smooth). Besides transferring title of property, the probate process notifies creditors of the death of the decedent and requires them to submit claims against the estate within a certain period of time. A summary proceeding may be available in the testator's state of domicile if his/her estate is at or below a certain value at the time of death.

E. ***Probate estate.*** Not all property a decedent owns will be part of a probate estate. Only property that the decedent hold's in his name alone with no named beneficiary or survivor becomes property in the probate estate. Any property that will pass by intestacy if the decedent does not have a will or that will pass by will if the decedent has a valid will at death.

F. ***Why avoid (or not) probate.*** Because of the attorney fees, executor's commissions, other fiduciary fees, court filing fees, appraisal costs, and the time and delay (can be from six months to one year) to probate an estate. Attorney's fees will often vary depending on the size of the estate to be probated. Often estates under $600,000.00 in value will be charged at flat or hourly rates where attorneys may charge fees as a percentage of the estate on larger estates.

Additionally the probate process is a court process and as such will create a public record. Notice to creditors must be published. If privacy is desired by the testator he/she may want to make provisions to distribute his/her estate without going through probate. Many people attempt to avoid probate by the following methods (non-probate property):

1. ***Lifetime gifts.*** Even gifts made shortly before death will avoid probate. However, such gifts may be brought back in to the estate for death tax purposes if the decedent retained some level of ownership rights, see 26 U.S.C. § 2041. Also gifts carry the donor's tax basis to the donee. Passing appreciated assets in the decedent's estate will generally get a new or stepped-up basis. Tax basis will be discussed below in section 0302.

2. ***Living trusts.*** An intervivos trust is a trust established by the decedent during his/her lifetime. A living trust can be established either as a revocable or irrevocable trust depending on the type of estate planning needed by the client. Trusts are often governed by the Uniform Probate Code of the state or by common law. Some states will allow intervivos trusts to exist unfunded. Living trusts are sometimes used to own life insurance.

3. ***Joint ownership with right of survivorship*** (i.e., Joint Tenancy and Tenancy by the Entirety). This form of title arrangement, usually between spouses, where title passes automatically to the surviving joint tenant allows the title to the property to pass without probate. Jointly owned property with a right of survivorship can include bank accounts, realty, stocks, bonds, securities, etc.

4. ***Contractual arrangements with third party beneficiaries***

   a. ***Payment on death (POD) or transfer on death (TOD)*** forms of registration on personal property (e.g., Individual Retirement Arrangements) and bank accounts (i.e., Totten trusts - a trust created by the deposit by one person of his own money in his own name as a trustee for another, when the depositor dies, the beneficiary gets the balance - a method of passing savings accounts to heirs. Passbook accounts are held in trust for another. Typical wording would be: "John Doe, in Trust for Johnny Doe.")

   b. ***Life insurance.*** The proceeds of life insurance are rarely subject to probate administration, unless the insured's estate is the beneficiary. Insurance, if owned by the decedent will be part of his/her death or gross estate for estate tax purposed but if there is a named beneficiary insurance proceeds pass by "contract" and not by "probate." The life insurance proceeds pass to a named beneficiary. While it is possible to make insurance payable to one's estate, the proceeds then become a probate asset, which may have significant income and inheritance tax consequences for the ultimate beneficiary under the estate. Additionally, including insurance benefits in the estate may result in those assets being tied up in the administration of the estate.

Many times a decedent will not wish to avoid probate because there are significant advantages of requiring creditors and putative heirs to voicing their issues in court. Additionally, heirs and beneficiaries are often advantaged by the clear title distribution provided by a probate court. Many times estate planning for a decedent may require that a probate estate be forced to take advantage of Federal and state estate tax laws. Estate planning techniques discussed below in section 0303 such as creditor shelter and disclaimer trusts

require an estate to be probated so that testamentary trusts are established. If these estate planning techniques are used with intervivos trusts probate may still be avoided.

G. **Estate planning for larger estates.** Larger estates are those over $500,000.00. Federal Estate Tax will not be required to be paid unless a decedent's estate is in excess of $625,000.00 in 1998 but for planning purposes an attorney should not draft a will or provide estate planning advice for estates over $500,000.00 without considering Federal Estate and Gift Tax (FE&GT) implications. Service members who have $200,000.00 Servicemen's Group Life Insurance (SGLI) and other property of significant value should be made aware of the FE&GT implications for their estate. A service member who has the full SGLI, owns a home and regularly saves can quickly accumulate an estate in excess of $500,00.00.

PART B – FEDERAL ESTATE AND GIFT TAX

0303 GENERALLY. The Federal Estate and Gift Tax (FE&GT) system is a tax on the transfer of wealth. The FE&GT system is a tax system where taxes paid on gifts given during an individual's lifetime will be calculated into the formula in determining how much Federal Estate Tax (FET) is owed at the individual's death. This is a tax in addition to the personal income tax. It is a tax that is on the fair market value on the gift given or the property passed by the decedent. Currently, an estate does not pay any Federal estate or gift tax unless a decedent has given away during his lifetime and passes an estate at his death in excess of $625,000.00 in value. The value of all gifts given during life and the value of property transferred at death are added together.

A. **Basic tax principles.** Tax basis is the value an owner is considered to have invested in the property. The tax basis of property is different depending on whether that property was received as a gift or inherited. Tax basis is generally the purchase price of property. Over the years, the tax basis of property may increase or decrease depending on whether value is added by way of permanent improvements, or subtracted by way of casualty losses to the property. When a gift is given and received the donor will be responsible for a gift tax on that gift based on the fair market value of the gift. The donee does not have any income from receipt of the gift but the donee receives that gift with the donor's tax basis. This is called a carry-over tax basis. When the donee disposes of the gift by sale or transfer, the donee will be responsible to pay capital gains taxes on any gains received above the donee's tax basis. When property is passed through inheritance the decedent's estate will be required to pay an estate tax based on the fair market value of the property transferred. The beneficiary will not be required to pay income tax based on the value of the property received and will receive the property with a tax basis equal to the fair market value of the property at the date of the death of the decedent. This is called a "stepped-up" basis.

There are a number of different taxing systems that may apply when an individual dies. An individual's estate will be required to pay personal income taxes for the last year of life. A standard 1040 can be filed. Additionally, if the decedent's estate exists for any period of time and has income it may need to pay income taxes also. This is Form 1041. If a decedent dies

with an estate of a value over $625,000 in 1998, the estate will probably be required to pay Federal estate taxes based on the fair market value of the estate as determined on the decedent's date of death or on the alternate valuation date. The decedent's estate may also be responsible for state estate taxes. Each state has a different taxing system. Many have an estate tax and many of those have what is called a pick-up tax which is a tax equivalent to the state estate tax credit provided in the Federal estate tax. There are some states that also have state inheritance taxes. This tax is often a tax on the value of the property inherited and is paid by the beneficiary.

B. Federal gift tax. 26 U.S.C. §§2501-2524. The FE&GT is considered a unified tax system because all transfers, those given during life and at death, are taxed under the same system. Therefore, it is incumbent on an estate planner to understand how the FE&GT works as a unified system. Gift or estate taxes are payable only on gifts or transfers of a certain value. Initially, each person is provided a FE&G tax exemption for transfers of a value up to $625,000.00 in 1998. The tax credit equivalent is $202,050.00. The tax credit of $202,050.00 is equivalent to the amount of tax on an estate of $625,000.00. This credit is applied initially as taxable gifts are given and then to transfers at death until the credit is exhausted. So long as any credit amount exists, no taxes will be paid even if the gifts given or property passed are taxable. Not all property passed is taxable. Some amounts are excluded from taxation; others are afforded deductions because of who the property is given to. Federal estate and gift tax will be payable on the remainder of value transferred at death if any once the credit is used up. The $625,000 value applies in 1998. Beginning in 1998 the value of an estate transferred during life and at death without estate tax owing increases incrementally to $1,000,000 by 2006.

In 1998 the value is $625,000 with a credit equivalent of $202,050.
In 1999 the value is $650,000 with a credit equivalent of $211,300.
In 2000 the value is $675,000 with a credit equivalent of $220,550.
In 2002 the value is $700,000 with a credit equivalent of $229,800.
In 2004 the value is $850,000 with a credit equivalent of $306,800.
In 2005 the value is $950,000 with a credit equivalent of $326,800
In 2006 the value is $1,000,000 with a credit equivalent of $345,800.

1. Taxable gifts. Gift tax will be due only on taxable gifts. Not all gifts are taxable. Additionally, gift tax will not be actually paid on taxable gifts until the FE&GT tax credit is used up. The credit must be applied to all taxable gifts and death transfers in the order the gift or transfer is made. A taxpayer cannot opt to pay tax on all gifts given during life to have the credit available at death. A gift is a lifetime transfer of value for less than adequate consideration. Adequate consideration is what an unrelated buyer with all the relevant facts would pay for the item or intangible property. The consideration provided must be the fair market value. If it is not, then the difference between the consideration provided, if any, and the fair market value is the gift.

2. Excluded gifts. Some gifts are actually excluded from gift taxation. To be excluded from gift tax the gift must be of a present interest. To be a gift of a present interest the

donee must have the ability to utilize the gift for his/her personal use. If it is a gift of money, it cannot be tied up in a trust that the donee cannot access until a certain age or event. So long as the gift is of a present interest, and it is of a value of under $10,000.00 per year, then the gift or gifts may be excluded from gift tax. The exclusion provides that one donor can give up to $10,000.00 value of gifts to a donee a year without it being subject to any gift tax. A donor may give gifts up to $10,000.00 a year to any number of donees. This annual exclusion amount will be increased by cost of living adjustments starting in 1999. If the donor is married and the donor's spouse is willing to split-gifts then a donor can give up to $20,000.00 a year to a donee. The donor's spouse does not have to be able to contribute any money to the gift given. Any amounts paid by a donor for tuition and medical expenses for a donee are also excluded from gift tax. The tuition and medical payments are only excluded from gift tax so long as the donor pays the tuition to the educational institution or pays the medical expenses to the medical facility or doctor. If the donor pays the amounts directly to the donee they will not be excluded from gift tax unless it falls within the $10,000.00 annual exclusion. Gifts are not taxable as income to the donee recipient. Any property received by a donee as a gift retains the tax basis that the donor had in the gift. 26 U.S.C. §1015.

3. Gifts typically not a present interest. Often gifts given to minors are not gifts of a present interest because the minor cannot have personal use of the gift. Typically a gift is given to a minor, in trust, for the minor as beneficiary and the minor may have access only to the income from the gift or no access at all until a certain age or event. These gifts will not qualify for the annual exclusion because they are not gifts of a present interest. To qualify for the annual exclusion, a gift to a minor in trust must be made available to that minor to use during the calendar year the gift is given. To establish at least a small portion of the gift as a gift of a present interest the donor must afford the donee the ability to get at and use that gift for his/her own personal use. To do this, a trust with a "Crummey" power can be established. A "Crummey" power is a right given to a donee for a set amount of time, for example, one month, to be able to access either 5% or $5000.00, whichever is greater, of the gift given to the donee in trust that year. Whether the donee uses that amount or not either the $5000.00 or 5% will be a gift of a present interest and excluded from gift taxes under the annual exclusion.

a. Gifts for educational purposes. Two provisions of the Taxpayer Relief Act of 1997 provide for a gift tax exclusion for gifts that would not otherwise qualify because they are not gifts of a present interest. Section 529(c) relating to qualified state tuition programs and §530(d) relating to educational IRAs provide that amounts paid into either a qualified state tuition program or an educational IRA will be considered a completed gift of a present interest. This makes these gifts eligible for the $10,000 annual exclusion or potentially eligible for the tuition exclusion if the amounts are paid directly to the school.

4. Other non-taxable gifts. Gifts given to qualified charitable organizations are not taxable under 26 U.S.C. §2522. Additionally, gifts given to qualified charitable organizations may be deducted from personal income taxes if a taxpayer itemizes deductions under §161. Gifts given between spouses are not taxable because of the unlimited marital deduction under 26 U.S.C §2523. The unlimited marital deduction is available only to U.S.

citizen spouses. Non-U.S. citizen spouses may be given up to $100,000.00 annually without any gift tax consequences. Additionally, transfers incident to divorce may qualify as nontaxable gifts under § 2516. Transfers between spouses and incident to divorce have no personal income tax implications either.

5. Gift tax returns. The return is Form 709 and is due on April 15 of the year following the tax year when the gift was made. The donor is liable for any gift tax payable on the gift. The FE&GT credit will be applied and if gifts given by the donor during his/her life do not exceed $625,000.00 in 1998 or the current exemption amount then no tax will be owed. To determine the gift tax due by a donor on a gift the donor must add all prior taxable gifts given to all taxable gifts made during the calendar year. The donor should ensure that the amount of the annual exclusion is taken out if any of the gifts were of a present interest. The tax rates are applied and then any prior gift tax payable or paid is subtracted back out of the gift tax due. The tax credit is applied and any remaining tax will be paid. If the donor owes tax and fails to pay the donee may be held liable by the IRS for the tax. The amount of tax due is subtracted from the value of the gift thus reducing the amount of tax due. This is a difficult calculation to make because the numbers become inter-related.

C. Federal estate tax. 26 U.S.C. §§ 2033-2056. The FET is a tax on the transfer of wealth at death. The tax is based on the value of the decedent's gross estate. This value will include any lifetime taxable gifts made by the decedent. Currently the FE&GT system taxes estates of $625,000.00 or over at 37% and by the time the estate is a value of $3,000,000.00 the tax rate is 55%.

1. Gross estate. The date of death value of the decedent's gross estate must be determined. Everything that a decedent had, any property or ownership interest in at his/her death, is a part of the decedent's gross estate. If a decedent had any ability to control the property at the time of his death, then that property is part of the decedent's gross estate to the extent he could control it. For example, a decedent always has the ability to change a beneficiary of any life insurance he owns on his life. The ability to change the beneficiary is an incidence of ownership and requires the value of the life insurance to be included in the decedent's estate. The value that is included is the payout or face amount on the policy not any other value. A military member's SGLI is included in his/her estate when he/she dies. This $200,000.00 policy is one-third of the value toward a taxable estate under the current FE&GT system. Additionally for a military member, the value of the member's pension if he/she opted for the Survivor Benefit Plan when he/she retired is included in the gross estate.

a. Property ownership. Any property the decedent owns even if he owned it jointly with rights of survivorship, the decedent's estate will have to show at least half the value of the property if the owners were husband and wife. If the decedent owned the real property with someone else, the decedent's estate will have to trace the consideration paid by the co-owners so that the decedent's estate does not have to include the whole value of the property.

b. Transfers immediately before death. Most transfers even one day before death are effective to move property out of a decedent's estate. If the decedent completely relinquishes control and ownership over property while he/she is still alive, a gift tax may be owing but the gift will not generally be included in the decedent's gross estate. There are some exceptions for transfers within three years of death that generally deal with life insurance and powers of appointment, see 26 U.S.C. §§ 2036-2038; 2041.

2. Valuation of the gross estate. A decedent's gross estate will be valued on the date of death generally. The value of the estate will be the fair market value on that date. However, a provision of the code allows an estate to be valued at the date six months from the date of death. All items in the estate are either valued on the date of death or on the alternate valuation date at six months after the date of death. 26 U.S.C. § 2032. If items in the estate have been disbursed to beneficiaries at the date of the alternate valuation date then the fair market value on the date of distribution is applicable.

3. Expenses from the gross estate. A decedent's estate is not actually taxed on the whole value of the gross estate. The estate is allowed a number of deductions before tax is imposed. Administrative expenses and indebtedness of the estate are deductible, see § 2053. If the estate suffers a loss, that may be deductible under §2054. Expenses of the decedent's last illness may also be deductible but both losses and last illness expenses may be deductible on the decedent's last income tax return and the deductions cannot be taken in both places. Any gifts to qualified charities may qualify for the charitable deduction, § 2055. This charitable deduction is available on both the FET and personal income tax return. Transfers to a U.S. citizen spouse are entitled to an unlimited marital deduction. If the transfers are to a non-citizen spouse the deduction is limited to $100,000.00. Any gift of a terminable interest whether it is to a charity or a spouse will not qualify for a deduction. Certain terminable interest gifts to spouses may qualify for the marital deduction if they are set up in the form of qualified terminable interest property (QTIP) under §2056. A terminable interest gift is one given where the beneficiary's interest in the property may terminate or fail based on a lapse of time or the occurrence or non-occurrence of an event.

4. Determining the Federal estate tax due. The FET due on a decedent's estate is determined by taking the value of the gross estate, subtracting out the deductions available and determining what tax is due on the remainder. The remainder is called the taxable estate. To determine the tax due on the taxable estate, the amount of all prior taxable gifts made by the decedent must be added back to the taxable estate. This value is the grossed-up estate. The tax rate schedule is applied to this amount and a tentative tax is determined. The amount of gift tax payable on all prior taxable gifts is then subtracted out of tentative tax. The unified tax credit of $202,050.00 is applied and any tax remaining is the tax due. The decedent's estate is responsible for paying the FET. Additionally, the FET allows a decedent's estate to take a credit for state estate taxes paid 26 U.S.C. § 2011. Many states impose a state estate tax equivalent to the amount of the state estate tax credit available. This kind of state estate tax is called a pick-up tax.

5. Paying the Federal estate tax. A decedent's executor is responsible for the distribution of the estate and for paying the FET. The executor must file a Form 706 within nine months of the decedent's death. The executor may file for one three-month extension. A FET return must be filed if the estate is valued over $625,000.00. Even when the estate will not owe any estate taxes because of deductions it is a good practice to file the return to show that the deductions were properly taken and no tax is due. Payment of the estate tax is due when the return is filed. This can cause great difficulty for some estates that are asset rich and cash poor. An executor can be held personally liable for the estate taxes due. This does not occur very often and typically only when waste by the executor occurs. An executor will also need to file a final income tax return for the decedent's last year of life. This will be a Form 1040. The executor will also be required to file a Form 1041 if the decedent's estate exists beyond a few months and earns any income. The Form 1041 is also the form used when filing income tax returns for trusts.

0304 ESTATE PLANNING TO REDUCE A CLIENT'S ESTATE. Many techniques can be used to reduce a client's estate so that he/she pays little or no estate taxes. Intervivos transfers can be used to move property out of a client's estate. However, many clients do not like to relinquish control of property during their life. Retention of control over property will cause it to be included in the client's estate at his/her death. So with many clients, lifetime gifts are not likely. For a client who owns life insurance that pushes him over the estate tax limit, the client may be able to establish an irrevocable lifetime insurance trust to hold and own the life insurance on the client. This cannot be done with SGLI but can be accomplished with other commercial insurance. SGLI cannot be owned or held by anyone except the government. The service member will always have the right to change his beneficiary of his/her SGLI. The client will not have the right to change the beneficiary on commercial insurance placed in an insurance trust.

A. **Living trusts.** Other clients may want to use a lifetime revocable trust to own their property during their lifetime with a named beneficiary receiving the benefits of the trust upon the death of the decedent. The trust becomes irrevocable upon the death of the decedent grantor. During the grantor's lifetime the trust is taxed as though it is the grantor's property. If the trust is revocable during the grantor's lifetime, the grantor retains some level of control over it. This means that the property held by the trust is included in the grantor decedent's gross estate at his death. The continuing problem with intervivos trusts is that grantors do not transfer their property into the trust or the transfer is in some way improper and becomes ineffective. The revocable living trust if funded is effective for transferring the grantor's property outside of probate but is not effective for avoiding FE&G taxes. Only an irrevocable living trust over which the grantor has no control will be effective for transferring property outside the grantor's gross estate. Once property is owned by the trust it becomes property over which the grantor no longer owns and has no control.

B. **Testamentary trusts.** Another option for a client is to establish a testamentary trust to which the Federal estate tax credit can be applied. This is a trust established through provisions in a will. The trust is established at the probate of the decedent's will. A testamentary

trust can be established for the benefit of whatever beneficiary the client desires. If the client desires to provide for his or her grandchildren or another beneficiary of an age group similar to grandchildren, the client must be concerned about the implications of the Generation-Skipping Transfer tax. The Generation-Skipping Transfer tax will not be discussed in this chapter but for client's desiring to establish gifts to grandchildren that skip their children you need to advise them of possible tax implications. 26 U.S.C. §§ 2601-2663.

1. Credit Shelter Trusts. A trust established in the will is funded with an amount up to the amount offset by the estate tax credit. The trust can be funded with property of a value up to $625,000.00 for 1998. The property placed in this trust should not be left to an U.S. citizen spouse. Property in the trust up to a value of $625,000 in 1998 will pass to the beneficiary tax free because the Federal estate tax credit of $202,050.00 will be applied. Any remaining property in an estate should be passed to a spouse or charity to take advantage of the deduction available. If the testator does not have a spouse or charity to be able to take advantage of a deduction and pay no estate tax then some estate tax may be due on the remainder of the estate passed to other beneficiaries. Establishing a trust to take advantage of the tax credit is called a credit shelter, by-pass or A/B trust. Two trusts could also be established but the first one should be funded with up to $625,000.00 of value and the remainder of the estate in the second. The trust funded to tax advantage of the tax credit should not be left to the spouse. Leaving this trust property to the spouse defeats the tax planning because with U.S. citizen spouses the unlimited marital deduction will apply to all property left to the spouse. To be able to take advantage of the credit shelter trust planning, the decedent's estate must be probated because the trust is established and funded through the decedent's will.

2. Disclaimer Trusts. Another estate planning technique that may be used is to establish a trust through a will but leave it unfunded. The testator's spouse will inherit the entire estate and then must disclaim certain property to fund the trust. A disclaimer must be accomplished under specific conditions listed in 26 U.S.C. § 2046. This funding technique is very effective because it allows the surviving spouse to keep what he/she needs and pass the remaining property into the trust up to a value of $625,000 for 1998. The catch with this technique is that the spouse must disclaim the property properly per the Code. Any usage of the property after the decedent's death can often defeat the surviving spouse's disclaimer.

3. SGLI Trusts. This estate planning technique will pour the SGLI life insurance into a testamentary trust. If the SGLI is poured into a trust via trust provisions drafted into the will and written designation on the SGLV form 8286. If the beneficiary of the trust is not the spouse it will serve as a partially funded credit shelter trust. The trust could be funded with property in addition to the SGLI proceeds.

Other estate planning techniques are more advanced and tax implications of all estate planning methods used should be well understood before attempting to draft estate planning documents. A legal assistance attorney can get help through OJAG Code 36 or JAL at HQMC.

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CHAPTER 4

WILLS

0401 WILL DRAFTING

A. ***Who may make a will?***

1. Competent testator of sound mind and requisite age, typically age 18 or state's age of majority.

2. Who physically complies with state statutory requirements.

3. Possesses the intent to make the document his/her last will and testament (animus testandi).

B. ***Standard wills.*** Every state has a statute prescribing certain formalities, (Statute of Wills):

1. In writing,
2. Signing,
3. Publication,
4. Witnessing or attestation, and
5. Presence of all parties.

C. ***Unusual wills.***

1. ***Holographic*** (olographic). Completely written and signed in handwriting of testator and no witnesses are required. Some states provide that the holographic will may be self-proved at any time during the testator's lifetime by attaching an affidavit by the testator to the effect that he/she is at least 18 years of age (or if under age, was or is lawfully married, or a member of the Armed Force when the will was written), and is of sound mind, and that he/she has not revoked the will.

2. ***Nuncupative.*** A nuncupative will is an "oral" will. Typically, nuncupative wills must be made during last sickness of the decedent. Can dispose of personalty only.

3. ***Soldiers' and seamans' wills.*** Several states relax statutory requirements for a soldiers' or seamans' will. They may be oral or handwritten and need not conform with rules of execution. These statutes often limit type and value of property that can be distributed.

4. ***Wills for domiciliaries of Puerto Rico and Louisiana***

a. ***Louisiana.*** – Forced heirs - cannot be deprived of their portion of estate except for legal cause (and other special considerations), new statute passed in LA eliminates some categories of forced heirs.

b. ***Puerto Rico.*** - Wills may be made by a all persons except minors less than 14 years old -forced heirs again - only a part of the decedent's estate may be disposed of freely by will.

5. ***Statutory fill in the blank wills***

a. Uniform (New Mexico and Massachusetts).

b. Unique (California, Maine, Michigan, and Wisconsin).

D. ***Codicils.*** A codicil is an amendment to a will. A codicil may be executed to modify or add provisions to an existing will. The codicil must be executed with same formalities as a will. It is generally preferable to execute an entirely new will instead of a codicil with the ability of technology to create a new will as easily as a codicil may be created. Whenever a new will is created for a testator the prior wills should be destroyed.

0402 STEPS IN WILL DRAFTING

A. ***Ethical considerations.*** Consider and resolve any conflict problems in drafting the will. If representing both husband and wife, request clients to sign dual representation letter. Insure that ethical requirements for competency, scope, diligence, and communication are fulfilled. See JAGINST 5803.1A; Rules of Professional Conduct 1.1, 1.2, 1.3, and 1.4.

B. ***Obtain data on client and family circumstances***

1. ***Use a will questionnaire or checklist.*** Legal assistance offices should have a Will Questionnaire developed for use by the legal assistance attorney.

2. ***Must*** learn the client's basic plan and intent. A large percentage of malpractice cases arise from the failure of the drafter to carry out the client's intent.

3. ***Must*** learn family data. Including whether the testator is married and the number of children, stepchildren and any other possible heirs.

4. ***Must*** learn financial data, assets, and debts. Ensure that data is specific as to worth of individual assets, liens and debts outstanding and type of ownership of property. You need this information to determine what property is part of the probate estate and what property will be included in the testator's death estate for estate planning purposes.

If a testator's estate's value is over $600,000 the testator may be liable for Federal and state estate taxes.

5. ***Must*** learn about other agreements or contractual relationships that may bind the estate.

QUESTIONS SHOULD BE SIMPLE, DON'T BE AFRAID OF BEING REPETITIVE. USE QUESTIONNAIRE AS AN INTERVIEW GUIDE. GO OVER IMPORTANT ITEMS WITH CLIENT TO DETERMINE UNDERSTANDING AND INTENT.

C. ***Identifying the family***

1. ***Spouse - client married, divorced or separated?***

a. ***Married.*** If client is currently married, does client have an antenuptial agreement? If so, review the agreement. Advise the client of the possible right of election by spouse. For estate planning purposes determine if spouse is U.S. citizen and advise of availability of marital deduction. Consider spouse's age, incapacity or infirmities and need for living or testamentary trust for spouse.

b. ***Divorced.*** Review divorce decrees and property settlement or agreement, if any. Look for possible claim by ex-spouse to the estate. Look for requirement to continue alimony/maintenance/support obligations after death. What are the property distribution provisions? Are there any indemnification or hold harmless agreements as to debts of previous marriage?

c. ***Separated.*** If client is only separated spouse my still have the right of election? Check state statute where drafting will for continued right of election and amount. Look at separation decree or agreement if any. Does it contain the a waiver of right of election?

d. ***Pretermitted heir.*** If pretermitted heir is a spouse, state law may provide for intestate share under will plus a share of non-probate property.

2. ***Children***

a. Determine the number and their ages.

b. ***Adopted, step, illegitimate*** - Are children all born of present marriage? Ensure client recognizes potential conflict between current spouse and children of prior marriage.

c. ***Issue of deceased children.*** Does the client want grandchildren to be provided for? Ensure client understands difference between *per stirpes* and *per capita*.

d. Spouse of deceased child.

e. ***Minor children guardianship issues.*** Will need to consider guardian of persons of minor children and somehow provide for property if minor children are beneficiaries. In considering guardianship or trustee of property for minor need to consider fiduciary responsibilities – may want to consider limitations on the (brother/sister) who can't balance a checkbook (i.e., can only invest in certain investments). May want to recommend different guardians for person and for property (i.e., a nurturer and accountant).

f. Are any children incapacitated, infirmed, handicapped or disabled. Be careful of distribution that may affect benefits being received from state based on income. Many disabled children may be entitled to benefits while parents are alive, e.g. MEDICAID, but upon death of parent if child receives property as beneficiary of testator, the child may no longer qualify for those benefits.

g. ***Pretermitted heirs.*** Does client intend to benefit after born children?

3. ***Pretermitted heirs.*** Where a testator unintentionally fails to mention or make provision for a child in his/her will at the date of the execution of the will or born thereafter, a statute may provide that such child shall share in the estate as though the testator had died intestate. All states, but five, have a statute giving children and issue not mentioned in a will an intestate share. However, some states will not allow extrinsic evidence to be admitted to show a contrary intent on the part of a testator.

D. ***Identify assets/liabilities***. Develop a complete inventory of the assets listing type of ownership, value, and probable date-of-death value for high value estates. DISCUSS each asset, clients often do not understand the significance of joint assets (non-probatable) and that their will does not control.

1. Joint accounts (with right of survivorship) opened for a convenience with no realization that balance will pass to owner.

2. Certain states have different types of joint accounts, i.e. NY creates a gift of one-half interest.

3. Joint accounts may avoid probate but the down-side is that the creditor of joint owner may be able to attach the account. There is also the possibility of gift tax liability.

a. ***Classify assets according to how they will be distributed.*** Probate v. Non-probate.

b. ***Estimate Amount of Debts and Claims Against Estate.*** Is any property encumbered? Do we want to pay off liens or mortgages on property? Distribution of encumbered property may not be much of a gift.

(1) "If my spouse survives me, I give my residence, (free and clear of) (subject to) any indebtedness secured by such property, to my spouse."

(2) Does the estate have sufficient liquid sums to pay debts? Determine availability of funds for family use and whether bequests will abate (be reduced or eliminated) due to payments of debts.

c. ***Miscellaneous personal property.*** Many states provide for an option for the testator to dispose of his/her personal property via a personal property memorandum. The statute may not require that the personal property memorandum be executed with the same formality as the will itself. Generally these statutes provide for disposal of tangible personal property. The DL Wills program offers this option for those states that permit it. One concern that a client needs to be aware of is that states that do not permit distribution of personal property in this manner may not recognize a personal property memorandum in a probate proceeding in that state court. The state may refuse to recognize even though the memorandum was drafted in conformity with the statute of wills for the state of the testator's domicile at the time of drafting.

d. ***Business interests.*** Does you client have outside business interests?

(1) ***Owned outright?*** Is the business a self-owned, self-made business. How can it be valued or will it have any value upon the death of the client?

(2) ***Partnership or shareholders cross-purchase agreements?***

E. ***Testator desires vs. statutory restrictions.*** Ascertain client's testamentary desires. Identify problems with proposed scheme including restrictions on freedom to transfer.

1. ***Rule against perpetuities.*** Principle that no interest in property is good unless it must vest, if at all, not later than 21 years, plus period of gestation, after some life or lives in being at time of creation of interest.

2. ***Forced share/statutory right to elect.*** Some states may permit a forced share for an heir. Louisiana and Puerto Rico do this. Most states provide for a widow's right of election against the will.

3. ***Florida homestead.*** Homestead descends as intestate property and may not be devised if owner is survived by spouse or minor child, except that homestead may be devised to spouse of owner if there is no minor child.

4. ***Conditional bequests.*** Conditional bequests are generally valid if the condition does not violate public policy. However, a conditional bequest may not qualify for tax benefits, such as a deduction, that would be allowed for outright gifts. To make a conditional gift clearly specify–

a. the conditions(s) required to be satisfied, and

b. the time for performance of the condition.

5. ***Ademption vs. abatement***

a. ***Ademption.*** A legacy is said to adeem when the testator sells or disposes of it during lifetime; occurs with specific or demonstrative legacies.

b. ***Abatement.*** If an estate is insufficient to pay its obligations, legacies, administration expenses, and taxes, legacies may have to be reduced. A legacy is said to abate when it must go to the payment of the estate debts or costs. The intention of the testator controls in determining how the loss is to be borne.

(1) General priority to cover deficiencies:

(a) residuary,

(b) general legacies,

(c) demonstrative legacies, and

(d) specific bequests.

(2) Usually a tiered plan as to priorities by statute (12 states do not have). Usual plan:

(a) property outside will used first,

(b) residue second,

(c) general legacies third, and

(d) specific legacies last.

Note: Some states also prioritize by the relationship of the recipient, i.e. the spouse, etc.

6. Suggest methods of reducing liabilities and consider methods to increase or reduce value of the estate or improve liquidity depending on the client's concern.

0403 PROVISIONS IN THE WILL

A. ***The Preamble***. Declares the proper state as testator's domicile. The attorney needs to determine if the statute of wills of the domicile is the best place to write the will in conformity with. Need to consider ownership of real property, whether it will pass via probate and if an ancillary probate will be required if the real property is in a state other than the state of domicile. The declaration is evidence of domicile, but is rebuttable.

Revokes all previous wills and codicils if preamble specifically so states. A drafting attorney should insure that such a provision is always included. In the absence of express revocation of prior wills and codicils, the new instrument revokes them only insofar as its provisions are inconsistent. Insure client's name and the names of beneficiaries are accurate.

B. ***Selection of personal representatives and trustees.*** A client should select qualified, trustworthy, and competent fiduciaries. The individuals should have some business sense. Can select corporate or individual fiduciaries. Benefits of corporate fiduciaries are experience and their continuing nature. Drawbacks are higher commissions and impersonal. Additionally, corporate fiduciary may refuse to take on estates below certain value. Always

appoint alternate fiduciaries. Fiduciaries (executors, trustees, or guardians) will be subject to the fiduciaries laws of the state where the estate is probated. Most states provide fiduciary provisions in their probate code.

Consider whether to appoint co-fiduciaries or a single fiduciary. Recognizing that co-appointees will have to act in concert.

Consider waiving bond for individual fiduciaries. However, may want to determine how much bonding would be compared to assets in fiduciary's control. A bond is simply an insurance policy against certain acts by a fiduciary. Don't automatically provide for waiver of bond. Consult with client.

Consider whether nonresident fiduciary can serve. Some states have requirements that a (personal representative) fiduciary be a resident.

Consider compensation for the fiduciary whether personal representative or trustee. Statutory commissions will be provided by the state probate code. **Many times the statutory scheme will provide for fees as a percentage of the value of the estate. A testator cannot require a fiduciary to act for less than statutory commissions. Consider a bequest in lieu of or in addition to commissions.

Specify fiduciary's management powers. If the powers specified in the will conflict with state laws, generally so long as they are not illegal or void as against public policy, the specific provisions of the will control.

Seventeen states and the District of Columbia have enacted statutes the same as or similar to section 3-715 of the Uniform Probate Code which grants to executors 27 stated powers except as otherwise restricted by the will.

Eight states have statutes granting a list of powers to executors and trustees that must be incorporated by reference in the governing instrument to be effective.

C. ***Expense clauses.*** Payment of debts, funeral, and administration expenses. Generally, a personal representative is required to pay expenses as a matter of state law out of the estate.

Avoid requiring executor to pay "all just debts." Client should leave some discretion to executor to determine or contest debts. Executor's as fiduciaries have a general duty to conserve the estate.

Grant executor the power to extend or renew indebtedness upon such terms and for such time as the executor deems appropriate.

3. ***Estate and death taxes.*** Include a statement as to the manner in which death taxes should be allocated among beneficiaries. Generally, estate taxes ought to be apportioned among beneficiaries vice requiring the residuary estate to pay the estate taxes. Watch DL Wills here. Some state statutes direct the manner of the apportionment (e.g., prorate) but permit direction to the contrary.

D. ***Legacies - specific bequest or devise.*** A testator often has many reasons for making specific bequests. A specific bequest will insure that the asset is distributed to the intended person. Specific bequests often avoid below market value sale of the asset. Can use to carve out assets such as personal property that would be inappropriate to administer as part of a trust.

1. ***Bequest.*** A gift of tangible or intangible personal property.

2. ***Devise.*** A gift of real estate. Realty in more than one state WILL RESULT in ancillary probate proceedings. DO NOT CREATE LIFE ESTATES. A client needs to recognize that life estates in realty present special drafting problems; obligation of life tenant for taxes, repairs, expenses, liability for waste or other deterioration and as to who is entitled to income if rented. An attorney must consider the possibility that a life tenant may become incompetent.

3. ***Specific devise of real property.*** For real property, title usually vests in the beneficiary as of the date of death - subject to probate. Devisee is entitled to the income from and pays the cost of realty from the date of death. If the property subject to any encumbrances or liens, specify whether or not the property passes subject to encumbrances. States may vary on case law/statute if not specified – as always – SPELL IT OUT.

4. ***Specific bequest of personal property.*** If the property described in the specific bequest is sold, transferred, or destroyed before the testator's death it "adeems." The estate is under no obligation to distribute another asset to pay for the failed gift.

E. ***Tangible personal property considerations.*** There are any number of issues a drafting attorney should address with the client in determining what to do with tangible personal property even though much of it may be worthless in terms of money value. Tangible personal property is often property that is most associated with the deceased and therefore often sentimentally valuable to the deceased's family.

Should the property be divided equally among children or other class? The testator must designate someone to make a binding distribution — usually executor if not a member of the class.

Exoneration? Is beneficiary to get personal property free and clear or subject to loan/debt. Can spell this out in will.

Certain items of family or sentimental value to be held by trustee/executor until certain age? The only way to relieve fiduciary from liability should value drastically decrease is by spelling this out in will since fiduciary statutes generally require estate conservation which may include disposing of worthless or non-income producing property.

4. ***Drafting problems with specific bequests.*** Must accurately describe each item. Define terms such as "all my personal property" or "all my household effects." If not clear with specific bequests - can give rise to litigation - e.g., household effects" has been held to include a motor boat.

a. **Ejusdem Generis** – rule of construction - if general words follow specific, the specific govern. "I give my rings, bracelets, and jewelry" held that jewelry in this bequest passed only rings and bracelets.

Avoid references to a specific location (e.g., "the pen set in my office").

5. ***Alternatives to lengthy specific bequests.*** Incorporate separate writing by reference in the will. A personal property letter to make specific gifts of tangible property. The following states allow document disposing of personal property to be incorporated by reference into a will Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, South Carolina, Utah, and Washington.

Consider a non-binding memorandum to the executor.

6. ***Advantages to spelling out specific bequests in will.*** Personal property letters are permitted in many states, however, due to the transient nature of military families, do not rely on this – state of legal residence may change.

Better to dispose of personal property by specific bequests, and not have such bequests go to residue if there is a residuary trust, only causes problem for executor - who must either sell or hold as non-income producing property.

Easier for executor to distribute specifically bequeathed property or sell property and add cash to residue. Don't have issue with executor improperly using his/her discretion when the will spells out the specific bequests.

F. ***General bequests.*** Cash gifts are classified as general bequests. General bequests do not adeem.

G. ***Demonstrative bequests – specific fund.*** Usually a stated sum of money, but could also include a gift of securities. Can be specific or general demonstrative bequest.

1. ***Specific.*** A sum of money paid from a specified fund - "I give Fred $100 to paid from the sale of my 1957 Chevy." This gift will adeem if the testator does not own the '57 Chevy at his death.

2. ***However, if general.*** No designation of specific property or fund, paid from general funds of estate. A general demonstrative bequest does not adeem.

Because of potential abatement problems general and demonstrative dispositions should, where possible, be avoided.

H. ***Residuary estate.*** The residue is the balance of the probate estate after payment of administration costs, debts, taxes, specific, demonstrative and general legacies/bequests.

Unless specified otherwise in the will:

1. Estate expenses will be paid out of the residuary estate.

2. Estate taxes will probably be paid out of the residuary estate. Should consider apportioning estate taxes among all beneficiaries.

3. The residuary estate will be increased if there has been any lapsed gifts.

Even if the entire estate appears to be disposed of by other types of bequests or devises always include a residuary clause to avoid intestacy as to omitted or after acquired assets. A testator should provide for alternative residuary beneficiaries. Because of expense or liabilities there may be an abatement problem with residuary estate.

I. ***Management of property to minors - alternatives***

1. ***Outright bequests.*** Outright bequests to minors require that a guardian of the property be provided until the minor reaches age of majority. Because of this, many clients will opt for alternatives to an outright bequest of property to minors. Guardianship of property involves the appointment by the probate court of a person as a fiduciary. Because the position is court appointed it is court controlled. This often means guardianships involve expense and inconvenience and can be a very restrictive arrangement for investments, loans, and use of funds. A court appointed guardianship will vest absolute ownership and control of the property to a child when he/she reaches the age of majority, typically 18 or 21.

2. ***Testamentary trusts for children.*** Establish a trust in the will document and designate a trustee under the trust established in a will. Establishing a testamentary trust allows greater flexibility in control over trust property held for benefit of minors. Settlor (testator) can establish trust in accordance with his/her desires and can provide discretion to trustee as the grantor determines is appropriate. Title to property vests in trustee. Testator controls age of distribution.

A trust must have certain elements:

a. Settlor, Creator, Grantor: the Testator

b. Trustee: the money manager

c. Beneficiary: the recipient

d. Corpus: the value of the assets in the trust

e. Income

f. Duration: Beware of the Rule Against Perpetuities, use a saving clause, i.e., "any trust must terminate not later than 21 years after the death of the youngest beneficiary alive at my death."

3. ***Types of trusts***

a. ***Unitary or sprinkling trust.*** **Pooled asset trust.** All assets are held in one trust and drawn upon for the benefit of all the children, with no proportionate scheme involved. Payments for the benefit of the child depends upon need or ability only, therefore closer to what the parent would do if alive.

Characteristics:

(1) One combined trust for several children.

(2) Terminates when the youngest child reaches age specified by testator.

(3) Trustee acts as parent, distributing trust assets to beneficiary based on need.

(4) Less costly to administer than separate trusts.

b. ***Single (separate) trust.*** Testator establishes one trust for each child. Typically, every child takes equal share. The testator may, however, set up trusts in unequal amounts. Trust(s) terminate upon age specified by testator.

4. ***Trust terms.*** The trust provisions in the will should contain all trust terms necessary for trustee to administer the trust. The provisions may incorporate state law by reference. Many trusts contain spendthrift provisions. Spendthrift provisions prohibit the beneficiaries of the trust from assigning or encumbering the trust property. Forty-two

jurisdictions permit a settlor to provide that any beneficial interest shall be free from anticipation or assignment and not be subject to claims of creditors. In a minority of states that do not recognize spendthrift trusts, the settlor may provide that in the event of an assignment, or attempted assignment, the interest of the beneficiary is divested. To ensure no violation of the rule against perpetuities occurs include a savings clause requiring interests to vest within 21 years of a life in being. Include terminology to provide for terminating trust when administration becomes uneconomical. Include a last resort clause specifying alternate beneficiaries.

To provide for funding for trusts SGLI proceeds may be poured-over into a testamentary trust. The beneficiary on the SGLI beneficiary form must provide that the proceeds are to be paid to the trustee as named in the trust established under the testator's last will and testament.

SAMPLE DESIGNATION FORMAT: "To my trustee, or successor trustee, to fund the trust established under my will, my testamentary trust, for the benefit of my minor children."

5. ***Custodial relationships.*** Custodial relationships may be created pursuant to the Uniform Transfers to Minors Act (UTMA) or Uniform Gifts to Minors Act (UGMA). State probating will must recognize UTMA/UGMA. Custodial relationships established under these statutes are entirely statutory. The provisions, ability of the custodian to act and age at which proceeds must be disbursed to the beneficiary are determined by statute. In most states that recognize UTMA/UGMA the age of distribution is the age of majority, either 18 or 21. Generally state laws do not provide any method to alter the statutory relationship.

SGLI - SAMPLE DESIGNATION FORMAT:

"To Michael R. Black, as custodian for my children, pursuant to the UTMA/UGMA."

J. ***Selection of guardian for minor children.*** Testator should always name guardians of the person for minor children. The will provisions naming guardians for minor children are typically naming guardians over the person as opposed to the property. Whether guardian of person or property, guardianships terminate at local age of majority (usually 18). Law of guardianship varies from state to state. Most states will be reluctant to designate a non-resident of the state as guardian of the estate of a minor. A client should always be encouraged to name an alternate if the first named guardian cannot serve.

K. ***Survivorship clauses.*** The Uniform Simultaneous Death Act (USDA) provides for common disaster situations where there is no is no proof of survivorship. Generally, the Act presumes the property owner survived beneficiary. USDA doesn't apply if the will

provides for a different presumption. Example: Husband and wife die simultaneously in a plane crash. Purposes of USDA:

1. Avoids two probate proceedings within a short time.

2. Could save estate taxes by avoiding doubling of estate of spouse.

3. Testator would probably want his/her property to flow to his or her relatives, not the relatives of the deceased beneficiary.

Testator should consider providing for survivorship for a specified period as a condition of the bequest. USDA (1991 version) incorporates a 120 hour survivorship requirement. Extended survivorship requirements serve the same policy served by the original USDA without risking litigation over evidence of survivorship. If the survivorship condition for gifts to a spouse exceeds six months, the marital deduction will be disallowed. ***If the testator's will is drafted with a credit shelter or disclaimer trust, the USDA provision provided for by DL Wills must be changed so that the beneficiary, typically the spouse, is deemed to have survived the testator.***

L. ***Testimonium clause.*** Establishes that document is intended to be testator's last will. The testator's signature should be at the logical conclusion of the will. The date the will was signed must always be included.

M. ***Attestation clause.*** Attestation clauses must comply with state statutory requirements although most states do not provide any specific form. Several states (e.g., California, New York, and South Dakota) specify that witnesses should give their addresses.

N. ***Self-proving clause.*** A self-proving clause establishes the authenticity of a will by affidavit. Use the self-proving affidavit for the client's state of domicile. Ensure witnesses sign both the will and the self-proving clause.

0404 OTHER TESTAMENTARY ISSUES

A. ***Lapsed legacies.*** The general rule at common law is that if a beneficiary dies after the execution of a will but before the testator, a specific bequest fails or lapses. Unless otherwise provided, a lapsed bequest becomes part of the residuary estate. Testator can anticipate the death of an intended beneficiary and provide for an alternate. Some jurisdictions may have an "anti-lapse" statute substituting intended beneficiary's issue (Uniform Probate Code § 2-605).

B. ***Contractual wills.*** (see § 2-701, Uniform Probate Code and state law). A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating the material provisions of the contract; (2) an express reference in a will to a contract

and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. Mere execution of joint or mutual wills does not create a presumption of a contract not to revoke the will; either may revoke at any time.

C. ***Disinheriting a relative.*** Determine whether relative is entitled to a statutory, or "forced," share. If not, testator may be able to disinherit the relative without converting probate to non-probate property. Mention the relative in the will. Avoid reference to specific reasons for disinheriting a relative. Example: "Since I have made gifts to my sisters, Esmerelda and Brunhilda, I no longer make provision for them in this will." Do not make derogatory statements in wills.

D. ***"In Terrorem" - Do not contest will clauses.*** Clauses that revoke a bequest if the recipient institutes or participates in a will contest are valid and enforceable in most states. Check particular state law. Good drafting practice to provide for a gift to the recipient. Some states provide that the clause is not operable if there is a reasonable cause for the will contest, or brought in "good faith with probable cause."

E. ***Funeral arrangements and special instructions.*** Generally, funeral arrangements are best handled outside the will. Anatomical gifts may be made by will request. Invalidity of will does not invalidate the gift. It is generally better for the testator to make an anatomical gift through a separate document. Most anatomical gifts need to be made on a timely basis to be effective. Many times a will is not be reviewed by family members until after the deceased has been buried or cremated. This makes specific provisions regarding funeral arrangements and anatomical gifts in the will ineffective. Do not use precatory language in will clauses.

0405 PROPER EXECUTION OF THE WILL

A. ***Use a standard procedure for executing will.*** If the will's execution is ever contested, you will have a much easier time establishing its authenticity if you have consistently used one procedure for all will executions.

1. Statute of Wills. See also JAGINST 5801.2. The ***formalities***

   a. Attorney must supervise entire execution ceremony.

   b. Testator orally declares document to be last will and testament.

   c. Testator signs at the end of the will in front of all the witnesses.

2. ***Witnesses***

   a. Use at least three young, disinterested witnesses.

b. Avoid mass will executions and having deploying sailors serve as witnesses. A trial lawyer's delight on a contest.

c. Include social security numbers of witnesses to aid in locating them.

d. All witnesses will sign the will and the self-proving affidavits in the presence of the testator and of each other. **Remember that self-proving affidavits only go to due execution.** Such affidavits will not avoid a contest on lack of testamentary capacity, undue influence or fraud.

e. Do not allow a beneficiary or fiduciary named in the will to serve as a witness to the execution of the will.

B. ***With wills – do not***

1. ***Execute multiple wills.*** Execute only one will (not copies) and do not permit alterations.

2. Ever remove staples or take apart a will.

3. Have the member keep the will with him/her – rather advise member to store will in a safe place (safety-deposit box, fire-proof safe). Will may be difficult to obtain if deceased member is only person authorized access to safe-deposit box.

4. The attorney drafting the will shall make sure his/her name, rank and state of admission are indicated on the will in case of a contest or construction proceeding. (JAGINST 5801.2 encl.1 part 7)

C. ***Debrief the client***

1. Advise client where to keep will and how to revoke it.

2. Inform client of need to review and update will.

3. Encourage testator to prepare a comprehensive list of his property and provide a copy to the executor and beneficiaries.

4. Explain termination of attorney-client relationship.

5. Inform client not to write on will and how the will could be revoked by not properly taking care of it.

0406 ADVANCE HEALTH CARE DIRECTIVES

A. ***Living wills.*** The living will is a document to exercise the right to determine medical treatment in case of disability. A living will usually provides that the maker desires to die a natural death and does not want to be kept alive by heroic methods or artificial means. A living will without statutory basis may not be binding on health care providers.

10 U.S.C. 1044c allows a legal assistance attorney to draft a living will that should satisfy all state law requirements in states that recognize and enforce living wills. The National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 747, 110 Stat. 388 (1996) codified at 10 U.S.C. § 1044c.

10 U.S.C. § 1044c(a) provides that "an advance medical directive executed by a person eligible for legal assistance–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 shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned."

10 U.S.C. 1044c(b) defines an advance medical directive as follows:
– "For purposes of this section, an advance medical directive is any written declaration that– 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 authorizes another person to make health care decisions for the declarant, under circumstances stated in the declaration, whenever the declarant is incapable of making health care decisions."

10 U.S.C. 1044c(c) provides that a "statement" setting forth the law under 1044c(a) will be included on the advance medical directive prepared by a legal assistance attorney. Advance medical directives that do not include the statement do not nullify 1044c(a).

10 U.S.C. 1044c(d) provides that 1044c does not make enforceable an advance medical directive in State that does not otherwise recognize and enforce advance medical directives under the laws of the State.

B. ***State natural death acts.*** Almost all states have laws dealing with the right to die. Advance medical directives prepared by legal assistance preempt state law requirements of form and substance. 10 U.S.C. § 1044c. Typical state requirements are:

1. Diagnosis of terminal illness by attending physician and one of more other physicians.

2. Many states now recognize a permanent vegetative state in lieu of a terminal condition.

3. Written declaration, signed by maker, and witnessed by two adults.

4. Restrictions on who can be a witness.

C. ***Drafting the living will***

1. Specify whether the maker wants nourishment and hydration withheld.

2. Clearly specify when life support systems should be withdrawn.

3. Consider an exculpatory clause excusing health care-providers from liability for honoring.

4. Make anatomical gifts in separate instrument.

5. Consider appointing a proxy if allowed under state law.

D. ***Durable powers of attorney used to decline medical treatment.*** Durable powers of attorney may be used to delegate health care decision-making powers to an agent. Patient does not have to be in an irreversible state to allow agent to make decisions. The agent has same power to make health care decisions as principal. In some states court approval may have to be obtained prior to withdrawing life-support treatment. Some forms direct agents to take specific courses of action while others merely authorize the agent to take action. Avoid imprecise words when drafting powers of attorney for health care.

0407 PROTECTING THE ESTATE DURING DISABILITY

A. ***Guardianship or conservatorship.*** Establishing a guardianship or conservatorship is a traditional methods of handling problems arising from disability. Proceedings, typically done in probate courts, involve strict rules of procedure, are time-consuming and expensive. It may be desirable if hostility and friction exist among relatives.

B. ***The durable power of attorney.*** Typically a durable general or special power of attorney is used to manage a principal's property, during incapacity or incompetence. It can be either a general or speical power of attorney.

1. ***Durable language.*** "This power of attorney shall not affected by subsequent disability or incapacity of the principal."

2. ***The "springing" durable power of attorney.*** "This power of attorney shall become effective upon the disability or incapacity of the principal."

CHAPTER 5

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CHAPTER 5

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0501 REFERENCES

A. 38 U.S.C. §§ 1965-1976 (SGLI); 38 U.S.C. §§ 1977-1979 (VGLI); 38 C.F.R. Part 9

B. CNO WASHINGTON DC 201346Z Feb 96 (NAVADMIN 035/96) (Eliminates "by-law" designations)

C. MILPERSMAN 6230120

D. CG PERSMAN, COMDTINST M1000.6A, Chapter 18D

E. Office of SGLI (OSGLI) information: 1-800-419-1473. OSGLI Claims Department: (201) 802-3446

F. ***Veterans Benefits Manual***. ***Veterans Benefits Manual*** (Vols. I and II, 1991), The National Legal Services Project, 2001 S Street NW, Suite 610, Attn: Publication Sales, Washington, DC 20009

G. ***Reserve Retirement Benefits***. ***Reserve Retirement Benefits*** (1992), The Retired Officers Association

H. ***1991 AFBA Financial Planning Guide***. ***1991 AFBA Financial Planning Guide***, Armed Forces Benefit Association, 909 N. Washington Street, Alexandria, Va 22314-1556

I. http://www.va.gov/

J. http://www.dfas.mil/money/retired/survbnft.htm

0502 SURVIVOR BENEFITS - GENERALLY. Survivor Benefits are benefits provided to surviving family members typically dependents after the death of an active duty service member. Some survivor benefits are afforded regardless of active duty or retired status such as social security benefits. Others where the deceased is no longer on active duty require a nexus between the death and military service.

A. ***Lifetime Planning.*** In trying to determine life insurance needs, survivor benefits should be considered when determining what family needs after death will be. Other sources of benefits (e.g. Navy-Marine Corps Relief Society and American Red Cross) should also be considered. Eligibility for the Survivor Benefit Plan should be figured in here.

Deathbed planning, particularly for active duty but terminally ill members requires a working knowledge of survivor benefits to ensure that the survivors are able to obtain the highest level of benefits available. Thus an attorney will be required to analyze the advantage of a member dying while on active duty versus dying while medically retired.

B. **Survivor Benefits Matrix.**

MONTHLY PAYMENT	LUMP SUM PAYMENT	OTHER BENEFITS
Dependents Indemnity Compensation (DIC)	Servicemen's Group Life Insurance (SGLI)	Military Burial
Survivor Benefit Plan (SBP)	Death Gratuity	Relocation
Social Security Benefits	Social Security Benefits	Medical Care
Dependents Educational Assistance (DEA)	Unpaid Pay & Allowances	Exchange/Commissary
		Emergency Assistance

0503 DEPENDENCY AND INDEMNITY COMPENSATION (DIC). Under this program the Department of Veteran's Affairs pays a lifetime payment per month for surviving family members of an active duty or retired service member. The death of the member or retired member must be service connected. If member is still on active duty there is a presumption that the death was service connected. If applicants for the benefits are survivors of a retired or separated member, then the survivors must show service connection of death.

A. ***References***

1. 38 U.S.C. §§ 1301-1322

2. 38 C.F.R. Part 3

3. Veterans' Benefits Act of 1992, 138 Cong. Rec. 517364-01 (enacted 29 Oct 92)

B. ***Conditions For payment.*** The deceased death must have a service connection and cannot be due to the individual's "willful misconduct."

1. ***Death on active duty***, by service-connected injury or disease, and not due to member's willful misconduct. If death occurs on active duty, a presumption arises that death was service-connected.

2. ***Death after active duty*** from service-connected causes, not due to member's willful misconduct.

3. ***Death after active duty*** not due to service-connected causes and not due to member's willful misconduct if decedent held a total service-connected disability rating.

4. ***Death or injury can not be due to member's "willful misconduct."*** Willful misconduct involves deliberate or intentional wrongdoing with knowledge of or wanton disregard of consequences. Requires proximate cause to injury, disease, or death to prohibit payments.

5. ***The Department of Veteran's Affairs*** makes the ultimate determination on service-connection and "willful misconduct" for purposes of DIC. Appeal may be had to the Court of Veteran's Appeals.

C. ***Eligible beneficiaries of Dependents Indemnity Compensation***

1. ***Surviving spouse.*** For the surviving spouse to be an eligible beneficiary the following conditions must exist. First, the Spouses must have continuously cohabited since date of marriage. Second, any separation must not be due to fault of surviving spouse. Temporary separations will be disregarded. 38 C.F.R. Parts 3.52 and 3.53. If survivor was abandoned by member then is not fault of survivor that spouses were not cohabiting.

2. ***Fraudulent marriages.*** To prohibit fraudulent eligibility for benefits for service members that separate from active duty, subsequently marry, and then die under circumstances described in paragraphs B.1.b and B.1.c above, the marriage must have begun within 15 years after separation from active duty, have existed for at least one year, or produced a child. 38 C.F.R. § 3.54.

3. ***DIC is paid for life unless remarriage occurs.*** A surviving spouse loses entitlement to DIC upon remarriage regardless of age. DIC will not be reinstated if second marriage is terminated through divorce or through death of second spouse. The statute includes provisions to lose DIC is surviving spouse cohabitates. No known case law removing benefits upon cohabitation.

For deaths occurring before 1 January 1993, monthly spousal payment depends on the rank of deceased at death:

E9 -- $949	W4 -- $997	010 - $1,774
E8 -- $909	W3 -- $943	09 -- $1,618
E7 -- $861	W2 -- $915	08 -- $1,510
E6 -- $833	W1 -- $880	07 -- $1,378
E5 -- "		06 -- $1,276
E4 -- "		05 -- $1,132
E3 -- "		04 -- $1,028
E2 -- "		03 -- $972
E1 -- "		02 -- $909
		01 -- $880

For deaths occurring on or after 1 January 1993, the Veterans' Benefits Act of 1992 mandates a flat monthly payment, currently $833. An additional $182 a month is added to the basic rate if the deceased veteran had been entitled to receive 100 percent service-connected compensation for at least eight years immediately preceding death and the surviving spouse was married to the veteran for those eight years. Additional $211 for each child under 18. Payments are adjusted periodically as Congress approves Cost of Living Adjustments (COLA). DIC offsets Survivor Benefit Plan (SBP) amount received by surviving spouse.

4. ***DIC to children.*** DIC does not offset SBP payment to children. Children are broadly defined: Legitimate, adopted, stepchildren in household or illegitimate if acknowledged or judicially decreed. 38 C.F.R. § 3.57. Children must be unmarried and under age 18, or under age 23 if in school.

a. ***Amounts payable (Children in the custody of a surviving eligible spouse).***

(1) Under age 18 - $211 per month per child. (Veterans' Benefits Act of 1992)

(2) Age 18 to under age 23 (in school.) -$174 per month per child unless child is receiving Chapter 35 benefits (Dependent's Educational Benefits).

(3) Disabled child - $327 per month.

b. ***Amounts payable (if no surviving eligible spouse).*** DIC is paid in a lump sum, calculated on the basis of the total number of eligible children.

(1) 1 child - $344 per month.

(2) 2 children - $496 per month.

(3) 3 children - $643 per month.

(4) Each additional child add $126 per month.

(5) Additional sum of $205 per month will be paid for a disabled child.

5. ***DIC to parents. 38 U.S.C. § 1315.*** The parent must have been dependent upon the deceased. The Parent(s) must be below certain income ceiling. The test used to determine dependency is very similar to the IRS test to determine dependency. Amounts paid will be based on the number of parents surviving.

D. ***Tax consequences.*** The value of DIC payments are not included in decedent's gross estate. DIC payments are not taxable income to the recipient.

E. ***Application.*** DIC is not automatically payable to survivors. Survivors must apply for DIC. Apply to survivor's nearest VA Regional office within 12 months to receive full payment from date of death (VA Form 21-534, Application for Dependency and Indemnity Compensation from the Department of Veteran's Affairs). If VA receives application more than 12 months after death, payments are retroactive to date of application only. 38 C.F.R. § 3.400. Appeals of denials may be taken to the Board of Veteran's Appeals from the Board of Veteran's Appeals may now be taken to the Court of Veteran's Appeals.

0504 SURVIVOR BENEFIT PLAN (SBP)

A. ***Reference***

1. 10 U.S.C. §§1447-1460b

2. Survivor Benefit Plan computer programs - on the JAGNET Bulletin Board System

3. BUPERSINST 1750.11 (Survivor Benefit Plan Instruction)

4. NAVADMIN 037/97 of 21 Feb 97 Subj: SURVIVOR BENEFIT PLAN

5. NAVADMIN 117/98 of 2 Jun 98 Subj: CHANGE TO SURVIVOR BENEFIT PLAN (SBP)

B. ***Eligibility to participate***

1. Active duty retired and Active duty and eligible to retire.

2. Retired with 30% or more disability.

3. Reservists eligible to retire. See Pub. L. 95-397, 1 Oct. 1978, which extended coverage (RC-SBP) to reserve service members completing 20 years, but not yet 60 years of age.

C. ***Eligible beneficiaries for SBP and RC-SBP***

1. ***Surviving spouse.*** 10 U.S.C. §§ 1447(3) and 1450(a). A spouse who survives retiree's death where the marriage either was in effect when service member became eligible to receive retirement pay, was in effect for at least one year immediately before retiree's death, or produced issue. Remarriage of surviving spouse before age 55 terminates the SBP annuity. Annuity may be reinstated if widow's second spouse dies or there is a divorce. Former spouses are eligible to be designated as a SBP beneficiary.

2. ***Surviving spouse and children.*** Full payment maybe made to surviving spouse as long as eligible; then full payment made to the remaining eligible children as a group.

3. ***Child eligibility***

   a. Child under age 18 and unmarried.

   b. Unmarried and under 22 if a full time student.

   c. Incapacitated before 18 or 22 - paid for life.

4. ***Children only.*** Usually elected when there is no eligible spouse.

5. ***Natural person with an insurable interest***

   a. Any person with a financial interest in survival of the service member.

   b. Eligible participants who are married or have children may not elect this option.

D. ***Annuity Amount***

1. ***Generally.*** If service member elects to participate in SBP, the service member then selects a "base" amount. The base amount can be anything from $300 to the full amount of service member's retired pay. The base amount is the amount the annuity is calculated from. The service member also selects a beneficiary, which in most cases will be the spouse. The service member then has a premium, which is calculated from the base amount selected, deducted from each retirement check, and if the service member dies before the spouse (or other eligible beneficiary), the beneficiary will begin receiving the monthly SBP payments.

If deceased became retirement eligible after 1 October 1985, the widow(er) receives an annuity calculated under a two-tiered system. Payments equal 55% of the base amount. Payments reduced to 35% of the base amount when the surviving spouse reaches 62, unless supplemental coverage also is chosen.

Example: 55% x $2000 = $1,100 before age 62

35% x $2000 = $700 age 62 & after

If deceased was eligible to retire before 2 October 1985, SBP payments to a surviving spouse will also be reduced. The surviving spouse may elect to have the reduction calculated under either the new two-tier system or under the old "social security offset."

2. ***Supplemental SBP (SSBP).*** A retiree may elect to pay an additional premium to raise annuity payments above 35% of the base amount when widow(er) reaches age 62. Under SSBP, payments may be made at 40%, 45%, 50%, or 55% of base amount. The additional amount is determined in accordance with actuarial principles based on life expectancy and annuity tables. Payment to all other beneficiaries (non-spouses) is at 55% of base for as long as they maintain eligibility.

E. ***Active component cost for SBP coverage.*** The premium that the member is required to pay depends upon the base amount selected and the type of coverage selected.

1. ***Determine desired base amount***

a. Minimum = $300.00.

b. Maximum = Full retired pay.

c. Any amount in between.

2. ***Determine type of coverage***

a. ***Surviving spouse only coverage***

(1) ***Formulas:***

(a) 2 and 1/2% of first $410, plus 10% of selected base over $410 (**OLD Formula**); or

(b) Flat 6.5 % rate of full base amount (**NEW Formula**).

(2) ***Example:*** Base = $2,000.00

(a) ***Old formula:***

2 1/2% of $ 410 = $ 10.25
10% of $ 1590 = v$159.00
monthly cost = $169.25

(b) ***New formula:***

$2,000 x 6.5% = $ 130.00

(3) The formula producing the least amount of cost will be used. In the example, the new formula produces the least cost. As a rule of thumb, if the base amount exceeds $860.00 then the new formula is used; if the base amount is less than $860 the old formula is used.

(4) For those entering the service on or after March 1, 1990, only the new formula (flat 6.5% of base) will be used.

b. ***Surviving spouse plus children coverage***

(1) Cost of widow-only coverage, plus actuarial amount that accounts for the difference in age between the retiree and the spouse and the age of youngest child.

c. ***Children only coverage.*** The cost is based upon actuarial tables comparing the ages of the retiree and the youngest child. If married at time of election, spouse must approve in writing.

a. ***Natural person with insurable interest.*** 10 U.S.C. § 1448b(1).

(1) Can only be elected if retiree has no spouse or dependent children.

(2) Cost is 10% of base amount plus 5% of base amount for each five years beneficiary is younger than retiree (to a maximum of 40% of base amount).

3. ***Stopping withholdings.*** Withholding for premium amounts stops if the beneficiary dies or otherwise loses eligibility. The survivors must notify finance office.

F. ***Election.*** Service members who are on active duty and have completed 20 years of active federal service are automatically enrolled in SBP without any affirmative election. Enrollment is at the full base amount of retired pay calculated as if the service member had been retired on the day of death. Both widow and children are covered. 10 U.S.C. § 1448(d). Retirees, however, must make an election to participate in SBP.

1. ***Active component.*** Retiring service members must elect type and amount of coverage within 30 days of retirement.

2. ***Reserve component.*** Retirement eligible reservists have 90 days to elect, with the period running from receipt of their letter of notification of eligibility for retired pay at age 60 ("20-year letter").

An election of no coverage, less than full coverage for a surviving spouse, or children only coverage requires written spousal concurrence.

If a service member is married at the time of retirement, the election made is generally irrevocable. Exceptions include:

a. An unmarried service member who later marries and/or acquires dependent children may opt into the plan after retirement or retirement eligibility.

b. An eligible participant need not continue premium payments if beneficiaries are no longer eligible.

c. An eligible participant who becomes permanently and totally disabled may withdraw.

d. An eligible participant who has spousal coverage and loses spouse to death or divorce may withdraw <u>after</u> remarrying. Finance must be notified of intent to withdraw, however, before second marriage produces issue or reaches its first anniversary.

3. **One-Time Disenrollment window.** Prior to the signing of the National Defense Authorization Act of FY98, discontinuation in SBP was not permitted, except under special circumstances. The FY98 act includes a provision which allows those who have been retired for over two years a one time opportunity to disenroll from SBP between 17 May 98 and 16 May 99. Future retirees and those who have not yet been retired for two years will be eligible for the disenrollment option between their second and third year retirement anniversaries. The decision not to participate in SBP remains irrevocable.

G. ***Spousal SBP reduction due to DIC offset.*** Any SBP or RC-SBP annuity to which surviving spouse is entitled will be reduced by amount of spousal DIC entitlement. The offset is mitigated, however, by a pro rata, lump sum return of SBP premiums paid. Any SBP or RC-SBP annuity payable to other beneficiaries is not reduced, even if that beneficiary is also eligible for DIC.

H. ***SBP tax consequences (Federal).*** Premium payments are not reportable as income for tax purposes. I.R.C. § 122. Payments to beneficiaries are taxable as ordinary income. The present value of the SBP annuity is part of the deceased retiree's gross estate. As such it is subject to federal estate tax in the retiree's estate. If the retiree had spouse-only SBP, there would be no estate tax due on the value because the unlimited marital deduction would deduct the value of the SBP out of the estate. For further information, see: Reserve Retirement Benefits, (The Retired Officers Association).

I. ***SBP advantages.*** There are advantages of SBP in comparison with commercial life insurance. It is a partially government funded so the premiums are kept much lower than commercial annuity policies might otherwise be. For various reasons, commercial insurers do not pitch annuities as replacements for SBP. Rather, they recommend term, whole life, or some combination of the two. Upon the retiree's death, the surviving spouse is supposed to collect the lump sum insurance proceeds, invest them, and draw a monthly check from the investment.

1. ***Commercial alternatives.*** There are basically three commercial insurance alternatives to SBP:

   a. Annuities,

   b. Term life insurance, and

   c. Universal/whole life insurance.

2. ***Advantages for the SBP system***

   a. Government subsidized; no administrative costs or commissions.

b. Premium costs for children coverage and small amounts of surviving spouse coverage are particularly low. A fantastic bargain if child is incapacitated - child paid for life.

c. SSBP and natural persons with insurable interests not so subsidized.

d. SBP premiums are not taxable income to the retiree.

e. SBP payments to beneficiary increase with cost of living adjustments to retired pay. A significant factor if significant inflation returns anytime in the next 40+ years.

f. Guaranteed insurability.

g. Value of electing SBP increases when factors exist which increase the probability retiree will not outlive spouse. Some factors include:

(1) Retiree is older than spouse;

(2) Retiree is a smoker, has a specific health problem, or some genetic condition that makes it more likely retiree will not live average life span; and/or

(3) Retiree is male (vs. female).

J. ***Disadvantages of SBP in comparison with commercial life insurance***

1. ***SBP irrevocable***

2. ***SBP is subject to change by Congress.*** *Weinfield v. United States*, 8 F.3d 1415 (9th Cir. 1993)(SBP is like military pay: a legislative policy that the legislature may change at any time). *But see, Miller v. Aldridge*, 700 F.Supp. 1565, 1571 (D. Wyo. 1988) (SBP is a contract with the government, with the terms of the contract defined by the statutes and regulations in effect on the date the retiree elects to participate)(dicta), *rev'd on other grounds, Miller v. McGovern*, 907 F.2d 957 (10th Cir. 1990), *cert. denied, Miller v. Rice*, 498 U.S. 1052 (1991).

3. ***Reduction in spousal SBP from 55% to 35% at age 62 of survivor.*** Supplement SBP is provided to cover the difference but an additional premium is required.

If spouse is entitled to DIC, the spouse need not be concerned about possible offset that may impact spouse's SBP entitlement.

Factors exist that increase likelihood retiree will outlive spouse (e.g., retiree is female).

0505 SOCIAL SECURITY BENEFITS

A. ***Generally.*** Surviving spouses and dependents are entitled to standard social security benefits so long as the member is either fully insured or currently insured as required under the Social Security system. The amount of monthly benefits depends on work history of the insured and the insured's family situation. Generally, the more social security (FICA) taxes paid by the insured, the greater the benefits available to the survivors. When calculating the amount of FICA taxes paid by an active duty service member, most service members will qualify for an additional $1200 annual credit above the actual amount of FICA taxes paid.

B. ***Eligibility.*** For an individual (or his/her survivors) to qualify for social security benefits, the individual will have to be either fully insured or currently insured, or both, depending on the benefit (but see para. C.2.d below). An individual is fully insured upon receipt of 40 quarters of social security work credits. If an individual dies before age 62, he/she may be considered as "fully insured" with less than 40 credits. The actual number of credits needed depends on age at time of death. An individual is currently insured if the individual has at least 6 quarterly work credits in the past 13 quarters. Generally, one social security work credit is awarded for each $600 of wages upon which FICA taxes are paid. A maximum of four credits can be earned in a year (hence, "quarterly credits").

C. ***Available benefits for survivors.*** Lump sum death benefit of $255 (deceased must have been either fully or currently insured at time of death). Surviving spouse and/or dependents may be entitled to monthly survivor benefit payments so long as:

1. Children are under age 18 (deceased fully or currently insured).

2. Surviving spouse with children under 16 (deceased fully or currently insured).

3. Surviving spouse age 60 and over, (deceased must have been fully insured at time of death).

4. If the death was service-connected, but the service member was not either fully or currently insured, the VA will make up any of these Social Security payments that the service member's survivors do not qualify for. 38 U.S.C. § 1312(a).

Social Security benefits may be reduced if surviving spouse has earned income.

Apply for benefits by submitting SS Form DA-C24, Application for Survivor Benefits from Social Security Administration to SS Office. More specific information on social security entitlements can be obtained by calling: 1-800-772-1213.

0506 DEPENDENTS' EDUCATIONAL ASSISTANCE (DEA)

A. ***References***

1. 38 U.S.C. § 3500–3566

2. 38 C.F.R. Part 21

B. ***Generally.*** Dependents' Educational Assistance are benefits provided to dependents of a deceased service member to provide for assistance in continuing or acquiring an education after the death of the member. Death of member must be under same circumstances that qualify dependents for receipt of DIC. Additionally, dependents of a totally disabled, but living, veteran may qualify.

C. ***School must be approved for Department of Veteran's Affairs (DVA) benefits. See 38 U.S.C. § 3523 and § 3672; 38 C.F.R. Part 21.7120.*** Each state establishes an agency that certifies educational programs according to standards established by the DVA. Generally, DVA will not allow approval of courses that are primarily a vocational or recreational in nature. The statute and regulation contain a list of specific courses that are either prohibited or discouraged.

D. ***Eligible recipients***

1. ***Surviving spouses.*** Period of eligibility for a spouse extends to 10 years from the date of the veteran's death; extension is possible. DEA will not be reduced by DIC payments. Remarriage permanently terminates DEA payments.

2. ***Children.*** Eligibility for child ends at age 26 (unless extended under certain conditions). **Children must elect between DEA and DIC.** Election of educational benefits is irrevocable and DIC may not be received once educational benefits begin. (Can receive DIC until age 23 and educational benefits to age 26). Marriage does not bar payments.

E. ***Amounts available. 38 U.S.C. § 3532.*** DVA will pay the eligible recipient $404 per month if the schooling is full time. Lesser amounts are available for part time schooling. Payments made for a maximum of 45 school months.

0507 INTRODUCTION TO SGLI. Servicemen's Group Life Insurance (SGLI) is probably the most significant asset of active duty personnel. The maximum pay out amount when a service member dies on active duty or within 120** days of separation from active duty is $200,000.00. SGLI is group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government. Service members do pay premiums although at a reduced rate and may waive the SGLI coverage entirely or partially. The total value of SGLI proceeds is included in decedent's estate for purposes of Federal estate tax but generally exempt from the claims of creditors and other taxes, including federal income tax for the beneficiary. *Compare* 38

U.S.C. § 1970g (1991) *with United States Trust Co. of New York v. Helvering*, 307 U.S. 57 (1939) and *United States v. Wells Fargo Bank*, 485 U.S. 351, 355 (1987).

0508 SERVICE MEMBERS COVERED

A. ***Active component.*** Active duty service members are automatically insured for $200,000 as of 1 Apr 96 unless they opt out in writing. Service members can elect lower coverage or no coverage by completing Form SGLV-8286. It costs $18.00 per month for $200,000 worth of coverage.

1. ***Reserve component.*** Certain reservists are eligible for coverage.

0509 SCOPE OF COVERAGE

A. ***Guaranteed insurability.*** Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, service members who desire to increase coverage may be subject to insurability determinations.

SGLI provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120-day period. A service member may convert to Veteran's Group Life Insurance (VGLI) within 120 days of separation. This conversion only guarantees insurability. The government does not subsidize VGLI and the former service member will have to pay premiums at the full rate.

Service members may lose entitlement to SGLI based on their duty status at time of death (e.g., if death occurs during extended unauthorized absence or while serving term of confinement), or other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes).

Cause of death, however, is not relevant to the payment of SGLI proceeds. The beneficiaries of service members who die as a result of their own misconduct or die by their own hand are not denied the insurance payout.

0510 SGLI ELIGIBLE BENEFICIARIES. Any person or legal entity designated by the service member on appropriate VA form (Active Component: VA Form SGLV-8286). SGLI Act gives service member absolute right to choose beneficiary. *Ridgway v. Ridgway*, 454 U.S. 46 (1981). In *Ridgway* the Supreme Court determined that a service member may always change his beneficiary for SGLI proceeds. The service member had designated his spouse by name on SGLI election form. The service member did not change election following a divorce, but he did remarry. The Court determined that the ex-spouse who was the named beneficiary at the time of the service member's death was entitled to all the proceeds.

If a service member has made no designation, or, "By Law" designation then proceeds paid according to SGLI statute:

1. All to spouse, but if none, then

2. All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then

3. All to parents (equally divided), but if none, then

4. All to executor of service member's estate, but if none, then

5. Next of kin under state law.

A. ***"By Law" designations are not authorized for naval personnel.*** Chief of Naval Personnel (CHNAVPERS) ltr 1741 PERS-06L2 of 30 Sep 93. A NAVADMIN message numbered 035/96 eliminates "by-law" designations. "By-law" designations are problematic because of the limitations provided in the statute.

The SGLI definition of "parents" for purposes of beneficiary designations is limited to the father/mother of a legitimate child, the father/mother of an adopted child, and mother of an illegitimate child. The father of an illegitimate child is considered the parent also, but only if

b. acknowledged in signed writing prior to death;

c. judicially decreed either to be the father or to provide support; or

d. proof of paternity is established from official records (e.g., birth, school or welfare records) which show that, with his knowledge, claimant was named father. 38 U.S.C. 1965(9).

See, Lanier v. Traub, 934 F.2d 287 (11th Cir. 1991) The court held that even though the service member raised by stepfather, "by law" designation precluded stepfather from sharing in SGLI proceeds, which went to natural father and mother.

SGLI definition of "children" for purposes of beneficiary designations is limited to a legitimate child or a legally adopted child. An illegitimate child is also included within the term if the insured is the child's mother or, if the insured is the father, the relationship meets the requirements of para. 1.(a) through (c), of 38 U.S.C. § 1965(8).

B. ***Ensure a service member keeps his/her designation current.*** *See Ridgway, supra. See also, Brewer v. Zawrotny*, 978 F.2d 1204 (10th Cir. 1992), *cert. denied*, 507 U.S. 974 (1993) (Oklahoma statute stated that, by operation of law, divorce causes ex-spouse to lose all entitlement to life insurance proceeds on life of-previous spouse. Court of Appeals held Oklahoma statute ineffective to change ex-spouse designation on SGLI

form.)

Since a service member may designate anyone as a beneficiary an attorney should consider advising a client to name a trustee (living or testamentary trust) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds. SGLI will not pay out to minors. Either a guardianship must be established or the service member should opt to designate a trustee or custodian as beneficiary for the benefit of the member's minor children.

C. ***Custodianship created pursuant to UGMA/UTMA.*** Check state statutes to see whether state has adopted UTMA/UGMA.

The potential advantages to a custodianship are no delay in payment of proceeds; avoids cumbersome restrictions found in guardianship arrangements; the members attorney can understand UGMA/UTMA; "Uniform" laws mean uniform application; UTMA allows transferor choice of law options and has clear conflicts of law provisions; transferor may designate a non-resident to serve as custodian; and a custodianship is not a separate taxable entity.

Potential disadvantages in custodianships as compare to using a testamentary or living trust are mandatory age of distribution to beneficiary may be too early (typically the age of majority or 18 most states); no protection against spendthrifts (only a potential problem if custodianship continues into majority).

0511 COUNSELING ON SGLI BENEFICIARY DESIGNATIONS. A service member may designate as beneficiary any person, firm, corporation, or legal entity, including a charitable organization or a trust.

A. **Designation of children.** Children may be designated by name or by relationship.

1. Designation by relationship preferred for equal split of SGLI proceeds.

2. If designated by relationship, not required to provide info on SGLV-8286 as to names, addresses, or social security numbers.

3. Service members, even with one child should not designate "my child" since this would exclude children born after designation.

a. May use "my children"

b. Children of a previous marriage: "My children from my marriage to Jane C. Smith."

4. Stepchildren, adopted children, or children born out of wedlock, should be designated by name rather than by relationship.

B. ***Designation of minors by name.*** A service member who wishes to designate a minor as a principal or contingent beneficiary, directly by name or by relationship, must be advised that SGLI proceeds **cannot** be directly paid to a minor, except for a minor spouse. The personnel clerk at the personnel office does not typically provide this advice and as a client's attorney planning out his/her estate it is incumbent on the attorney to advise the client of this fact.

So long as a beneficiary is designated or no beneficiary is designated the insurance proceeds will be paid out to the beneficiary as designated or determined by statute. So long as the service member has not designated his or her estate as the beneficiary the proceeds will not be subject to probate.

If designated beneficiaries are minors at the time the proceeds are to be disbursed a court will determine the person best qualified to serve as custodian of the SGLI proceeds for the benefit of the minor if no custodianship under UTMA/UGMA or a trust has been established. The distribution of SGLI proceeds will be delayed pending the appointment of this person as guardian of the property owned by the minor children.

The court may require the guardian selected to pay for a surety bond to ensure payment of the SGLI proceeds. A bond is basically an insurance policy and requires either the one time or periodic payment of premiums.

Under some state laws, only a certain amount of money may be spent on behalf of a minor child each month or year, despite the service member's election; if more is needed, approval of the court appointing the guardian must be obtained.

Expenses of establishing and administering the guardianship such as bond, court and legal expenses will be paid out of the SGLI proceeds initially as well as during the period of time the designated beneficiary remains a minor.

All SGLI proceeds will usually have to be paid out to the minor at age 18, regardless of the minor's maturity, or lack thereof.

C. ***Guardianship designation provisions***

"(Full name of minors): _____, _____, _____, _____, and _____,"

OR

"My child(ren)"

OR

"My child(ren), including (name of step-child\illegitimate child)"

OR

"My children from my marriage to (name of spouse)."

D. ***Designation of a custodian.*** A service member who desires to name a custodian for a minor as the principal or contingent beneficiary under the UGMA or the UTMA will be advised that prior to completing the SGLV-8286, the member needs to secure the approval of the person to be named as custodian. Transfer of SGLI benefits under the UTMA/UGMA may be for the benefit of a minor child or children, regardless of their relationship, if any, to the service member.

1. ***Custodianships generally***

   a. Life insurance custodianships are recognized in every state except Michigan, Mississippi, or Vermont.

   b. A separate custodianship will be established for each child.

   c. Either the service member, the children, the custodian, or OSGLI should have some connection with the state named by the service member.

   d. The age of distribution to the child in most jurisdictions is 18, although in some other states the age of distribution is 21. In CA, NV, and AK (and only in these jurisdictions), the service member may designate any age between 18 and 25 as the age of distribution.

There is no requirement for court involvement. The court appointment of a custodian and the probate of a will is not required in order to pay the SGLI proceeds. If the SGLI proceeds are the only major asset, the delay and expense of probate may be avoided. There ordinarily will be no delay in the distribution of SGLI proceeds to the designated UTMA/UGMA custodian.

The service member, not a court, determines who will act in the minor's best interests with regard to the use of SGLI proceeds. The UGMA/UTMA custodian can use the SGLI proceeds, as the UGMA/UTMA custodian determines is appropriate, for the benefit of the child(ren) during the time the child(ren) remain minor(s). There is no automatic court supervision of the UGMA/UTMA custodian and this may be a disadvantage in some instances.

Ordinarily, the UGMA/UTMA custodian will not be required to pay for a surety bond to receive the SGLI proceeds. If no surety bond is required nothing exists that could protect the minor's funds from the theft, fraud, waste, and other such acts by the UGMA/UTMA custodian. All persons in position of fiduciary are held to standards in the cognizant state's statutes of fiduciary responsibilities and can be held personally responsible for improper fiduciary action however, without a bond no money may exist to recompense the children.

A disadvantage to custodianships are that all SGLI proceeds will usually have to be paid to the minor at age 18, regardless of the minor's maturity, or lack thereof.

2. ***Custodianship under the Uniform Gifts or Uniform Transfers to Minors Act sample designations***

> "(Name of custodian), as custodian for each of my children, pursuant to the UGMA/UTMA of the state of (name of state), (with distribution to each minor when that minor reaches age (desired age)."

E. ***Designating a trustee under a trust established in a will.*** A service member who wishes to designate a trustee under a trust established in a will (testamentary trust) as a primary or contingent beneficiary should be advised that before completing the SGLV-8286, the service member must have a will prepared that contains a trust, and the service member must sign (execute) the will. The trust in the will may be established for minors or adults, regardless of their relationship, if any, to the service member.

1. ***Advantages***

   a. The need (and related) expense of maintaining a surety bond may be waived in the will.

   b. The trustee can use the SGLI proceeds for the benefit of the minor for the period of time, and in the manner specified, in the will. Direct distribution may be delayed beyond the 18th birthday of the minor (e.g., upon completion of college, or age

25, whichever occurs first).

2. ***Disadvantages***

   a. The will, which might not have otherwise required probate (e.g., because of the small amount of other property in the service member's estate), will have to be probated and the court will need to appoint the trustee before the designated trustee may receive the SGLI proceeds. Court and legal expenses will have to be paid.

   b. The distribution of SGLI proceeds will be delayed.

   c. There is no surety bond required that could protect the minor's funds from theft, fraud, waste, and other such acts by the trustee.

3. ***Testamentary trust for children sample designations***

"My trustee to fund a trust established for the benefit of my children under my will."

OR

"To the trustee to be named under my testamentary trust for the benefit of my minor children."

   a. Remember the service member's will must contain a provisions for a testamentary trust.

   b. If step children or illegitimate children are intended beneficiaries, they should be included **by name** in the SGLI designation. For example, "...for the benefit of my children, including, including my stepchild, MARY LAMB, ..."

4. ***Living trust for children sample designations***

"(Name of trustee), my trustee, pursuant to a trust agreement dated (date)."

   a. The service member must create a living trust prior to completing the SGLI form.

b. A copy of the trust agreement should be provided to the SGLI office.

0512 SGLI IS IMPORTANT! Counsel your clients on designation of beneficiaries!

A. ***Use sample designations.*** Recommended SGLI language.

SGLI intended for minors may be designated by the service member for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift in which case a court must appoint a guardian or conservator to receive and maintain the proceeds.

Don't leave the completing of the SGLV-8286 to the personnel office. Actively get involved, liaise with the local personnel office. Legal assistance attorneys may want to provide training to personnel clerks to ensure that they recognize that many different beneficiary designations are available to service members. Training on what "by-law" means and why it has been prohibited is valuable also.

0513 APPLICATION FOR SGLI BENEFITS. Beneficiaries should apply for benefits by submitting VA Form 29-8283, Claim for Death Benefits, to OSGLI, 212 Washington Street, Newark, N.J. 07102-2999. OSGLI may accept a fax copy of the claim.

A. ***Settlement options.*** Service member may elect lump sum or 36 monthly installments. If service member did not specifically elect monthly payments, beneficiary may elect type of settlement.

OSGLI will need Service Headquarters (e.g. a Personnel Casualty Report which is a message forwarded to BUPERS by Navy commands reporting the death of a service member) to provide them with DD Form 1300 (Report of Casualty) and a copy of the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) before payment will be made. The CACO (Casualty Assistance Calls Officer) assigned to the deceased service member's case should be able to help the beneficiaries apply for and receive the SGLI proceeds. As a legal assistance attorney do not leave this up to the CACO, it is your duty to assist your client to your best ability and resources.

0514 VETERANS' GROUP LIFE INSURANCE. VGLI is a renewable group term life insurance available after service member leaves active duty. The term is for 5 years. Up to $200,000 in coverage available. Active Component service members should apply for VGLI within 120 days of leaving the service. Certain reservists may also be eligible.

A. ***VGLI Rates (Per $100,000 coverage - effective 1 September 1993)***

	AGE	MONTHLY RATE
(through)	29	$12
	34	20
	39	26
	44	34
	49	44
	54	65
	59	88
	64	113
	69	150
	74	225
(over)	75	450

0515 SGLI OR A COMMERCIAL INSURANCE ALTERNATIVE?

A. ***Insurance needs.*** Clients need to consider whether insurance beyond SGLI or in place of SGLI.

B. ***Relative costs.*** The client needs to consider costs involved for the insurance.

C. ***Comparison of benefits.*** A client needs to shop around to determine what if any extra insurance is needed and the provisions contained in the insurance.

1. War Clauses.

2. Renewal.

3. Preexisting Conditions.

4. Suicide.

0516 OTHER PAYMENTS AND BENEFITS TO SURVIVORS OF DECEASED MEMBERS

A. ***Death gratuity.*** 10 U.S.C. § 1475. A death benefit for survivors of a member dying on active duty is paid to the service member's beneficiary. For survivors to be paid the service member must have died on active duty, or within a 120 days after release if death resulted from a disease or injury incurred while on active duty.

1. ***Amount.*** Beneficiary receives a lump sum payment of $6000 made by the local finance office. The lump sum payment amount does not depend on the rank or years of service of the deceased. (National Defense Authorization Act for FY 1992-1993).

2. ***Beneficiaries.*** By law, to surviving spouse. If no surviving spouse, to children equally without regard to age or marital status. If no spouse or children, by designation between parents, brothers, and sisters. DD Form 93. If no spouse or children and no designation then to parents (if any survive), otherwise to brothers and sisters. If there are no parents, brothers, or sisters, the death gratuity is not payable (to the estate or otherwise).

3. ***Tax consequences (IRC § 134).*** A total of $3,000 is excluded from the gross income of the recipients. Remaining $3,000 is included in gross income. If Gratuity is split amongst more than one recipient, tax liability is split pro rata. Section 134 does not specifically exclude the death gratuity. However, the death benefit falls within §134(b)(1)(B) as a qualified military benefit. Since the death gratuity was $3,000 as of 9 September 1986 $3,000 is currently excludable from gross income. Additionally, this whole amount is not included in decedent's gross estate.

Apply by submitting DD Form 397, Claim Certification and Voucher for Death Gratuity Payments to local finance office.

B. ***Unpaid pay and allowances.*** Chap. 5, para. 40511, DOD Military Pay and Allowances Manual.

1. ***Amount.*** All pay due service member at death, including allowances and any accrued leave not to exceed 60 days.

2. ***Beneficiaries.*** Those persons designated by service member. If no designation, to spouse, children, parents, or the estate (in that order).

C. ***Burial benefits***

1. ***References***

a. 10 U.S.C. §1482.

b. 38 U.S.C. §§ 2301-07 & 2402.

c. 38 C.F.R. Part 3.1600.

2. ***Burial in a national cemetery.*** Generally, a service member is entitled to burial in a national cemetery. All active duty personnel are entitled to burial in a national cemetery. Additionally, veterans who served a minimum period of time on active duty (generally, 2 years) and were discharged with an other than dishonorable characterization, and reservists who die on active duty, or die as a result of service connected injuries, or die after completing 20 good years toward retirement. See P.L. 103-240 (Signed 4 May 1994). A recent change to the burial benefits now prohibit burial in a national cemetery for anyone convicted of a felony even after honorable discharge from the military.

a. Burial in a National Cemetery is on a space available basis.

b. Eligibility creates the rights to: A headstone (monetary reimbursement no longer available), and A grave liner (if actually buried in a National .Cemetery).

3. ***Additional assistance with burials.*** All active duty service members. The next of kin are eligible for the following support:

a. ***A primary burial allowance.*** Survivors are authorized reimbursement up to $1750 to cover the expenses of recovery, preparation, casketing, and transportation of the body.

b. ***An internment allowance.*** The family may request reimbursement for additional funeral expenses, including funeral services and costs of purchase of a plot. The maximum amount of reimbursement ranges from $110 to $3100 depending on whether the service member is buried in a private cemetery or a national cemetery and whether a funeral home service is used.

c. ***Travel.*** Reimbursement for next of kin travel to the burial site.

d. ***Certain veterans.*** The next of kin are entitled to: A burial allowance not to exceed $1500 if death is service-connected. An allowance not to exceed $300 for preparation and transportation of remains and other funeral and burial expenses if death is not service-connected but veteran was eligible for VA pension or compensation (i.e., the veteran was rated partially or totally disabled). An additional $150 plot or internment allowance is available to these next of kin if burial

is in a private cemetery.

D. ***Other military benefits.*** The following are miscellaneous benefits available when a member dies on active duty. Travel of dependents and shipment of household goods and personal effects. Emergency financial assistance (Navy-Marine Corps Emergency Relief and/or American Red Cross). Continued service benefits and privileges for dependents of service member dying on active duty including:

1. ***VA Death Pension.*** 38 U.S.C. § 5112(b) (4); 38 C.F.R. 3.660(d) (1990). This benefit is designed for surviving spouses and children of wartime veterans (i.e., those who served at least 90 days during designated war periods) whose survivors have limited income. Service during Desert Storm qualifies. Property holdings and date of marriage to the veteran also effect eligibility. Death need not be service connected.

0517 TERMINAL CONDITION: IS MEDICAL RETIREMENT APPROPRIATE?

A. ***Factors favoring retirement.*** This is the situation where as a legal assistance attorney you can advise the client what the wisest thing to do is based on the survivor benefits that are going to be available to the client's family.

1. ***Availability of Survivor Benefit Plan (SBP).*** Is the client eligible for the survivor benefit plan? If so, DIC will offset any amount of SBP received. Since the surviving spouse will be entitled to DIC so long as the death is service connected might it be wiser for the member to choose Child only SBP? Children are entitled to DIC only until 23 if full time student. SBP payments received by children are not offset by DIC payments.

2. ***Availability of Service Disabled Veteran's Life Insurance (38 U.S.C. § 1922).*** $20,000 of life insurance available to disabled retirees who are otherwise uninsurable. Must be applied for within one year of retirement. If retiree is mentally competent at any time between injury and death, the retiree must sign the insurance application (VA Form 29-4364 (NSLI-RH insurance)). If serviceman is mentally incompetent for the entire period prior to death, the insurance (NSLI-ARH insurance) may be applied for retroactively after the death of the retiree.

B. ***Factors favoring continued active duty.*** Is family at risk for extensive medical costs? How long might service member continue to live? If retired, when will service member be removed from military medical care? If retired, will care be available in a VA facility?

Eligibility for the Death Gratuity expires if death occurs more than 120 days after retirement.

Eligibility for SGLI expires if death occurs more that 120 days after separation from active duty. Some commercial life insurance policies issued by companies that deal with the military provide for automatic termination or reduction of coverage upon retirement. Consider terms of other insurance client might have.

Survivors may have to pick up some additional burial expenses if service member is retired vice remaining on active duty.

C. ***Processing the service member for medical retirement.*** If the command determines that a service member should be retired prior to death, several steps should be taken at the local level to ensure rapid processing of the retirement.

1. ***Identify the Physical Evaluation Board Liaison Officer (PEBLO) at the local Medical Treatment Facility (MTF).*** The PEBLO have 24 hour access to their Physical Evaluation Board (PEB) counterparts and should warn the PEB of imminent request for retirement, and ask the PEB for further instructions on processing.

2. ***Medical evaluation boards.*** Appoint a Medical Evaluation Board (MEB), usually consisting of one physician, to prepare the MEB recommendation to the PEB.

3. ***Ensure a Line of Duty investigation is initiated and completed, if required by JAGMAN, Chapter II.*** The PEB must have the LOD determination before a service member can be recommended for retirement. The PEB is bound by the determination of the LOD determination in the investigation and its endorsement. See JAGMAN 0222.

4. ***Financial counseling.*** Complete and document financial counseling of Next of Kin (NOK); obtain approval for rapid processing of retirement.

5. ***Documents.*** Ensure that the client has a Living Will with a springing Durable Power of Attorney and a current will made out for the state that his estate will be probated in.

SURVIVOR BENEFITS		
MONTHLY PAYMENTS	LUMP SUM PAYMENTS	OTHER BENEFITS
Dependency and Indemnity Compensation (DIC)	Servicemen's Group Life Insurance (SGLI)	Burial Reimbursement (Burial in a National Cemetery)
Survivor Benefit Plan (SBP)	Death Gratuity	Relocation - Travel and Shipment
Social Security	Social Security	Medical care/NEX Commissary
Dependents' Educational Assistance (DEA)	Unpaid Pay and Allowances	Emergency Financial Assistance (Navy Relief - Red Cross)

CHAPTER 6

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PART A - IMPLEMENTATION OF DOD "FAMILY SUPPORT" POLICY

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A. DoD - 32 C.F.R. Part 733

B. Navy - Naval Military Personnel Manual (MILPERSMAN) 6210120

C. Marine Corps - Legal Administration Manual (LEGADMINMAN) Chapter 8

D. Coast Guard - Commandant Instruction 1000.6A, Chapter 8 – Section M

0602 INTRODUCTION. Nonsupport complaints are among the most common problems handled by legal assistance attorneys. The typical case involves an accusation by a servicemember's spouse, made either in person or by letter, that the servicemember has neglected legal/moral support obligations to the spouse and children. The obligations to support apply to all members, regardless of sex. State law may impose additional support obligations. The support obligations expected of a military member may not necessarily coincide with a member's legal obligation to provide support in accordance with state law.

0603 DOD POLICY. THE MILITARY SERVICE WILL NOT BE USED TO EVADE FAMILY SUPPORT OBLIGATIONS!! One is obligated to support all legal dependents. The member must provide adequate and continuous support, and comply with support terms in separation agreements and valid court orders. Legal dependents include spouse, legitimate children, and illegitimate children if paternity established or support ordered by court with jurisdiction. A failure to comply with support requirements brings discredit upon service and may result in administrative action or disciplinary action (UCMJ violation).

Disciplinary action can be based on a violation of Article 134, wrongful failure to pay a just debt, or a violation of Article 132, fraud upon the government. Administrative action can be taken to withhold BAQ at the with dependents rate, and to recoup BAQ previously paid to the service-member if the member refuses to provide support to his or her legal dependents. Administrative separation processing action can be taken for failure to support lawful dependents. A servicemember must have received counseling and administrative remarks for failure to support legal dependents.

0604 SERVICE FAMILY SUPPORT REGULATIONS

A. ***Introduction.*** The support provisions provided in Navy, Marine Corps, and Coast Guard service regulations are recommended support amounts. These recommended amounts can be used as guidelines in determining what is adequate support of legal dependents in the absence of an agreement between the spouses or temporary/final court order setting support

amounts. Additionally, commanders have some leeway to adjust support amounts up or down to fit individual circumstances.

B. ***Navy implementation of DOD policy.*** Naval Military Personnel Manual (MILPERSMAN), Article 6210120. Support amounts in the absence of an agreement or court order:

Relationships and Number of Dependents	Support to be Provided
Spouse Only	1/3 gross pay
Spouse and One Minor Child	1/2 gross pay
Spouse and Two or More Minor Children	3/5 gross pay
One Minor Child	1/6 gross pay
Two Minor Children	1/4 gross pay
Three Minor Children	1/3 gross pay

"Gross pay" means basic pay and BAQ plus VHA, but not BAS or other pay entitlements. These are only guidelines, and a commander can require a member to pay more or less, based on all the salient factors. The member may seek waiver of spousal support obligation under MILPERSMAN 6210120.4. The spousal support obligation (**not the child support obligation**) may be waived by the Director, DFAS - Cleveland based on the spouse's desertion without cause, infidelity, or physical abuse.

1. ***Procedure for requesting waiver of spousal support.*** Submit to Director, DFAS-Cleveland, a statement of facts and substantiating evidence, with the commanding officer's endorsement. Substantiating evidence may consist of an affidavit of disinterested person based on personal knowledge; affidavit of the servicemember or relative based on personal knowledge and supported by corroborating evidence; a written admissions of the spouse; or affidavit of physical abuse allegations corroborated by medical or police reports, eye witnesses, counselors, chaplains, or social workers.

2. ***Obligation To support children.*** Desertion or other misconduct by spouse does not relieve the servicemember's obligation to support minor children, nor does divorce unless the judicial decree so states. If the decree is silent, child support must be paid. A reasonable amount should be paid. The MILPERSMAN guidelines and state child support guidelines should be consulted to determine an appropriate amount. Adoption relieves the natural parent's support obligation.

A commanding officer has discretion to witary Perspective it is apparent that the person requesting support for a child does not have physical custody of the child or children.

3. ***Paternity***. In disputed cases, the issue must be resolved by a civil court. Support must be paid in accordance with any applicable court order, agreement between the parties, or the above guidelines.

C. ***Marine Corps implementation of DOD policy***. Chapter 8 of LEGADMINMAN. Support amounts in the absence of an agreement or court order:

Relationships and Number of Dependents	**Support to be Provided**
Spouse Only	BAQ, VHA + 20% of basic pay
Spouse and One Minor Child	BAQ, VHA + 25% of basic pay
Spouse and Two or More Minor Children	BAQ, VHA + 30% of basic pay
One Minor Child	1/6 of basic pay
Two Minor Children	1/4 of basic pay
Three Minor Children	1/3 of basic pay

1. ***Grounds for waiver of spousal support obligation***. [LEGADMINMAN 8004.4] The spousal support (**not the child support**) obligation may be waived by the Commandant of the Marine Corps based on desertion without cause, or infidelity.

With regard to non-payment of child support, the commander has discretion to withhold administrative or disciplinary action. This action is appropriate when the whereabouts and welfare of the child cannot be determined and when the person seeking payment **does not** have physical custody of the child, **or** when the Marine has a lawful right to custody pursuant to court order and is capable of assuming custody, but doesn't have physical control.

2. ***Paternity***. In disputed cases, the issue must be resolved by a civil court. Support must be in accordance with any applicable court order, agreement between the parties, or the above guidelines.

D. ***Coast Guard implementation of DOD policy***. Commandant Instruction 1000.6A, Chapter 8 Section M. Members are expected to "provide continuous and adequate support for lawful dependents." If, after counseling, the member demonstrates a pattern of non-support and/or failure to obey civil court orders, the member is subject to administrative discharge for unfitness. Non-support that is "notorious" and discrediting to the Coast Guard can be the subject of court-martial and other disciplinary proceedings.

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

Relationships and Number of Dependents	Support to be Provided
Spouse Only	BAQ and VHA, plus 20% of basic pay
Spouse and One Minor Child	BAQ and VHA, plus 25% of basic pay
Spouse and Two or More Minor Children	BAQ and VHA, plus 30% of basic pay
One Minor Child	1/6 of basic pay
Two Minor Children	1/4 of basic pay
Three Minor Children	1/3 of basic pay

1. ***Defenses to non-support.*** (In accordance with Coast Guard guidelines): spousal non-support – infidelity or desertion and for child non-support – inability of the member to ascertain the whereabouts and welfare of the child. Where the person seeking payment does not have physical custody of the child.

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

2. ***Paternity – a civil matter.*** If there is no court ordered amount of support and no agreement with mother of the child then the guidelines apply.

E. ***Making the system work***

1. ***Who do you write to first?***

a. ***The member.*** Does this do any good? How "forceful" (i.e., threatening) can you be? How forceful do you need to be? Consider recommending that (s)he consult with an attorney to ascertain the applicable support obligation. Writing the member directly if (s)he is represented by an attorney is an ethical violation.

b. ***The member's commander.*** May be more likely to get action if the member or his attorney has first been contacted. Can you contact the commander if the member is represented by an attorney? YES! JAGINST 5803.1A, Rule 4.2, Communication with Person

Represented by Counsel – This Rule does not prohibit a judge advocate from representing one party in a matter from communicating concerning the matter with the commanding officer of the other party.

Options when the commander does not answer the mail. Send a follow-up letter to the commander. Send a letter to the next level of the command. Request assistance from higher headquarters – DFAS - Cleveland.

c. ***Requesting help from higher headquarters.***

Navy: DFAS-Dependency Claims Branch
1240 East 9th Street
Cleveland, Ohio 44199-2055

Marine Corps: Commandant of the Marine Corps
Code MHP-20
2 Navy Annex
Washington, D.C. 20380-0001

Coast Guard: Commandant (G-PWL-2)
U.S. Coast Guard
2100 2nd St. SW, Rm. 4406
Washington, D.C. 20593-0001

To speed processing of the request for assistance always include the member's name and SSN. If the request pertains to a child, name the child. Give specific facts (i.e., not just that he "has not provided any support for a long(?) time). State clearly the relief that is being sought. Allotments for current support. Payments of support arrearages.

What about notifying member's command that crime of BAQ fraud is suspected? This is a gray area - may not be an ethical problem but are you helping your client? Check with your supervisors.

PART B - CIVILIAN FAMILY SUPPORT ENFORCEMENT

0605 INTRODUCTION. Since the 1950's Congress has shown a persistent interest in child support enforcement. To that end, Title IV-D of the Social Security Act was enacted in January 1975. Later, Congress enacted the Child Support Enforcement Amendments of 1984 (P.L. 98-378). More recently, the Family Support Act of 1988 (P.L. 100-485) has addressed support enforcement issues.

0606 CIVILIAN FAMILY SUPPORT ENFORCEMENT MECHANISMS

A. ***Involuntary allotments.*** Established for payment of child support or child & spousal support in arrears.

1. ***References***

a. 42 U.S.C. § 665

b. 32 C.F.R. Part 54 (DOD implementing regulations)

c. 33 C.F.R. Part 54 (Coast Guard implementing regulations)

d. SECNAVINST 7431.1

e. LEGADMINMAN 8007

2. ***General.*** An involuntary allotment can be initiated against an active duty servicemember to pay for child support or a combination of spousal and child support (but not spousal support only). The servicemember must be under a court or administrative order to make the payments and the total amount in arrears must be greater than or equal to two months of payments. Attorney's fees, court costs, and administrative fees are not recoverable by the client. An involuntary allotment for family support is not the same as an involuntary allotment for a judgment creditor. A creditor with a judgement requesting an involuntary allotment of a member's pay to satisfy the judgement must follow different procedures than those required for an involuntary allotment for family support.

3. ***Amount.*** The allotment shall be established in the amount necessary to comply with the support order and to liquidate arrearages.

4. ***Procedure.*** A state child support enforcement agent (or court) sends a letter (or order) to the military finance center stating that the requisite arrearage (an amount greater than two months support) exists and requesting that a "mandatory allotment" be started. A foreign country agency or court may not use this process. The finance center notifies the

member's commander and the member concerning the request. Absent presentation of an adequate and timely defense by the servicemember, the allotment is started. The allotment will be for the amount of the monthly support obligation, payable in accordance with the request and continuing until the requester advises that it should stop. Arrearages can be collected, but there must be second court order requiring payment of the arrearage by involuntary allotment. A letter from a child support enforcement agent asking for arrearages is insufficient.

5. ***Limitations.*** The amount of the allotment, however, must not exceed the following percentages, which comply with the Federal Consumer Protection Act, 15 U.S.C. § 1673. If the member is supporting other family members, the maximum amount of the involuntary allotment is 50% of disposable earnings.

"Disposable earnings" is basic pay plus most bonuses and special pay, minus taxes and other deductions. "Disposable earnings" also includes BAS for officers and warrant officers, and BAH for members with dependents and all members in the grade of E-7 and above. *See* 32 C.F.R. § 54.6(b). Servicemember may assert by affidavit that he or she is supporting a spouse and/or child, other than a party to the support in order to limit allotment.

If the member is not supporting other family members (spouse and/or child), the maximum is 60% of disposable earnings. Regardless of the foregoing limitations, an additional 5% of disposable earnings shall be withheld when the notice states the total amount of support payments are 12 or more weeks in arrears. The maximum allotment is therefore boosted to 55% or 65% if "the total amount of the member's support payments is 12 or more weeks in arrears." 32 C.F.R. § 54.6(a)(5)(iii).

The designated official to whom notice of the allotment should be sent is:

Navy & Marine Corps

Director, Defense Finance and Accounting Service - Cleveland Center
1240 East Ninth Street
Cleveland, OH 44199-2087
Attention: Office of Counsel/Code DG
(216) 522-5301, DSN 580-5301

Coast Guard

Coast Guard Pay and Personnel Center
444 S.E. Quincy Street
Topeka, KS 66683-3591

6. ***Strategies for the member.*** First, the member can show that the information in the request is in error. 32 C.F.R. § 54.6(d)(5). Member must submit an affidavit

and evidence to support the claim of error. He or she must provide this information to the finance center within 30 days of the notice sent by the finance center. Examples of errors: (a) the arrearage does not equal or exceed 2 months worth of support, or (b) the support order itself has been amended, superseded, or set aside.

Are the defects in jurisdiction that affect the validity of the underlying support order a defense? It is unclear whether the finance center will act on such an allegation.

Negotiate a mutually acceptable resolution with the child support agency or the custodial parent.

DO NOT start a voluntary support allotment upon receiving notification of an involuntary allotment action. Otherwise, the result will simply be that two allotments will be deducted from military pay.

7. ***Helping the custodial parent.*** He or she must first have a child support, order issued by (or registered with?) a U.S. court. There are two approaches to getting a mandatory allotment:

a. Ask the applicable CSE agency to submit the request. "Applicable" agency is probably in the state where the order was issued. This approach usually works well if the order calls for payments to be made through the court or agency so they have a record of the arrearage. At one time, Fort Benning, Georgia, had negotiated with the state to have a civilian employee in the legal assistance office appointed as a deputy state child support enforcement agent. She could then initiate involuntary allotments for legal assistance clients. Problems develop if the agency has no payment records. However, some may be willing to act on a sworn affidavit of nonsupport supplied by the custodial parent.

b. The second approach is to submit a request directly to the court that issued the order, asking it to initiate a mandatory allotment. The court will need a sworn representation from the custodial parent alleging the appropriate arrearage.

B. ***Garnishments***

1. ***References***

a. 42 U.S.C. §§ 659-662

b. 5 C.F.R. Part 581

c. SECNAVINST 7200.16 (32 C.F.R. Part 734)

d. LEGADMINMAN 8006

2. ***General.*** Historically, there has been no "federal garnishment law." The garnishment statute is merely a waiver of federal sovereign immunity, allowing state garnishment orders to be served on federal officials. The wages of Federal employees, including those of active and reserve military personnel, are subject to garnishment or wage assignment orders issued by a state or foreign court of competent jurisdiction for child support and/or alimony. The garnishment can be for current support, or support arrears, or both, according to state law. Arrearages, attorney fees, interest, and court costs can be recovered by garnishment, but the court order must expressly provide for such recovery.

The ceiling on the amount subject to garnishment is the lower of state law or the limits stated in the Federal Consumer Credit Protection Act (CCPA) (15 U.S.C. § 1673). CCPA provides for garnishment of a maximum of 50% of disposable earnings if the member is supporting other family members and 60% if he or she is not. An additional 5% can be garnished if the support obligation is more than 12 weeks in arrears. Disposable pay includes basic pay and most bonus and special pay entitlements, but not BAQ or BAS.

3. ***Defenses for the member.*** NONE! The finance center will not entertain defenses raised by the member in garnishment actions from U.S. courts. Disputes must be litigated in the state that issued the garnishment order. If the member is supporting family members other than those to whom the garnishment order pertains, make sure the finance center knows this since it can affect how much money is deducted from the member's pay.

C. ***Wage assignment orders.*** These are "involuntary allotments" created by state law that can be used to enforce support obligations against civilian and military parents. The trigger for a wage assignment generally is an arrearage of not more than 30 days. Some states currently have automatic wage withholding that takes effect immediately upon issuance of the support order, whether or not there is an arrearage. The Family Support Act of 1988 requires that all states implement automatic wage withholding in phases (based on varying categories of obligees) by 1994. In cases involving contingent withholding provisions, the absent parent receives notice of intent to initiate a wage assignment. Notice of assignment is also sent to the employer. All employers must honor wage assignment orders. DOD agencies process them as if they were garnishment orders.

1. ***Assisting the absent parent.*** Upon receipt of notice to initiate a wage assignment, first, notify the agency of any error in alleged arrearages. Then, notify the agency of modifications of the underlying support order or other facts that negate the support obligation. Ensure the finance center knows that the servicemember is supporting other family members. If

a servicemember is paying support by allotment and a decree or support order is pending in a state with automatic wage assignments, stop the allotment several months before the decree will be issue.

2. ***Assisting custodial parents obtain support.*** Refer them to the nearest state or county child support enforcement office.

D. ***Uniformed Services Former Spouses' Protection Act (USFSPA)***

1. ***References***

a. 10 U.S.C. § 1408

b. 32 C.F.R. Part 63

c. Military Retired Pay Manual (DoD 1340.12M)

d. OPNAVINST 7431.1

e. LEGADMINMAN 8008

f. www.dfas.mil

The USFSPA's "direct payment" provisions authorize wage withholding against military retired pay for support enforcement. The support obligation must be contained in a final decree of divorce, dissolution, annulment, or legal separation. A simple support order or paternity decree is not sufficient. DFAS enforces USFSPA support orders prospectively. The custodial parent sends the appropriate finance center a request for direct payment (DD Form 2293). The controlling statutory provision is 10 U.S.C. § 1408(d). The maximum amount recoverable under a USFSPA direct payment for a division of property or support is 50% of disposable retired pay. If one or more USFSPA orders and one or more garnishment orders under 42 U.S.C. § 659-662 are in effect, then the amount is increased to 65% of disposable retired pay. There is no requirement that any arrearage be accrued.

2. ***Alternatives mechanisms.*** Garnishment of retired pay for support. State wage assignments (if state law defines "wages" broadly enough to encompass retired pay).

0607 TITLE IV-D OF THE SOCIAL SECURITY ACT — HELP FOR CUSTODIAL PARENT SERVICEMEMBERS SEEKING CHILD SUPPORT

A. ***General.*** Title IV-D of the Social Security Act of 1975, as amended, requires that states receiving federal funding for Aid to Families with Dependent Children (AFDC) create

programs to ensure that child support from noncustodial parents is paid. Available services include:

1. State Parent Locator Service (SPLS)

2. Paternity establishment (Acknowledgment and/or Finding of Paternity)

3. Collection/Enforcement of Support Orders

Service members can use the "IV-D" program in the state in which they are assigned. *See* 42 U.S.C. §§ 651-657 (1988). Under the IV-D program, for a minimal fee – not exceeding $25.00, a state's attorney will pursue the sailor's support claim, even if the non-supporting ex-spouse is located in a different state.

B. ***Required programs.*** The IV-D program requires that all states enact a wide variety of tools to ensure that adequate levels of child support are ordered and paid. States are now required to have legislation authorizing:

1. Income tax refund intercept programs to collect arrearages in IV-D cases;

2. Recording of personal and real property liens to enforce child support obligations;

3. The reporting of child support arrearages exceeding $1000 to credit bureaus upon request of any consumer reporting agency;

4. Absent special circumstances, immediate wage withholding in all IV-D cases in which a child support order is issued or modified after November 1, 1990, and in all cases in which a new child support order is issued on or after January 1, 1994;

5. Promulgation, and revision, at least every four years, of child support guidelines with the force of rebuttable presumptions;

6. Periodic review and adjustment of IV-D child support orders pursuant to the state's support guidelines; and

7. Genetic testing provided upon the request of either party to a contested paternity action.

C. ***Interstate child support enforcement under Title IV-D***

1. ***Child Support Enforcement Amendments of 1984*** (P.L. 98-378). States must have statutes for interstate wage withholding. States must have statutes for establishing and

enforcing child support orders (interstate). States must provide for interception of state income tax refunds, liens against real or personal property, security or bonds to assure compliance with support obligations. Other provisions: (1) states must allow bringing of paternity actions any time prior to a child's 18th birthday; (2) all support orders issued or modified after October 1, 1985 must include a provision for wage withholding; and (3) the amendments provided access to state CSE agencies for non-welfare families.

2. ***Omnibus Budget Reconciliation Act of 1986*** (P.L. 99-509). "Bradley Amendment." 42 U.S.C. 666(a)(9). Required states to provide that support installments are vested as they fall due and are therefore judgments entitled to full faith and credit. It is not subject to retroactive modification by such state or any other state. Processing of interstate cases will be less costly because new child support orders will not have to be created. Collections should increase because accumulate arrearages will stay intact and not be forgiven or reduced.

3. ***Family Support Act of 1988*** (P.L. 100-485). For all cases (IV-D or non IV-D), State must pass statutes so that there will be immediate wage withholding applies to all orders initially issued on or after January 1, 1994.

4. ***Recent amendment.*** Some states allow courts to include a provision in divorce decrees and custody orders that says unless the obligee waives the support, it will be automatically garnished from the obligor's wages based upon the support order itself.

0608 PROCEDURAL ISSUES IN FAMILY SUPPORT ENFORCEMENT

A. ***Jurisdiction — Who has it?*** First, consider the physical location. Where does the absent parent reside/stationed? Also, consider long-arm jurisdiction. Past marital or cohabitation domicile. Sexual relations leading to conception. Maintenance of matrimonial domicile within the state. Possible "in rem" jurisdiction over defendant who has ownership, use or possession of real property within the state but an action will most likely be limited to the piece of property.

B. ***Long-distance service of process***

1. ***Service by mail.*** Service by military mail (i.e., APO and FP0) may be sufficient under state law. Service by regular mail to overseas locations may be invalid (depending on state law), and it is illegal in some countries.

2. ***Personal service of process issued by U.S. courts in overseas locations.*** Generally impermissible by local law except in cases where a member of the force or someone accompanying the force voluntarily elects to accept process offered by a military official. See JAGMAN, Chap. VI.

3. ***The Hague Convention on the service of judicial and extra judicial documents abroad.*** Cite: TIAS 6638, 20 UST 361, 15 Nov 65. Text reprinted in: (a) Martindale-Hubbell, Volume VIII and (b) Appendix to Fed. Rule of Civil Procedure 4, West's U.S C.A.

a. ***Procedure.*** Document is sent to central authority for country where the defendant resides, and it is served in accordance with local law. Plaintiff's attorney sends the documents in most cases. For service on a person in Great Britain or Israel, there must be a court order requiring the service, and the clerk of the court should mail the documents. Some documents may have to be translated into local law; U.S.C.A. materials explain this. The coordinating agency in the U.S. is the Dept. of Justice. DOJ Memo 386 provides further guidance, although it is out of date. It can be reviewed, and forms usually can be obtained, at any U.S. Marshal's office.

For assistance regarding non-signatory nations and for problem cases, contact the Office of Citizens Consular Services, (202) 647-3675, or the DOJ Foreign Litigation Office, (202) 724-7455.

4. ***Service of process from U.S. courts by consular personnel.*** They will not provide this service unless expressly authorized to do so by the State Department.

5. ***Commercial services.*** Check state bar journals.

C. ***Avoiding the need for long distance service.*** Ask the CSE agency for the state or country where the absent parent lives, or perhaps where the custodial parent is domiciled, to handle the case.

D. ***Obtaining evidence in international cases.*** Consider the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. References — TIAS 7444, 23 UST 2555, 18 Mar 1970. Text and sample form available at 28 U.S.C.A. § 1781. Any court of a signatory nation can send a "letter rogatory" to a court of another signatory nation. The "letter" asks the receiving court to order a person within its jurisdiction to produce evidence. This treaty has been used by German courts in paternity actions to obtain blood samples from putative fathers located in the U.S.

0609 UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA)

A. ***Significance of UIFSA:*** One of the many significant legislative actions brought about by the Welfare Reform Act of 1996 was the requirement that all states adopt UIFSA by 1 January 1998 or lose federal funding support for state welfare programs. The congressional objective was to ensure true uniformity between states as regards child support orders and

enforcement action. UIFSA replaced the Uniform Reciprocal Enforcement of Support Act (URESA) which never achieved its goal of uniformity.

B. ***Lingering URESA Enforceability.*** Many states while repealing URESA and enacting UIFSA still have cases pending under URESA. What statute applies to the particular case depends on state implementation of UIFSA. However, most states determine that the statute in effect at the time of filing action controls, not the statute in effect at the time of the determination of the case. *See DelToro v. McMullen,* 471 S.E.2d 742 (S.C. 1996) *rehearing denied, June 1996.*

C. ***Operation of UIFSA.*** Requires full faith and credit of other jurisdiction's actions.

1. ***Key Definitions.***

a. **Continuing Exclusive Jurisdiction (CEJ):** A state that has issued a support order and remains the residence of the obligor, individual obligee or child, unless the parties agree in writing for another state to exercise jurisdiction.

b. **State:** Any state of the United States, the District of Columbia, Puerto Rico or U.S. territory or possession. It includes Indian tribes and foreign jurisdictions that have established similar procedures for the issuance and enforcement of support orders.

c. **Tribunal:** A court, administrative agency, or quasi-judicial entity authorized to establish enforce or modify support or determine paternity.

2. ***UIFSA Long-Arm Jurisdiction.*** The CEJ has personal jurisdiction over residents and non-residents applicable in proceedings to establish, enforce, or modify a support order or determine parentage. This long-arm jurisdiction is premised on any one of the following factors:

(a) The individual is personally served within the state;
(b) consent;
(c) individual resided within the state with the child;
(d) individual resided in the state and provided prenatal expenses or support for the child;
(e) the child resides in the state as a result of the acts or directives of the individual;
(f) individual engaged in sexual intercourse in the state and the child may have been conceived by that act;
(g) individual asserted parentage in the putative father registry maintained by the state; OR
(h) there is any other basis consistent with the constitution of the state and the U.S to assert personal jurisdiction.

The result of this long-arm jurisdiction is a one-state proceeding even though the parties live in separate states. If there are simultaneous filings, then the priority is for the home state of the child. If there is no home state, the first state filed in has jurisdiction.

3. ***Enforcement of Support.*** The first thing to determine is if there is one or more controlling orders for support. If there is one order it controls. If there is more than one controlling order, the following rules apply.

(a) If 2 or more supporting orders but only one CEJ, then the CEJ order controls.

(b) If 2 or more orders and more than 1 CEJ then the order issued by the child's home state controls.

(c) If 2 or more controlling orders and more than 1 CEJ but no home state then the most recent order controls.

(d) If 2 or more orders, and no CEJ, then the responding tribunal must issue a new support order if it has personal jurisdiction over the obligor.

UIFSA is limited to child support issues, and has no bearing in collateral matters such as visitation. UIFSA also has no bearing on the determination of support arrearages which are judgements entitled to full faith and credit pursuant to 42 USC 666a(9).

4. ***Order Modification.*** As long as the tribunal has jurisdiction to enforce a controlling order as discussed above, that tribunal also has jurisdiction to modify an existing order in accordance with its own support guidelines.

5. ***Enforcement Options.*** Registration is the primary method of enforcement under UIFSA. Unless modified by a later jurisdiction, the law of the issuing states governs the nature, extent, amount and duration of current payments and arrearages under the order. Any enforcement order by a tribunal must provide effective notice to the obligor by certified or registered mail or personal service. Registration can be accomplished either by a guardian, the child, or by the issuing state. UIFSA also provides for automatic income withholding. Sometimes referred to as "direct enforcement," this method allows for direct contact with the employer of the obligor without filing a petition or pleading or even registering the order. The amount of pay withheld is controlled by the law of the issuing state.

6. ***Using UIFSA To Establish Paternity.*** Though generally associated with a request for the establishment of a support order, UIFSA allows a tribunal to serve as an initiating or responding tribunal in a pure parentage action in the interstate context.

0610 ANALYSIS OF DEFENSES TO SUPPORT OBLIGATIONS

A. ***Inability to pay.*** Federal law requires states to treat each monthly support payment as a judgment when it becomes due. 42 U.S.C. § 466(a). Payments must be

enforceable as judgments. Payment/judgments must be entitled to full faith and credit. Payment/judgments must not be retroactively modifiable.

Consequently, an obligor should immediately get a support order amended if (s)he suffers a change in financial circumstances; arrearages cannot be excused. A current problem is how to treat reservists ordered to active duty.

B. ***Payment in accordance with a subsequent URESA order.*** This is the typical situation. Custodial parent (CP) uses the URESA process to enforce a support order (issued by state A), against the obligor (located in state B). State B orders a reduced amount of support, and the obligor thereafter pays the new support amount. The obligor subsequently becomes amenable to process from state A, and the CP seeks to enforce the arrearage that has accrued under the original order.

1. ***General rule.*** The new URESA order does not supersede or modify the existing court order unless the URESA court specifically provides otherwise.

C. ***Interference with visitation.*** The general rule is that interference with visitation rights is not a defense to nonpayment of support. Additionally, denial of visitation is not a defense in a URESA action. *See* URESA § 23; *In re Marriage of Traux*, 522 N.E.2d 402 (Ind. App. 1988). Occasionally, however, support orders may include a support termination or escrow provision for denial of visitation. The original court may later enter a modification providing for such a remedy.

Concealment of a child to prevent visitation may have a different result when arrearages are sought. *E.g., State of Wash. ex rel. Burton v Leyser*, 196 Cal. App. 3d 451, 241 Cal. Rptr. 812 (1987) (based on estoppel and waiver theories, court denied custodial parent's request for arrearages for a period of time during which she had concealed the child from the father).

D. ***Emancipation of children.*** What is the effect of emancipation on support orders? In some jurisdictions, the support order can remain in effect until it is modified, regardless of the child's age. The provision may be explicit as in "Pay child support of $150 per month until further order of this court." It may be ambiguous such as "Pay child support of $150 per month. In other jurisdictions, the support obligation automatically terminates at the age of majority, regardless of the wording of the court order (unless the order is based on an agreement between the parties). Emancipation due to marriage and childbirth does not necessarily terminate a support obligation. An annulment of a marriage while the child is under the age of majority may revive the parents' support obligation. *Eyerman v. Thias*, 760 S.W.2d 187 (Mo. Ct. App. 1988). A minor child's giving birth may not constitute an emancipation event for support purposes. *Doerrfeld v. Konz*, 524 So.2d 1115 (Fla. Dist. Ct. App. 1988). Emancipation may affect the custodial parent's ability to enforce a support obligation after the child has reached the age of majority.

E. ***Payment other than as ordered by the court.*** Generally, credit is not allowed for expenditures made while the child is the obligor's custody or for other voluntary payments that do not conform to the decree. Voluntary payments in excess of court ordered obligation do not entitle obligor to credit for overpayments. Also, a URESA order generally does not modify a pre-existing order.

F. ***Mutual agreement to terminate payments.*** What is the effect of release agreements or an "accord and satisfaction?" Generally, an agreement between the parents of a child made outside the courtroom that purports to absolve the absent parent of the support obligation is invalid. **The parents cannot nullify a court's order so as to deprive a minor child of support granted to in a decree.** Such releases from a court-ordered support obligation are void as against public policy. They may also be void for lack of consideration. Honoring such an agreement creates a problem in that it ignores the strictures concerning retroactive modifications, and provides the non-custodial parent a financial windfall.

1. ***Temporary reconciliation.*** Temporary reconciliation while divorce is pending or subsequent to divorce does not nullify or abate the child support order.

2. ***Remarriage of parents.*** Remarriage annuls the prior divorce and restores parties to their rights. The custodial parent is barred from collecting child support arrearages. Support arrears due a IV-D agency could still be collected if the custodial parent had assigned the support judgment to a IV-D agency.

G. ***Miscellaneous***

1. ***Consent to adoption.*** Merely giving consent to adoption by a stepparent may not terminate the support obligation. Arrearages due and owing and reduced to money judgment are probably not eradicated by the adoption decree. The typical situation is as follows. A custodial parent, in exchange for a consent to adoption, agrees to waive the right to collect accrued support arrearages. In most states, the custodial parent has the legal authority to bargain away the arrearages as consideration for the consent, which is viewed as a simple contractual agreement. The conflict arises when the consent is given but the adoption never is completed (since parents cannot terminate the duty to support) and later the custodial parent seeks arrearages.

2. ***Laches and waiver by acquiescence.*** Laches and waiver by acquiescence are similar defenses. In child support enforcement cases, laches is an equitable defense to a delay in seeking recovery of arrearages of court-awarded child support. It is a defense only when it is shown that the custodial parent's delay in seeking recovery prejudiced the non-custodial parent.

Another view, laches is not a defense to child support obligations since such obligations are equitable in nature. Occasionally courts have denied the custodial parent's claim for arrearages based in equitable considerations when the parent had done nothing to collect support for a long period of time. Such cases may have little precedential value with the new limits on retroactive modifications.

Note that a custodial parent's waiver of right to child support in a decree-incorporated separation agreement does not necessarily prevent a court from later awarding child support based on a change of circumstances.

3. ***Obligor-induced delays in litigation.*** There are several methods for an obligor to achieve delays. First, they avoid actions that allow a court to obtain jurisdiction over the obligor. Next, they avoid service of process. Non-response to correspondence from child support agencies. Finally, they request a stay of proceedings pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.

a. ***The attorney's role.*** Counseling clients about their rights and obligations. Advocating a client's best legal argument in response to a controversy.

b. ***Problems with delays.*** Children who need (and are entitled to) support do not get it. In some jurisdictions, any subsequent order may include an order for support dating back to: (a) the child's birth, (b) the date the action was filed, (c) the date the obligor was served, or (d) the date the state began paying public assistance for the child. This means that the delay may simply build up an arrearage rather than serve to avoid payment.

0611 INVOLUNTARY ALLOTMENT VS. GARNISHMENT

INVOLUNTARY ALLOTMENT	GARNISHMENT
Applies to pay and some allowances for E-7 and above.	Applies to pay only, not allowances.
Support obligation set by court order or by an administrative support order of a designated agency.	The client must have a support and garnishment order from a court.
Arrearages must exist and can be sought; automatic 5% increase in allotment if payments are more than 12 weeks in arrears.	Arrearages need not exist to permit garnishment, but satisfaction of arrearages may be sought.
Servicemember can raise defenses through affidavit to the respective finance center without going to court.	Servicemember can only attack the order by going to court; if DFAS concludes order is proper, DFAS must begin garnishment.
Attorney fees and court costs are not recoverable by the client.	Attorney fees, interest, and court costs are recoverable if so provided in the court order.
Cannot be used to obtain spousal support **alone** (may only be used in conjunction with non-payment of child support.	Can be used to obtain spousal support and/or child support.
Requires a 30-day waiting period after the servicemember receives notice before the allotment can be started.	Garnishment is required to be initiated immediately upon receipt of proper court order.

CHAPTER 7

FAMILY LAW

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CHAPTER 7

FAMILY LAW

PART A - MARRIAGE AND DIVORCE

0701 INTRODUCTION. Marriage is an institution that is both public and private in nature. As a public institution, it is regulated to advance the public's interests. For instance, the laws regarding marriage do not allow members of the same sex to marry and do not allow close relatives to marry.

The private side of marriage is largely a creature of contract law. Most states today, in deference to the private dimension of marriage, allow parties to terminate the marriage on nothing more than "irreconcilable differences."

A valuable resource for the military practitioner is *The Family Law Guide (JA 263).* This guide, prepared by The Judge Advocate General's School of the Army, provides a state-by-state analysis of the requirements for marriage and divorce, and support requirements and enforcement.

0702 PRE-MARRIAGE CONSIDERATIONS. To the extent that marriage is contractual, the parties have some liberty in shaping their rights and obligations by agreement before entering the relationship. Antenuptial agreements are the primary means to settle the economic ramifications of marriage. Couples normally focus on and address issues such as identifying and protecting pre-marital property (separate property), assigning responsibilities for paying joint and individual debts incurred before or during the marriage, and allocating authority to manage the household budget, family businesses and investments. A key issue to address is the duty to provide financial support for each other and for any children resulting from the marriage. The parties should be cautioned that antenuptial agreements have not evolved to a point of stability. The private right to contract may be circumscribed by public policy — especially on issues such as parental support of children.

0703 RECOGNITION OF MARRIAGES. A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage. (Emphasis added.) Restatement (Second) of Conflict of Laws § 283(2).

The DoD generally follows the civilian practice of recognizing a marriage that is valid under the laws of the jurisdiction where it is contracted. See DoDFMR Chapter 7a, Paragraph 260403. The issue of a marriage's validity typically arises in the context of applying for increased Basic Allowance for Housing (BAH) or other military-related benefits (e.g. health care) that accrue to the "lawful spouse" of a servicemember. If a marriage is irregular in form, its validity will not be presumed, and there will be greater scrutiny. Examples of heightened scrutiny include a request for BAH where the claim is based on a "common law marriage," a

marriage entered into after a divorce granted by a foreign country, or when a servicemember, as happens quite often, marries and later discovers the other person was not divorced from a prior spouse. When this occurs, finance officials may recoup BAH from the member where the marriage is invalid. If, on the other hand, the member was found to have entered marriage in "good faith," finance officials may choose not to recoup the BAH.

Determining the validity of a marriage will also arise in the context of military criminal prosecutions and administrative actions. This often arises in courts-martial where a servicemember is charged with bigamy. The military still defers to state law on whether a valid marriage exists. The UCMJ, however, defines the parameters of the offense of adultery.

Overseas marriages are frequently subject to increased attention and military regulation. Not surprisingly, servicemembers marry foreign nationals more frequently than do civilians. Marriages in overseas commands are governed by joint regulations of the Department of the Army, Navy and Air Force. The detailed and time-consuming requirements imposed by these military regulations encourage members to consider fully their decisions to marry and to avoid unwise choices. *See* MILPERSMAN 5352-030 - marriage of naval personnel to foreign nationals. Also, one contemplating marriage should check overseas areas local 1752 series of instructions. Those who desire to continue the marriage process will apply through their overseas area commander.

Service regulations outline procedures that servicemembers must follow in contracting a foreign marriage. The servicemember must seek permission to marry overseas from overseas commander in the area where marriage is to take place. Examples: (a) CINC-USNAVEUR — Europe, United Kingdom, Africa, Middle East; and (b) COMNAVFOR-MARIANAS — Pacific, Philippines, Hong Kong, China, Singapore, Australia. Command approval can be delayed while physical examinations and background investigations are completed to determine the likelihood that the intended spouse will be eligible to receive a visa. The screening process is substantially similar to the processing of requests for entry of alien spouses into the United States. There is no "right" for foreign spouse to enter United States. Likewise, there are no visa guarantees. Each member will be counseled regarding legal responsibilities incurred as a result of the marriage. If a servicemember proceeds to marry without requesting permission or after such a request has been denied, the marriage is nonetheless valid. However, the failure to follow marriage overseas instructions or regulations could result in punitive action against servicemember for an orders violation (Article 92, UCMJ).

0704 CATEGORIES OF MARRIAGE. Marriages are broadly classified as either formal or informal. Formal marriages can be ceremonial or "by proxy." Informal marriages arise by common law, by estopple, on a putative basis, or by quasi-contractual operation. Each of these is examined in detail below.

A. ***Formal marriages.*** The ceremonial form of the formal marriage is the most common. It is contracted during formal ceremonies conducted by religious or civil officials designated in the local jurisdiction to join people in wedlock. A marriage license is often required. Legal capacity and voluntary assent are also necessary to validate the marriage.

A formal marriage can also be created "by proxy." A marriage by proxy is a ceremonial marriage contracted through an agent (or agents) acting on behalf of one or both parties. Some states do not recognize proxy marriages. Almost all states recognize proxy marriages from other jurisdictions that permit them. The marriage by proxy may arise when a servicemember stationed overseas is unable to return and wants to wed a person in the United States. This process should be avoided if possible. First, proxy marriages create "doubtful relationships" for finance purposes, and the member may experience delay in receiving an increase in BAH. Second, the administrative burden of proving the validity of a proxy marriage can be cumbersome and the possibility of defects in the process is increased.

B. ***Informal marriages.*** A common law marriage occurs when a man and a woman, each with legal capacity to marry, engage in conduct which the law regards as sufficient to infer the existence of a marriage in fact. Those few states that recognize common law marriages usually impose one or more of the following requirements: (a) a present intent on the part of each party to enter into a marriage; (b) that the parties openly cohabit as a married couple; and (c) that the parties hold themselves out to the world as husband and wife. If a common law marriage is recognized as valid, it achieves the same status as ceremonial marriage. Additionally, it may only be terminated through formal, legal dissolution.

The putative marriage and marriage by estoppel are imposed to prevent injustice to others. Where a relationship between a man and a woman fails to satisfy statutory or common law requirements, a court may, in equity, postulate a marriage (putative marriage) to alleviate an intolerable injustice upon a party who relied in good faith upon the existence of the marriage. In a marriage by estoppel, the parties are treated as if they were married — although in reality they were not — in order to protect one "spouse" from injury caused by reliance upon a representation by the other "spouse" concerning the other's capacity to marry.

The final form of informal marriage is the quasi-contractual marriages. Some jurisdictions have upheld the validity of a contractual agreement between a man and a woman who live together in one household (with or without the benefit of sexual relations) and share their earnings, assets, and responsibilities in a manner analogous to marriage. The validity of such arrangements is premised entirely upon contract law. However, provisions involving the performance of sexual services are void as against public policy — partial invalidity may not negate the remainder of the "contract."

0705 TERMINATION OF MARRIAGE. A marriage may end with either a decree of annulment or of divorce. When counseling clients, one must address the threshold choice between annulment and divorce.

0706 ANNULMENT. A suit for divorce is not quickly settled. Where there are no children and the marriage has been one of short duration, an annulment may be a better course of action.

A. ***Jurisdiction.*** The most commonly accepted statement of jurisdiction required for an annulment is set forth in the Restatement (Second) of Conflict of Laws § 76 (1971):

> A state has power to exercise judicial jurisdiction to nullify a marriage from its beginning
> (a) under the circumstances which would give the state jurisdiction to dissolve the marriage by divorce, or
> (b) if the respondent spouse is personally subject to the judicial jurisdiction of the state, and it is either the state where the marriage was contracted or is the state whose local law governs the validity of the marriage . . .

B. ***Voidable grounds for annulment.*** Certain conditions make a marriage voidable. These are incapability (i.e. non-age), prior valid marriage (innocent bigamy), unsound mind, fraud, force, and physical incapacity.

C. ***Void marriages.*** Void marriages, marriages that are never valid, result from bigamy and incest.

D. ***The void/voidable distinction.*** The grounds relating to annulment apply to voidable marriages — marriages with such defects are still treated as valid until annulled. If a person enters into a marriage with knowledge of the facts that would render the marriage voidable, as opposed to void, the individual is generally held by the courts recognizing the void/voidable distinction to be estopped from later securing an annulment for misrepresentation based upon those facts. If a servicemember's marriage is annulled, the finance center may seek to recoup any increased BAH the member received because of the alleged marriage. Advice to soon-to-be-former spouses — if marriage is annulled there may be no basis to claim military benefits for which the spouse would have been eligible <u>but for</u> the annulment.

0707 DIVORCE

A. ***Jurisdiction over the marital status***

1. ***Domicile.*** Jurisdiction over the marital status generally rests with the state where either party is domiciled. When it is established that one of the spouses is a domiciliary of the state in which the divorce action is brought, the court has met the constitutional prerequisite to terminate the marriage. A military member will be deemed to have met the jurisdictional requirements for divorce if he/she was stationed in the state pursuant to military orders for a specified time (usually six months to a year). Some of these statutes purport to substitute such residence for domicile. Other statutes provide that such

residence creates a rebuttable presumption of domicile. Although domicile may not be an absolute prerequisite to conferring jurisdiction to grant a divorce, a prudent course would be to sue for divorce in the state where one of the parties is domiciled, or in a state that has a "servicemen's divorce statute" and the member has met the local residency requirements under such statute.

2. ***Residence.*** Nearly all states, the District of Columbia, Puerto Rico and the Virgin Islands, have a minimum period of time of residence in the state preceding the filing of a divorce action, and a few also have county residence requirements. Residence requirements are in addition to domicile requirements. Military spouses are often shopping around for the "quickie" divorces. Minimum period of time of residence in a particular state can be found in the Martindale-Hubbell Digest or the Family Law Guide published by the Army Judge Advocate General School.

3. ***Divorces in foreign countries.*** Divorce decrees obtained outside the United States and its possessions do not invoke the protection of the full faith and credit clause of the Constitution. State courts may recognize a foreign divorce based on the concept of "comity." A legal assistance attorney should counsel against foreign divorces since they are subject to many different challenges including improper jurisdiction, contrary to public policy of the reviewing state, fraud, and denial of due process to one of the parties.

B. ***Personal jurisdiction over the parties.*** In addition to terminating the marriage, a divorce decree usually provides for transfer of property, spousal support, child support, and custody of children. These provisions in a divorce decree may not be fully enforceable outside the state in which the decree was rendered unless the court issuing the decree had personal jurisdiction over the defendant. Personal jurisdiction is satisfied by personal service within the jurisdiction, by substituted service in accordance with local rules if the defendant is a domiciliary, or by the defendant's appearance in court (in person, by an attorney, or by other means, if such appearance subjects the defendant to jurisdiction of the court under local practice).

Jurisdiction to provide for the needs of the children generally depends upon whether the state has sufficient basis to assert an interest in a child's welfare, and whether the court would be able to enforce its orders. All states have adopted major portions of the Uniform Child Custody Jurisdiction Act (UCCJA). This act is intended to avoid jurisdictional conflict between states in matters of child custody. The custody decrees will be rendered in states best situated to evaluate and protect the best interests of the child. The child's "home state" is that state having the closest connection to the child. If there is no qualifying "home state," the state where significant evidence essential to an informed custody order exists has jurisdiction. Divorces may be granted reserving other complex issues like custody and property division to be determined later. This is referred to as a bifurcated proceeding. The Child Support Enforcement Amendments of 1984 require states to determine support obligations through an expedited process. Courts retain continuing jurisdiction over matters such as child custody, visitation, child support and spousal support.

A military member may request a stay of divorce proceedings under the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. § 521) when the member's military service "materially affects" his/her ability to appear and defend in the action. One should request only a stay of reasonable duration since the SSCRA is not a bar to divorce proceedings. The best method for requesting stay is to have a member of the individual's chain of command notify the court that his/her duties preclude his/her attendance.

0708 GROUNDS FOR DIVORCE. Most states have some form of "no fault divorce" based upon neutral grounds. These neutral grounds include incompatibility, irreconcilable differences, or physical separation for an extended period of time (usually a year). The benefit of the "no fault divorce" is the convenience of not needing to litigate accusations between spouses that arise when a "fault" basis for divorce is used.

Many states still permit a traditional divorce for grounds based upon the fault of one of the parties. Mental cruelty, abandonment and adultery are some common faults alleged. Spouses may seek a divorce on traditional grounds in order to get a quicker divorce or where such grounds may affect judgment on other issues such as spousal support, child custody or visitation.

0709 CONTENTS OF DIVORCE DECREES

A. ***Spousal support***. The court may provide spousal support (also called alimony or spousal maintenance) to a spouse before, during, and after the divorce proceeding. Spousal support obligations normally continue until modified by the court, remarriage of the spouse receiving the support, or death of either spouse. The parties may agree that the support obligation will survive these events.

B. ***Division of property***. Individual or personal property generally remains with the individual spouse. Property acquired during the marriage may be divided by the court or by a "property settlement" agreement. A number of states use an equitable division approach to divide marital assets. The division of property also entails allocating primary responsibility for payment of debts. Military retirement pay and related benefits (commissary, exchange, and medical care) are always a critical division of property to be addressed. The legal assistance attorney should refer to the Uniform Services Former Spouses Protection Act.

C. ***Child support***. Child support obligations continue under most state laws for each child until the child reaches majority, marries, dies, is otherwise emancipated, or until further order of the court. Remarriage of the custodial spouse does not affect the other spouse's child support obligation. A change of circumstances, especially financial, may justify a modification by the court. For the most part, child support guidelines — due to The Family Support Act of 1988 (P.L. 100-458) — are used by judges and other state officials to determine child support awards.

D. ***Child custody***. The types of child custody include: (a) joint legal custody; (b) joint physical custody (shared custody); (c) split custody; (d) sole custody; and (e) parenting plans.

E. ***Child visitation***. The noncustodial parent's right to visitation may be stated either in broad language — right of reasonable visitation — or in great detail. It is generally preferable to state in the divorce decree that the noncustodial parent shall have "such reasonable visitation as the parties may agree, but if they fail to agree, then the following: [set forth a specified schedule]." Additionally, third party visitation is today becoming an issue frequently raised. Grandparents may be joined as litigants and be granted visitation rights.

0710 POST-DIVORCE CONSIDERATIONS

A. ***Records***. When a divorce is granted, the spouses should be advised to make proper changes in their personal and business records. Required changes typically include joint accounts, credit cards, checking and savings accounts, life insurance policy beneficiaries, wills and trusts, and income tax withholding elections.

B. ***Remarriage considerations***. Before remarrying, the future couple should secure a copy of any divorce decrees. They should be sure there is a final divorce and avoid the mistake that the service member or spouse believed he/she was divorced but in fact was not. Some states now impose a statutory waiting period before a party can remarry.

PART B - CHILD CUSTODY FROM A MILITARY PERSPECTIVE

0711 INTRODUCTION

A. ***Background to understanding custody — a needs assessment***. Two major needs drive a custody decision, those of the child and those of the parents. Children must be reassured that both parents love them. The children must also be reassured that the noncustodial parent will be okay after the divorce. The children will recover best from a divorce with a quick return to stability and with consistent parenting.

Parents will use custody decisions to express anger, hurt and frustration — emotions otherwise legally irrelevant in no-fault divorces. Parents will also use custody to minimize support burdens on finances. Parents frequently see custody as the means to maintain their relationship with the children. They must also be reassured that "losing" custody does not mean losing the child. Everyone is best off when the custody arrangement fits each parent's individual lifestyle. Lastly, parents must be reassured that the former spouse's/other parent's new partner won't become a replacement parent.

B. ***Settlement vs. litigation: Which to choose***? A settlement can be reached when parents can agree without unacceptable concessions. However, when parents choose to fight, or when there are unacceptable options, a trial will likely result.

As far as cost goes, settlement can be free with legal assistance services. It is still relatively inexpensive with private counsel if parties have agreed on most terms and the attorney merely writes down their promises and then "tightens them up." However, settlement may be very costly in terms of time (for legal assistance attorney) and also money (private counsel) if the parties are way off in their positions. How much backing off, compromise and persuasion will be needed? Are clients willing to be flexible?

On the other hand, trials are **just plain expensive**! A "simple" custody trial might last just two days. Assuming preparation equivalent to three days of legal work before the hearing and no expensive pretrial depositions, this comes to 5 days x 8 hrs. x $150/hr. = $6,000!! [Rates vary across the country.] Results do not compare favorably. After a settlement, the parties can generally look forward to greater agreement and cooperation. The end product of a trial is greater animosity.

C. ***A role for mediation***? Courts are increasingly turning to mediation to help parents arrive at a mutually agreeable custody determination. A mediator sets up several meetings with parents, finds out what they want, attempts to fine tune and reconcile differences, uses neutral language ["son lives with father every other weekend"] rather than "loaded words" with win-lose implications [i.e., "custody" and "visitation"]. Mediation is relatively inexpensive, and more likely to achieve a result the parties will abide by. In addition, it is cheaper, less traumatic, and includes an increased likelihood of compliance. By and large, women are much more satisfied with litigation results than men. Women seem to indicate no particular preference for the results of mediation compared to litigation. Men generally perceive fairer treatment in mediation than in litigation. However, there are problems. Sometimes one party tends to dominate the other. This is especially true in cases involving child/spousal abuse or substance abuse.

0712 SETTLEMENT OF CUSTODY AND VISITATION

A. *Custody options in "separation agreements" and "consent orders."*

1. ***Sole custody***. The "custodial" parent has full-time custody of the children. The "noncustodial" parent receives visitation rights. Visitation should be "reasonable and seasonal." Courts leave it up to the parents to work out visitation. Specific visitation provisions are spelled out explicitly in the agreement or court order.

2. ***Split custody***. In multi-child situations, one parent has the sole custody of one child and one parent takes custody of the other child. In addition to the parent's visitation, the parents need to coordinate visitation periods so siblings see each other.

3. ***Joint Custody, Or "Shared Custody."*** There are two basic types of arrangements. Joint **legal** custody wherein one parent has sole physical custody, but both parents have an equal voice in major life decisions. And, joint **physical** custody wherein the child or children live with one parent for a specified period of time and then live with the other parent a specified period. Alternating weeks or months are often given as examples. A sample joint custody order:

RESPONSIBILITIES OF JOINT LEGAL CUSTODY

7. Each of the parents shall make every effort to maintain free access and unhampered contact between the child and the other parent. Each of the parents is prohibited from making derogatory or demeaning statements concerning the other parent within the hearing of the child. Neither parent shall do anything that will estrange the child from the ether parent or impair the natural development of the child's love and respect for each of the parents. Both parents need to understand that parenting requires the acceptance of mutual rights and responsibilities insofar as the child is concerned.

8. The parties shall consult and cooperate with each other in substantial questions relating to religious upbringing, educational programs, significant changes in social environment, and health care of the child. Before the parties separated, they agreed that the child should be raised as a Roman Catholic and attend worship services.

9. The parents shall jointly select all schools, health care providers, day care providers, and counselors jointly. In the event that the parents cannot agree to the selection of a school, the child shall attend the local public school pending mediation and/or further order of the court.

10. Each parent is authorized to obtain emergency health care of the child without the consent of the other parent.

11. Each parent is responsible for keeping himself/herself advised of school, athletic, and social events in which the child participates. Both parents may participate in school activities for the child such as open houses, attendance at athletic events, etc.

12. Each parent shall promptly provide the other parent with information concerning the well being of the child where the other parent is not likely to know of the information without prior or special knowledge or through discovery by routine inquiry. This information includes but is not limited to: results of standardized or diagnostic tests; notices

of activities involving the child; samples of school work; all communication from health care providers, regular day care providers, and counselors.

13. Each parent shall provide the other parent with the address and telephone number at which the minor child resides, and shall notify the other parent within five days any changes of address or telephone number. Each parent shall notify the other parent a soon as reasonably possible of any serious illness requiring medical attention, or any serious emergency.

14. Each parent shall provide the other parent with a travel itinerary and, whenever reasonably possible, telephone numbers which the child can be reached, whenever the child will be away from the parent's home for a period of seven (7) days or more.

EXTRACT FROM SEPARATION AGREEMENT

33. Joint Custody. The parties shall share the joint legal care, custody, and control of the minor child(ren), _____, born _____, and _____, born _____ The _____ is awarded the primary physical custody of said minor child(ren), subject to the reasonable visitation rights of the _____. The parties shall make every reasonable effort to foster feelings of affection between themselves and the child(ren), recognizing that frequent and continuing association and communication of both parties with a child is in furtherance of the best interests and welfare of the child. In exercising joint legal custody, the parties shall share equally in all major decisions relating to the minor child(ren)'s educational training, extracurricular activities, medical needs, and religious training. In the absence of an agreement between the parties, the decision shall be made by (the primary custodian) (_____). This arrangement is in the best interest of the child(ren) and the primary custodian is fit and proper for primary physical custody.

a. ***Labels vs. reality: Does joint custody work?*** Clients are frequently ignorant as to what joint custody is. Some parents think it's equal time with the children. Others see it as just a label so that neither parent appears to have lost custody. Custody is, for many parents, a "zero-sum game" — for every winner, there must be a loser. For some parents, joint custody means an unacceptable label to be granted to the "visiting parent," something that "I doesn't deserve!" Under conditions of true joint legal custody, one parent has primary physical custody, but both parents have an equal voice in major decisions for the child. When "the roadblock problem" arises, can the parties find

a truly neutral tiebreaker? Does such a person exist when the parties distrust each other?

Joint custody is the presumptive approach in many states. Desirable preconditions that lead to successful joint custody include cooperative, communicative, flexible parents who respect each other, and parents who are dedicated to providing for the child's best interests. In some cases, psychological studies indicate that perhaps joint custody is not in the child's best interest, especially where the parents are likely to continue fighting.

b. ***Joint physical (shared) custody and the military parent — can it work?*** Odd working hours make for irregular child-care schedules. A military career requires frequent moves. For parents to make joint decisions, they may need to reside in close proximity to one and other. Joint custody can be more expensive. Both households will have to maintain two rooms and sets of clothes and other necessities for the child. In spite of these drawbacks, there are important tactical considerations. Joint custody (even a limited joint legal custody arrangement) may be more palatable than "losing custody" completely. A joint custody award at the time of separation or divorce may preclude attacking the parent's fitness when he or she later requests a custody modification.

B. ***Visitation: Problems and Solutions***

1. "***Reasonable visitation.***" Provisions frequently allow for reasonable visitation. Who decides what is reasonable? For the military member, an additional consideration arises due to military bases being located in remote places. Is it reasonable to drive over 5 hours to exercise weekend visitation?

2. "***Visitation by mutual consent.***" What if mom disagrees to Wednesday night supper with dad? What if dad disagrees with mom having the children on the 4th of July? What if there is no mutual consent because one parent is being unreasonable? Can you solve the problem by adding a clause stating that neither parent shall be unreasonable in requesting or withholding visitation? Will it work with these parents?

3. ***Accommodating, flexibility and predictability***. There is a significant need to know when visitation will occur in order to avoid disappointing the child and unnecessarily disrupting the parents' schedules. But there is also a need to leave room for changes in visitation due to the child's schedule [a sleep-over with a friend, a trip to the mountains or the beach on dad's weekend], mom's schedule or dad's schedule. Such issues occur just as frequently when long-distance visitation is involved.

4. ***A typical local schedule***:

a. *Alternating weekends, from 6 p.m. Friday till 6 p.m. Sunday.*
b. *One week at Christmas.*
c. *Four weeks in the summer, taken two weeks at a time.*
d. *Every Father's Day with dad (and every Mother's Day with mom).*
e. *Alternating Thanksgivings and spring breaks.*

5. ***Forecasting long-distance visitation.*** What will be the visitation time during summer vacation and Christmas/New Year's holidays?

6. ***The "sitter-of-first choice" option (when both parents are local).*** Instead of hiring a sitter, call "local parent" and give him/her the right of first refusal to stay with the kids. Save money and let him/her spend time with the kids! Everyone wins!

7. ***Logistics for drop-off and pick-up.*** There is no right answer except to spell it out and make sure everyone understands and there are no uncertainties. The usual situation is that the noncustodial parent is responsible for all transportation. Occasionally, the parents agree to transfer children at mid-point there is a reasonable distance between them such as a 3 to 5 hour drive.

8. ***Long-distance logistics.*** A frequently used arrangement is for the noncustodial parent to provide round-trip plane tickets in advance to the custodial parent. Will the child require a traveling companion if under a certain age? This means either mom or dad must accompany the child on the flight at the cost of one more plane ticket.

9. ***Penalties and make-up time for missed visitation.*** A penalty might be necessary if the visited parent regularly shows up late. For example, "If s/he's more than an hour late without calling to explain, the visitation is canceled without make-up." It also might be necessary if the visited parent occasionally skips visitation without explanation, but this could be handled by "preventive drafting" — "Visited parent must call 48 hours in advance to confirm visitation or else it won't occur." Compare to alternative, "Visited parent must call 48 hours in advance to cancel visitation or else it will take place." Make-up time should occur if the schedule of the child or either parent requires a cancellation of visitation not due to the visited parent's fault. Make-up visitation would occur on one of next two weekends, at the choice of mom if it was dad's schedule that caused the change, or dad if it was mom's or child's schedule.

10. ***Child support during extended summer visitation.*** Reduction of some costs associated with full-time care of child, i.e. food, gasoline. "Embedded costs," such as

the extra bedroom for the child, don't go away. One answer might be to reduce child support by 1/2 or 1/3 for each full month of summer visitation. Potential problem if the support is paid through the courts. How will clerk know that dad had visitation for that month and isn't in arrears?

0713 ADVISING ON CUSTODY LITIGATION

A. *Factors in awarding custody*

1. ***Are all things ever equal?*** Is the courtroom an empty box, the judge a perfect neutral official, and each parent equally qualified for the role of custody? How does the judge determine what are the child's best interests? What the judge brings into the courtroom: (a) beliefs about effective parenting, (b) emotions, and (c) personal value system and experiences in life. What evidence will the judge consider? Testimony of parties and friends as to parenting skills and relationships with the child. The child's planned environment, a crucial aspect for military parents and spouses. Testimony from psychological experts. There often is no "right answer." The legal principles are very general. The judge has a great deal of discretion. Predicting results is difficult.

2. ***Maternal preference and the "tender years doctrine."*** Absent some showing of mental or physical incapacity of the mother, or evidence of gross misconduct by the mother, a presumption arises that custody of children of "tender years" should be awarded to the mother. This doctrine benefits the court because it is relatively easy to apply. However, it is largely rejected today as unfair, sexist, and not necessarily in the child's best interest.

3. ***Marital fault, parental misconduct.*** *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979), *cert. denied*, 449 U.S. 927 (1980)(cohabitation = disqualification for custody *per se*). *Almond v. Almond*, 257 S.E.2d 450 (N.C. Ct. App. 1979) opposite result. Evidence of misconduct/fault must be child-related.

4. ***The voice of the child.*** *James v. Pretlow*, 86 S.E.2d 759 (N.C. 1955), and *Kearns v. Kearns*, 170 S.E.2d 132 (N.C. Ct. App. 1969), *overruled on other grounds*, *Stephenson v. Stephenson*, 285 S.E.2d 281 (N.C. Ct. App. 1981).

5. ***Primary caretaker issues.*** Presumption that custody of young children should be awarded to the parent who is the "primary caretaker." *See, e.g., Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981) for primary caretaker criteria:

   a. Preparing and planning meals.
   b. Bathing, grooming, and dressing.
   c. Buying, cleaning, care of clothes.
   d. Providing medical care, including nursing and trips to physicians.

e. Arranging for social interaction among peers after school such as transportation to friends' houses and to girl or boy scout meetings.
f. Arranging alternative care such as baby-sitters and day-care.
g. Putting the child to bed at night, attending the child in the middle of the night, and waking child in the morning.
h. Disciplining, including teaching general manners and toilet training.
i. Educating (religious, cultural, social, etc.)
j. Teaching elementary skills such as reading, writing, and arithmetic.

Problem: Are the above criteria truly non-discriminatory on the basis of gender?" West Virginia law does not permit a maternal preference in child custody litigation.... (However; the preceding] list of criteria usually... spells 'mother.' That fact reflects social reality; the rule itself is neutral on its face and application.... Our rule inevitably involves some injustice to fathers, who, as a group, are usually not primary caretakers." *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989).

6. ***Awarding joint custody.*** The courts prefer joint custody. A presumption exists that the parents should have equal rights in providing care, custody, education, and control for the child. Statute and case law in many jurisdictions favor joint custody.

Is joint custody a dream or a nightmare? What about the problem of "Dad's new wife." Cooperation and communication vs. the trial — "If you can't get along well enough to have a marriage, how can you make decisions for the child jointly?"

7. ***"The Military Uniform" and custody awards.*** Is there a bias against military parents? Given the problems associated with some military parents' duties are they setting themselves up for rejection by asking for custody while staying on active duty? Irregular child-care schedules. Full-time duty for the service. Frequent PCS moves. "Alerts" and deployments.

8. ***Ancillary considerations***

a. ***Psychological evaluations.*** A good idea all the time? The psychologist has more time to determine what's best for the child than a judge does in a contested hearing. Or, only if there are indications of mental health problems? Is this trial by psychologist? If so, why have judges? What if one parent refuses to cooperate? Can a visiting parent legally take the child

to a psychologist when s/he doesn't have custody? Who pays for the evaluations?

b. ***Guardian ad litem for the child.*** Some states require it. Some states allow it if one party files a motion. And some haven't heard of it!

c. ***Assessment of attorney's fees – an additional cost of contesting custody.*** Some courts put the cost of custody litigation on the losing party, or on the party better able to pay it. So "you pay your own lawyer, and the opposing one as well!"

B. ***Visitation rights.*** Whose rights are they? Probably the dad's as well as the child's. In some cases, mom might also think they're her rights — the right to some time off!

1. ***"Supervised visitation."*** Fond hope or an unrealistic goal? Why the supervision? Who's going to supervise? Give dad enough rope to hang himself. Absent clear evidence of an immediate danger of irreparable harm (the legal standard for a TRO), judge probably won't require supervised visitation until some problem or damage has already occurred.

2. ***Visitation and child support (two views).*** In most cases, these are unrelated; enforcement of one cannot be accomplished by withholding the other. In rare cases, the courts [not the parties] will link them if, for example, the suspension of child support is the only way of getting out-of-state mom's attention and compliance with court-ordered visitation rights.

0714 DEALING WITH CHILD SNATCHING

A. ***Attorney misconduct.*** *Attorney Grievance Commission of Maryland v. Kerpelman*, 420 A.2d 940 (Md. 1980), *cert. denied*, 450 U.S. 970 (1981) (Attorney suspended from practice for recommending, inter alia, that client snatch child from custodial parent).

B. ***Tort actions.*** Restatement (Second) of Torts, § 700. A cause of action for damages may be founded upon the violation of, or interference with, custody rights. Defendants can include the abductor and anyone who assists or abets the abductor, such as grandparents, etc. The cause of action may arise against out-of-state defendants. *See, e.g., D & D Fuller CATV Const. Inc. v. Pace*, 780 P.2d 520 (Colo. 1989) (Colorado has jurisdiction over North Carolina residents (the abducting father, his parents, and their company) where the custodial parent resides in Colorado and therefore the tort had an effect in Colorado).

1. ***Jurisdictions adopting the Restatement provision.*** *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) (recognizing the cause of action in the District of Columbia). *D & D CATV Construction Inc. v. Pace*, supra (Colo. 1989). *Wood v. Wood*, 338 N.W.2d

123 (Iowa 1983). *Spencer v. Terebelo*, 373 So.2d 200 (La. Ct. App. 1979). *Kramer v. Leineweber*, 642 S.W.2d 364 (Mo. Ct. App. 1982). *Plante v. Engel*, 469 A.2d 1299 (N.H. 1983). *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181 (Sup. Ct. 1970). *LaGrenade v. Gordon*, 264 S.E.2d 757 (N.C. Ct. App. 1980), *appeal dismissed*, 270 S.E.2d 109 (N.C. 1980). *McBride v. Magnuson*, 578 P.2d 1259 (Or. 1978). *Marshall v. Wilson*, 616 S.W.2d 932 (Tex. 1981) (concurring opinion). *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982) (applying Wisconsin law). Minnesota, however, has decided not to allow a custodial parent to recover in tort for interference with custodial rights. The Minnesota Supreme Court found that allowing this cause of action would increase the possibility of further harm to the child's well being, without providing a significant deterrent to parental abductions. *See, Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990).

A cause of action may arise simply from violation of a court order. *E.g., Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980) (Ex-wife awarded $65,000 compensatory and $65,000 punitive damages against ex-husband and relatives who took child to Canada in violation of custody order).

And, one may arise from violation of separation agreement even if there is no court order. *E.g., LaGrenade v. Gordon*, 264 S.E.2d 757 (N.C. Ct. App. 1980) *appeal dismissed*, 270 S.E.2d 109 (N.C. 1980) (A cause of action lies for breach of custody agreement through interference with custodial rights under the agreement).

Can interference with visitation rights may or may not give rise to a cause of action for damages? No. *Politte v. Politte*, 727 S.W.2d 198 (Mo. Ct. App. 1987); *Owens v. Owens*, 471 So.2d 920 (La. Ct. App. 1985). Yes. *Hall v. Hall-Stadlevy*, Denver Dist. Ct., No. 84-CV-2865 (No 26, 1986).

Other Tort Actions. *E.g., Beebe v. Beebe*, 10 Fam. L. Rptr. 1340 (U.S. Dist. Ct. Kan. 1984) (unpub. decision) (Federal court found diversity jurisdiction to consider actions for false imprisonment, abuse of process, deliberate infliction of emotional injury and malicious prosecution based on father's alleged refusal to turn child over to custodial mother).

0715 AN OUNCE OF PREVENTION . . .

A. ***Reducing the temptation to abscond or detain.*** Evaluate client and spouse for signs of "flight risk". Abuse (spousal or child). Vindictiveness. Address the issue of moves in the separation agreement. How will relocation affect custody, visitation rights, and allocation of visitation expenses? Require consent of court or other parent to remove the child from the jurisdiction? Specify visitation rights with some precision. Holidays. Period during summer. Limitations on travel. Notification period. Affirm communication rights. With the child. About the child. "Guaranteeing" visitation and return of the child. Posting bonds with a court. Secured appearance bond. Cash bond. Corporate surety bond. Escrow account.

Liquidated damages provisions in a separation agreement. Searches, attorney's fees, court costs. Anxiety, distress. Lump sum and/or daily basis.

B. ***Preventing parental kidnapping.*** Obtain a custody order. Provide a copy to the school. Provide a childcare provider with explicit instructions. Consider blocking Passports. 22 C.F.R. § 51.27.

1. ***CONUS.*** Objection to passport issuance can be raised by custodial parent, or by noncustodial parent if a court order restricts the child's removal from the United States. Provide full name, birth date, and other identifying data regarding the child and objector's relationship to the child. Objection should be accompanied by a court order issued by a court in the United States. Cf. § 51.27(c) with § 51.27(d).

Address: Department of State
Office of Citizenship Appeals and Legal Assistance
Passport Services
Washington, DC 20520

2. ***OCONUS.*** Send objection to the American embassy or consulate nearest the child. Denial of a passport will occur only if the request is accompanied by a custody award issued by a court recognized by the country where the child is located. Otherwise, the objecting parent will simply receive notification when passport is applied for (or that one has already been issued).

0716 LOCATING KIDNAPPED CHILDREN

A. ***Locating the absconding parent.*** Military locator services. Parent Locator Service; contact state CSE agency. Monitor request for transfer of school records. *See* 20 U.S.C. § 1232(g); 45 C.F.R. Part 99.

B. ***Other considerations.*** Report absence to police and request an NCIC listing. Contact kidnapper's friends, relatives, employer for leads. Also, post office, credit card issuers, drivers license/vehicle registration agencies, utility companies. Private detective? Check BBB and insist on references. Avoid anyone who suggests a "snatch-back." The Department of State may be able to provide information on whereabouts and welfare of children residing overseas.

Address: Department of State
Office of Consular Services
Overseas Citizens Service
Washington, DC 20520

0717 THE UNIFORM CHILD CUSTODY JURISDICTION ACT

A. ***Purposes.*** The UCCJS seeks to avoid jurisdictional conflicts and promote cooperation between courts and the states. It assures that child custody litigation takes place

in a state where the child and family have the closest contacts. It deters abductions, discourages continuing controversies, avoids re-litigation of prior custody disputes, and provides a stable home environment for the child. All states have adopted the UCCJA, although some have modified the uniform language in places.

B. ***Key Definitions***

1. ***Custody determination***. A court decision and court orders or instructions providing for the custody of a child, including visitation rights, but not including support or other monetary obligations.

2. ***Home state***. The state where the child(ren) lived with the parents, one parent, or a person acting as parent for at least six months immediately preceding the date on which the action is commenced, or if the child is less than six months old, the state where the child has lived from time of birth.

C. ***Basic jurisdictional provisions***. UCCJA § 3. A court may exercise jurisdiction over a custody proceeding if it has subject matter jurisdiction under state law and if it is the "home state" at the time the proceeding is commenced, or had been the home state within 6 months preceding the commencement of the action, and the child is absent because of "removal or retention by a person claiming custody or for other reasons," and a parent or person acting as parent continues to live in the state. But note *Sams v. Boston*, 384 S.E.2d 151 (W.Va. 1989) (a state does not attain "home state" status if the child was taken there as a result of parental kidnapping. Instead, the state from where the child was kidnapped remains the home state).

Jurisdiction may be exercised if the court has subject matter jurisdiction and it is in the best interests of the child because: (a) the child and both parents, or the child and at least one contestant, have a significant connection with the state, and (b) there is available in the state substantial evidence regarding the child's present or future care, protection, training, and personal relationships.

1. ***What is a "significant connection"***? Consider *Matter of B.B.R.*, 566 A.2d 1032 (DC 1989), wherein the prospective adoptive parents removed the child from California two days after his birth. The birth mother immediately changed her mind and sought the child's return. On these acts, does California have a "significant connection" with the child?

> "[After removal,] the child...remained significantly connected with California since it was there that his mother and the (adoptive parents) signed a contractual agreement, governed by California law, establishing the terms of his removal to and continued presence in (Washington DC, the adoptive parents' home). The rights of the (adoptive parents) to bring

him to the District initially and to continue to hold him here, if legitimate at all, were founded in that agreement. The child remained yet further connected to California by virtue of the presence there of a sibling (the mother's older child). We conclude that even assuming no one of these ties would by itself suffice, taken as a whole they constitute a 'significant connection.' (Even if these ties were deemed insufficient, we think a court could legitimately take into account the circumstances under which further ties to the state were thwarted by wrongful acts of a contesting party. Had the (adoptive parents) returned the child to (the mother) upon her initial request, the ties with California would have been overwhelming)."

Jurisdiction may be exercised, assuming the court has subject matter jurisdiction, if the child is physically present in the state, and it has been abandoned, or emergency action is necessary to protect the child from actual or threatened mistreatment, abuse, or neglect.

A fourth basis for the exercise of jurisdiction exists if it would be in the child's best interests and no other state has jurisdiction under any of the first three grounds, or another state has declined jurisdiction on the ground that custody would more appropriately be determined in the state proposing to exercise jurisdiction.

2. ***The role of physical presence of the child.*** The child's physical presence in the state is not by itself a sufficient basis to exercise jurisdiction. On the other hand, while the child's physical presence in the state may be desirable, it is not a prerequisite for jurisdiction in a custody proceeding unless the court is using the "emergency" provision.

D. ***Resolving jurisdictional conflicts.*** UCCJA §§ 6, 7, 8. It is possible for two states to claim jurisdiction under these provisions. A court shall not exercise jurisdiction if a custody proceeding is already proceeding in another state, unless that state stays its proceeding to allow jurisdiction in the state in question. UCCJA § 6. Courts are directed to actively explore the issue of parallel proceedings and are encouraged to communicate with other courts hearing related cases. If a court discovers that another proceeding has been initiated before the instant case commenced, it shall stay the proceedings and communicate with the other court to discuss which court is most appropriate. A court may decline to exercise jurisdiction it otherwise has under the Act if it finds that it is an inconvenient forum and another state is a more appropriate forum. UCCJA § 7. The court can act *sua sponte*. The court is encouraged to contact the other court in appropriate cases. The court may dismiss or stay the custody proceeding and continue with a divorce or dissolution action. A court may decline jurisdiction in an initial decree action if it finds that the petitioner has wrongfully removed the child from another state or has engaged in similar reprehensible conduct. UCCJA § 8(a).

E. ***Modifying initial decrees.*** In a custody modification action, a court shall decline jurisdiction, unless required to proceed in the interests of the child, if the petitioner, without consent of the party entitled to custody, has improperly removed the child or retained

custody after visitation. The court may decline jurisdiction if the petitioner has violated any other provision of a custody decree. UCCJA § 8. A court shall not modify an initial decree issued by a court of another state unless the court has jurisdiction under this Act, **AND** the court that rendered the initial decree either no longer has jurisdiction under the Act **OR** has declined to modify the decree. UCCJA § 14. In a modification proceeding involving a decree issued by another state, the court shall give due consideration to the transcript of the previous proceeding.

F. ***Registering out-of-state decrees***. UCCJA §§ 15, 16. Court clerks are required to maintain a registry of out-of-state custody decrees they receive, together with other communications received concerning the decrees and subsequent proceedings. Certified copies of out-of-state decrees may be filed with the local court clerk. Once filed, the decree shall be treated and enforced in like manner with decrees issued by the local court, including assessment of costs against a violating party.

G. ***Notice requirements***. Reasonable notice and an opportunity to be heard must be afforded to any parent or person with physical custody of the child(ren). This applies to persons outside the state as well. Personal service must be in accordance with the law of the forum state. Any method permissible by the law of the place where service is made (for courts of general jurisdiction) is recognized. Notice by any form of "return receipt required" mail is usually sufficient. Notice must be served at least 10 (20) days before any hearing on the merits. Examples: *Copeland v. Copeland,* 314 S.E.2d 297 (N.C. Ct. App. 1984) (Ex parte order obtained by mother in Massachusetts without notice to N.C. father held not entitled to full faith and credit in N.C.); *but see, Lutes v. Alexander,* 18 Fam. L. Rep. (BNA) 1547 (Va. Ct. App., Aug. 8, 1992) (failure of mother to obtain service on father living in Germany in accordance with the Hague Convention (based on his failure to accept service) did not defeat the court's jurisdiction).

H. ***"Teeth" in the UCCJA (enforcement)***. Binding force, *res judicata* and recognition of out-of-state decrees. A custody decree by a court with jurisdiction binds all parties served in the state, served in accordance with the notice provisions of the UCCJA, or who have submitted to the court's jurisdiction, or who had an opportunity to be heard. Courts of one state are required to recognize and enforce any decree of another state rendered under the UCCJA or a substantially similar act. Example: *Lofts v. Superior Court In and For Maricopa County,* 682 P.2d 412 (Ariz. 1984) (Arizona Supreme Court found that Arizona courts were bound by *res judicata* on a prior jurisdictional determination by a Washington State court). If the court finds that it is an inconvenient forum, it can require the party bringing the action to pay all costs, including travel expenses, of the child, opposing parties, and other witnesses, and to pay attorneys fees. Same provision for all costs and attorneys fees where party has wrongfully taken a child or engaged in other reprehensible conduct.

1. ***Appearance of the child and other parties***. The court may order any person within the state to appear, and if that person has physical custody of the child, to

appear with the child. If a party outside the state desires to appear, the court may require the party requesting the hearing to pay any costs. A court in one state may request a court in another state to order a party in the other state to appear before the requesting state court, and if the party has custody of the child, to appear with the child. A court may request a court of another state to hold evidentiary hearings or to have social services studies made.

I. ***International application***. UCCJA § 23. The UCCJA applies internationally if (a) there was reasonable notice, (b) the jurisdiction has laws substantially similar to the Act, and (c) an opportunity to be heard was given to all affected persons. *See Middleton v. Middleton*, 314 S.E. 2d 362 (Va. 1984) (Virginia Supreme Court applied UCCJA to two international custody disputes, finding that England was a "state" within the meaning of the UCCJA and that its jurisdictional rules were substantially similar to the UCCJA); *Klont v. Klont*, 342 N.W. 2d 549 (Mich. Ct. App. 1984) (Michigan trial court should have deferred to a pending custody proceeding in West Germany). Note the effect of DOD Dir. 5525.9. Consider use of the Hague Convention.

0718 THE PARENTAL KIDNAPPING PREVENTION ACT OF 1980 (28 U.S.C. § 1738A)

A. ***Impetus for the PKPA***. Congress became dissatisfied over the increasing numbers of parental kidnappings, the inconsistent and conflicting court orders, and the excessive relitigation. Additionally, the UCCJS lacked a criminal enforcement mechanism. Finally, there was a desire to track down runaway parents.

B. ***Jurisdictional aspects of PKPA***. Full faith and credit must be given to valid a sister state's child custody determinations. Such determinations are valid as long as the rendering state had jurisdiction pursuant to one of the jurisdictional bases found in the PKPA.

C. ***Four bases of jurisdiction***

1. "Home state" on the date of commencement of the proceeding, or had been the home state within 6 months of the commencement, and child has been removed by a contestant, and a contestant continues to reside in the state. Note: Home state trumps significant connection under PKPA.

2. If no state qualifies as a home state, jurisdiction can be exercised if the child and at least one contestant have a significant connection with the state other than mere physical presence, and there is available in the state substantial evidence concerning the child's present and future care, protection, training, and personal relationships.

3. The child is physically present in the state, and has been abandoned or there exists some other emergency situation.

4. If no state has jurisdiction on the preceding grounds, or all states with potential jurisdiction have declined to exercise it, and the exercise of jurisdiction is in the best interests of the child.

D. ***Conflicts between the UCCJA and the PKPA are resolved in favor of the latter.*** A court in one state is entitled to modify a custody award by a court of another state if it has jurisdiction, **AND** the court in the other state no longer has jurisdiction or has declined to exercise jurisdiction to make a modification. The statute provides that the state with original jurisdiction continues as long as the child or one parent remains in the state. There is some authority questioning the constitutionality and wisdom of this rule. *Robinson v. Robinson*, 511 N.Y.S.2d 172 (App. Div. 3d Dept. 1987) (New York court that issued the original order declined to exercise continuing jurisdiction, even though the noncustodial parent still lived there, where the custodial parent and child had resided in Florida since 1979). *Hemingway v. Robertson*, 778 S.W.2d 199 (Tex. Ct. App. 1989) (under Texas version of the UCCJA, state courts do not retain jurisdiction over custody after the custodial parent and child establish a "home state" elsewhere, but they do retain jurisdiction over visitation as long as the noncustodial parent remains in Texas).

A court cannot exercise jurisdiction if there is already another custody action pending in another state and that state is exercising jurisdiction consistent with the PKPA. *See, e.g., Matter of B.B.R.*, 566 A.2d 1032 (DC 1989).

E. ***Federal Parent Locator Service (PLS) established by PKPA.*** States may use PLS and may charge a fee for it. For authorized official use only.

F. ***PKPA's enforcement mechanism: The unlawful flight warrant.*** Parental kidnapping is an act for which a warrant for unlawful flight to avoid prosecution may be issued under 18 U.S.C. § 1073 if there is evidence that the child was taken across interstate or international borders, and the state from which the child was taken has a statute which makes such taking a felony.

1. ***DOJ experience under PKPA.*** Initially, FBI/DOJ was reluctant to handle PKPA cases. After its passage, DOJ determined that it would issue unlawful flight warrants only if there was probable cause to believe that a violation of the unlawful flight statute had occurred, the state law enforcement agency requesting the warrant was committed to extraditing and prosecuting the defendant, and there was independent credible evidence that the child was in physical danger or in a condition of abuse or neglect. Local U.S. attorneys were required to get DOJ Criminal Division authorization before such warrants could be issued. However, Congressional pressure forced change. Now, local U.S. attorneys make the warrant decision. The DOJ concurrence is not required. The only limitation now is that U.S. attorneys should not issue such warrants where there is reason to believe that the state will not extradite and prosecute once the FBI has apprehended the fugitive.

G. ***Judicial enforcement.*** Does PKPA create a federal cause of action to resolve which of two conflicting orders is entitled to full faith and credit? No. *Thompson v. Thompson*, 484 U.S. 174 (1988) (PKPA does not create a cause of action that may be pursued in federal courts to resolve a dispute between two competing custody orders, and neither does it supersede the family law exception to diversity jurisdiction). PKPA is not a defense to extradition proceedings based on self-help enforcement of a custody order entitled to full faith and credit, in violation of a different custody order that was not issued in compliance with PKPA. *California v. Superior Court of California, San Bernardino County*, 482 U.S 400 (1987).

PART C - ADOPTIONS

0719 INTRODUCTION. For the legal assistance attorney, step-parent/step-child adoptions will be the most commonly encountered adoption situation. On occasion, servicemembers will seek assistance regarding placement adoptions through state or private agencies. The legal assistance attorney must also be able to counsel clients about the Adoption Expense Reimbursement Program. This program is available to all active duty members of the Air Force, Army, Coast Guard, Marine Corps, and Navy. It reimburses members for certain qualifying expenses associated with the adoption process.

0720 DEFINITIONS

A. ***Adoption.*** Adoption is the legal process by which a person or couple takes a child that is not their biological offspring into their family and raises the child as their own. Adoption severs all legal ties between the adoptee and his or her birth parents and establishes such ties between the adoptee and the adoptive parents. An exception to this rule would be the case of step-child(ren) adoptions where one biological parent is the spouse of the adopting parent and whose legal ties to the child(ren) are therefore unabridged.

B. ***Child.*** "Child" does not mean only infants. It refers to any one who is under eighteen years of age. The legal result of adoption is that the child ceases to be the legal obligation of the natural parent(s) and becomes the responsibility of the adoptive parents.

0721 METHODS OF CHILD PLACEMENT FOR ADOPTION

A. ***Children may be placed for adoption in a variety of ways.*** An "agency placement" is the procedure for adoption used by County Departments of Social Services or licensed private adoption agencies. A "direct placement" or "independent adoption" is one made by the natural parents directly into an unrelated adoptive home without the assistance of an agency. A "relative adoption" is one in which a parent's relative (often a stepparent) agrees to adopt the child of that parent. All of these procedures require court approval and a home study.

B. ***Agency placement vs. direct placement***

1. ***Agency placement.*** For agency placement, one should apply through the County Department of Social Services or a licensed private adoption agency. The child must be placed in suitable home with parents well matched to the child's background, capabilities, and medical history. Adoptive parents will usually not be able to identify or contact birth parents. A child should be placed with a couple so that there is no danger of future recognition by the child's natural parents, or the friends and relatives of the natural parents. The prospective adoptive parent(s) must be assured that the child can be legally adopted. The agency will ensure that every available protection has been given to the natural parents, the child, and the adoptive parents under state law. Potential problems that may arise include fees, waiting lists, background checks and home studies.

2. ***Direct placement.*** Direct placement is made directly by the natural parents into an unrelated home. Depending on state law, a hospital may not be able to release an infant to someone other than a natural parent. It may be a crime in some states for the new parent(s) or anyone else to pay for any expenses associated with the direct placement of the child. This includes medical expenses, home care arrangements, and any other costs. Direct placement will require considerable effort on the part of the prospective parents regarding the natural parents of the child. These efforts include finding the natural parents and obtaining valid and legal consent to the adoption. When considering direct placement (without an agency) other potential problems include: (1) obtaining information about the child's background, medical history and birth parents; (2) proper consent forms and child legally available for adoption; and (3) possible loss of privacy and later interference with one or both of the birth parents.

In many states, even when prospective parents have not used an adoption agency, state law requires following procedures similar to agency adoptions.

0722 STEPS IN ADOPTING A CHILD. In adopting a child, it is necessary to file certain papers in court. In some cases, an attorney must be retained for assistance. The procedures will vary in individual cases depending on whether the proposed adoption is one based on abandonment, consent by the other parent, or placement by an agency.

Procedures will vary among states. However, the basic steps for adoption are as follows:

The first step is filing of the petition for adoption. The petition is signed by the adoptive parents and is filed either in the county where the child is living, in the county in which the adoption agency is located, or in the county in which the adoptive parents live.

If the adoption is by consent (either a "relative adoption" or an agency placement, for example), the next step is the filing of the consent to the child's adoption by the natural parent(s) who would give such a consent. Some jurisdictions require a child over twelve

years of age to consent to his or her own adoption as well. If the adoption is based on abandonment, then a separate petition for termination of parental rights must be filed in district court to terminate the rights of the abandoning parent.

Next, the order of reference and the home study must be completed. The order of reference refers the case to the licensed private adoption agency or to the county Department of Social Services for the completion and filing of a home study. The home study is a report on the circumstances of the proposed adoption. It includes a history of the adoptive parent(s) with background and home situation. The same information is included for the child and the birth parents. The study will also update how the child and adoptive parents are adjusting to each other. Reports of recent medical examinations of the child and parents, as well as any other pertinent information, are included in the home study.

Once the home study is filed, the court issues an interlocutory decree. An interlocutory decree is a temporary court order giving the adoptive parents custody of the child until the final order is issued. The interlocutory decree is not the final order. It usually takes up to a year between the interlocutory decree and the final decree of adoption. At the appropriate time, the adoption agency files a second home study with the court describing the progress of the adoptive placement.

The final step is the filing of the final order of adoption. The final order of adoption makes the child legally one of the family, just as if he or she had been born to the adoptive parents. The child is able to inherit real and personal property just as a natural child would. After the final decree, the birth certificate of the child is amended and the new certificate will show the adoptive parents as the birth parents of the child.

0723 NATURAL PARENT WITHDRAWAL OF CONSENT. The laws of each state permit a natural parent to withdraw his or her consent to the adoption proceedings only in very limited circumstances. Consent may be withdrawn, for example, in some states within 30 days of giving it. In some states, if no adoption petition has been filed within 18 months then consent may also be withdrawn.

0724 TERMINATION OF PARENTAL OBLIGATIONS. Once a child has been adopted, the natural parents cease to have any legal rights or obligations toward the child. If a natural parent owed a child support obligation, that obligation would stop once the child was adopted. However, back child support may still have to be paid.

0725 THE ADOPTION EXPENSE REIMBURSEMENT PROGRAM

A. ***References***

1. Public Law (P.L.) 102-190, "National Defense Authorization Act for Fiscal Years 1992 and 1993," Section 651, December 5, 1991

2. DoD Memorandum, "Reimbursement of Adoption Expenses," April 20, 1992

3. Public Law (P.L.) 102-484, "National Defense Authorization Act for Fiscal Year 1993," Section 652, October 23, 1992

4. DFAS Instruction 1341.1 (NOTAL), "Reimbursement of Adoption Expenses," November 5, 1993

5. Navy — SECNAVINST 1754.3A, Subj: Department of the Navy Adoption Reimbursement Policy

6. Coast Guard — COMDTINST 1754.9A, Subj: Reimbursement of Adoption Expenses

7. DODINST 1341.9

8. DFAS-cl 1341.1

B. ***General.*** Active duty members of the armed forces whose adoption of a child under age 18 years of age is finalized on or after December 5, 1991 may be reimbursed a maximum of $2,000 per child for "qualifying expenses" related to the adoption. For multiple adoptions, the maximum reimbursable amount is $5,000 per calendar year. The date the claim is served on DFAS-Cleveland Center by certified mail is used to determine the creditable calendar year for the reimbursement. If both parents are active duty members, only one member may be reimbursed for the expenses related to the adoption of the same child.

C. ***Qualifying adoption expenses.*** "Reasonable and necessary expenses" for the adoption of a child under 18 years of age qualify for reimbursement, but only if such adoption is arranged through one of the following agencies. The adoption must be through a governmental agency that has responsibility under state or local law for child placement, or by a private adoption agency that is authorized by state or local law to place children for adoption. 10 U.S.C. § 1052(g) and 14 U.S.C § 514(g) (for Coast Guard).

1. ***Qualifying adoptions.*** Adoptions by a married couple. Adoptions by a single person. Adoptions of children under 18 years of age. U.S. or inter-country adoptions. Adoptions of children with special needs. Stepparent adoptions do not qualify.

2. ***Reasonable and necessary expenses.*** Reimbursement is authorized for public and private agency fees including adoption fees charged by an agency in a foreign country. Placement fees, including fees charged adoptive parents for counseling, may be claimed. Also included are legal fees, including court costs, for services unavailable to military members under 10 U.S.C. sections 1044 or 1044a. Finally, medical

expenses, including hospital expenses of the biological mother of the child to be adopted and of the newborn infant to be adopted, for medical care given to the adopted child before the adoption, and for physical examinations of the biological mother of the child to be adopted may be recovered. There is no reimbursement for travel expenses of an adoptive parent.

D. ***Claims procedures.*** To apply for reimbursement, the member submits a completed form Reimbursement Request for Adoption Expenses (DD Form 2675, Aug 93) to:

Defense Finance and Accounting Service
Cleveland Center (Code FMC)
1240 East Ninth Street
Cleveland, OH 44199-2059
Commercial: (216) 522-5576
DSN: 580-5576

Claims will not be paid until the adoption is final. All amounts claimed must be substantiated by documentation such as receipts marked "paid," canceled checks, or associated receipts. Reconstruction of expense records is permissible when original records are unavailable. A letter from the agency stipulating the dates of the home study and the placement of the child is sufficient for establishing "agency" involvement. The member must submit claims for reimbursement no later than 365 days following date on which the adoption is finalized.

0726 RECENT TAX LAW CHANGES. Recent changes in the Federal Income Tax law provide tax incentives for adoptive parents. Those tax incentives are examined in more detail in the Tax Chapter of this Study Guide.

PART D - ESTABLISHING PATERNITY AND PROCESSING PATERNITY COMPLAINTS

0727 REFERENCES

A. 32 C.F.R. § 733.5 — Determination of Paternity and Support of Illegitimate Children

B. USN — Military Personnel Manual (MILPERSMAN), Article 5800-010, Paternity Complaints

C. USMC — LEGADMINMAN Section 8005, Determination of Paternity and Support of Illegitimate Children

D. USCG — Personnel Manual (COMDINST M1000.6A), Ch. 8-M-5, Determination of Paternity and Support of Illegitimate Children

E. Essentials for Attorneys in Child Support Enforcement, 2nd Ed., U.S. Dept. of Health and Human Services (1992)

0728 INTRODUCTION. Paternity establishment has become more important to the Child Support Enforcement program in recent years due to the large increase in out-of-wedlock births and the burden on society of supporting these children through public assistance. The Armed Forces also recognize the importance of supporting one's child, legitimate or illegitimate.

The law makes no distinction in support obligations between parents who are married when a child is born and parents who are not married when the child is born. The law allows the courts to determine custody and visitation rights of parents of legitimate, as well as illegitimate children. There are no distinctions or preferences given to either mothers or fathers under many state laws concerning who is entitled to custody of a child or what type of visitation rights should be allowed.

0729 ESTABLISHING PATERNITY. State law allows anyone involved in the case to file a motion in court asking for a hearing or blood tests for the mother, child and alleged father of the child. The court frequently allows the blood tests to be taken and the results are reported back to the court for a further determination of paternity.

The tests used most often to "prove" paternity are the "Red Cell" test and the "HLA" (Human Leukocyte Antigen) test. These tests usually cost upwards of $100 per person and take two to four weeks for the results to be reported. There usually are several laboratories in the state that can perform these tests, and the resulting report will be accurate enough to exclude 90-95% of falsely accused fathers. DNA testing can be requested. It is a more costly and time-consuming process.

The person making the motion for blood tests usually is required to pay for them, but the alleged father can be ordered to pay back the cost of the tests if he is found to be the natural father of the child. Such blood tests cannot be conducted on a child until he or she is at least 6 months old.

0730 TITLE IV-D OF THE SOCIAL SECURITY ACT

A. ***References***

1. Pub. L. No. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. §§ 651 and 1305nt)

2. Pub. L. No. 93-647, 88 Stat. 2351 (codified at 42 U.S.C. §§ 651-657)

3. 45 C.F.R. Parts 302 and 303

   a. 45 C.F.R. § 302.31 — Establishing paternity and securing support

   b. 45 C.F.R. § 303.5 — Establishment of paternity

   c. 45 C.F.R. § 302.33 — Services to individuals not receiving AFDC ...

4. Child Support Guidelines: A Compendium (National Ctr. for State Courts, March 1990)

5. Essentials for Attorneys in Child Support Enforcement (2d ed. 1992), U.S. Dept. of Health and Human Resources, Federal Office of Child Support Enforcement

B. ***General.*** Title IV-D of the Social Security Act of 1975, as amended, requires that states receiving federal funding for Aid to Families with Dependent Children (AFDC) must create programs to ensure that child support from noncustodial parents is paid. Title IV-D was enacted by Congress in 1975 in reaction to the increase in number of out-of-wedlock births and the importance of paternity establishment to children and the cost to society of supporting such children through public assistance.

Title IV-D programs are now administered in all states. These programs provide custodial parents with a low cost means of obtaining a child support order and enforcing the order. Within 90 days of establishing paternity or locating an absent parent, the IV-D agency [state child support enforcement (CSE) agency] must establish an order for support, or complete service of process necessary to commence proceedings to establish a support order. Title IV-D programs are not limited to AFDC recipients, however non-AFDC parents are required to pay a $25.00 registration fee. All states must provide services established under

their Title IV-D plans to any individual who files an application for the services with the Title IV-D agency. 45 C.F.R. § 302.33(c).

In 1984, Congress emphasized the responsibility of state and local agencies to provide equal services to both welfare and non-welfare families. Section 451 of the Social Security Act (42 U.S.C. § 651) was revised to state "that assistance in obtaining support will be made available under this part to all children for whom such assistance is requested." The State plan must provide that the services established under the plan shall be made available to any individual who files an application for the services with the IV-D agency. 42 U.S.C. § 654(6); 45 C.F.R. § 302.33(a).

Services available under the Title IV-D program:

1. ***State Parent Locator Service (SPLS).*** The SPLS has contracts with all appropriate state agencies and authorization to review records concerning public assistance (welfare), driver's licenses, vehicle registration, employment, revenue (state taxes), and law enforcement records. Access to these records requires the absent parent's SSN, and his or her date and place of birth. SPLS can also access information from sister states outside its jurisdiction.

2. ***Paternity establishment.*** An agency attorney, typically from the Attorney General or District Attorney's office, will initiate and prosecute an action to establish paternity, including state-financed genetic testing, discovery and expert testimony. Non-AFDC parents must pay an additional $25.00 fee. When the alleged parent is outside the state, the action may be forwarded for prosecution, under Uniform Reciprocal Enforcement of Support Acts, if states have adopted URESA statutes that allow such actions.

3. ***Establishment/assessment of support.*** The Title IV-D agency will make an assessment of the appropriate support obligation according to state guidelines. An investigation may include contact with both parents, current and past employers, credit agencies, financial institutions, and insurance companies. The assessment can form the basis for an administrative consent order or a court order in a contested case.

4. ***Collection.*** An agency has a number of methods to enforce support orders. Some states also provide for criminal prosecution in cases of nonsupport. Refer to the chapter on Family Support Enforcement for additional information regarding support obligations of servicemembers.

0731 SERVICE POLICY ON PROCESSING PATERNITY COMPLAINTS

A. ***Illegitimate children.*** If the servicemember desires marriage, leave for this purpose is recommended whenever consistent with the needs or exigencies of the service.

B. ***Court order.*** A servicemember is expected to provide support when a family court has issued an order directing the servicemember to do so, when the member has acknowledged paternity, or when paternity has been proven by competent evidence. Some state courts may impose a legal obligation to support an illegitimate child without a determination of paternity. In this situation the servicemember is still expected to provide financial assistance as specified in the court order, regardless of any doubts of paternity he may have. A servicemember may be subject to adverse administrative or disciplinary action for failure to provide court-ordered support.

C. ***No court order and the member admits paternity.*** A servicemember who admits paternity should be counseled as to his obligation to support the child. In the absence of a court order, the member should pay the amount of support agreed to by the member and the mother or guardian of the child. If no such agreement exists, the Navy or Marine Corps or Coast Guard support scales apply. The servicemember may be subject to administrative or disciplinary action for failure to provide adequate support.

D. ***No court order and the servicemember denies paternity.*** The servicemember should be informed of the following. A state receiving Federal aid must investigate paternity complaints. A state where the mother is located or where the purported father is located may require the servicemember to appear before a family court or administrative hearing. A stay of the proceedings may be requested under the Soldiers and Sailors Civil Relief Act (SSCRA) for court hearings. However, the SSCRA has generally been held not to apply to administrative hearings. Refusal to appear by the servicemember may result in a default order establishing paternity or the ordering of child support payments without establishment of paternity. A default order entered against a servicemember, who is residing in a state other than the state where the order was issued, will not abrogate the servicemember's obligation to provide support. State services, such as the State Parent Locator Service, will normally be able to locate the servicemember.

Worldwide Military Locator Services are also available:

Army Worldwide Locator
Commander, USAEREC
Ft. Harrison, IN 46249-5301
(317) 542-4211

Department of Navy
Bureau of Naval Personnel
Worldwide Locator
(Pers 324D)
2 Navy Annex
Washington, DC 20370-5000
(703) 614-3155/5011

Marine Corps Headquarters
CMC MMRB-10
Quantico, VA 22134-0001
(703) 640-3942

Air Force Headquarters
AFMPC/DPMD003
Randolph AFB, TX 78150-6001
(512) 625-5774

Coast Guard Commandant
U.S. Coast Guard
GPIM/2 USCG
2100 2nd St., S.W.
Washington, DC 20593-0001
(202) 426-8898.

E. ***State enforcement options.*** Until such time as the order is modified, the state must use one or more of the following procedures to enforce the order (45 C.F.R. § 303):

1. mandatory wage withholding;

2. contempt proceedings with possible jail term;

3. interception of state/federal income tax refunds;

4. garnishment of wages if available under state statutes;

5. obtain liens on personal/real property;

6. obtain a security bond from the servicemember to guarantee continuous and adequate payment;

7. make reports to credit reporting agencies; and/or

8. pursue IRS collection of child support arrearage.

To modify or nullify a court order, the servicemember must petition for a rehearing in the state issuing the order.

F. ***Defenses in paternity actions.*** The following are some defenses that may be asserted by a party in an action to establish paternity and set child support:

1. nonpaternity;

2. inability to pay (active or passive avoidance of the duty to support does not qualify);

3. release agreement with mother of child (may not be binding upon the court);

4. accord and satisfaction (may be valid as to arrearages, but not to future support); and

5. marriage of mother.

0732 PATERNITY & SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (SSCRA)

A. ***References***

1. 50 U.S.C. App. §§ 501 et seq.

2. *Soldiers' and Sailors' Civil Relief Act Guide (JA 260)*, The Judge Advocate General's School, U.S. Army.

B. ***General.*** As with most other civil matters, the servicemember can seek protection under the SSCRA for all spousal/child support and paternity issues. However, as the SSCRA refers to a "court", it is doubtful whether the servicemember could invoke the provisions of the SSCRA in state administrative hearings regarding spousal/child support matters. The SSCRA will not shield the servicemember from his or her financial obligations. In order to prevail, the servicemember must prove that military service materially affect his or her ability to present a defense or appear in court. Ordinary military service, where the servicemember is not deployed on the date of the hearing, may not be sufficient to convince the court to grant a stay of the proceedings.

C. ***Options***

1. ***Stay of proceedings.*** The member may request a stay of proceedings commenced in civil court on the grounds that military service "materially affects his or her ability to appear and defend the action.

2. ***Stay of execution of order.*** The member may request a stay of execution of a support order on the grounds that ability to pay is materially affected by military service.

3. ***Re-opening a default judgment.*** The member may request the re-opening of a default judgment. Before a default judgment can be entered, the plaintiff is required to file an affidavit with the court stating that the defendant is not on active duty in the military service. Two-fold burden to meet to re-open: (1) must demonstrate "material effect" and (2) must demonstrate "meritorious defense" to the underlying action or some part thereof.

D. ***Practice notes.*** In the area of child support, courts have a very strict interpretation of "material effect." The servicemember must provide a solid factual basis that his military service materially affects his ability to appear in court. If a stay is granted, it is usually only effective until the servicemember is no longer materially affected by military service (e.g., until the servicemember is able to take leave to appear in court). If the servicemember is ordered to pay spousal/child support as the result of a paternity action, the member may be required to pay all back support concerning the period the action was stayed due to protections of the SSCRA. Some courts will construe any communication to the court by the servicemember or the servicemember's counsel to be a general appearance, thus subjecting the member to the jurisdiction of the court. It is imperative that the law and local practice in the court's jurisdiction be determined in order to prevent inadvertently entering a general appearance resulting in the loss of the servicemember's SSCRA protection. One option may be to contact opposing counsel or the party, if not represented by counsel, instead of the court. Another option may be to have someone in the servicemember's chain-of-command write a letter requesting a stay of proceedings on behalf of the servicemember.

For additional discussion on the rights and implications of the Soldiers and Sailors Civil Relief Act, see the chapter on the Soldiers and Sailors Civil Relief Act in this Study Guide

0733 FAMILY CARE PLANS

A. ***References***

1. Navy - OPNAVINST 1740.A (17 Dec 96)

2. Marine Corps – MCO 1740.13A

B. ***Plan requirements.*** The member has the primary responsibility to ensure family members and dependents are adquately card for at all times. The services require a Family Care Plan in which certain members outline the person(s) who shall care for dependents during the member's absence. The named caregiver is required to sign the plan and thereby accept responsibility during the member's absence.

The Plan must include all reasonably foreseeable situations and be sufficient detailed and systematic to provide for a smooth, rapid transfer of responsibilities to the designated caregiver in the event the member is called away.

C. ***Who must have a plan***? Any single parent with custody of a child under age 19, dual military couples with custody of a child under age 19, and any member solely responsible for the care and provision of another person must have a Family Care Plan.

It is the commanding officer's duty to implement this program. Members required to have a plan must submit must submit their plan to the command within 60 days (90 days for Ready Reserves) either of arrival at the command or of a material change affection the existing Plan.

Commanding officers shall ensure that caregivers are permitted to use installation facilities on behalf of the member in caring for the member's family. Each command should have a designated Family Care Plan coordinator. The coordinator's primary function is to manage the commands' program and assist the member.

D. ***Who assists in developing the plan***? Family Services and Child Care Centers, the legal assistance office, the chain of command, command financial specialist, and the Navy-Marine Corps Relief Society can all assist in preparing the plan. Reservists make seek assistance through their reserve activity.

E. ***Consequences of failing to maintain a Plan***. The member is counseled on the importance of the Plan and that failure to maintain an up to date Plan may be grounds for separation. Grounds for separation may be either convenience of the government or dependency/hardship.

CHAPTER 8

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

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C. Military Retired Pay Manual (DoD 1340.12M)

D. OPNAVINST 7431.1, Subj: Former Spouse Payments from Retired Pay

E. WWW.DFAS.MIL

0802 INTRODUCTION. The Uniformed Services Former Spouses' Protection Act (USFSPA) allows states to treat disposable military retired pay as marital property or community property. 10 U.S.C. § 1408(c)(1). It provides that some former spouses are entitled to commissary and exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services. 10 U.S.C. § 1062 and 10 U.S.C. § 1072(2)(F)(i). It provides that some former spouses are entitled to health/medical benefits. 10 U.S.C. §§ 1072(2), 1076, and 1086. It also provides that former spouses may be designated as beneficiaries of a Survivor Benefit Plan (SBP). 10 U.S.C. §§ 1447(6), 1448(b)(2), and 1450. Also, spouses or former spouses may receive military retired pay that would otherwise have been terminated due to a member's or former member's misconduct involving abuse of a spouse or dependent child. Finally, USFSPA allows for direct payment of current child support and/or alimony from the member's military retired pay.

0803 BASICS OF MILITARY PENSION. Active duty servicemembers become entitled to a pension after 20 years of active service. Retirement pay, however, does not begin until after the servicemember is discharged from active duty. The amount of retired pay per month is based on the term of service and the member's basic pay at the time of retirement. The formula used to calculate retired pay is as follows:

1) For a service entry date on or before 7 Sept 1980: 50% at highest base pay at 20 years. 2.5% increase in retired pay for each year of service up to 75% of base pay at 30 years of service.

2) For service entry date from 8 Sept 1980 to 31 Jul 1986: 50% of average of last 36 months at 20 years. 2.5% increase in retired pay for each year of service up to 75% of base pay at 30 years of service.

3) For service entry date after 31 Jul 1986: 40% of average of last 36 months at 20 years. 3.5% increase in retired pay for each year of service up to 75% of base pay at 30 years of service.

Example: An O-5 at 20 years of service who started active duty in 1977: His base pay per month on active duty in 1997 would be $4955.70. At 20 years and 0 months, his monthly retired pay would be $2,477.00 (50% of base pay).

Example: An O-5 at 25 years of service who started active duty in 1977: His base pay per month on active duty in 1997 would be $4955.70. At 25 years and 0 months, his monthly retired pay would be $2,477.00 (50% of base pay) plus 5 times 2.5% of $4955.70 (62.5% of base pay).

A reservist's retired pay is calculated on a point system. While serving on extended active duty, a reservist earns one point per day. During a typical year with weekend drills and a two week active duty, a reservist will earn 72 points a year toward a retirement. After 20 years of service creditable for retirement, a reservist will be entitled to receive retired pay after attaining age 60. The amount of retired pay is based on total points earned over the years of service. The formula is as follows:

$$\frac{\text{total points} \times .025 \times \text{basic pay}}{360} = \text{pension paid per month}$$

A retiree can, and in some cases must, waive some or all of his/her retired pay. The waiver can be made to receive disability payments which are generally tax free, or to increase a civil service federal employee pension upon future retirement. A retiree may also waive part of retired pay to avoid prohibitions against "double dipping" for officers.

0804 HISTORY. In *McCarty v. McCarty*, 453 U.S. 210 (1981), the Supreme Court held that states are preempted from dividing non-disability military retired pay. *McCarty v. McCarty* was a California divorce case. The servicemember-husband was appealing the California Appellate court's affirmation of the divorce decree dividing his military retired pay as community property.

The Supreme Court of the United States made the determination that military retired pay was not divisible as community property. The Court determined that the retired pay of a retired military member is a personal entitlement. It is at least in part reduced compensation for reduced services. Additionally, the right to the payment dies with the retiree unless he or she specifically designates a beneficiary for a portion of his retired pay. The Court noted that the member had the ultimate right to choose to not participate in this survivor benefit plan. Secondly, the Court stated that the entitlement to retired pay after 20 years of service was relatively new to the military. They determined that Congress had enacted a military retirement

pay system to "serve as an inducement for enlistment and re-enlistment, to create an orderly career path, and to ensure "youthful and vigorous" military forces. *McCarty* at 234. The Court found that the retirement system as an inducement would be diminished if a state where a member was transferred to because of military service could divide his/her retired pay. The Court relied on these two bases in determining that military retired pay was not subject to division under community property law. The Court stated that Congress could clearly change this determination by enacting legislation that would be provide for the division of military retired pay as marital property. *McCarty* at 235, 236.

In direct response to the *McCarty* case, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, & 1451. See 32 C.F.R. Part 63 (rules regarding direct payment from finance centers). The USFSPA overrules *McCarty* by providing that state courts may treat disposable retired pay as marital property. 10 U.S.C. § 1408(c)(1). It provides that in certain cases the former spouse may receive his/her share of retirement pay directly from the military services. 10 U.S.C. § 1408(d).

The effective date of USFSPA was 1 February 1983. The USFSPA is retroactive to June 25, 1981, one day before *McCarty v. McCarty* was decided by the Supreme Court. A court may not treat retired pay as property of the marriage if the parties' final decree was issued before June 25, 1981 and did not treat (or did not reserve to treat) retired pay as property of the marriage. 10 U.S.C. § 1408(c)(1).

0805 DIVISIBILITY OF MILITARY RETIRED PAY

A. **USFSPA - dividing military retired pay.** "... a court may treat disposable retired pay ... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1).

B. **What the courts What may divide?** 10 U.S.C. § 1408(a)(1). Any state or federal court of competent jurisdiction [including DC, Puerto Rico, Guam, Am. Samoa, the Virgin Islands, N. Mariana Islands, & the Trust Territories of the Pacific] may divide military retired pay. Any foreign court of competent jurisdiction may divide retired pay if there is a treaty requiring the U.S. to honor court orders of such nation. (to date there are no such treaties).

C. **Whose law controls?** There is no federal right to a portion of retired pay created by this law. Within the broad limitations set by the USFSPA, state law controls whether and how much military retired pay is divided. Division is also permitted to enforce current child support obligations, to enforce current alimony, and to divide property for divorce settlement purposes.

Almost all states have ruled that military retired pay is divisible for property settlement purposes (as well as alimony and child support in appropriate cases). Arkansas, Indiana, North Carolina, and Mississippi require that the pension be "vested" before it can be divided as a marital property. Vesting can occur at different points in the military career. Some states treat an unvested pension as separate property and thus not divisible. A vested pension, on the other hand, would constitute marital property. A servicemember will have to be retirement eligible for these jurisdictions to divide the pension as property. See *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990) and *Seifert v Seifert*, 82 N.C.App. 329, 346 S.E.2d 504 (1986).

D. **Jurisdictional requirements.** 10 U.S.C. § 1408(c)(4). If a court intends to divide disposable military retired pay between the parties as property, then the court must have jurisdiction over the member by reason of:

(a) the member's domicile in the territorial jurisdiction of the court,

(b) the member's residence within the state other than because of military assignment in the territorial jurisdiction of the court, or

(c) the member's consent to jurisdiction.

Consent is not defined under the USFSPA and is a question of the law of each individual state. A general appearance has been held to constitute consent. Continuing jurisdiction may constitute consent. One should specify whether a court retains continuing jurisdiction in any final decree of divorce or a separation agreement. Filing a lawsuit for division of the pension as property or responding to the claim for property division in a manner in which affirmative relief is requested will also constitute consent (e.g. an answer or counterclaim).

Domicile is not defined under USFSPA and is a question of law for each individual state. Generally, domicile is established by physical presence [excluding temporary absences] and intent to remain in that place permanently. The Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940 allows military members to retain their original domicile upon entry into the service. 50 U.S.C. § 574. While on active duty, residence for the USFSPA equals domicile.

These jurisdictional requirements do not apply to direct payment of child support or alimony. The USFSPA permits direct payment of current child support or alimony by a "court order." A "garnishment" order is not needed but may be used to enforce current alimony and child support obligations under the USFSPA. See 10 U.S.C § 1408(2)(B), 32 C.F.R. 63.6, 42 U.S.C. §§ 659-662, and 5 C.F.R. Part 581. Child support and alimony arrearages are not enforceable by means of direct payment under the USFSPA. A court order for garnishment of retired pay to enforce alimony arrearages or child support arrearages will, however, be honored by DFAS pursuant to 42 U.S.C. §§ 659-662.

E. **Formula to divide retired pay.** Typically the former spouse's share is determined by calculating one half of a marital fraction representing the number of years of marriage by the former spouse to the member which overlap the total number of years of military service by the member creditable towards retirement. The one half represents an even split between husband and wife of the pension by the court for applicable years.

(PERIOD OF MARITAL PENSION SERVICE)

1/2 X Length of time the marriage overlaps with military service (marital pension svc) X 100 = %
Length of member's creditable military service towards retirement (total pension service)

(PERIOD OF TOTAL PENSION SERVICE)

The marital fraction is usually expressed by the period of "marital pension service" divided by the period of "total pension service." DFAS will then pay the former spouse the dollar amount calculated by multiplying the former spouse's percentage times the disposable retired or retainer pay. The dollar amount to be paid to the former spouse can also be calculated by computing: MARITAL FRACTION x DISPOSABLE RETIRED PAY x 50%

Historically, DFAS did not honor court orders requesting direct payment to a former spouse that fail to specify a "specific dollar amount" or a "percentage of disposable retired pay." Specific lump sums dollar amounts were desired less because such amounts do not include cost-of-living adjustments. The problem for family law attorneys and DFAS lies in the fact that in the formula used to divide retired pay, the denominator, the period of total pension service is not known when the military member is still on active duty.

In an attempt to resolve this problem, DFAS adopted an amendment to 32 C.F.R. Part 63 that allows DFAS to honor orders containing "formula clauses." DFAS, since 1 April 1995, has accepted court orders containing formulas that are consistent with the new rule. The rule permits limited use of formulas that leave "years of service" or "retirement points" open for members who have not yet retired. DFAS will supply these figures if theses are the only figures missing. The new rule divides "reserve retired pay" by points acquired instead of years of creditable service. The new rule also allows DFAS to honor court orders that award a former spouse retired pay in terms of a hypothetical retired pay amount (such as 25% of the disposable retired pay of a Lieutenant Commander with 20 years of service) even though the officer may retire at a higher rank and with greater than 20 years of service. Variation of the standard formula above:

$$50\% \times \left| \frac{\text{Total \# of months married during military service}}{M} \times \right| \text{Retired Pay of Member at Retired or Given Grade}$$

M = Total # of months of creditable military service upon retirement.

Under the new rule, the hypothetical retired pay amount is computed on the basis of the member's retired pay at the time of retirement.

F. **What part of retired pay may the courts divide?** A court may treat disposable retired pay either as property of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of the court. 10 U.S.C. § 1408(c). 10 U.S.C. §1408(a)(4) defines "disposable retired pay" for divorces made final after 3 February 1991. The term 'disposable retired pay' means the total monthly retired pay to which a member is entitled less amounts which:

(a) are owed by that member to the United States for previous overpayment of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(b) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

NOTE: Title 5 U.S.C. contains civil service pension provisions and dual compensation restriction provisions.

5 U.S.C. § 5532 governs reduction in retired or retainer pay of regular retired members of the uniformed services who accept a civilian position in the Federal Government.

For example, regular retired officers receiving military retired pay forfeit a portion of such retired pay when they begin receiving pay as a federal civilian employee. 5 U.S.C. § 5532(b).

A military retiree has the right to receive both military retired pay and civil service retirement pay at the same time. 5 U.S.C. § 8332(e).

5 U.S.C. 8332(c)(2) permits a member to include creditable military service in computing a civil service retirement annuity. See also § 30101 of the Military Retired Pay Manual (DOD 1340.12-M).

A retired military member entitled to military retired pay seeking to combine years of military service with years of civil service to receive a larger civil service annuity would need to execute a waiver of military retired pay. A federal civil service employee may not receive credit for military service for which credit is allowed for purpose of retired pay under other statute. 5 U.S.C. § 8332(d).

NOTE: Title 38 of the United States Code governs Veterans' Benefits.

38 U.S.C. §§ 5304 and 5305 prevent disabled military retirees from receiving longevity retired pay and disability compensation from the VA at the same time and requires waiver of retired pay equal in amount to any VA disability compensation received in order for the disabled retiree to receive disability benefits.

38 U.S.C. § 5306 allows members to renounce their rights to disability benefits.

(c) in the case of a member entitled to retired pay under chapter 61 of this title [10 U.S.C. §§ 1201 et seq.] are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

Note that total monthly retired pay less a deduction for receipt of military disability retirement pay may leave only a small portion of "disposable" retired pay to be divided between a member and former spouse. See 10 U.S.C. § 1401 for computation of military disability retired pay.

(d) are deducted because of an election under chapter 73 of this title [10 U.S.C. §§ 1431 et seq.] to provide an annuity to a spouse of former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

The deductions under this provision are for premiums paid for Government life insurance (Retired Serviceman's Family Protection Plan) or for deductions to provide Survivor Benefit Plan annuity coverage to a spouse or former spouse.

For divorces final before 3 February 1991, the deductions from gross retired pay also include the following: Federal employment taxes and income taxes withheld to the extent that the amount deducted is consistent with the member's tax liability, including amounts for supplemental withholding under 26 U.S.C. § 3402(i). State employment and income taxes when the member makes a voluntary request for such withholding from retired pay and the Uniformed Services have an agreement with the State concerned for withholding from retired pay.

G. **Authority to divide gross pay or disposable retired pay.** In the following table, assume retired pay is divided equally by the court and that neither party has any other income or are claiming any withholding exemptions:

	MILITARY RETIREE	FORMER SPOUSE
GROSS RETIRED PAY	$2,000	
VA DISABILITY PAY	($361)	
DISPOSABLE RETIRED PAY	$1,638	
DIVISION OF DRP	$819	$819
TAX	($123)	($123)
NET AFTER TAXES	$696	$696
WAIVED RETIRED PAY	($361)	

The arguments whether a state can divide disposable retired pay or can divide gross retired pay were addressed in *Mansell v. Mansell*, 490 U.S. 581, 1989. Ultimately, the Court's holding was that retirement pay that is waived in order to receive veteran's disability benefits is not divisible as property by state courts. The arguments on either side of the issue look to the statute for acceptance. Section 1408(c)(1) provides that courts may treat disposable retired pay as separate or marital property according to state law. However, section 1408(e)(6) is a catch all section that provides that nothing in section 1408 can be construed to relieve a member of liability imposed by a court order for alimony, child support or other payments. Most states that had held gross retired pay was divisible before *Mansell* have backtracked in light of the Court's determination in *Mansell*.

Also note possible state statutory limitations. Indiana defines marital property as including "disposable military retired pay." Virginia statute says pensions are divisible, but that the spouse can be awarded only 50% of the actual cash benefits received by the retiree. North Carolina has ruled that courts can divide gross pay, up to a maximum of one-half the disposable pay; this limitation arises from state law.

Practice Point: Choosing a state that prohibits division of nonvested military retired pay may be a problem for a former spouse. The former spouse should choose, if possible, a jurisdiction that allows division of nonvested pensions.

H. **VA disability benefits and military retired pay.** See *Mansell v. Mansell*, 490 U.S. 581 (1989). 10 U.S.C. § 1408(c)(1) provides that "a court may treat disposable retired . . . pay . . . either as property solely of the member or as property of the member and his spouse. . . ." Retired service members who are disabled can receive disability benefits from the Veterans Administration. The VA determination of disability is made independent of the military physical evaluation board. In order to receive these VA benefits, however, they must first waive an equivalent amount of military retired pay. These VA benefits are not taxable. The VA benefits are not retired pay or "disposable retired pay." The money waived to receive the VA benefits is excluded from the term "disposable retired pay." Major Mansell divorced his wife, and the court awarded her a share of his military retired pay. When Major Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay.

Issue: Do state courts have authority to award the spouse a share of the value of such waived military retired pay? **Holding**: The language of 10 U.S.C. § 1408(c)(1) preempts states from dividing the value of the waived military retired pay because it is not "disposable retired pay." **Dissent:** This is unfair to former spouses because it allows members unilaterally to shift money from the spouse to the member. This is too narrow a view of the USFSPA. It was intended to completely overrule *McCarty* and restore to states authority to divide military benefits in any manner they felt appropriate.

All the state case law which allows division of gross retired pay precedes the case of *Mansell*. So does *Mansell* decide the issue? ". . . [U]nder the Act's plain and precise language, i.e. 10 U.S.C. § 1408(c)(1), state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted authority to treat total retired pay as marital property." *Mansell*, 490 U.S. at 587.

I. **Pre-retirement payments [when do payments start?]** Is expected retired pay divisible? Members of the armed forces may remain on active duty after they are eligible for retirement. A deferral of the retirement increases the amount of the retired pay and delays receipt of the retired pay benefit to the parties.

California courts have held that a former spouse has a right to begin receiving a share of the retired pay benefit as soon as the member is eligible to retire. It is unlikely that the USFSPA could be used as an enforcement mechanism under these circumstances as a state court can only divide "disposable retired pay" which does not include the expectancy of retired pay. An attorney for a former spouse may want to secure the right to receive retirement pay when the member is eligible to retire in a separation agreement.

J. **Military disability retired pay.** Neither *McCarty* nor the USFSPA addressed the issue of military disability retired pay. States split on the issue of whether they have the authority to divide it.

Although *Mansell* appeared to have resolved the issue in the negative, the USFSPA was amended to include a limited portion of disability retired pay within the definition of "disposable retired pay." 10 U.S.C. § 1408(a)(4). Now, at least a small portion of disability retired pay is divisible. A few states never divide disability pay as marital property. The rest must decide whether they are limited in their power to do so by the change in the USFSPA.

An attorney for the former spouse needs to draft a separation agreement that would protect the former spouse under the circumstances where a member could receive military disability retired pay.

K. **Civil service employment and pensions.** A military retiree who is employed in a federal civil service position may have to forfeit a portion of military retired pay to receive compensation for the civil service job. The forfeited pay would be deducted from the total monthly retired pay under 10 U.S.C. § 1408(a)(4)(B). A military retiree who elects to waive his/her military retired pay in order to combine the years of military service with the years of federal civil service in order to receive a larger civil retirement annuity. The waived retired pay would be deducted from the total monthly retired pay under 10 U.S.C. § 1408(a)(4)(B). How does one protect a former spouse from losing his/her share of disposable retired pay? The solution is to draft a separation agreement with provisions protecting the former spouse.

Section 637 of the National Defense Authorization Act of 1997 amended 5 U.S.C. § 8332 to prohibit certain uniformed services retirees from receiving longevity credit for civil service pension purposes through a waiver of military retired pay. Apparently, some unsavory military retirees had discovered that they could avoid paying a portion of their military pension to their former spouses simply by waiving their military retired pay and instead receiving an increased civil service pension (in which the former spouse had no ownership right) by getting credit for their military service. Under this provision, where effective service of a USFSPA court order on the Service Secretary has been made, a retired service member may still receive credit towards an increased civil service pension so long as they authorize DFAS to withhold from the civil service pension and pay over to the former spouse the amount they were entitled to under the USFSPA order. This statutory scheme leaves a lot of accounting issues unresolved.

L. **Application for direct payment by the former spouse.** For all direct payment orders, the court order must be regular on its face, meaning that is issued by a court of competent jurisdiction in accordance with the laws of that jurisdiction. [10 U.S.C. § 1408(b)(2); 32 C.F.R. § 63.6(c)(1)]. The order must show that the court has jurisdiction over the service member in accordance with USFSPA provisions. [10 U.S.C. § 1408(c)(4); 32 C.F.R. § 63.6(c)(6)(i)].

It must be in legal form and include nothing on its face that provides reasonable notice that it is issued without authority of law. It is required that the court order be authenticated or certified within 90 day period immediately preceding its service on the designated agent. [10 U.S.C. § 1408(b)(2); C.F.R. § 63.6(c)(2)]. A final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement [including a final decree modifying the terms of a prior divorce, etc. . . . or a court ordered, ratified or approved "property settlement" incident to such previously issued decree]. [10 U.S.C. § 1408(a)(2); 32 C.F.R. § 63.6(c)(3)]. A statement in the order certifying that the Soldiers' and Sailors' Civil Relief Act (SSCRA), [50 U.S.C. App. 501 et seq.] rights were observed and complied with, provided that the member was on active duty at the time the order was issued and was not represented in court. [10 U.S.C. § 1408(b)(1)(D); 32 C.F.R. § 63.6(c)(4)]. Sufficient information must be contained in the court order to identify the member. 10 U.S.C. 1408(b)(1)(C); 32 C.F.R. § 63.6(c)(5).

There are no other special requirements for a former spouse to receive direct payment of child support and alimony awards. DD Form 2293, Feb 91 - Application for Former Spouse Payments from Retired Pay must be submitted and signed by former spouse before DFAS will begin direct payment.

> "Court orders specifying a percentage or fraction of retired pay shall be construed as a percentage of disposable retired pay. A court order that provides for a division of retired pay by means of a formula wherein the elements of the formula are not specifically set forth or readily apparent on the face of the court order will not be honored unless clarified by the court." [32 C.F.R. § 63.6(c)(8)]

For direct payment of retired pay awarded as property, the following additional requirements apply. A "10 year" test has to be met. The court order (or other accompanying documents) must show that the former spouse was married to the member for 10 years or more, during which the member performed at least 10 years of service creditable toward retirement. 10 U.S.C. § 1408(d)(2); 32 C.F.R. § 63.6(c)(6)(iii). The court order must provide for payment from military retired pay. The amount must be a specific dollar figure, a specific percentage of disposable retired pay, or a formula where the elements are specifically set forth or readily apparent. 10 U.S.C. § 1408(a)(2)(C); 32 C.F.R. § 63.6(c)(8).

In general, payments will begin to the former spouse within 90 days after a completed application is effectively served on DFAS. 10 U.S.C. § 1408(d)(1); 32 C.F.R. § 63.6(h)(1). The maximum amount of money directly payable to the former spouse is 50% of the retiree's disposable retired pay. The 50% maximum of DRP is a limit on how much retired pay can be paid directly, but it is not a limit on how much a court can award. 10 U.S.C. § 1408(e)(1); 32 C.F.R. § 63.6(e)(1)(i). Where disposable retired pay is subject to one or more USFSPA court order(s) and one or more garnishment order(s) under 42 U.S.C. §§ 659-662, the amount of disposable retired pay subject to direct payment is increased to 65%. 10 U.S.C. 1408(e)(4)(B); 32 C.F.R. § 63.6(e)(1)(ii).

1. **DFAS requirements for direct payment.** The following procedures must be followed so that direct payment orders will be honored by DFAS. The applicant needs:

a. completed application (DD Form 2293) signed by the former spouse and/or a written request to enforce the pertinent court order, together with a copy of the final court order, and served either personally, by facsimile, electronic transmission or by certified or registered mail, return receipt requested, upon the:

Defense Finance and Accounting Service
Cleveland Center, Code LF - Room 1417
Garnishment Operations Directorate
P.O. Box 998002
Cleveland, Ohio 44199-8002;

b. the full name, address and SSN of the former spouse applying for direct payment must be provided and the member should be identified by full name, SSN and branch of military service; and

c. the final decree of divorce, legal separation or annulment must have been authenticated or certified by the court within 90 days immediately preceding its service on DFAS.

Evidence must be provided, unless so set forth in the order, that the former spouse was married to the member for at least ten years during which the member performed at least ten years creditable service, where the application is based on a court order dividing retired/retainer pay as property. Provide a copy of the marriage certificate if the date of the marriage is not in the court order.

Recently, section 636 of the National Defense Authorization Act of 1997 added a new paragraph to 10 U.S.C. §1408(d)(6)(A) which prohibits the Service Secretaries from accepting service of, or complying with the provisions of, a court order which is a modification of an existing order by a court of a state other than the state which issued the original order unless the modifying court has obtained jurisdiction over both the member and the former spouse. This provision is designed to prevent forum shopping either spouse to modify an unsatisfactory original order. Thus, it buttresses the jurisdictional rules contained in USFSPA that limit which states may lawfully divide a military pension.

M. **Tax treatment of divisions of retired pay.** Amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree by the military services; instead direct payments of retired pay received by a former spouse from the finance center are now subject to withholding. For qualifying orders issued before 3 February 1991, taxes withheld and credited to the retiree are allowed as a deduction before dividing the

retired pay. For qualifying orders issued after 3 February 1991, the finance center will withhold taxes paid directly to a former spouse.

N. **Information.** Information regarding the retiree's retirement account may be protected by the Privacy Act. Therefore, the separation agreement should include a waiver whereby the member/retiree specifically authorizes and consents to release of information to the spouse. Information about the retiree's retired pay account may be necessary to ensure that the former spouse is receiving his/her fair share including cost-of-living adjustments. Call DFAS Cleveland's toll free number for retired pay questions: 1-800-321-1080.

0806 ADDITIONAL BENEFITS FOR FORMER SPOUSES

A. Survivors' Benefit Plan (SBP)

1. **Original USFSPA provisions.** Member could designate a former spouse as an SBP beneficiary, but only on the basis of a person with an insurable interest. The designation had to be voluntary. "Nothing in this chapter [USFSPA) authorizes any court to order any person to elect under [10 U.S.C. § 1448(b)] . . . to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such an election." USFSPA § 1003.

2. **Amendments to the original provisions.** A former spouse can be designated an SBP beneficiary in the same category that applies to current spouses, so the natural person with an insurable interest offset does not apply. Additionally, a court can now order a retiring soldier to designate the former spouse as an SBP beneficiary—the election need not be voluntary. This "deemed" election is not automatic. It must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center not later than one year after the date of the court order. 10 U.S.C. § 1450(f)(3)(A). Once a timely request is made, the finance center will flag the servicemember's records. Upon the member's retirement, the former spouse will be designated as an SBP beneficiary.

B. **Commissary and exchange privileges.** An unremarried former spouse is entitled to commissary and exchange privileges to the same extent and on the same basis as a surviving spouse of a military retiree provided the spouse is a 20/20/20 former spouse. See 10 U.S.C. § 1062 and 1072(2)(F)(i).

1. **20/20/20 former spouse**

20	The military member has completed 20 years of creditable military service, and
20	The spouse has been married to the military member for 20 years, and
20	The period of marriage overlaps the period of creditable military service by at least 20 years.

Unremarried has been read to mean "unmarried" for these benefits. A 20/20/20 former spouse's full commissary and exchange privileges are suspended upon remarriage but "revive" when the subsequent marriage is terminated in any manner. A 20/20/15 former spouse is not entitled to full commissary and exchange benefits.

C. **Medical benefits**. There are three categories of health care.

1. **Full military health care program**. See 10 U.S.C. §§ 1072(2)(F), 1076(b) and 1086(c). Includes CHAMPUS coverage (up to age 62) and inpatient or outpatient care at military treatment facilities. Qualifications: An unremarried 20/20/20 former spouse (and a 20/20/15 former spouse whose divorce was final before 1 April 1985). These benefits are extinguished upon subsequent marriage, and the privileges will not "revive" if the subsequent marriage is terminated by any cause other than annulment.

2. **Transitional health care**. Full coverage for one year after the divorce, with the possibility of limited coverage for an additional year. An unremarried 20/20/15 former spouse with no employer-sponsored health insurance is entitled to FULL military medical care only for a transitional period of one year after the date of divorce. After the first year, the 20/20/15 former spouse is eligible to enroll in a DOD civilian health group care plan. A second year of military health care may be available for pre-existing health problems that are not covered by a civilian health care plan. To qualify for the second year of limited coverage, the spouse must have enrolled in the DOD-negotiated health insurance plan.

3. **Health insurance plan that has been negotiated by DOD**

a. **Eligibility**. Any person who was formerly entitled to military health care and lost that entitlement.

b. Health insurance for former spouses who lose entitlement to military health care is covered by the Continued Health Care Benefit Program (CHCBP). CHCBP is effective October 1, 1994 and replaced the group health insurance offered by Mutual of Omaha Insurance Company (U.S. Voluntary Insurance Program, or USVIP). CHCBP is a premium-based, temporary transitional health care program that provides health care coverage via standard CHAMPUS. Application for CHCBP must be made within 60 days of loss of eligibility for military health care. Quarterly premium for a former spouse is $410.00 in FY 95. The premium is increased annually on October 1st. For more info on CHCBP:

CHCBP
P.O. Box 1608
Rockville, MD 20849-1608
[1-800-809-6119]

D. **Legal assistance.** Former spouses are not entitled to legal assistance. This includes all types of former spouses. , even 20/20/20 unremarried former spouses who are authorized may significant benefits and entitlements including military medical coverage, CHAMPUS, commissary, exchange and base theater privileges. It is important to remember that entitlement to any military benefit, including legal assistance, is governed by public law and/or regulation. There is no mention of legal assistance in the benefits extended by the USFSPA, which is hardly surprising. It would be odd indeed if we guaranteed to former spouses that which we do not guarantee to active duty personnel (legal assistance is always provides on a "resources permitting" basis.)

Many ineligible former spouses can be screened out over the telephone when they call for an appointment. Careful in-office screening can identify those who come directly to the office. Ultimately, examining the individual's Uniformed Services Identification and Privilege Card (DD 173). If the letters "URFS" or "UMFS" appear on the ID card, the individual is a former spouse and not eligible for assistance. See PUPERSINST 1750.10, at encl. 8, p. 18 for a detailed explanation of the various codes used on ID cards.

CHILDREN OF SERVICE MEMBERS IN THE CUSTODY OF FORMER SPOUSES ARE ELIGIBLE FOR LEGAL ASSISTNCE IN THEIR OWN RIGHT. Just as former spouses may assist their dependent children in exercising their commissary/exchange entitlements, former spouses also may legitimately seek legal assistance on behalf of minor dependent children in their custody. In such a case, the relevant ID Card is that of the child rather than that of the former spouse. Legal assistance personnel must ensure that the assistance provided is directly related to a legal matter to which the child is a party in their own right.

0807 USFSPA AND DEPENDENT ABUSE. A spouse and former spouse have a right to retired pay lost as a result of a member's misconduct involving "dependent abuse."

> The USFSPA has a special provision providing benefits for dependents who are victims of abuse by members losing right to retired pay. 10 U.S.C. § 14078(h). This law was effective as of October 23, 1992 and was implemented by DOD by issuance of a "Policy Guidance" Memo signed 23 June 1993 by the Deputy Assistant Secretary of Defense (Military ManPower and Personnel Policy) and new subparagraphs were added by a memo of 11 January 1994 signed by ASD (Personnel and Readiness).

When a retirement-eligible member receives a punitive discharge by court-martial for dependent-abuse offense(s) and his/her eligibility to retired pay is terminated as a result of that misconduct, a spouse or former spouse may still be able to receive payments from retired pay that the member would have been entitled to "but for" the misconduct. Payment commences for eligible (former) spouses on the date the sentence is approved by the convening authority.

Only victim-spouses who were married to the military member for at least ten years while the member was performing military service creditable for retirement will be eligible for payment of a portion of retired pay. This is the "10/10 spouse" criteria that is required for direct payments of portion of retired pay from DFAS. If the victim-spouse is not a 10/10 spouse, he/she is ineligible to receive direct payment under 10 U.S.C. § 1408(h). 10/10 victim-spouses must also obtain a "court order" awarding the spouse/former spouse a property interest in the member's retired pay. A victim-spouse receiving payment under this provision is entitled to full medical/dental care and commissary/exchange privileges based on the eligibility rules. 10 U.S.C. § 1408(h)(9). Remarriage of a former spouse receiving payments under § 1408(h) terminates the former spouse's entitlement but payments may "resume" if subsequent marriage is terminated by divorce or annulment. 10 U.S.C. § 1408(h)(7).

An eligible spouse may not receive payments under both 10 U.S.C. § 1058 (transitional compensation) and 10 U.S.C. § 1408(h) (Former Spouse Protection Act). He or she must make an election. See 10 U.S.C. 1058(i).

For matters concerning transitional compensation for dependents for members separated for dependent abuse see 10 U.S.C. § 1058 for available benefits and entitlement.

0808 USFSPA AND SEPARATION INITIATIVES. In addition to involuntary separation benefits and voluntary 15 year retirement, some sailors are being offered annual annuity payments (Voluntary Separation Incentive (VSI); 10 U.S.C. § 1175) or a lump sum Special Separation Benefit (SSB); 10 U.S.C. § 1174a) if they elect to leave active duty voluntarily. Are VSI/SSB payments divisible as marital property? Clearly they are not "disposable retired pay" and therefore do not fall under the USFSPA. Does *McCarty* control? The *McCarty* federal preemption of state law argument may succeed. What was Congress's intent? VSI payments are non-transferable, but can be inherited. 10 U.S.C. § 1175(f).

Although the USFSPA does not provide a basis for dividing SSB or VSI, some courts are treating it as the functional equivalent of retired pay and dividing it. Other courts have held that VSI or SSB is not marital property subject to division. See Navy OTJAG Memo reviewing the Divisibility of SSB and VSI in Divorce Cases (March 1995).

Army, Navy, Air Force and Marine-Corps
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Cleveland Center (Code LF)
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CHAPTER 9

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CHAPTER 9

PART A - DRAFTING SEPARATION AGREEMENTS

0901 INTRODUCTION. Drafting separation agreements is one of the most demanding — time-wise, professionally, and emotionally- services a legal assistance attorney can provide for a client. Legal assistance attorneys should be aware that post-nuptial agreements are regulated by statute in many states. Today, most jurisdictions permit voluntary agreements between spouses concerning support and allocation of property.

0902 SEPARATIONS

A. ***Legal separation and limited divorce.*** Statutes in approximately one half of the states provide for a limited divorce or legal separation. One should not confuse voluntary separation with legal separation or limited divorce. A properly executed legal separation agreement, whether issued or sanctioned by a court, will be sufficient to entitle the supporting spouse for BAH at the "with dependents" rate. 62 Comp. Gen. 315 (1983). DoDFMR Chapter 7a, Paragraph 260406.

0903 THE ROLE OF VOLUNTARY SEPARATION AGREEMENTS. Voluntary separation agreements are based on the parties' right to exercise their private powers to contract. Under general contract law principles, the parties may agree which state's law governs the voluntary separation agreement. Where there is no statement as to which law governs, the general rule is that the law of the place where the contract is executed governs the validity of the contract, *lex loci contractus*. A good practice when drafting separation agreements for military members to declare which state's law is going to govern the voluntary separation agreement or property settlement agreement.

Voluntary separation agreements do not necessarily imply eventual dissolution of the marriage. In fact, some jurisdictions do not allow agreements in contemplation of divorce. In jurisdictions that do not allow agreements in contemplation of divorce, the state may allow property settlement agreements where the parties intend to live separate and apart the rest of their natural lives. In jurisdictions that do allow agreements in contemplation of divorce, such voluntary separation agreements and property settlements may be incorporated by reference into the final decree of dissolution.

0904 DRAFTING SEPARATION AGREEMENTS. Each legal assistance office decides whether to offer separation agreements. There is no direct prohibition against drafting agreements, but be aware of professional responsibility considerations. JAGINST 5803.1A, Rule 1.1, (Competence), and LAPA 6.97. One attempting to draft separation agreements must first be competent. The required competency is gained through study and through consultation with lawyers of established competence. The test of competency is that the individual must be as capable as other judge advocates. Usually, the supervising judge advocate will make the decision regarding a subordinate's competence.

0905 PROFESSIONAL CONDUCT CONSIDERATIONS. Before becoming involved in drafting separation agreements, legal assistance attorneys are cautioned to review JAGINST 5803.1A, Rule 1.7, regarding conflicts of interest and JAGINST 5803.1A, Rule 2.1, regarding the required level of competence. See also JAGINST 5801.2 (Navy-Marine Corps Legal Assistance Manual). See *Knisley v. US*, 817 F.Supp. 680 (S.D. Ohio 1993) for an excellent analysis of competency and malpractice issues arising in a separation agreement.

0906 BASICS

A. ***Purposes of agreements.*** In contemplation of divorce, couples typically seek agreements that will either divide assets and allocate debts, record the terms and conditions of their separation, or a combination of both.

B. ***Legal requirements***

1. ***A valid marriage.*** A valid marriage must first exist. This marriage, its dates and conditions, will become the foundation of the separation agreement.

2. ***Capacity to contract.*** Both of the spouses must possess the capacity to contract. The practitioner must be sure that neither spouse is suffering a disability nor is underage.

3. ***Fact of separation or imminent separation.*** The majority of states requires that the parties must be living apart at the time of the agreement or will start to live apart at the time of the agreement. An agreement to separate at an indefinite time may render the agreement void as against public policy because it is seen as promoting marital discord. A recital that the parties are not living together is usually sufficient.

4. ***Consideration.*** The agreement must be supported by consideration just as any other contract would be. One spouse agreeing to live apart and the other spouse agreeing to make support payments will be usually be adequate consideration.

5. ***Legal purpose.*** Agreements that contain clauses wherein parties agree to procure a divorce are invalid in many jurisdictions. One should avoid conditioning the separation agreement on the granting of a divorce.

6. ***Full disclosure.*** Both sides should fully disclose all pertinent information to the other party.

7. ***Fair provision for the disadvantaged party.*** The terms of the settlement should be fair to both sides. The issue of fairness goes to the voluntariness of the consent to the agreement. Sometimes, regardless of intention, some agreements may be determined by a court to be unconscionable.

8. ***Form.*** The agreements should be written. An oral agreement is, as the saying goes, "worth the paper it's written on."

C. ***Choice of law.*** Normally the law of the jurisdiction where the agreement is executed will be applied. However, the parties may find it to their advantage to express a contrary intent and apply the law of another jurisdiction.

D. ***Scope of the agreement.*** The agreement may be as comprehensive or as narrowly focused as the parties want it to be. Generally, you will want to make the agreements as comprehensive as possible. However, let your professional judgment guide you when omitting issues. The couple may not always know what is best for them and unwittingly choose to omit a provision. Other times, they may be unable to reach an agreement and choose to reserve a matter until they cool off and are later able to reach a settlement. As a protective measure, you should document any deviation from standard office practices. If you omit an issue, state the omission explicitly in the agreement and reserve for future consideration if in the clients interest. This can help to defend a future claim of malpractice. See *Knisley v. US*, 817 F.Supp. 680 (S.D. Ohio 1993).

E. ***Duration of the agreement***

1. ***Interim agreements.*** Courts will generally recognize an interim agreement if it is stated as such. Problems may arise when the agreement becomes more comprehensive or when the parties live under the provisions for a long time. If so, then these problems may be alleviated by a modification.

2. ***Final agreements.*** Which law applies and are we capable of interpreting it? Courts may decide to merge, incorporate, or acknowledge an earlier separation agreement when rendering a final divorce order.

F. ***Approval, incorporation and merger clauses.*** The key to understanding how the court will treat the separation agreement is to recall its initial status, which is that it is a contract.

1. ***Levels of court "approval".*** The separation agreement will be subject to three distinct actions by the court.

a. ***Acknowledgment, ratification, or approval.*** First, the court will acknowledge the existence of the agreement. In doing so, the court will determine that the agreement is valid thereby insulating it to some extent from future attack.

b. ***Incorporation.*** Next, the court will determine that the agreement is valid and include its terms as part of the final decree. This action usually insulates agreement from collateral attack, at least to some extent.

c. ***Merger.*** Finally, when the agreement is determined to be valid, it may become the part of the order of the court. Be aware however, these are terms of art in some jurisdictions, and the agreement should clearly state their intent. The word "incorporation" is especially ambiguous and may have several different meanings. The use of "approval," "merger," and "incorporation" terms provides a degree of protection from attack after the divorce is granted. Incorporation and merger provide the greatest level of protection from challenges based on alleged unconscionability and improper execution. "Acknowledgment" may provide no such protection.

2. ***Effect of terms on enforcement mechanisms.*** Acknowledged, and incorporated (usually but depends on state law), agreements can only be enforced as a contract, with no basis for contempt actions. Specific performance may be available for breach of periodic payment provisions where a remedy at law is inadequate, costly and time-consuming. Merged agreements can be used as the basis of an action for the payment of money in the form of a judgment, a contempt action, an involuntary allotment, a garnishment, or a seizure of property.

If drafted correctly, terms of approval, incorporation, and merger can satisfy a prerequisite in order to request direct payment of military retired pay. The decree or a "court ordered, ratified, or approved property settlement" must provide for division. 10 U.S.C. § 1408(a)(2). These terms also satisfy a prerequisite to request garnishment, income withholding or involuntary allotment, again if drafted correctly.

3. ***Effect of terms upon modification of provisions.*** Any provision that is merged ceases to exist as a contractual obligation and instead becomes a part of the decree. It may only be modified as such. Typically, this means that executory terms may be modified if there has been a change in circumstances. A court may not modify acknowledged and incorporated provisions. A court may always independently determine terms for child support, custody, and visitation. The same rule holds true in some jurisdictions for alimony. One must first determine whether it is a modification of the contract or only a separate and independent determination? Next, examine what have the parties bargained for? Should easier enforcement be traded against modifiability? What about mutual and interdependent promises?

4. ***Further caution.*** Incorporation and merger are not solutions for poorly drafted separation agreements. They are not "re-work shops" for settlements. They are not the means of getting a bad agreement in front of a sympathetic judge. And even if the judge can modify an incorporated/merged agreement, that can be GOOD or BAD for the client, depending upon who cut the better deal when the agreement was signed.

0907 PRELIMINARIES

A. ***Representation***

1. ***The attorney's role.*** A critical aspect of the attorney's role is setting the tone for the client. The attorney must establish what the client's relations are with the other spouse. The attorney must ensure the client has realistic expectations regarding the outcome of the agreement. To shape these expectations, the attorney should explain the legal processes involved and the problems that the case presents. Explain your role and capabilities in terms of a problem solver versus a no-holds-barred advocate. The client must understand his role and responsibilities. Finally, discuss asset preservation. The key is to balance advising the client on legal aspects against guiding the client towards a position. In arriving at the final settlement, the attorney will either work through the client or negotiate with opposing counsel.

2. ***Dual vs. one-sided representation.*** With regards to dual representation, just as in civilian practice, don't do it. Although the clients always deny it initially, the parties inevitably have adverse positions. Additionally, legal assistance attorneys from the same office should not see opposing spouses.

As for one-sided representation, avoid this situation as well. However, if you must, include the following provision in separation agreements:

> In the negotiation and execution of this separation agreement, ____ was not represented by legal counsel. During the negotiation and prior to the execution hereof he/she was advised of his/her right to consult with counsel, of the availability of free legal counsel, and of the desirability of consulting with counsel before executing this agreement because if affects important personal and financial rights. By his/her signature on the line below and his/her execution of this agreement _____ represents that he/she has not received any advice from _____'s attorney other than the recommendation to consult with counsel of his/her choice, and he/she hereby waives his/her right to counsel.
>
> _____ (signature)

When representing one side: (1) don't contact the other spouse except to advise him or her to consult with an attorney; (2) don't suggest that the spouse see a specific legal assistance attorney (or any other named attorney) and don't let your client do so; and (3) don't "bend over backwards" to be watch out for the other spouse — represent your client to the best of your ability.

B. ***Gather facts and documents.*** Before proceeding with drafting any agreement, have the client provide you a copy of the marriage certificate and prior divorce decrees, SSNs of both spouses, copies of any antenuptial and postnuptial agreements, proof of citizenship, education, training and work experience of the parties, the dates of servicemember's military

service, and the child(ren)'s names, DOBs, SSNs, names of other children being supported, whether there are special needs. You will also need to obtain all financial information including income or lack thereof, other sources of income, etc.

C. ***PROPERTY DIVISION.*** [Often used acronym is I-C-E-D]

1. ***IDENTIFY all of the property.*** Include all real property, tangible personal property (e.g., household furnishings, motor vehicles, lawn and garden equipment, books, china, crystal, jewelry, etc.), and intangible personal property (e.g., bank accounts, mutual funds, stocks and bonds, CD's, retirement benefits, IRA's, etc.)

2. ***CLASSIFY.*** Classify all property as either separate, marital or mixed. Separate property is often described as premarital property plus gifts or inheritances to one of the spouses during marriage. Professional degrees or licenses may or may not be separate property. In some states, non-vested pension rights are separate property. Marital (or community) property is generally described as all property acquired by either or both of the parties during the marriage (unless it falls into one of the above categories of separate property). Mixed property is property that starts as one category and then has added to it components of the other category. Community property is generally all property acquired during the marriage and is deemed to be owned by both spouses equally regardless of title. Community property applies in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico (partial), Texas, Washington, and Wisconsin

3. ***EVALUATE the marital, separate and mixed property.*** Certain items are easy to value. For instance, for bank accounts one need only look at bank statement, for mutual funds read the stock market section of the newspaper. Some items may require some research. For motor vehicles refer to the NADA "blue book." Other items may require an expert. A real estate agent can usually value houses. A CPA, economist or actuary calculates the present value of retirement rights. Businesses can be extremely difficult to assess and may require a trained appraiser.

The agreement will also need a valuation date. This can be as agreed by the parties, or as provided by state law. Choices can be date of separation, divorce, summons issuance in divorce or dissolution lawsuit, or irretrievable breakdown, just to name the more common valuation dates.

Some property should be appraised at its "net value." The net value valuation insures that one spouse is not unfairly burdened with the costs of transforming an asset into cash. By net value, we mean after any liens, mortgages, deeds of trust or other security interests are subtracted from its fair market value. Whether "sales costs" are subtracted depends on whether the sale of the property is required or optional.

A related valuation is "after-tax" value. After tax value is calculated by reducing the fair market value of the asset by the taxes due on the transfer.

Transfers of property do not qualify as alimony. For tax purposes, a recipient spouse receives carry-over basis in appreciated property. Dividing property pursuant to a property settlement does not trigger capital gains. The sale of the property to will trigger capital gains even if the cash is later divided. Therefore, the spouse may delay capital gains recognition by dividing divisible property.

4. ***DIVIDE the marital property***. Should the division be equal or unequal? What is equitable? Are the "wage-earner" and "home-maker" contributions equal? Does an "equal presumption" really favor the homemaker? Has the division addressed marital fault vs. economic fault? When was the property acquired and how long have the spouses owned it? Parties may have to divide separate property when there isn't enough marital property to go around.

For most couples, their home will be the principle and most valuable asset. It may be to their advantage to defer capital gains recognition for the recipient. Does any change in ownership or financing affect the servicemember's VA entitlement?

0908 SPECIFIC PROVISIONS

A. ***Recitals***. The recitals portion of the separation agreement should state the date and place of the marriage. The names and birthdays of any children should be included. Additionally, be alert to statutes that presume any children born during the marriage are a product of the marriage. On occasion, the wife may be pregnant with a child not of the husband (a frequent cause of divorce).

State that the parties are living separate and apart and the date they commenced to do so, or at least that they intend to do so when the agreement is completed or when transportation is available. Identify any pending legal proceedings by case number and court. State the reason for the action and the purpose of the agreement (e.g., "Unhappy and irreconcilable differences have arisen between the parties, and their health, welfare, and general happiness require that they live separate and apart. They do not intend to live together again as husband and wife.") State each party's current employment status and expected future employment status. State the consideration supporting the agreement (usually phrased in terms of "valuable consideration, the receipt of which is hereby acknowledged.")

Include a sample clause on advice of counsel:

> (1) Each party has consulted with counsel of his or her own choice, independently selected without suggestion by the other party. Neither party was precluded from obtaining an attorney of his or her choice because of the cost of attorney fees, and neither party has at any time received advice or counsel on this matter from the other party's attorney.
>
> (2) Husband's attorney throughout the negotiation of this agreement has been _____.
>
> (3) Wife's attorney throughout the negotiation of this agreement has been _____.
>
> (4) The parties have reached agreement on the matters contained herein only after receiving advice from counsel on every question either of them have raised. Issues discussed by each party include legal rights and obligations under state and federal law and the legal effect of each clause in this agreement. The parties and their respective counsel have also generally discussed the tax consequences of this agreement but both parties have been advised and understand that their counsel are not tax specialists. Each party has been advised to seek specific tax advice in connection with this agreement, and each party sought such independent advice as each has deemed necessary.
>
> (5) Each party has carefully read this agreement and each is fully aware of its contents and legal effect.

B. ***Personal property division.*** The property division typically starts with an equitable distribution. Community property jurisdictions require that the property be divided equally. Attach a schedule to provide the details of who gets what. List bank accounts, CD's, etc. by owner, account number, institution, and approximate balance. Consider a waiver clause for property not mentioned in the agreement. For example:

> "Each party has independently-determined to his or her satisfaction the extent of property owned by the parties jointly and individually. Each is satisfied that this agreement divides all property and assets that should be divided between the parties. Notwithstanding contrary provisions of law, any property, asset or expectancy, be it real or personal, tangible or intangible, vested or contingent, that is not addressed in this agreement is the separate property of the party who now owns or possesses it."

If you are going to use a waiver clause, make sure you use a reliance on representations clause.

1. ***Military retired pay.*** This is a critical matter that should be addressed in every separation agreement involving a servicemember. For the non-servicemember spouse, address the matter if only to preserve the matter for future resolution. For the servicemember,

this may be the servicemember's greatest reason for wanting a separation agreement — to preserve his/her retirement pay. See *Knisley v. US*, 817 F.Supp. 680 (S.D. Ohio 1993). If the parties choose not to include the matter, memorialize your advice to the client if the matter is not raised. Also, provide them advice on direct payment requirements (10 U.S.C. § 1408). The common formula to calculate a nonmilitary spouse's share of retired pay is:

$$1 \times \frac{\text{length of marriage overlapping service}}{\text{length of retirement creditable service}} \times 100 = \text{spouse's percentage}$$

See the chapter on the Uniform Services Former Spouses Protection Act for more information.

2. ***Other issues to consider***

   a. ***Gross vs. disposable retired pay.*** Will calculations be a percentage of gross or disposable retired pay? How does one calculate "disposable" retired pay?

   b. ***When do the payments actually begin?*** Must the spouse wait until the servicemember retires before receiving payments? Can partial payments begin today based upon a hypothetical calculation of what the member would receive were he/she to retire today?

   c. ***Disability vs. retired pay, VA disability pay, and the "Dual Compensation Act."*** Servicemembers may have the option upon retirement to receive a portion of their retirement compensation in the form of disability pay in lieu of retired pay. Disability pay receives more favorable income tax treatment compared to retired pay. Can the spouse claim a portion of the retired pay? What about the fact that the disability pay is to compensate the servicemember for some injury or disability incurred during service?

   d. ***Post-divorce increases in retired pay due to promotions, step increases every two years.*** Will the spouse's share of retired be calculated as if the servicemember retired today? Will the spouse not share any increases in retired pay due to promotions, pay increases, longevity of service increases?

3. ***The "Double-Dipping" problem.*** "Double-dipping" occurs when a non-servicemember spouse is receiving a portion of the servicemember's retired pay and alimony payments at the same time. The problem is that retired pay is frequently divided as property between the parties, thereby giving the spouse a definite share. Can the court later consider the servicemember's portion of retired pay again as income in determining how much

alimony he or she should pay? There are three possible approaches: (1) if retired pay is treated as marital property, and especially if it is divided as marital property, then it cannot be considered at all for alimony purposes (i.e., no "double dipping"); (2) a court can consider income-producing assets in setting alimony even if those assets were awarded to the retiree as property in the divorce. (See, e.g., *Lang v. Lang*, 425 N.W.2d 800 (Mich. Ct. App. 1988) (the court distinguished between an award of the retirement plan itself, which is what occurred in this case, and an award of the individual periodic payments, which would limit the court's ability to subsequently consider the payments in setting alimony); or (3) a compromise where portions of retired pay earned during the marriage and treated as marital property cannot be considered in setting alimony, but portions earned by service before or after the marriage can be considered for alimony or child support. See, *Staver v. Staver*, 526 A.2d 290 (N.J. Super. Ch. 1987). In cases where alimony is awarded or jurisdiction over alimony is reserved, this issue probably should be resolved in the separation agreement or divorce decree. However, one must be cautious. Merger of the agreement into a court decree (or a clause permitting this) can cancel the effectiveness of such protections, since it usually gives the court modification powers and allows the court to redetermine such terms as time limit and amount — unless state law allows these issues to be defined as non-modifiable, such as in an integrated property and support settlement.

C. ***Spousal support***

1. ***Know local customs.*** It may be malpractice not to seek support pendente lite (getting temporary support ordered while petition for dissolution is pending).

2. ***Alimony.*** Which way is the law headed with regard to alimony? According to a study conducted in 1988, an astounding number of trial courts that limited alimony are being reversed. On the other hand, a California court stated, "a marriage license is not a ticket to a perpetual pension."

a. ***Statutory versus contractual alimony.*** Statutory alimony is support that a court has power to award; the law controls what court can do. Contractual alimony is support that parties have agreed to regardless of court's power to award support; agreement specifies what the court can do.

b. ***Permanent alimony vs. temporary or "rehabilitative" alimony.*** Permanent alimony is for an indefinite period of time. Temporary alimony is support for a limited period of time, usually to allow the financially disadvantaged spouse time to develop skills or training for a job. Typically, the longer the marriage, the longer the period of time that alimony is appropriate.

c. ***Advantages of alimony over property division for payer.*** Alimony is a tax deduction for the payer and taxable income for the

recipient. Alimony can be terminated upon stated conditions. Alimony can be reduced during periods of financial hardship. The alimony obligation ends upon the death a one of the spouses. Alimony may also end if the recipient spouse cohabitates or remarries. Property divisions assign property to a spouse and that property must go to the spouse regardless who has custody of the property.

d. ***Sample clause terminating alimony upon cohabitation***:

> "Martha's right to receive spousal support shall terminate upon the earliest occurrence of the following events: John's death; Martha's death; or Martha's remarriage. The term remarriage includes any marriage, whether void or voidable or terminated by divorce, annulment, death, or otherwise, and shall also include Martha's habitual cohabitation with an unrelated male [for a continuous period of ____ days] (for various periods of time totaling ____ days in any _____ consecutive months]."

e. ***Advantage of alimony over property division for payee.*** The alimony amount is frequently based on need. Alimony may be modified by the court as to amount or length of payment period (if merged in decree).

f. ***If no alimony is to be paid, say so!*** Consider using the following clause or its equivalent:

> "Neither party shall now or in the future be obligated to pay to the other any amount or form of maintenance, alimony, or spousal support. They agree that neither of them shall petition any court for any form of such support and they each release the other from any obligation for support. This clause may be pleaded in bar of such a petition."

g. ***Placing condition on alimony.*** If alimony is to be paid, counsel for payer should consider a provision conditioning payment upon the payee's non-breach of other terms in the agreement. For example:

> "John may abate payment of spousal support for any period of time that Martha is in breach of any provision of this agreement, and Martha shall have no right to recoup such abated payments after the breach is remedied."

Similarly, counsel for payee should consider a provision conditioning her compliance with other terms (such as current house payments on jointly titled residence) on the payer's non-breach of alimony terms. For example:

> "Martha's duty to make mortgage payments on the marital residence at [address] is specifically conditioned on the alimony payments John shall make under Paragraph ___ herein; should he fail to comply with that provision, she shall be relieved of her duty to hold him harmless on the mortgage payments, and she shall be entitled to any other remedies at law or in equity that may be available."

D. ***Child custody and visitation.*** Custody will generally be either joint or sole. The couple's decision depends upon the parties and whether or not they can or will cooperate with each other in the future.

When drafting custody and visitation provisions for separation agreements, describe them with more than usual specificity. For instance, allocate travel expenses and responsibilities incident to the exercise of visitation rights. A sample provision might be:

1. *The noncustodial parent shall have the right to have the child with him during the following visitation periods:*

   a. *The first weekend each month, from 5:00 p.m. on Friday until 5:00 p.m. on Sunday; however, if the following Monday is a holiday, the visitation period shall extend until 5:00 p.m. on Monday.*

   b. *For the month of July every summer.*

   c. *For a one week period each Christmas/New Year's Holiday, and the period will include December 24 and 25 in each even-numbered year.*

   d. *For 4 days during spring school break in each odd-numbered year.*

   e. *Such other times as the parties may agree.*

2. *The parties agree that upon the child's attaining the age that airline carriers will allow him/her to travel unaccompanied, he/she will use this means of travel for visitation purposes. The noncustodial parent will bear all transportation costs incident to exercise of visitation rights except as follows:*

a. *The custodial parent will be responsible for delivering the child to and picking the child up at the major commercial airport nearest his/her home.*

b. *If the custodial parent moves to a new location so that the transportation costs are higher, he/she will bear the additional cost.*

3. The noncustodial parent's exercise of the rights of visitation under this agreement shall be optional with him/her, and his/her failure to exercise such rights on any occasion, for whatever reason, shall not be construed as a waiver of future rights. However, any such unused visitation shall not accumulate.

Also, include an obligation to avoid disparaging the other parent in the child's presence.

"Neither party will disparage or criticize the other party in the child's presence, and each party will ensure that other adults refrain from disparaging or criticizing the other party in the child's presence."

Another recent visitation issue to address is that grandparents or other adults may have significant standing in the child's life.

E. ***Child support***

1. ***Amount.*** What amount, if any, have the parties allowed for child support? If the parties do not agree, review state or local child support guidelines. Most states have created formulas or charts that calculate the parent's support obligation based upon a portion of net income of the parents. Excessively low support amounts are self-defeating because the court will likely ignore this portion of the agreement. Even when the agreement is to be incorporated or merged into court decree, the court may be required to determine whether the amount of child support conforms to the state guidelines.

a. ***Contractual child support vs. court-ordered support.*** Accrued contractual arrears may pose a problem. The situation may arise where a court orders a lower amount of child support at a date some time after an unmerged separation agreement for a higher amount is signed. What happens to the contract arrears? There is also the problem of incorporation or merger of agreement. Will court require recitation of the financial circumstances of the parties? Should there be a statement as to consistency with (or variance from) state guidelines?

Advantages of court orders. Court orders streamline enforcement. With a court order, one can obtain an involuntary allotment. Failure to comply with the court order can lead to contempt proceedings. An alternative to involuntary allotments is garnishment. If there is no income for allotments or garnishment, then property can be seized.

Check your local jurisdiction or state laws to find out if a court order can be entered voluntarily in tandem with separation agreement. If so, will the separation agreement merge into the divorce decree? Will there be a voluntary support agreement? What about a confession of judgment?

b. ***Should support be stated on a per-child basis?*** Yes, where possible, if you are representing the payer. In the separation agreement, state the amount per child. For example:

> "Child support in the amount of $ 250 per child per month."

Or, state the percentage for each child. For example:

> "Child support of $500 per month, 50% of which is for each child."

Guidelines usually reduce the amount of support by other than a pro-rata share as the number of supported children decrease.

No, if you are representing the payee. Instead of a per child or percentage amount, state a flat amount. For example:

> "Child support in the amount of $500 per month."

OR

> "Child support in the amount of $500 per month until the first child is emancipated, and then the support obligation will be recalculated using the applicable guideline for one child."

c. ***Dependency exemption — who gets it?*** When calculating income taxes, the taxpayer receives a tax benefit in the form of an exemption of an amount of income for each dependent. The spouse who applies the income exemption for the child reduces the taxes they owe. One spouse could permanently assign the

exemption to the other spouse. This is attractive where one spouse's income is significantly higher than the other's income. Part of this assignment could include a trade for higher support. Where more than one child is involved, each spouse may take a portion of the total available exemptions. Also, the exemptions could change annually between spouses.

d. ***Escalator clauses.*** The cost of living can reasonably be expected to increase in the future. Likewise, money will lose its purchasing power due to inflation. The support payee would certainly prefer support amounts that increase over the course of time. Maybe these increases can be merely "painless" adjustments. On the other hand, the payer is likely to complain that "everyone else pays a flat amount of support, but mine keeps on going up!" Any changes in support can foreseeably lead to enforcement problems.

If an escalator clause is to be used, then what kind of escalator clause? Should there be a "cap" in the amount of the increases? Should the increases be based upon net or gross pay? Should the increases be tied to the Consumer's Price Index (CPI)? Or, should the increases be at a flat rate?

Be advised that some jurisdictions will require a periodic review of support amounts regardless whether escalator clauses are included. Also, some states favor automatic adjustments as the child grows older. Other states will order adjustments be tied to the CPI.

e. ***Who should be the payee?*** Obligee benefits from payments through a state agency or the clerk of court (if paid under "court order" or incorporated agreement) to facilitate publicly assisted enforcement. The obligor benefits from record keeping by neutral public agency. If he's current in support payments, they can help prove it. Potential problems arise if anything but a direct and unvarying monthly/weekly payment goes from one parent to the other. A sample provision:

> "The child support set out herein shall be paid to Martha through the Child Support Enforcement Agency of [jurisdiction] at [address] to be forwarded to Martha at [address]."

f. ***Should child support be reduced during extended visitation?*** If support payments are reduced, then the payer has a good incentive to encourage visitation. However, the changes in

payments may create problems for the agency keeping track of payments and arrears. Also, what reduction is due for one month with noncustodial parent?

2. ***Health care expenses.*** Military medical care may be preferred by the servicemember but may not be convenient for the custodial parent.

The agreement should address the issue of health insurance. The servicemember may choose to continue with CHAMPUS. Under some circumstances, civilian insurance may better satisfy the family's requirements.

3. ***Uncovered health care expenses.*** Define what is health care. Does it include psychological counseling? Orthodontia? Prescription drugs? Who pays for what? Silence likely means the custodial parent will bear the burden.

4. ***Termination.*** Define what "emancipation" means. Does the support obligation terminate at a specific age? What about higher education? Some jurisdictions may require support past age 18 if the child is still in high school. Some may include college expenses as well. Carefully scrutinize support provisions while children are in college. Should this money go to the child or the custodial parent? Will the child's marriage terminate support obligations? What about void or voidable marriages? What if the child resides outside the custodial parent's home? What if the child enters military service?

5. ***College expenses.*** What is the length of the obligation? Four years? Eight semesters? Until age 23? What items will be covered? Room and board? Books? Tuition? Fees? Are there any terms or conditions on enrollment? Child's performance in school? Generally recognized degree? Accredited institution? What portion will be paid by the noncustodial parent? Specific amount? All or a portion? For the payer's sake, don't leave a fractional amount to be calculated at future date. Also, be aware that hortatory or vague language regarding college education is probably worthless. For example, the following was held too vague to be enforceable in *Ault v. Pakulski*, 520 A.2d 703 (Me. 1987):

> "The Husband and Wife are to establish a trust fund for the education of the children. This trust is to be executed within one year from the date of the divorce judgment, and the cost is to be borne on a percentage basis on the respective incomes of the Husband and Wife."

F. ***Insurance provisions.*** What will be the amount of coverage? How to calculate the amount? Should the amount scale down as the children get older and "age out"? Who will be covered? Will it be both parents, or just the noncustodial one? Who will be beneficiary? The other parent? Or will it be another child(ren)? Might it be a trust?

What are the potential problems in providing insurance? The policyholder may want to change the beneficiary without the other parent's authorization. The owner could cancel the policy. The company could cancel for nonpayment of premium. The owner could take unauthorized loans on policy (if cash value type policy).

Including the clauses that follow could solve the above potential problems. First, require parties to specify irrevocable beneficiary on company form (this requires sending off to company for form and takes several weeks). Next, mandate transfer of ownership of policy (same as above) — cannot be done for SGLI or group life insurance. Also, bar loans or pledges against policy (if cash value). All parties should regularly review of the current policy, and provide each other written authorization to get information directly from the carrier. Include in the separation agreement, remedies for breach. The key is preventing problems in the first place by using provisions such as:

1. FOR FIXED AMOUNT OF INSURANCE:

John will maintain life insurance on his life with a face value of $200,000 naming _____ [as sole (and irrevocable) beneficiary] [as joint (irrevocable) beneficiaries], until [the youngest child reaches the age of 22][____]. He also agrees that he:

Will not take loans against or otherwise encumber in any manner said insurance before (the youngest child reaches the age of 22][____].

Will execute such forms as are necessary within forty-five (45) days of signing this agreement to [transfer ownership of all said policy or policies to her] [assign her as irrevocable beneficiary of said policy or policies for the duration of his support obligation as set out herein]

Will provide Martha with proof on an annual basis that insurance remains in force sufficient to meet the obligations created by this agreement.

Will authorize and require the insurance company to provide notice to Martha immediately upon any change in the status of said insurance.

If John fails to provide such proof or to maintain insurance as required herein, Martha may in her discretion, after notifying John at his last known mailing address, procure a policy for up to [$200,000] on his life and recover from him or his estate the amount of the premiums [without first submitting the matter to arbitration]. Alternatively, if John dies before [the youngest child reaches the age of [22][____] without such insurance in force, his estate shall be indebted to Martha, or to the child[ren] if Martha does not survive him, in the amount of [$200,000]. The requirement to maintain insurance and the limitations on John's actions regarding said insurance shall terminate upon [the youngest child reaching the age of 22][____], and at that time all rights, title, and interest in said insurance shall revert exclusively to John.

2. FOR DECREASING INSURANCE:

John will maintain life insurance on his life with an initial face value of [$200,000], naming _____ [as sole (and irrevocable) beneficiary] [as joint (irrevocable) beneficiaries], until [the youngest child reaches the age of 22][____]. John may reduce the initial amount of insurance proceeds payable to the [beneficiary] [beneficiaries] named herein by $X,000 on the 1st day of January 199__ and by a like amount on each succeeding January 1st thereafter until [____]. He also agrees that he Will not take loans against or otherwise encumber said insurance before (youngest child reaches the age of 22][___] in any manner which reduces the death benefit payable to the [beneficiary] [beneficiaries] named herein to an amount less than the minimum insurance required by this provision.

Will execute such forms as are necessary within forty-five (45) days of signing this agreement to [transfer ownership of all said policy or policies to her] [assign her as irrevocable beneficiary of said policy or policies for the duration of his support obligation as set out herein]

Will provide Martha with proof on an annual basis that insurance remains in force sufficient to meet the obligations created by this provision.

Will authorize and require the insurance company to provide notice to Martha immediately upon any change in the status of said insurance.

If John fails to provide such proof or to maintain insurance as required, Martha may in her discretion, after notifying John at his last known mailing address, procure a policy for the amount of insurance as required herein on his life and recover from him or his estate the amount of the premiums [without first submitting the matter to arbitration]. Alternatively, if John dies before [the youngest child reaches the age of 22][_____] without such insurance in force, his estate will be indebted to Martha, or to the child[ren] if Martha does not survive him, for the minimum amount of insurance required herein at the time of the John's death. The requirement to maintain insurance and the limitations on John's actions regarding the insurance shall terminate upon [the youngest child reaching the age of 22][____], and at that time all rights, title, and interest in said insurance shall revert exclusively to John.

G. ***Reconciliation clause.*** Sometimes a party will realize they have worked themselves into a bad situation. To alleviate this situation, they may attempt an insincere "reconciliation" to void an unfavorable agreement by operation of law. To prevent voiding the agreement include a provision such as:

"Even if the parties reconcile and resume living as husband and wife, this agreement shall nevertheless continue in full force and effect unless and until both parties execute a notarized agreement expressly modifying or rescinding this agreement. No failure to enforce any provision of this agreement for any period of time shall constitute a waiver of such provision."

H. ***Dispute resolution clauses.*** The purpose of dispute resolution clauses is to reduce violations of the agreement and specious arguments, and to provide an incentive to resolve disputes promptly and efficiently. There are a number of techniques to resolve disputes. The first technique is liquidated damages provisions--e.g., for denied visitation and delayed return after visitation. Next, the parties can condition transfer of dependency exemption on making current payments of child support. Another powerful tool is to secure periodic payments with a lien on the payer's property (i.e., H's payments to W to buy out her interest in home should be secured with a promissory note and additional mortgage/deed of trust).

1. ***Provide for interest on late payments.*** For example:

> "If any payment due [under any provision of this agreement] [under paragraphs X and Y of this agreement] is not paid by the 10th day of the month following the month in which it becomes due, interest shall accrue on the arrearage at a rate of 1% per month from the date the payment was first due. An obligation is paid when the receiving party actually receives the money or when it is deposited in an account maintained by the receiving party."

2. ***Include arbitration clauses.*** For example:

> If John suffers a substantial, adverse, and involuntary change of financial circumstances, making his support obligations under this agreement inequitable or a substantial hardship for him, the parties shall negotiate a modification of his obligations, consistent with their then-existing financial circumstances. Upon a failure of the parties to agree on the terms of such a modification, either party may submit the dispute to arbitration in [city], in accordance with the rules of the American Arbitration Association, and Judgment upon any award rendered in such arbitration may be entered in any court of competent jurisdiction. [Submission of such issues to arbitration is a prerequisite to seeking judicial resolution of the matter]."

If arbitration or mediation is to be a prerequisite to initiating litigation, state this intent. Make payments of money (except child support) dependent upon the recipient's compliance with the terms of the agreement.

> "John may abate payment of spousal support for any period of time that Martha is in breach of any provision of this agreement, and Martha shall have no right to recoup such abated payments after the breach is remedied."

Lastly, include **"loser pays"** clauses wherein if a party brings a suit to compel the other party to comply with the agreement, then the losing party will pay the legal fees of the winner.

> "In the event that litigation is initiated by either party to enforce any term of this agreement or to adjudicate rights under this agreement, the prevailing party shall be entitled to recover his or her reasonable attorney's fees and costs at the time of trial."

I. *Soldiers' and Sailors' Civil Relief Act Waiver*

1. ***Purpose.*** A servicemember's waiver of SSCRA protections can expedite the court proceeding and help facilitate direct payment of retired pay to the former spouse. The waiver can however affect certain rights listed in 50 U.S.C. App. § 520, 521. Sample provision:

> "John hereby waives all rights and protection afforded by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. §§ 501-548 and 560-591), and any state law providing similar rights and protections, in any proceeding brought by Martha to dissolve the parties' marriage, provided that Martha requests the court to [merge) [ratify and incorporate] this agreement in any decree the court may render; that she seek no relief or remedy in addition to the provisions of the agreement or contrary to its provisions; and that the court does [merge] [ratify and incorporate] this agreement in its decree and does not render any remedy or relief in addition to or contrary to the provisions in this agreement.

0909 STANDARD PROVISIONS IN SEPARATION AGREEMENTS

I. Preamble
II. Separation of the Parties
III. Child Custody and Visitation
IV. Child Support
V. Spousal Support
VI. Division of Personal Property
VII. Division of Real Property
VIII. Marital Debts
IX. Life Insurance
X. Emancipation Event
XI. Acceptance and Mutual Release
XII. Release Of Estate Rights
XIII. Military Privileges
XIV. Tax Matters
XV. Prior and Subsequent Agreements
XVI. Additional Instruments
XVII. Subsequent Divorce
XVIII. Counsel Fees
XIX. Waiver of Rights under the Soldiers' And Sailors' Civil Relief Act
XX. Enforcement
XXI. Binding Effect
XXII. Notices
XXIII. Entire Agreement
XXIV. Governing Law
XXV. Execution
XXVI. Acknowledgment

0910 SPECIAL PROVISIONS IN SEPARATION AGREEMENTS

A. Special Spousal Medical Coverage Clauses.
   1. Specify Minimal Coverage for Wife.
   2. Place Dollar and Time Limitations on Husband's obligation.
   3. Ensure Broad Medical Coverage for Wife.
   4. Continue Existing Private Medical Coverage.
   5. General Medical Coverage Provision.

B. Special Military Medical Provisions.
   1. CHAMPUS Deductible Only.
   2. CHAMPUS Deductible and Costs In Excess Of CHAMPUS Coverage.
   3. Clause Requiring Custodial Spouse To Use Military Medical Treatment Facilities, If Available.

C. Attorney Representation Provisions.
   1. Both Parties Represented By Counsel.
   2. One Party Not Represented By Counsel.

D. Transfer of Automobile.

E. Release of Interest in Realty.

F. Survivor Benefit Plan Provision.

G. Military Retired Pay Provisions.
   1. Fractional or Percentage Share.
   2. Set Dollar Amount.
   3. Share Based on Rank at Time of Divorce.

PART B - NEGOTIATING SEPARATION AGREEMENTS

0911 REFERENCES

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B. Karrass, Give and Take (Harper Business, 1993)

C. Kass, "Pension Double Dipping: A Legal or Mathematical Question?" Fair$hare December 1990, Volume 10, No. 12

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E. Sullivan, "Child Support: Shopping for Options," The Army Lawyer, July 1992

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G. Turner, "Recent Case Law on Construction of Separation Agreements," Divorce Litigation, Vol. 4, No. 2, pp. 25-41 (February 1992)

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0912 NEGOTIATING STRATEGIES

A. ***Know the facts.*** To succeed in a negotiation, you must be fully familiar with the facts underlying the case. The requisite facts come from several sources. First, interview the client. Next, review the documents. Your client's memory is not infallible. Take notes and keep them in an accessible form. Your computer can be extremely useful, especially when searching for dates or phrases. Lastly, you need full disclosure — the pro's and the con's. Don't ignore unfavorable facts.

B. ***Know your opponent.*** Understanding your opponent's motivations and concerns will assist your preparation. What may be significant interests for them, may be trivial concerns for you.

C. ***The impasse.*** When negotiations stall on a point, leave it open for the time and do nothing. Frequently, the parties may cool off and later be able to reach agreement. In order to preserve what has been agreed upon, sign a partial settlement. "Except out" the disputed term. Be aware however that one of the parties usually loses negotiating leverage if the other party really needs a signed agreement and only a partial settlement is signed. An alternative to a partial agreement excepting the disputed term is to leave the term out of the agreement and say nothing about it. This may however create as many problems as it solves. Is silence golden? Often not. Consider the need for explicit reservation of the issue; don't just remain silent on it. *Knisley v. United States,* 817 F.Supp. 680 (S.D. Ohio 1993) [malpractice claim against Army for failure to include military pension in separation agreement negotiated between two Army legal assistance attorneys]; *Hagler v. Hagler,* 354 S.E.2d 228 (N.C. 1987) [failure to hold open or reserve any issues of property division means they are waived under the "general release" clause in a separation agreement].

D. ***Negotiating leverage***

1. ***Who has time on their side?*** One matter you must ascertain regarding your case is who has time on his side. Who must get a signed separation agreement? What are the hidden dynamics of settlement? Is there a pending remarriage by one party? Does one party intend to return to his or her home "back in the states"? Does the servicemember need to get a senior commander off his or her back?

The key point is don't be rushed. Don't let "them" pressure you. Try to organize the case so that you will have time on your side. A rushed bargain is no bargain at all, and few people make good decisions under time pressure.

2. ***Value of knowing when someone won't negotiate.*** A party will negotiate only to satisfy a need, either to obtain or to retain something. If the status quo is acceptable or even preferable, there is no need or desire to negotiate. Examine what, if anything, is motivating the other party.

3. ***The timing of apparently neutral acts.*** Legal assistance attorneys must advise a husband on the following fairly common separation scenario. He leaves the house, wife stays behind. Who gets to write off tax and interest portions of home mortgage on separate return? [i.e., if he continues to pay the mortgage, can he take a deduction even though it is no longer his primary residence?] Who loses eligibility for §1034 capital gains deferral? [i.e., if parties agree to split house sale proceeds equally, will his really be equal to hers if he has to pay taxes on it, while she can roll hers over within 24 months on purchase of a replacement residence?]

On the other hand, legal assistance attorneys just as often may advise the wife regarding the scheduling of husband's year-end divorce. The husband wants the marriage over in December. The wife can agree or play a waiting game. Is it solely a matter of time? If the divorce is postponed into the new year, that's one more year in which the parties will have the option of joint tax filing. This may give leverage to a wife earning much less than her husband by leaving him to file married, separate... a higher tax bracket with at least one fewer exemption. "How much is my signature worth?"

E. ***The value of "money on the table" [AKA "A bird in the hand is worth two in the bush."]*** Would you rather have $1,000 now or $1,100 five months from now? How about $1,100 five years from now?

F. ***The difference between executed and executory terms.*** Executed promises are permanent, final or completed. Executory promises are modifiable or incomplete. The lesson is: Don't trade permanent terms for modifiable terms (unless you know what you're doing!).

Examples of executory promises being traded for executed promises: LCDR John Smith agrees to give his wife the house, and she agrees to accept a low amount of child support. Then once the agreement is signed and the house deeded to her, she petitions in court for higher child support. Or, LT Jane Brown negotiates for zero visitation by her husband in exchange for his keeping his civilian retirement benefits. Then, two years after the settlement is executed, he files for visitation rights with the children.

G. ***Keep track of concessions.*** Know how many concessions you've made for when you're asked to make another.

H. ***Consider linking one concession to another.*** The parties should consider linking one concession to another thus resolving two issues at the same time. "We'll be willing to deed the house over to Mrs. Jones, but we'd like her to waive her rights to Chief Petty Officer Jones' retirement benefits in exchange for this. Fair enough?"

I. ***Find out why things have changed or need to be modified.*** If your adversary doesn't provide you with an explanation of his position, then demand one. Don't be afraid to ask for detailed information and objective reasons in support of that position. Ask about the reason for the other side's position, and suggest objective criteria to resolve the impasse.

Fisher & Ury suggest three keys to successful negotiating. First, focus on basic interests, not on the positions of the parties. Next, define problems objectively and separate the people from the problem. Finally, invent solutions, be creative and look at a range of options.

J. ***Don't negotiate against yourself.*** For example, you offer your adversary $500 per month child support and she responds, "That's not enough." If you go back to your client and try to improve the offer, rather than demanding a counter-offer, you are negotiating against your own offer.

K. ***Know the law and know your friends.*** A number of resources will assist you in researching other states' laws. Review All States guides. Consult with reservists in the state you are interested in. Contact legal assistance attorneys stationed in the state. Finally, seek assistance from civilian attorneys.

L. ***Referrals to civilian attorneys.*** Sometimes one must recognize the limits of professional competence. Other times, professional ethics will dictate that you refer the case to another attorney. Is this a cop-out or trump card? See Sullivan, "Lawyer Referral... Do's and Taboos," The Army Lawyer, June 1988. Does the referral cause a problem or solve one? Referral can also be a means of avoiding malpractice when the other side won't agree on a reasonable solution and you don't feel like recommending their settlement.

CHAPTER 9A

SEPARATION AGREEMENT

SEPARATION AGREEMENT

THIS AGREEMENT made and entered into this ___ day of _____, 1998, by and between [Husband name], hereinafter called "Husband", and [Wife name], hereinafter referred to as "Wife". Upon the filing of a complaint for divorce, the party filing such a complaint shall be referred to as the Plaintiff for the purposes of this agreement.

WITNESSETH:

WHEREAS, the parties were married on the _____ day of _____, 19____, the Wife is now a legal resident of [city], [state], the Husband was domiciled in [city], [state] for ____ year(s) prior to filing his complaint for divorce;

WHEREAS, there were [number] children born of the parties hereto as a result of the marriage;

WHEREAS, the irreconcilable differences have arisen between the parties and upon the signing of this document the parties will be living separate and apart; and,

WHEREAS, the parties desire to determine and settle their respective property rights and the rights and duties spouses, without affecting the right of either party to obtain a divorce;

NOW, THEREFORE, for and in consideration of the mutual covenants, promise and agreements and other good and valuable consideration herein contained, in full complete and final settlement, adjustment and compromise of any interest whatsoever of each in any property, estate or interest of the other, the parties hereto agree as follows:

1. Freedom from Restraint and Interference.

The parties shall hereafter be free from the authority or control, direct or indirect; of the other to the extent that it is permitted by law, as fully as if he, or she, were unmarried. The parties shall not molest or interfere with the other, nor shall either of them compel or attempt to compel the other to cohabit with him or her by any means whatsoever. Each party hereto shall have the rights and privileges accorded to each by law to married persons living

separate and apart from each other, including the right to reside at any place, engage in any occupation, employment, or business, and to contract or be contracted with, without the consent of the other.

2. Full Settlement.

Each of the parties receives the property set apart to him or her and the undertaking hereof in full and complete settlement and release of all claims against the other party hereto, including liability now or at any time hereafter existing on account of support, maintenance, dower, curtesy, or allowances, either relationship, including any rights in or to the property, both real and personal, of the other. Husband and Wife shall receive nothing whatever of the other except as herein provided.

3. Waiver of Claims Against Estate.

Subject to the provisions of this agreement, each of the parties may hereafter in any way freely dispose of his or her property of any kind, be it real or personal, and each of the parties hereto, for himself or herself, and for his or her heirs, legal representatives, executors, administrators and assigns, hereby waives any right of election which he or she may have or hereafter acquire regarding the estate of the other, or to take against the last Will and Testament of the other, whether heretofore or hereafter executed, as may now or hereafter be provided for in any law of any state or territory of the United States, or any foreign country. Further, the parties renounce and release all interest right or claim of right dower, curtsey or otherwise, that he or she now has or might otherwise have against the other in any property of whatsoever nature, real or personal, of the other, under or by virtue of the laws of any state or country.

4. Debts.

The parties agree that each will assume and pay all outstanding debts listed below, such credit card debts, utility payments and rental payments incurred hereafter, if any such debts remain unpaid, except as herein otherwise provided. Each party shall be responsible for his or her own debts incurred after the date of this agreement. Existing debts are divided as follows:

HUSBAND	WIFE
19XX Jeep Cherokee (VIN #xx123456789)	Sears credit card #987654321

5. Credit of the Parties.

Neither party shall at any time hereafter obligate or charge to the other party's credit in any manner whatsoever, or contract any debts, charges or liabilities of any nature whatsoever for which the other party shall or may become liable to answer. Each party covenants and agrees to save and keep the other party free and harmless from any and all debts, charges and liabilities which may hereafter be incurred or contracted by such party.

6. Child Custody, Support and Visitation

Wife shall retain custody and control over all children. Both parties agree to consult with the other on such matters as surgery, major medial treatments and selection of schools for the children. Husband shall have the right to visit the children at reasonable times and places.

The Husband agrees to pay to the Wife the sum of $XXX per month per child for the support and maintenance of each child. Such child support payments shall continue until each child reaches the age of eighteen (18 years), marry, die, enter the armed forces, or are otherwise emancipated.

The Wife will, as necessary and to the maximum extent possible, seek treatment at U.S. Armed Services hospitals. Wife shall pay the first $100 and one-half of the excess over $100 annually. Husband shall pay the balance of the cost.

The Parties agree that each will assist the children with reasonable expenses of education beyond secondary schooling, provided such child is in legitimate and diligent pursuit of education until age XX.

7. Division of Property.

The parties have heretofore divided the household furnishings and other tangible personal property belonging to them or either of them in a manner satisfactory to each of them. Specific division of property is listed as follows:

HUSBAND	WIFE
1/2 money market account	19XX Jeep Cherokee (when paid in full by Husband) (#123-45-6789)
	1/2 money market account

8. Pension.

A. The parties agree the Wife will receive a portion of the military retired pay based on active or reserve service attributable to the Husband's military service using a percentage formula of XX%, vice a fixed dollar amount. In the event that the Husband does not qualify to retire but is awarded separation pay, Husband agrees to pay the Wife XX% of his separation pay offered to him by the [military service] in lieu of military pension based on active duty.

B. The parties agree that the Husband's military retired pay, if he becomes eligible for such, will be defined as follows;
It is the amount of the total monthly retired pay to which Husband is entitled or "disposable retired pay", as this term is defined in Title 10, United States Code Section 1408(a) (4). "Military retired pay" also includes all amounts of military retired pay the Wife would be entitled to receive notwithstanding any voluntary waiver or renouncement of retired pay by the Husband or any actual or constructive waiver, forfeiture or reduction of military retired pay for any purpose or reason such as medical disability pay.

C. The parties agree, if the Husband becomes eligible for a military retirement that the Husband shall not take any action which would defeat, reduce, or limit the Husband's military pension benefits. If the Husband breaches this paragraph, he will indemnify and pay directly to the Wife any sums reduced by such action to equal XX% of the husband's military pension benefits as if no reduction had occurred.

D. The parties agree that the Wife shall receive her XX% portion of the Husbands' military retired pay directly from the appropriate military finance center, payable from the Husband's disposable retired pay, and that the Wife shall receive the same percent of all cost-of-living adjustments which the Husband receives during his retirement.

E. The parties agree that Husband shall provide the Wife a copy of any annual retired pay tax statement and a copy of any amended retired pay tax statement that Husband receives from a military finance center, said copy of such annual retired pay tax statement or amended retired pay tax statement or amended retired pay tax statements.

F. The parties agree that the Husband will provide a copy of the Husband's annual retired pay tax statement shall include as a minimum the following information as provided by the military finance center:

a. Husband's social security number;
b. Husband's total annual military retired pay compensation; and
c. The total annual amount of income tax withholding deducted from Husband's military retired pay.

G. The parties agree that the Husband shall promptly provide any information or documentation the Wife needs to complete a request for survivor benefit plan insurance or direct payment of disposable retired pay from the military finance center and that the Husband also authorize any official of the [military service] Finance Center to release to the Wife the following information for any future tax or calendar years: the amount of the Husband's retired pay; the amount of Federal and State income tax withholdings from such pay; the number of exemptions claimed by the Husband for income tax withholding purposes; the amount of and nature of any deductions from Husband's military retired pay that have been used to calculate disposable retired pay.

H. The parties agree that if the Husband subsequently qualifies for a civilian retirement plan that allows him to combine his military and civilian service in order to receive a larger civilian pension, any such election by the Husband shall not affect the Wife's right to a monthly sum equal to her XX% portion of the military retired pay provided for in paragraph 8(C) of this Order.

9. Alimony.

The Husband agrees to pay $XXXX per month for XX months starting the month after the Final Divorce Order is filed. Alimony ceases if Wife remarries or dies.

10. Execution of Releases.

Each party agrees that, upon the requests of the other, or his or her legal representative, executors, administrators or assigns, each will execute and acknowledge any and all deeds, documents, or instruments of release for the proper carrying into effect of any of the provisions of this Agreement or as necessary in order to enable the other party to sell, convey or otherwise dispose of his or her property, free from any apparent right or interest therein.

In the event that either party fails to substantially comply with the terms and provisions of this Agreement, the cost and expenses of any litigation or other action of any nature necessary to compel compliance herewith, including attorney's fees, shall be borne by the defaulting party.

11. Modification.

The provisions of this Agreement shall not be modified or changed except by the written mutual consent of the parties or their respective heirs, executors, administrators and assigns or order of the Court.

12. Severability.

In the event that any part of this Agreement shall be adjudged or decreed invalid, such invalidation shall not invalidate the whole Agreement, but shall pertain only to the special covenant in question and the remaining covenants of this Agreement shall continue to be valid, binding and in full force and effect.

13. Binding on Heirs and Assigns.

This Agreement shall apply to and be binding upon the heirs, executors, administrators, personal representatives and assigns of the parties hereto.

14. Subsequent Divorce.

The parties agree to sign any documents which may become necessary to carry out the intention and purposes of this Agreement, which said Agreement shall be construed and interpreted in accordance with the laws of the State of _____ and may not be amended or modified except by written instrument executed by both of the Parties. The Parties in no way intend to attempt to take jurisdiction away from the [state] Family Court. The Agreement shall be incorporated by reference, but shall not be merged into the Final Judgment of the [state] Family Court and shall survive the same, as a separate and independent, binding legal contract, by and between the Parties. Notwithstanding the foregoing, the Parties agree that the Family Court will continue to have jurisdiction to issue any additional Orders necessary to administer, effectuate and/or clarify the division of property, including the military pension set forth hereinabove. The Parties hereto respectfully acknowledge that each has had an opportunity for independent legal advice by counsel of his or her own selection, and that each fully understands the facts and has been fully informed in regard to their respective legal rights and obligations and that each having had such advice, and with such knowledge, each is signing this Agreement freely and voluntarily, without duress, coercion or undue influence.

15. Entire Agreement.

Both parties hereby acknowledge that the Agreement contains the entire understanding of the parties, there being no promise or undertakings, written or oral, other than those expressly set forth herein.

IN WITNESS WHEREOF, the parties have signed this Agreement and hereby voluntarily enter into it.

_____
[wife]
Date:

_____
[husband]
Date:

[notary block(s)]

CHAPTER 10

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CHAPTER 10

PART A: WARRANTY PROTECTIONS

1001 REFERENCES.

A. U.C.C. §§ 2-312 through 2-318.

B. Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1982).

C. 16 C.F.R. Subchapter G – Rules, Regulations, Statements, and Interpretations Under the Magnuson-Moss Warranty Act (Parts 700-03).

D. 16 C.F.R. Part 455 (Trade Regulation Rule Concerning Sale of Used Motor Vehicles).

E. National Consumer Law Center, "Sales of Goods and Services. " (2d ed. 1989 w/ 1993 cumulative supplement).

1002 The Uniform Commercial Code, Title 2 (Sales), §§ 2-312 through 2-318.

A. ***Warranties.*** The Uniform Commercial Code (UCC) governs warranties accompanying the sale of consumer goods in all states except Louisiana. There are a number of different types of warranties described under the UCC. Along with warranty of title, there are express and implied warranties of quality. Implied warranties of quality include the warranty of merchantability and the warranty of fitness for a particular purpose. A warranty of fitness for a particular purpose is imposed by law whenever the seller at the time of contracting has reason to know both the particular purpose for which the goods are being purchased, and that the buyer is relying on the seller's skill or judgement to provide goods suitable for that purpose.

B. ***UCC Procedural Requirements.*** There are certain procedural requirements for enforcing rights under a UCC warranty. Consumers seeking to enforce warranty rights normally must notify the seller that the warranty has been breached within a reasonable time after the breach is or should have been discovered. U.C.C. § 2-607(3)(a). Actions must also be brought within the statute of limitations (4 years). U.C.C. § 7-725. The UCC statute of limitations begins to run at the time of delivery of the goods, not from the time the defect is discovered or the time of injury.

C. ***Buyer's Remedies for Breach of UCC Warranties.*** The primary UCC remedy for defective goods is revocation of acceptance, which permits the buyer to recover any money paid to the seller. The buyer may also:

1. Obtain a judicial declaration that a warranty "fails of its essential purpose. "U.C.C. § 2-719(2).

2. Sell the goods and obtain the difference in value from the original seller.

3. "Cover" – go into the market place to buy other goods to replace the defective goods received from the seller, then recover the excess price for the substitute goods.

4. Keep the goods and either the amount of damages from the unpaid purchase price or, if the buyer has already paid for the goods, sue for damages. U.C.C. §§ 2-714, 2-717.

D. ***Possible Recovery for Breach of Warranty.*** The UCC provides for several potential remedies. These include: general damages, incidental damages(U.C.C. § 2-715(1)), consequential damages (U.C.C. § 2-715(2)), punitive damages, liquidated damages, and any other remedies agreed to by the contracting parties. In order to invoke these remedies the defect in the goods must be serious enough to "substantially impair" their value to the buyer (U.C.C. § 2-608(1)) and the seller must first be given an opportunity to "cure" the defect before the buyer is allowed to revoke acceptance of the goods. U.C.C. § 2-508.

1003 WARRANTIES UNDER THE MAGNUSON-MOSS WARRANTY ACT

In 1975 Congress was concerned that the protections offered by the UCC were inaccessible to the average consumer and pass the Magnuson-Moss Warranty Act. This act requires manufacturers and sellers of consumer products to disclose warranty protections in the form of easy-to-read written warranties.

A. ***Magnuson-Moss Warranty Act Protections.*** The Act requires that if there is a written warranty, implied warranties cannot be disclaimed. If there is a full warranty, consumer must receive refund of the purchase price or replacement of defective goods. A warrantor cannot attempt to condition its written or implied warranty on the consumer's using a product or a service, aka a warranty "tie-in." The only exception is if the FTC approves a tie-in that provides a product or service that is free of charge and is identified by brand name.

B. ***Costs/Fees & Arbitration.*** The Act (federal law) authorizes state courts to award attorney's fees and court costs to consumers who win their revocation of acceptance cases. The FTC rules provide incentives to encourage manufacturers to set up consumer arbitration programs. Manufacturers and dealers can require consumers to use arbitration before resorting to legal remedies, provided:

1. The arbitration process is at no coast to the consumer.

2. The arbitration result is nonbinding.

3. The arbitration program is independent from company control.

4. An annual audit which reveals how many awards favor consumers is published annually.

C. ***Definitions.*** A written warranty is either a written affirmation that the product is defect free or will meet a specified level of performance for a specified period, or a written undertaking to refund, repair, replace or remedy a product **IF** it fails to meet specifications. The written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

D. ***Seller Requirements.*** The Magnuson-Moss Warranty Act does not require that any consumer product be warranted. However, it does provide that if the manufacturer of such a product chooses to give a written warranty it must be made available to the consumer before the decision to buy is made. The seller must comply by:

1. Clearly and conspicuously displaying the text of the warranty "in close conjunction to" the warranted product, and/or

2. Maintaining readily available binders containing copies of the warranties for the products sold in each department of the seller's store, and/or

3. Displaying the package of a warranted consumer product in such a way that the printed text of the warranty on the package is clearly visible to prospective buyers at the point of sale, and/or

4. Placing a notice containing the text of the warranty in close proximity to the warranted consumer product, in a manner which clearly indicates to prospective buyers the product to which it applies.

E. ***Warranty Terms.*** If the product cost more than $10, the warrantor must disclose (by means of its caption as a "full" or "limited" warranty) whether the warranty meets federal minimum warranty standards. The terms and conditions of the warranty (including those required by the Act) must be expressed in "simple and readily understood" language. All written warranties, full or limited, on consumer products costing more than $15 are required to disclose the terms and conditions of the warranty. This disclosure of term shall include:

1. The identity of the parties to whom the warranty is extended, including any limitations (such as to the original purchaser of the product).

2. A clear description and identification of products, parts, characteristics, components, or properties covered by the warranty.

3. A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with the written warranty.

4. The point at which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration.

5. A step-by-step explanation of the procedure which the consumer should follow to obtain performance of any warranty obligation..

6. Information about the availability of any "informal dispute settlement mechanism" elected by the warrantor.

7. Any limitations on the duration of implied warranties.

8. Any exclusions of or limitations on relief available to the consumer, such as incidental or consequential damages.

9. The following statement: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

Certain Magnuson-Moss Warranty Act provisions, including the provision requiring designation of written warranties as "full" or "limited," apply only to products actually costing the consumer more than $10 excluding tax. A warrantor who requires the consumer to return a "warranty registration card" or similar document as a condition precedent to warranty coverage must disclose this fact in the warranty.

F. ***Service Contracts.*** Defined by the Magnuson-Moss Warranty Act as a "contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product." 15 U.S.C. § 2301(8). The Magnuson-Moss Warranty Act specifically recognizes the right of a supplier or warrantor to enter into a service contract with the consumer in addition to or in lieu of a written warranty, as long as the service contract 'fully, clearly, and conspicuously discloses its term and conditions in simple and readily understood language." 15 U.S.C. § 2306(b).

G. ***Dislaimers.*** The Magnuson-Moss Warranty Act limits disclaimer or modification of implied warranties when the product is covered by a written warranty or by a service contract entered into within 90 days of the sale. A disclaimer, modification, or limitation made in violation of the Magnuson-Moss Warranty Act is ineffective.

H. ***Parties.*** Who can sue under the Magnuson-Moss Warranty Act? Either, anyone who buys a consumer product for purposes other than resale; or, anyone to whom the product is transferred during the life of a written or implied warranty. Any warrantor or supplier can be sued under the Magnuson-Moss Warranty Act.

I. ***Remedies.***

1. Cease and desist orders issued by the FTC under its administrative enforcement authority.

2. Civil penalties for unfair or deceptive acts or practices.

3. Injunctive relief.

4. Private civil relief under the Magnuson-Moss Warrantly Act.

a. Negotiation and/or mediation through an informal dispute settlement mechanism. Although a warrantor need not provide this nonjudicial alternative for the resolution of warranty disputes, if such a mechanism is available a consumer can be required to use the mechanism before beginning civil action provided:

(1) The mechanism and its implementation meet the requirements established by the FTC and

(2) The warrantor incorporates into the written warranty the requirement that the consumer resort to the mechanism before pursuing any legal remedy under Magnuson-Moss Warranty Act.

b. Industry complaint bureaus.

c. Consumers can sue for damages and other legal and equitable relief in either state or federal court.

d. The amount in controversy for suit in federal court must exceed $50,000 for both individual and class actions.

e. Personal injury damages.

(1) Typically, private actions for breach of warranty may be brought under the Magnuson-Moss Warranty Act only for direct economic damage.

(2) Consequential damages, such as personal injuries, cannot be recovered unless there has been a violation of the Act'ssubstantiveprovisions.

f. Punitive damages may be recovered in suits brought under the Magnuson-Moss Warranty Act if available under state law.

g. Damages for emotional distress can be recovered under the Magnuson-Moss Warranty Act if they are available in breach of warranty actions under state law.

h. Attorney's fees and court costs are allowable if the consumer prevails in the action.

PART B - COOLING OFF PERIOD FOR DOOR-TO-DOOR SALES

1004 REFERENCES

A. 15 U.S.C. §§ 41-58 (1994)

B. 16 C.F.R. Part 429 (1995), *amended by*, 60 Fed. Reg. 54,180, 54186 (1995)

C. National Consumer Law Center, Unfair and Deceptive Acts and Practices § 5.8 (3d Ed. 1991 and 1993 Cumulative Supplement)

1005 INTRODUCTION. Under 15 U.S.C. § 45, Congress declared unfair methods of competition unlawful. The Federal Trade Commission (FTC) under its authority of 15 U.S.C. §§ 41-58, promulgated the Federal Door-to-Door Sales regulation at 16 C.F.R. Part 429.

The FTC recognized that state laws which provided the buyer with a right to cancel door-to-door sales transactions were often inconsistent with each other. State laws that afford greater protection than the federal statute for the buyer are still valid. State laws inconsistent with the Federal Cooling-Off Period for Door-to-Door Sales are preempted.

The FTC reviewed the Cooling Off rule in 1995 and retained the rule with some minor amendments. The name of the rule was changed from "Cooling-Off Period for Door to Door Sales" to the "RULE CONCERNING COOLING-OFF PERIOD FOR DOOR TO DOOR SALES AT HOMES OR CERTAIN OTHER LOCATIONS." The effective date for the new rule is 19 December 1995. The amendments to the old rule may be found at 60 Fed. Reg. 54186 (1995).

1006 GENERAL. The rule grants a unilateral right to rescind consumer purchase contracts for three business days following a door-to-door sale. The rule imposes disclosure and notice requirements upon the seller. The seller in a door to door sale is required to furnish the buyer with a copy of the sales contract containing a summary notice of the buyer's right to cancel,

and a completed cancellation form, in duplicate (one for the buyer to retain and one to send to the seller), captioned "Notice of Right to Cancel" or "Notice of Cancellation."

1007 SCOPE, DEFINITIONS, AND EXCLUSIONS. The RULE CONCERNING COOLING-OFF PERIOD FOR DOOR TO DOOR SALES AT HOMES OR CERTAIN OTHER LOCATIONS applies to sellers making "Door-to-Door" sales.

A. ***Definitions***

1. ***Door-to-door sale.*** (16 C.F.R. § 429.0) A door-to-door sale is a sale, lease, or rental of consumer goods or services with a total purchase price of $25.00 or more that is personally solicited by the seller at a place **other** than the permanent place of business of the seller.

a. ***Examples.*** Sales made at the following locations: (a) the buyer's residence; (b) facilities rented on as temporary or short-term basis such as hotel or motel rooms, convention centers, fairgrounds and restaurants; or (c) the buyer's workplace or in dormitory lounges.

b. ***NOT door-to-door sales***

(1) ***Pre-arranged visits.*** Buyer agrees to a visit by seller after buyer visits the seller's regular place of business.

(2) ***Seller financed home equity loans.*** Any contracts in which the cooling-off period of TILA applies. A buyer has the right to rescind a contract under TILA for goods or services sold to the buyer and financed by the seller through a home equity loan. (See TILA outline).

(3) ***Buyer contacts seller for repairs in emergency situation.*** Buyer initiated contracts for a bona-fide emergency need.

(4) ***Mail or telephone solicitations.*** Transaction is conducted and consummated entirely by mail or telephone.

(5) ***Buyer initiates contact with seller to make personal property repairs.*** Requests seller to come to house to repair personal property.

(6) ***Industry exclusions.*** Transactions involving the sale or rental of real property, insurance, securities.

c. ***Specific exemptions from cooling off rule.*** Automobiles sold at tent sales or other temporary places of business provided the dealer/seller has permanent place of business elsewhere. Sellers who sell art or crafts at fairs or similar places.

2. ***Business day.*** Any day **except** Sundays or any federal holiday – New Year's Day, President's Day, Martin Luther King's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day and Christmas Day.

1008 REQUIREMENTS OF THE RULE

A. ***Notice of the cancellation right.*** The consumer should receive two copies of the completed sales contract. One copy is an easily detachable, fully completed copy for consumer to retain. The other copy is for the consumer to send to the seller to cancel the contract. The contract should include the date of transaction, and the name and address of the seller.

In addition to the written notice of rescission, the seller **must orally** inform the consumer of the right to rescind. The notice of the right to rescind must be in close proximity to the signature block of the consumer. The seller must not attempt to misrepresent the right to rescind. The notice must be in bold print.

> **"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."**

The notice must be in the same language as that used during the sales presentation, e.g., Spanish. The notice need not conform exactly to FTC recommended language. It should be in a conspicuous location and printed in easily readable type.

B. ***Waiver is not allowed.*** The seller may not allow or request the consumer to waive the right to rescind the contract. An exception to this provision is provided for goods or services to satisfy emergency needs.

C. ***Sellers must honor cancellation.*** A seller is not permitted to sell or transfer a credit note before midnight on the fifth business day following the transaction. If the consumer cancels the contract, the seller has 10 days within which to provide consumer with instructions regarding goods already delivered to the consumer.

1009 MECHANICS OF CANCELLATION. A consumer must mail or deliver written notice to the seller before midnight of the third business day following the transaction. He or she may use the cancellation form provided by the seller, or **any written form**, to include a telegram, that communicates the desire to rescind to the seller.

The seller must return a trade-in, if any, within 10 days of receipt of the consumer's notice.

The consumer must make goods already delivered available to the seller, or follow the seller's instructions regarding return of the goods. The return must be at the cost of the seller. Any risk of loss during return is on the seller.

If the seller fails to pick up the goods within 20 days, the consumer may retain the goods with no further obligation to the seller.

1010 FEDERAL TRADE COMMISSION APPLICATION AND INTERPRETATION OF THE RULE. The FTC strictly interprets the rule against the seller. If the buyer cancels the contract, but the seller has performed, there is no recovery for the seller based on *quantum meruit.* Some states, however, do interpret the state cooling off rule to allow for *quantum meruit* recovery.

A. ***Extended right to rescind.*** What if the sales contract is deficient in form such that the consumer is not adequately notified of his right to rescind? What if the seller does not orally inform the consumer about the right to rescind the contract? Does this toll the three day cancellation period until proper notice of rescission rights is provided? The answer is not clearly present in FTC rule. FTC administrators have indicated that the 3 day period is tolled until proper written and oral notice is given. Some state Unfair Deceptive Acts and Practices (UDAP) statutes may provide relief.

B. ***Remedies.*** There is no independent cause of action for a rule violation. However, rule violations may be prima facie evidence of a violation of a State's Unfair and Deceptive Acts and Practices (UDAP) statute.

1011 RELATIONSHIP WITH STATE LAWS. The rule does not preempt state law, except when state law is directly in conflict with the rule.

A. ***Examples.*** State law authorizing a cancellation fee would be preempted. State law with no requirement for providing notice preempted. State law with less than 3 days to rescind preempted.

PART C - TRUTH IN LENDING ACT (TILA)

1012 REFERENCES

A. 15 U.S.C. §§ 1601-1667

B. 12 C.F.R. Part 226 (1995), (REGULATION Z)

C. National Consumer Law Center, The Consumer Credit and Sales Practice Series, "Truth in Lending," (2d. ed. 1989 w/1993 Supplement)

1013 INTRODUCTION. Congress found that consumers needed protection from inaccurate and unfair credit billing and credit card practices. Congress also noticed a trend toward leasing automobiles as an alternative to installment credit sales. Based on its findings (15 U.S.C. § 1601), Congress passed laws assuring meaningful disclosure of credit terms to avoid uninformed use of credit by consumers and to ensure meaningful disclosure of lease terms to consumers. The resulting federal regulation 16 C.F.R. Part 226 is also called REGULATION Z.

1014 PURPOSE

A. ***Economic stabilization and competition is strengthened by informed use of credit by consumers.*** TILA requires "meaningful disclosure of credit terms." TILA is also designed to protect consumers against inaccurate and unfair credit billing and credit card practices. The Act is in Title I of the Consumer Credit Protection Act and is implemented by the Federal Reserve Board via Regulation Z (12 C.F.R. Part 226). The Regulation has effect and force of federal law. *Gray-Taylor, Inc. v. Tennessee*, 587 S.W.2d 668 (Tex. 1979). *But see, Porter v. Hill*, 838 P.2d 45 (Or. 1992) (While regulations promulgated by the FRB pursuant to its authority to construe provisions of TILA are not binding on courts, they are entitled to substantial deference, since agency has interpretive powers). TILA is to be liberally construed in favor of consumers, with creditors who fail to comply with TILA in any respect becoming liable to consumer regardless of nature of violation or creditors' intent.

1015 SCOPE

A. ***TILA applies to.*** Each individual or business that offers or extends credit is subject to TILA when four (4) conditions are met. First, credit must be offered or extended to consumers. Second, credit must be done "regularly." Regularly is defined as extending credit more than 25 times (or more than 5 times for transactions secured by a dwelling) per year. Third, the financing must be subject to a finance charge or be payable by written agreement in more than 4 installments. Fourth, the financing must be primarily for personal, family, or household purposes.

1. ***Credit cards.*** If a credit card is involved, however, certain provisions apply even if the credit is not subject to a finance charge or is not payable by agreement in more than 4 installments, or if the credit card is used for business purposes.

2. ***Home equity plans.*** Certain requirements apply to persons who are not creditors but who provide applications for home equity plans to consumers.

B. ***TILA is inapplicable.*** Creditors who extend credit primarily for business, commercial, agricultural, or organizational purposes or other purposes which are otherwise

regulated, such as securities brokers, are not subject to TILA. Student loan programs are not subject to TILA requirements. Also not covered by TILA are credit transactions over $25,000.00, except those involving a security interest in real property, or in personal property used or expected to be used as the principal dwelling of the consumer.

1016 MATERIAL DISCLOSURES REQUIRED. Any required disclosures must be made "Clearly and conspicuously," in a meaningful sequence, in writing, and in a form the consumer may keep. The Federal Reserve Board promulgates model disclosure forms, but where they would be misleading, lenders should provide tailored notice consistent with TILA.

A. ***Closed-end credit transactions***

1. ***Definition.*** The credit is advanced for a specific time period. The amount financed, the finance charge, and the schedule of payments are agreed upon by the creditor and the consumer.

2. ***Closed-end disclosures.*** The forms must disclose the identity of the creditor, the amount financed, an itemization of amount financed, the annual percentage rate (including applicable variable-rate disclosures), the finance charge, the total of payments, a payment schedule, and any prepayment/late payment penalties. If applicable to the transaction, then the total sales cost, demand feature, security interest, insurance requirements, the required deposit, and a reference to the underlying contract should be included.

B. ***Open-end credit transactions***

1. ***Definition.*** Any credit transaction "other than closed end." Open-end credit includes bank and gas company credit cards, stores' revolving charge accounts, and cash-advance checking accounts.

2. ***Typical features.*** With open-ended credit transactions, creditors reasonably expect the consumer to make repeated transactions. The creditors may impose finance charges on the unpaid balance. As the consumer pays the outstanding balance, the amount of credit is once again available to the consumer.

3. ***Open-end disclosures.*** Open-end credit transactions must disclose the annual percentage rate (including applicable variable-rate disclosures), the method of determining any finance charge and the balance upon which finance charge imposed (as explained in 12 C.F.R. § 226.6 must be included), amount or method of determining any membership or participation fees, the security interests (if applicable to transaction), and statement of billing rights.

Other requirements include furnishing the consumer with a periodic statement of the account. 12 C.F.R. § 226.12 details special credit card provisions, including liability of card-

holder and assertion of claims and defenses against card issuer (see Fair Credit Billing Act outline). 12 C.F.R. § 226.13 details billing error resolution (see FCBA outline).

1017 VIOLATIONS OF TILA. With the exceptions discussed below, creditors are liable for violations of the disclosure requirements, regardless of whether the consumer was harmed by the nondisclosure. The first exception is if the creditor corrects the error within 60 days of discovery and prior to written suit or written notice from the consumer.

The second exception is if the error is the result of bona fide error. If so, the creditor bears the burden of proving by a preponderance of the evidence that the violation was unintentional. Also, the error must have occurred notwithstanding compliance with procedures reasonably adapted to avoid such error (error of legal judgment with respect to creditor's TILA obligations is not a bona fide error).

A. ***Civil remedies.*** For failure to comply with TILA requirements, the regulations provide for the following remedies. The consumer may bring an action in any U.S. district court or in any other competent court within one year from the date on which the violation occurred. This limitation does not apply when TILA violations are asserted as a defense, set-off, or counterclaim, except as otherwise provided by state law.

B. ***Private remedies.*** Private remedies are applicable to violations of provisions regarding credit transactions, credit billing, and consumer leases. One may recover actual damages in all cases, and attorneys' fees and court costs for successful enforcement and rescission actions.

C. ***Statutory damages.*** Statutory damages can be imposed on creditors who fail to comply with specified TILA disclosure requirements, with the right of rescission, with the provisions concerning credit cards, or with the Fair Credit Billing requirements.

1. ***Individual actions.*** Individual actions may double the correctly calculated finance charge, but not less than $100 or more than $1,000 for individual actions.

2. ***Class actions.*** An amount allowed by the court with no required minimum recovery per class member to a maximum of $500,000 or 1% of the creditor's net worth, whichever is less.

D. ***Enforcement by administrative agencies.*** Nine separate agencies currently have enforcement responsibilities.

1. ***Banks.*** The Federal Reserve Board, the Federal Deposit Insurance Corporation, and other agencies all enforce TILA with regard to banks.

2. ***Others not subject to the authority of any specific enforcement agency.*** The Federal Trade Commission monitors everyone else.

E. ***What can enforcement agencies do?*** Agencies can issue cease-and-desist orders or can hold hearings. If either of these actions are taken, the creditors are required to adjust the debtors' accounts (15 U.S.C. § 1607(e)(4)(A) and (B)) to ensure that the debtor is not required to pay a finance charge in excess of the finance charge actually disclosed or, the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

If the FTC determines in a cease-and-desist proceeding against a particular individual or firm that a given practice is "unfair or deceptive," it may proceed against any other individual or firm for knowingly engaging in the forbidden practice, even if that entity was not involved in the previous proceeding.

F. ***Criminal penalties.*** Willful and knowing violations of TILA permit imposition of a fine of $5,000, imprisonment for up to 1 year, or both. Discussed below is an additional penalty of rescinding the contract.

1018 TRUTH IN LENDING ACT RESCISSION RIGHTS: 3-DAY COOLING OFF PERIOD (15 U.S.C. § 1635; 12 C.F.R. § 226.15)

A. ***General.*** In addition to remedies described above, consumers who enter home equity loans may also have rescission rights as described below.

1. ***Rescission rights.*** Under TILA, a consumer may rescind a consumer credit transaction involving a non-purchase money security interest in the consumer's principal dwelling, a home-equity loan transaction, within 3 business days if all TILA disclosure requirements are met. Rescission rights are extended statutorily for TILA disclosure violations including failure to give adequate notice of right to rescind, and failure to give adequate TILA credit term disclosures.

Rescission voids the security interest in the principal dwelling. The consumer must have an ownership interest in a dwelling that is encumbered by creditor's security interest. The consumer need not be a signatory to the credit agreement.

TILA rescission rights do not apply to business credit transactions, even if secured by consumer's principal dwelling.

2. ***Scope of rescission rights.*** Rescission rights apply to any loan involving a non-purchase money security interest in consumer's principal residence (i.e., home equity loans/lines of credit home improvement loans, etc.). A consumer can have only one principal dwelling at a time.

3. ***Time to exercise right to rescind.*** The right to rescind lasts until midnight of the third business day following the later of the consummation of transaction, the delivery of the required rescission right notice, or the delivery of all material disclosures. In

the case of closed-end credit, consummation occurs on the date when the credit agreement is signed. In the case of open-end credit, the occurrence giving rise to the right to rescind can be the opening of the plan, each credit extension above a previously established credit limit, increasing the credit limit, adding to an existing account a security interest in the consumer's principal dwelling, or increasing the dollar amount of the security interest taken in the dwelling to secure the plan.

4. ***Extending the right to rescind.*** The right to rescind continues if required disclosures not made or made incorrectly. But, statutes impose a cut-off of extended right to rescind at 3 years after consummation. The right to rescind will be cut off earlier by transfer of all consumer's interest in the property (including involuntary transfer such as foreclosure), or sale of the property.

5. ***Violations giving raise to an extended 3-year right to rescind.*** The extended 3-year right to rescind arises upon failure to give proper rescission notice. Creditors are required to deliver two copies of the right to rescind to each consumer entitled to rescind. The notice must disclose the retention or acquisition of a security interest in the consumer's principal dwelling, the consumer's right to rescind, how to exercise the right to rescind, with a form for that purpose setting forth the creditor's business address, the effects of rescission, and the date the rescission period expires. Also, failure to disclose credit terms of the transaction in accordance with TILA (i.e., interest, payment terms, etc.) extends the rescission rights extends the right to rescind.

B. ***Waiver of the right to rescind.*** Consumers may modify or waive the right to rescind a credit transaction if the extension of credit is needed to meet a bona fide personal financial emergency before end of rescission period. To do so, the consumer must provide the creditor with a dated written statement describing emergency and specifically modify or waive the right in the contract. All consumers entitled to rescind must sign the contract.

C. ***Delay of performance.*** Unless the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party, disburse advances to the consumer, begin performing services for the consumer, or deliver materials to the consumer. During the delay period, a creditor may prepare a cash advance check (or loan check in the case of open-end credit), perfect the security interest and/or accrue finance charges. In the case of open-end credit, the creditor may prepare to discount or assign the contract to a third party.

1. ***Delay beyond rescission period.*** The creditor must wait until he or she is reasonably satisfied consumer has not rescinded. The creditor may do this by waiting a reasonable time after expiration of period to allow for mail delivery, or obtaining written statement from all eligible consumers that right to rescind was not exercised.

D. ***Mechanics of rescission process.*** The consumer sends or delivers written notice to the creditor. If the consumer rescinds, the security interest becomes void and the

consumer is not liable for any amount, including finance charges. Within 20 calendar days after receiving notice of rescission, the creditor must return any property or money given to anyone in connection with the transaction, and take whatever steps are necessary to reflect termination for the security interest. When the creditor meets its obligations, the consumer must tender the money or property to creditor, or if tender not practicable, its reasonable value. If the creditor fails to take possession of tendered money or property within 20 days, the consumer may keep it without further obligation. The court may modify these procedures.

E. ***Particular types of transactions***

1. ***Refinancing and consolidation.*** Rescission rights do not apply to refinancing or consolidation by the same creditor of an extension of credit already secured by consumer's principal dwelling. Rescission rights do apply to the extent the new amount exceeds the unpaid balance, any earned unpaid finance charges on existing debt, and amounts attributed solely to costs of refinancing or consolidation.

2. ***Open-end home equity loans.*** An open-end line of credit secured by one's home used to pay off a loan not originally secured by the home requires complete rescission rights.

3. ***Door-to-door sales.*** When a home solicitation sale is financed with second mortgage loan, consumer may be entitled to two separate rights to cancel when the transactions are independent. When the consumer offers to obtain his/her own financing independent of assistance or referral from seller, sale and financing are separate transactions. When there are separate transactions (i.e., 1 – a Door to Door Sale and a contract signed, and, 2 – the consumer obtains financing from a bank (home-equity loan), the TILA 3 day rule and FTC DTD Sales Rule both apply. The FTC Rule (Cooling Off Period for Door-to-Door Sales) applies. The TILA requires 3-day rescission period (unless extended for TILA violation). The seller is bound by consumer's timely cancellation regardless of which party (the Seller or the bank) receives notice of cancellation.

For single transactions (seller arranged financing), look to state home solicitation law to determine whether transaction still covered by state's home solicitations statute 3-day cooling off period. For seller arranged financing with a home-equity loan, only TILA 3-day right to rescind applies.

PART D - UNFAIR DECEPTIVE ACTS AND PRACTICES (UDAP)

1019 REFERENCES

A. The Federal Trade Commission (FTC) Act, 15 U.S.C. § 45 (1988)

B. Federal Trade Regulations, Rules, Guides, and FTC Advisory Opinions, 16 C.F.R. Ch. I (1995)

C. TJAGSA Publication JA 265, Consumer Law Guide

D. National Consumer Law Center, Unfair and Deceptive Acts and Practices. (3d ed. 1991 with supplement)

1020 INTRODUCTION. "The Federal Trade Commission is an independent administrative agency which was organized in 1915 pursuant to the Federal Trade Commission Act of 1914 . . .. It is responsible for the administration of a variety of statutes which, in general, are designed to promote competition and to protect the public from unfair and deceptive acts and practices in the advertising and marketing of goods and services. It is composed of five members appointed by the President and confirmed by the Senate for terms of seven years." 16 C.F.R § 0.1. The FTC's principal office is:

Federal Trade Commission
Pennsylvania Avenue and Sixth Street, NW
Washington, DC 20580.

The FTC exercises enforcement and administrative authority under many Federal statutes, including The Truth in Lending Act (15 U.S.C. §§ 1601-1667), The Fair Credit Reporting Act (15 U.S.C. §§ 1681-1682t), The Fair Credit Billing Act (15 U.S.C. § 1666), and The Magnuson-Moss Warranty–Federal Trade Commission Improvement Act (15 U.S.C. §§ 2301-12, 45-48).

1021 FEDERAL TRADE COMMISSION ACT. The Federal Trade Commission Act is the federal law upon which most state unfair and deceptive acts and practices (UDAP) statutes are patterned. "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45.

A. ***FTC enforcement.*** If the FTC identifies an abuse, they will notify the violator and allow 30 days for correction. If no correction if forthcoming, the FTC can conduct hearings. They may issue cease-and desist orders. There are no private remedies.

1022 STATE UDAP STATUTES. All states (including D.C.) have enacted at least one UDAP statute. These UDAP statutes are often called "Little FTC Acts." They apply to most consumer transactions and provide widespread consumer remedies for many sales abuses.

UDAP violations are easier to prove than common law fraud. There is no requirement to prove a seller's fraudulent intent or motive. In some cases, the consumer's reliance, damage or even actual deception is not a prerequisite for action.

Where a practice does not fall precisely under another consumer statute, UDAP statutes can provide an all-purpose remedy. Almost any abusive business practice is arguably a UDAP violation. UDAP statutes allow private rights of action and can award attorneys' fees and treble damages!

These UDAP state statutes are referred to in various states as Consumer Protection Acts, Consumer Sales Acts, Unfair Trade Practices Acts, Deceptive and Unfair Trade Practices Acts, Deceptive Consumer Sales Acts, and Consumer Fraud Acts.

1023 UDAP APPROACHES TO CLIENT'S PROBLEM. Many transactions are amenable to a UDAP approach whenever there is a consumer problem, i.e.:

1. Landlord/tenant
2. Nursing home cases
3. Mobile home parks cases
4. Auto repairs
5. Warranty, sale, and lease practices
6. Home improvement scams
7. Door-to-door sales
8. Mail order problems
9. Real estate sales
10. Campground resorts
11. Timeshares
12. Abuses at default or collection stages of credit transaction
13. Abusive credit practices
14. Contracts written overly complex

A legal assistance attorney should explore potential UDAP violations in all aspects of the transaction including advertising, sales presentations, consummation of sale, the credit terms, the seller's performance, any subsequent debt collection practices. UDAP liability may exist if the consumer was in any way mislead in the sales transaction taking into account the consumer's level of sophistication.

1024 DETERMINING A UDAP STATUTE'S SCOPE. Does the challenged practice fall within the UDAP statute's scope? In some states UDAP statutes will not apply to credit, debt collection, landlord/tenant, realty or business opportunity practices. Others may exempt from coverage insurance companies, banks, or other regulated industries. Therefore, one should

closely examine the statutes to determine their scope. Even though a statute may broadly prohibit all deceptive practices "in trade or commerce" in one section, "definitions" within the statute may further limit applicability. Use care in relying on court interpretations of the statute, as remedial changes in the statute may have occurred.

1025 UDAP ENFORCEMENT

A. ***Private remedies***. Most states authorize a private UDAP right of action. Where a private UDAP action is authorized, most statutes provide for private remedies beyond mere actual damages. Some jurisdictions authorize treble damages in certain situations, such as when the seller's conduct is willful or the seller refuses to make a reasonable settlement. Some UDAP statutes explicitly authorize punitive damages, and such damages may be available in other states through the court's inherent authority. UDAP statutes may authorize minimum statutory damages ranging from $25 to $2,000. Most common among these are $100 and $200 minimum damages. Every state UDAP statute that permits a private right of action also permits the award of attorneys' fees.

B. ***Injunctions***. Injunctions are explicitly authorized by a majority of statutes and may be allowed, even if not explicitly mentioned, where the UDAP statute refers to "other equitable remedies."

C. ***Class actions***. Class actions, unless specifically prohibited by the UDAP statute, should be allowed under a state's class action statute.

D. ***Government enforcement***. Every state has a UDAP statute enforced by a state agency. Most commonly, the state attorney general office is given enforcement authority and other powers under the statute. In some states, local prosecutors, such as county or district attorneys, also have enforcement authority. In some jurisdictions, a state consumer agency is given investigatory, enforcement, or advisory authority. Many UDAP statutes authorize a state agency to promulgate regulations interpreting the act and numerous states have enacted such regulations.

Since UDAP statutes do not define deception or unfairness, and since state case precedent is limited, many states permit the state attorney general's office, state consumer protection agency, or other state agency to promulgate regulations defining specific practices as unfair or deceptive. In some states, rule-making has been used creatively and aggressively to regulate in detail specific consumer transactions that have generated special public concern. All states permit an enforcing authority (usually the state attorney general) to seek injunctions or cease-and-desist orders. Violation of such injunctions can involve penalties from $5,000 to $25,000. In a majority of states, the enforcement authority can seek criminal or civil (ranging from $250 to $1,000) penalties for initial violations of UDAP statutes. In most jurisdictions, the state can seek restitution on behalf of injured consumers. Additionally, state agencies can mediate complaints and pursue investigations.

The FTC and other federal agencies can initiate law enforcement investigations against suspected wrongdoers, especially if the scheme has an important economic impact on consumers or receives extensive publicity.

PART E - ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB)

1026 REFERENCES

A. Armed Forces Disciplinary Control Boards are established by joint service agreement and Army Regulation 190-24 to assist commanders in eliminating conditions inimical to the health, welfare, morale, and discipline of military personnel.

1. ARMY - Army Regulation 190-24
2. NAVY - OPNAVINST 1620.2A
3. AIR FORCE - AFI 31-213
4. MARINE CORPS - MCO 1620.2C
5. COAST GUARD - COMDTINST 1620.1D

1027 INTRODUCTION. Armed Forces Disciplinary Control Boards are better able to deal with unscrupulous proprietors than individual service members or family members. Most members of the business community realize that having their establishments declared "off-limits" will result in adverse publicity and financial loss. Thus, the referral of such cases to these boards may contribute greatly to protecting service members and their family members from unscrupulous merchants.

The AFDCB may designate a given establishment as "off limits" to military personnel. "Undesirable conditions" include conditions relating to disorders and lack of discipline, prostitution, sexually transmitted diseases, liquor violations, racial and other discriminatory practices, alcohol and drug abuse, the presence of drug abuse paraphernalia, criminal or illegal activities involving cults or hate groups, illicit gambling, areas susceptible to terrorist activity, unfair commercial or consumer practices, and other undesirable conditions that may adversely affect members of the military or their families. Among the establishments most often targeted are merchants, landlords, real estate brokers, and public accommodation or consumer managers and owners.

A. ***Role of the legal assistance attorney.*** Legal assistance attorneys (LAA) often detect patterns of unfair or unethical practices by particular businesses or firms through their contact with clients. When this occurs, the LAA may have the client present the complaint to the Board or may proceed to the Board under the SJA's guidance if the clients involved agree

to disclosure of privileged information. LAA's typically explain the functions and procedures of the Board to their clients and, when appropriate, help the client prepare the complaint. Complaints should be sworn and documented as fully as possible.

1028 ESTABLISHMENT OF ARMED FORCES DISCIPLINARY CONTROL BOARDS. AFDCBs may be established by installation, base, or station commanders. Coast Guard commanders must have written authorization from the Commandant (G-PS) prior to establishing an AFDCB. The AFDCB is charged with several missions. First, is to advise and make recommendations to commanders on matters concerning the elimination of crime or other conditions which may negatively affect the health, safety, morals, welfare, morale, or discipline of Armed Forces personnel. Second, they ensure the establishment and maintenance of the highest degree of liaison and coordination between military commands and appropriate civil authorities. Finally, violations of an off-limits sanction may subject the service member to disciplinary action under the Uniform Code of Military Justice.

A. ***Composition of an AFDCB.*** Each AFDCB, as a minimum, should consist of representatives from the following ten functional areas: (a) law enforcement, (b) legal counsel, (c) medical, health and environmental protection, (d) public affairs, (e) equal opportunity representatives, (f) fire and safety, (g) chaplains' service, (h) alcohol and drug abuse, (i) personnel and community activities, and (j) consumer affairs.

B. ***Duties and functions of an AFDCB.*** Periodically, the board meets in session. They receive and take appropriate action on reports of conditions that may negatively affect the health, safety, morals, welfare, morale, or discipline of Armed Forces personnel. The board should conduct liaison with civil authorities on problem areas. Finally, the board makes recommendations to commanders in the board's area of jurisdiction concerning off-installation procedures to prevent or control undesirable conditions.

C. ***AFDCB procedures.*** Prior to initiating AFDCB off-limits actions, installation commanders will attempt to correct, through contact with local civilian leaders, any adverse condition or situation. If these actions are unsuccessful, commanders will submit requests for off-limits action to the AFDCB serving their area. The AFDCB, prior to recommending off-limits restriction, will send written notice of the condition or situation to the person or firm responsible. The AFDCB will offer a reasonable time to correct the condition or situation. The AFDCB will provide the individual or firm with the opportunity to present any relevant information to the board.

Even if a person's establishment or area has been declared off-limits, the person may, at any time, petition the president of the board for removal of the off-limits restriction. The petition will be in writing. The petition will state, in detail, the action taken to eliminate the adverse condition or situation that caused the imposition of the restraint. In response to the petition, the Board will either recommend removal or continuation of the off-limits restriction to the local sponsoring commander.

1029 CHALLENGES TO THE OFF-LIMITS RESTRICTIONS

A. ***Adequacy of due process.*** *Ainsworth v. Barn Ballroom Co.*, 157 F.2d 97 (4th Cir. 1946) A public dance hall in Newport News, Virginia was declared off-limits by a joint Army-Navy Disciplinary Control Board to all service personnel due to unsanitary and immoral conditions. There was no previous warning given to the establishment that it would be placed of-limits. The dance hall brought suit and a temporary injunction was issued preventing the enforcement of the off-limits order. The dance hall also wanted a permanent injunction against the Admiral and General from interfering with its business. The 4th Circuit reversed the District Court and dismissed the law suits by the dance hall holding that the authorities acted within the scope of their powers. Note: The current regulations add more due process requirements before an establishment can be declared off-limits.

See also *Harper v. Jones*, 98 F. Supp. 460 (W.D. Okla. 1951), *rev'd*, 195 F.2d 705 (10th Cir. 1952), *cert. denied*, 344 U.S. 821 (1952) A Commanding General placed a car dealership off-limits in Lawton, Oklahoma for failing to refund $1006.00 to lieutenant in his command who purchased a car from the dealership. The District Court held that the (AFDCB) regulation did not give the Commanding General the authority to declare this dealership off-limits. The controversy between the lieutenant and the car dealership should have been settled in court. The dealership lost the military patronage as a result of this off-limits order which constituted a taking of private property without due process of law. The District Court found that the Commanding General acted outside the scope of his authority as the discipline, health or morale welfare of military personnel was not involved. The order was rescinded and an injunction against its enforcement was issued. The 10th Circuit, upon appeal by the Government, held that the Commanding General had the power and authority to declare the car dealership off-limits based on the regulations giving him authority to declare establishments and areas off-limits to troops for the purpose of maintaining discipline and to safeguard the health and welfare of military personnel. The 10th Circuit stated that this case was similar to *Ainsworth, supra*. The 10th Circuit held the off limits order did not constitute a taking of property. The 10th Circuit reversed the District's Court's decision. The Supreme Court later denied certiorari in this case.

B. ***Free exercise of religion.*** *Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985) An off-limits order was issued by Rear Admiral Flatley, Commander of Great Lakes Naval Training Center, which prohibited "all naval personnel attached to activities comprising the Great lakes naval complex" from entering the Christian Servicemen's Center. The Christian Servicemen's Center allegedly was counselling Great Lakes naval personnel to absent themselves without authority, were inducing military personnel to terminate their careers prematurely under other than honorable conditions, and was using individuals for both homosexual and financial gains. The District Court granted the United State's summary judgment motion. An appeal ensued in which the plaintiff's alleged violation of First Amendment rights. The 7th Circuit denied the damages claimed by the Plaintiffs but

remanded to have the District inquire whether the off-limits order was overly broad impinging on the rights of the Plaintiff's right to practice religion.

PART F - LANDLORD-TENANT MATTERS

1030 INTRODUCTION. Military service by its nature is transitory and requires mobility. As a consequence, servicemembers more commonly rent than buy their homes. This situation is ripe for recurring problems between landlords and tenants. Many servicemembers fail to adequately review a lease before signing. On the one hand, there is usually urgent need for the family to move into a house and there is pressure on the servicemember to resume duties at the new station. On the other hand, there is a mistaken belief that the military-lessee has no bargaining power. Under these circumstances, education and preventive legal assistance measures are essential.

1031 ELIGIBLE CLIENTS. Legal assistance is authorized for personal legal affairs only. Legal advice will not be provided regarding business ventures or matters that are not of a personal nature. JAGMAN Section 0709. With specific regard to landlord-tenant relations, advice and assistance, including review of personal leases and communication and correspondence in behalf of the client, will normally be provided. JAGMAN Section 0708(f).

A situation not directly addressed by regulations but occurring occasionally is a servicemember who purchased a house at a previous duty station and has rented it in hopes of returning to the home at a later date or selling when a favorable opportunity arises. Can legal assistance be provided the servicemember-landlord under these circumstances? The officer in command of the legal assistance office considers this situation on a case-by-case basis. Assistance will generally be provided on matters discussed later in this chapter. Assistance will be denied when the issue is one more related to business practices than "personal legal affairs."

1032 CURRENT TRENDS

A. ***Conveyance vs. contract.*** Landlord-tenant law has changed substantially during the last few decades. Previously, a lease was treated as a temporary conveyance with the rule being *caveat lessee*. Currently, the move is away from the view of the lease as a conveyance and toward the view that the lease is a contract. As a consequence, tenants are enjoying greater rights and protections. This area of the law is always very state specific. State statutory law controls the lease provisions, landlord rights and responsibilities, and tenant rights and responsibilities.

B. ***Implied warranty of habitability.*** The shift from lease as a conveyance to lease as a contract is the result of judicial frustration with the impotence of the tenant. A warranty

of habitability is now frequently implied with respect to residential dwellings. The warranty imposes on the landlord the obligation to deliver and maintain a habitable dwelling.

C. ***Implied covenant of quiet enjoyment.*** At common law, and explicitly by statute in Maryland, Massachusetts, and Virginia, a lease carries with it an implied covenant of quiet enjoyment. A landlord must assure that the tenant may peaceably and quietly enter upon the leased premises at the beginning of the term. If the landlord fails to provide possession of the dwelling unit at the beginning of the term, then rent is abated until possession is delivered, and the tenant may, upon written notice to landlord, terminate the lease, in which event the landlord must return all deposits. Whether or not the lease is terminated, the landlord is liable for consequential damages suffered after the tenant gives notice of inability to enter the premises.

1033 THE LEASE. A lease for one year or longer may fall within two provisions of the **Statute of Frauds**. The "conveyancing" section will usually require leases exceeding one year in duration to be in writing. The "contract" section will usually render unenforceable any contract that cannot be performed within one year from the making of the contract.

A. ***Essential terms***. A lease should at a minimum contain several "essential" terms. First, the address or location of the dwelling should be described. Next, the landlord and the tenant should be named. The duration of the lease should be included and define when the lease begins, how long it lasts, and when it will terminate. Additionally, the lease should provide for the removal of a holdover tenant. The amount of rent, and method, time and place of its payment, as well as the landlord's authority to raise rent should be included. Finally, certain terms required by state law must be in the lease. For example, the date of execution, deeds, seals, acknowledgments, authentication, and recording the lease are sometimes required.

B. ***Negotiable terms.*** The following are provisions that are not required by statute but are frequent sources of landlord-tenant conflict. It is in the best interests of both parties to explain in the lease how the issues will be resolved.

1. ***Military clauses.*** As stated in the introduction, military service requires frequent moves — some of them unexpected. For ease of management and reliable cash flow, landlords frequently prefer leases of one year's duration. Obviously, this can lead to conflict. What does a servicemember do who receives PCS orders three months after signing a one-year lease?

The best recourse is exercising the **military clause** or the **PCS clause** in a lease. Unfortunately, there is no "standard" military clause. In some states, they are not required. Other states impose a military clause by statute and it is commonly non-waivable. See Delaware, Idaho, Maryland, North Carolina, and Virginia. In addition to provisions to terminate the lease in the event the tenant receives PCS orders, the clause may also address what to do if

the tenant desires to move into government quarters, and what to do if the tenant is **required** to move into government quarters.

A recent development related to the military clause is a provision some times called **the reverse military clause**. The reverse military clause allows the servicemember-landlord to terminate the lease in the event the servicemember-landlord receives PCS orders to the location of the house and chooses to occupy the house.

2. ***Security deposits.*** This is another area increasingly covered by statute. At common law, there was no limit to the amount of the security deposit. The landlord did not have to pay interest on the deposit and could commingle it with other funds. If the landlord improperly refused to refund the deposit, the tenant could sue to recover only the deposit but not punitive damages or attorney's fees.

Many states have passed statutes to prevent these abuses. Frequently, the security deposit is limited to an amount not greater than twice the monthly rental amount. Additionally, the landlord must separate the deposit from other funds and pay interest on it. The deposits may be only applied to certain uses. At the conclusion of the tenancy, the landlord is provided 30 to 60 days to make an accounting of any expenditures of the deposit and refund the balance. If the landlord fails to properly account for and refund the deposit, then the tenant is allowed to sue for the deposit in its entirety regardless whether valid damages exists plus punitive damages and attorney's fees.

The legal assistance attorney should be especially watchful for risky provisions sometimes placed in a lease. For instance, some provisions condition refund of the deposit on the lessee surrendering the premises in "good and clean condition" with the lessor as the sole judge of cleanliness. Sometimes, a deposit will become the sole property of the lessor upon acceptance of the lease. Other times, if the lessee fails to pay rent timely or surrenders the premises in other than good condition, the deposit is forfeited to the landlord.

3. ***Attorney's fees.*** Landlords will sometimes include provisions to recover attorney's fees for any actions they may have to institute against the tenant to collect rent, recover the property, etc. Such provisions will either impose a fixed amount payable to the landlord upon commencement of the action, or require the tenant to pay the landlord's actual expenses on the conclusion of the action regardless of the outcome. There is no requirement that these provisions be included. If the landlord insists upon inclusion, then negotiate a provision that requires the tenant to pay reasonable fees only if the landlord prevails in the action. Further, a provision may be included that allows the tenant to recover attorney's fees for actions that prevail against the landlord.

4. ***Fees for late rent payment.*** These provisions frequently provide that the tenant will pay an additional amount, normally $15 or $20, if the rent is paid more than a specified number of days late, typically five days after the due date. Under the common law, if this provision is construed as a liquidated damages clause, it will be enforceable. If on the

other hand, it is construed as a penalty, it will be unenforceable. By definition, liquidated damages must be a good faith estimate of, and bear a reasonable relation to, the loss that is likely to occur by reason of the delinquent payment. Georgia appellate courts have upheld a $50 late payment fee. Massachusetts allows late fees only for payments more than 30 days late. In Connecticut, a tenant will forfeit any earned interest on the security deposit if the rent is late more than 10 days at any time during the year.

At common law, the landlord enjoyed the **right of distress/distraint**. Under this right, the landlord could seize the tenant's property and hold it until the rent was paid. Since the 1950's, this right has been modified or abolished. A sample clause would be: Upon termination of the tenancy, the Lessor shall immediately have the right, with or without process of law, to take possession of the premises and all goods therein. This is generally not in the tenant's interest and should be avoided where possible.

5. ***Inspections.*** Landlords have a valid interest in maintaining their properties. Tenants have an equally valid interest in their privacy. Inspections are an effective tool for landlords to examine the physical condition and discover any unpermitted uses of the property. By their nature, inspections intrude and interrupt the tenant's enjoyment of the property.

A provision for inspections should be fair to both sides. Inspections should be permitted if scheduled ahead of time and be limited in scope, duration, and frequency. Additionally, inspections should be conducted by the landlord and tenant at the beginning and ending of the lease. The purpose is to establish the condition of the property before and after the tenancy. Normal wear and tear is generally a cost borne by the landlord. Negligent or intentional damage is usually charged to the tenant.

6. ***Use of the premises.*** Leases frequently include covenants that restrict or limit the use of the leased property. If a tenant breaches these covenants, the landlord will have an action for damages, injunctive relief, or termination of the lease pursuant to a forfeiture clause.

7. ***Alterations and improvements.*** Lease provisions governing alterations and improvements should consider the length of the tenancy, nature and scope of the intended change, the economic necessity for improvement, if any, and the relief sought by the landlord. In the absence of a lease provision, the law of waste will govern.

8. ***Fire and casualty insurance.*** Leases should be carefully reviewed to determine who bears the risk of fire, flood, and weather damage. Any tenant who bears this risk is well advised to insure against possible loss. This is especially true where the common law applies. At common law, courts construe leases which include a tenant's promise to "keep the lease premises in repair" to require the tenant to rebuild premises destroyed by fire or other casualty. Statutes have supplanted the common law in many jurisdictions on this

matter. Either the tenant is deemed not liable for damage caused by casualty or other cause, or the tenancy is terminated upon destruction of the property by fire or other casualty.

9. ***Holdover provisions.*** What does a tenant who allows a lease to expire and is unable to move into government quarters do when the promised quarters are unavailable? The tenant and landlord can either negotiate a new lease, the landlord can evict the tenant, or the landlord can allow the tenant to remain. A tenant who remains, or holdsover, creates a tenancy at sufferance. Generally, the provisions of the previous lease apply. The term of the lease becomes monthly.

10. ***Assignment/sublet.*** What about the spouse wants to return to a parent's home during the servicemember's deployment? What about the family who is offered government quarters? Generally, these are insufficient to trigger a military clause lease termination. Unless addressed by other provisions in the lease, the tenant remains liable for the rent for the entire term. One solution to relieve the tenant of primary responsibility for rental payments is to find another tenant for the property. Either through assignment or sublet, the new tenant takes the property from the previous tenant. Both tenants benefit from living in the place of their choice. The landlord benefits from continuing to receive rental payments. The drawback to the landlord is that he may end up with a tenant he would otherwise not accept. The drawback to the first tenant is that he remains secondarily liable for the property.

Other common negotiable lease provisions include: lease renewal, default provisions, inability to give possession, services and utilities, options to purchase, rules and regulations, and condemnation. These clauses apply rarely but can be of significant benefit when needed.

C. ***MILITARY PROVISIONS.*** What follows are sample military lease provisions.

1. MILITARY LANDLORD: In the event LANDLORD is or hereafter becomes a member of the United States Armed Forces, then LANDLORD may terminate this lease on thirty days' written notice to TENANT in any of the following events:

a. If LANDLORD receives permanent change-of-station orders to return to the area in which the premises are located.

b. If LANDLORD is released from active duty.

c. Other: _____

2. MILITARY TENANT: In the event TENANT is or hereafter becomes a member of the United States Armed Forces, TENANT may terminate the lease on thirty days written notice in any of the following events:

a. If TENANT receives permanent change-of-station orders to depart from the area in which the premises are located.

b. If TENANT is released from active duty.

c. If TENANT has leased the property prior to arrival in the area and TENANT is ordered to a different area before occupying the property.

d. Other: _____

3. **MILITARY NOTICE AND RENT ADJUSTMENT:** Notice furnished under the provisions of this paragraph shall include a copy of official orders or a letter signed by the party's commander reflecting the circumstances warranting termination under this paragraph. If LANDLORD terminates the lease under this paragraph, a credit shall be allowed toward the rental otherwise due, and if TENANT terminates the lease under this paragraph, TENANT shall pay an amount in addition to the rental otherwise due. Such adjustment (credit or addition) shall constitute a liquidation of the damages caused by such termination, but shall be in addition to a proration of the rental to the actual termination date and shall not reflect any actual physical damages to the property for which TENANT is otherwise liable under this lease. Said adjustment amounts shall be computed as follows:

a. If termination occurs before expiration of one-half of the original term, without extension, _____ percent of one month's rent.

b. If termination occurs on or after the period stated above but before the end of the original term, without extension, _ percent of one month's rent.

c. If termination occurs on or after the end of the original term of the lease, without extension, there shall be no adjustment of rent under this paragraph.

4. **EXTENSION OF TERM:** Unless one party gives the other party written notice of termination at least one month prior to expiration of the lease, the lease shall be extended for an additional period of . Unless a party provides the other party one month's termination notice at the end of this extension, the lease shall be further extended- from year to year thereafter until one party furnishes the other at least one month's notice of intention to terminate.

5. **HOLDOVER TENANCY** (in the alternative to "EXTENSION OF TERM"): This LEASE will automatically terminate on 19_, without further action by either LANDLORD or TENANT. In the event TENANT shall remain beyond the expiration of the LEASE and TENANT shall not then have exercised the OPTION TO PURCHASE, TENANT shall pay to LANDLORD an amount equal to twice the monthly installment each month TENANT remains beyond the lease's automatic termination.

6. **PRORATED RENTAL PAYMENT** (in the alternative to "EXTENSION OF TERM"): If vacation of the premises occurs on a day other than the last day of a normal rental period, the rent due for any resulting partial rental period shall accrue at the daily rate which shall be calculated by dividing the rent due for such period by the number of days in the period. This daily rate shall be multiplied by the number of days TENANT remains on the premises to determine additional rental due.

7. **TERMINATION**: Upon termination of this LEASE, TENANT shall vacate the premises, remove all personal property belonging to them, and leave all personal property belonging to LANDLORD and leave the premises and such personal property in the condition extant when this LEASE began, normal wear and tear excepted.

8. **NOTICES**: Unless otherwise provided, any notice provided for by this lease shall begin to run on the date such notice is delivered. If properly sent to the recipient's last known address by prepaid mail, notice shall be construed delivered as of the postmark date or the date of the sender's mail receipt form in the case of certified or registered mail. Notice by LANDLORD or AGENT to TENANT may also be given by posting it on the front door of the premises.

9. **TERMINATION BY DEATH OR MISSING STATUS**: If LANDLORD, TENANT, or LANDLORD'S or TENANT'S spouse should die or be reported in a missing-in-action status under 37 U.S.C. § 551 during the term of this lease, the spouse of the deceased or missing -person or the deceased's executor or administrator may terminate this lease by giving at least one month's written notice. This right of lease termination must be exercised within _ days of the death or missing status report.

10. **TERMINATION DUE TO DEFAULT**: After occupancy under this lease has begun, if either party fails to comply timely with any of the terms of this lease and such default continues for 1 month after delivery of a notice to cure the default (except that only a 5-day notice shall be required if the default consists of a failure to pay rent when due), then I month after notice (or 5 days in the case of rent), the injured party shall have the option of declaring the lease terminated and shall be entitled to immediately vacate the premises, or take immediate possession thereof as the case might be, without forfeiting whatever further right the injured party may have to damages for breach of the lease. Notice provided for in this paragraph shall begin to run on the date delivered in all cases.

11. **DESTRUCTION OF PREMISES**: This lease will terminate if the premises become uninhabitable because of dilapidation, condemnation, fire, or other casualty for a period in excess of 1 month, except where caused in whole or in part by the negligence of TENANT or TENANT'S family, invitee, or guest. Except when caused by the misconduct or negligence of TENANT, TENANT'S family, invitee, or guest, rent shall abate for any period during which the premises are uninhabitable.

12. **INSPECTION DURING OCCUPANCY:** TENANT will allow LANDLORD or any agent of LANDLORD, duly authorized in writing, to enter upon the premises for purposes of inspection or the posting of "For Sale" signs at reasonable times and, during the last month of this lease, will permit the posting of customary "For Rent" signs and, after reasonable telephone notice, will permit LANDLORD or LANDLORD'S agents to show the premises to prospective TENANTS or purchasers provided TENANT has not exercised the option to purchase.

13. **ALTERATIONS AND FIXTURES:** TENANT has no authority to make alterations to the premises or to incur any debt or make any charge against LANDLORD or create any lien upon the leased property for any work done or materials furnished without LANDLORD'S express written consent. Any television antenna, cable, or other equipment, or other fixtures installed by TENANT shall be installed at TENANT'S expense, shall be affixed in a manner which will not damage the building, and shall be removed by TENANT at the expiration of the lease. In the event such antenna, other fixture, or other personal property of TENANT is not removed at the expiration of the lease, LANDLORD may treat the same as abandoned and charge TENANT the cost actually paid for removal. Before vacating the premises, TENANT shall cause all picture hooks and similar devices to be removed from all walls and all holes caused by the removal to be filled or repaired.

14. **ASSIGNMENT AND MITIGATION OF DAMAGES:** TENANT shall not assign or sublet the premises during the ten-n without LANDLORD'S written consent. If, during the term, without cause and without having presented a suitable assignee or subtenant, TENANT vacates the premises, it shall be the LANDLORD'S duty to mitigate damages by making every reasonable effort to rerent the premises for the remainder of the term as agent for TENANT.

15. **USE, QUIET ENJOYMENT, AND LOCAL LAWS:** TENANT shall keep the streets, alleys, steps. And sidewalks on and adjacent to the premises clear of filth,, refuse, debris, and obstructions and shall keep the steps and sidewalks on and adjacent to the premises free from ice and snow. TENANT shall use the premises in compliance with all laws and ordinances applicable thereto and shall not use the premises in a manner that will increase the fire or other liability insurance rate applicable thereto. LANDLORD convenants that TENANT, on paying the rent and complying with the terms of this lease, shall peaceably and quietly have, hold, and enjoy the premises for the term of the lease.

16. **TIME OF THE ESSENCE:** Time is of the essence in the matter of possession of the premises, and the failure of either party to permit possession by the party entitled thereto shall entitle the offended party to any damages provided by law. If initial possession on the date provided is denied TENANT because of possession by LANDLORD or third persons, failure of LANDLORD to complete initial repairs, or other fault of LANDLORD, TENANT may, upon being so denied such possession for a period in excess of 24 hours, terminate this lease by notifying LANDLORD and, if so terminated, TENANT shall be entitled to a return of money paid under the lease and any damages provided by law.

17. **TAXES: LANDLORD** shall pay any and all property taxes upon the premises until the expiration of this LEASE or termination thereof by the sale to TENANT of the premises described herein pursuant to the OPTION TO PURCHASE provision, in which event the taxes shall be prorated to the date of purchase with appropriate adjustment in the purchase price.

18. **OFFER**: This document, when signed by one of the parties only, constitutes an offer which may be revoked at any time prior to delivery, to the first party signing, of a fully executed original. If such delivery is made by mail, time of delivery shall be the postmark date.

19. **AGENTS:** If LANDLORD retains an agent who is an attorney or licensed real estate agent, any authority vested in LANDLORD under the terms of this lease may be exercised by LANDLORD'S agent and all notices to be furnished LANDLORD may be furnished to LANDLORD'S agent; otherwise, such agent must have written authority from LANDLORD, a signed copy thereof to be furnished TENANT, to exercise such authority or receive such notice.

20. **LAWSUITS**: IF either party successfully enforces this LEASE in court, or successfully asserts or defends the existence or validity of this agreement, the successful party shall be awarded court costs and reasonable attorneys fees to be paid by the other.

IN WITNESS WHEREOF, the parties have set their hands and seals to duplicate copies of this lease, each of which shall constitute an orginal.

_____(SEAL)
LANDLORD

_____(SEAL)
TENANT

1034 LANDLORD'S RESPONSIBILITIES

A. ***Repair and maintain.*** The common law created a *caveat lessee* situation. With regard to substantial defects involving health, sanitation and safety, the courts would assign re-

sponsibility based upon the cause, nature and period of the deficiency, the amount of rent, and age of the dwelling. Beware of lease provisions to the effect that the tenant has inspected the premises, found them in good condition, and will maintain them in good condition.

The modern practice imposes a warranty of habitability by statute. Typically, these statutes direct the landlord to covenant "there are no latent defects in facilities and utilities vital to use of premises for residential purposes and that these essential features shall remain during entire term in such condition to maintain habitability of dwelling." States, including California, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, South Carolina, Washington, and West Virginia, have codified the implied warranty of habitability. These states have further imposed a wide range of contractual duties on the landlord and afforded the tenant a broad range of remedies unknown at common law.

Some statutory authority allows tenants to complete required repairs and deduct the cost from the rent. Arizona, California, Connecticut, Louisiana, Montana, Nevada, North Dakota, South Dakota, Texas, Oregon, and Washington have such **repair and deduct statutes**. To invoke the statutory remedy, the tenant must give the landlord notice of dilapidation. If the landlord does not act within a reasonable time, the tenant may vacate the premises and be discharged of further obligations under the lease, or may repair the dilapidation and deduct the repair expense from the rent. Some states limit the dollar amount a tenant may spend to repair the premises.

Under **rent escrow statutes**, a tenant is permitted to withhold rent from the landlord only if the tenant deposits the withheld rent into a court maintained or other officially designated account. The landlord may recover the rent payment when the repairs are completed. States having such statutes include Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, and Virginia.

Other states including Connecticut, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, and New York have extended the rent withholding statutes and escrow concepts through legislation providing for the appointment of a receiver to collect and apply rents to the repair and rehabilitation of substandard premises. The procedure leading to receivership starts when a landlord is unable or unwilling to maintain the condition of the property within legal standards. Upon petition from a private individual or a municipality, the court may place the property in the hands of a receiver. The receiver, who may be the municipality, a private party, or a social agency, assumes control and management of the building for purposes of abating the violations. The receiver collects the rents and applies them to correct the inadequacies. When the rehabilitation is complete and the expenses fully paid for, the receiver is discharged and the building reverts to the owner.

B. ***Tort liability.*** At common law, the landlord is not liable for injuries sustained because of dangerous or defective condition of the premises, since responsibility for the

condition is governed by the doctrine of *caveat emptor.* Though social conditions have changed substantially, this is one area of the law that has been usually resistant to change.

A basic exception to the rule of *caveat emptor* imposes tort liability on the landlord if the landlord has fraudulently concealed latent defects in the premises. Because this rule is so strict, courts have held the landlord liable for hidden defects only if the landlord "knew or should have known" of the condition.

C. ***Discrimination.*** Three major federal statutes prohibit discrimination. The 1866 Civil Rights Act (42 U.S.C. § 1982) prohibits discrimination with respect to the sale or rental of real or personal property within the U.S. based upon race or color. The 1968 Fair Housing Act (42 U.S.C. §§ 3601-3631) prohibits discrimination with respect to sale, rental, and brokerage of real property within the U.S. based upon race, color, religion, sex or national origin.

There is also the Fair Housing Act of 1988 that amends the Civil Rights Act of 1968 (82 Stat. 85). In particular, Georgia has mandated that the administrator of the Commission on Equal Opportunity maintains with the United States Department of Housing and Urban Development status as a "certified agency."

1035 TENANT'S RESPONSIBILITIES. At common law there were few restrictions on the tenant's use of the property. The tenant could use the premises for anything legal but couldn't do anything that would "waste" the premises. Absent an express covenant to the contrary, the tenant was obligated to make minor repairs necessary to preserve the leased premises.

Tenant must refrain from using the property for prohibited purposes. These can be of the nature to prohibit criminal activity, e.g. sale of illegal drugs, or otherwise lawful activities that the landlord chooses not to allow, e.g. accommodating pets, children, or commercial activities.

In the absence of a lease provision, the right of a tenant to improve leased premises is governed by the law of waste. This not only prohibits changes that reduce the value of the leasehold; it also technically prohibits changes that improve the value of the premises.

The tenant is required to make timely rental payments. For payments not timely submitted, the landlord is allowed to charge for late payment. See above.

1036 LANDLORD'S REMEDIES. Many courts and legislatures have recently reexamined the common law with regard to self-help repossession. Their response has been to either drastically limit the degree of self-help permitted or abolish the remedy altogether. The trend is to make resort to legal process the landlord's exclusive remedy. In many jurisdictions, the landlord will be liable for punitive damages if self-help repossession is attempted.

Statutory summary eviction procedures have been developed by every state in order to avoid the protracted process required for writs of ejectment and the potential for violence and physical injury inherent in a landlord's attempt to recover possession personally. Summary eviction is available when the tenancy term expires and the tenant refuses to leave the premises, or upon certain statutorily enumerated conditions, such as the tenant's failure to pay the rent or commission of waste.

In many jurisdictions, the landlord's claim for rent is secured by a statutory lien on chattels brought onto the leased premises. In some states, this lien supplants the distress remedy, while in other jurisdictions both remedies remain. Unlike the common law right of distraint, the statutory lien in most jurisdictions attaches only to property owned by the tenant and located on the demised premises.

In addition to the statutory lien, the landlord may also have a contractual lien on the tenant's property. This lien only arises by agreement of the parties, and the lease terms determine which property of the tenant's is subject to the lien. The contractual lien exists independently of the right of distress or a lien conferred by statute.

The last remedy available to a landlord is to retain the security deposit. Statutes discussed previously control this.

1037 TENANT REMEDIES. Tenants who feel they have been wronged may seek relief through the courts. The principle defendant will likely be the landlord. However, actions have been allowed against the publishers and sellers of deceptive form leases.

For all parties concerned, negotiation is the preferred method to settle differences. Many landlords in military towns rent or manage multiple properties. It is not in their interests to put themselves at odds with the military establishment. Additionally, resort to the courts can be costly and time consuming. The landlords are generally well versed on the law and will comply when discrepancies are brought to their attention. Tenants also benefit from an amicable settlement. They get the repair needed, can remain on cordial terms with the landlord, and avoid the inconvenience of a move. The legal assistance attorney can play a key role in aiding the parties in arriving at an agreement.

Mediation is the next level above negotiation. This is a more formal means of settling disputes. Landlord associations commonly form a panel to mediate disputes. The detriment to the tenant is that membership on the mediation panel is largely other landlords. In the alternative, mediation firms offer services that may appear more neutral but can be expensive.

Along with sweeping regulation of consumer matters, landlord-tenant matters have been subject to statutory reform. The Uniform Residential Landlord and Tenant Act (URLTA) views a residential lease as a bilateral contract rendering performance of many of its obligations interdependent. This act was adopted, often with variation, by 18 states including Alaska, Arizona, Delaware, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska,

Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Virginia, and Washington. Kentucky did adopt a variation of the statute, but it has been held by a Kentucky court to be unconstitutional.

Some states have passed legislation dealing exclusively with the landlord-tenant relationship. A New Jersey statute precludes a landlord from terminating or refusing to renew a residential lease except for good cause as defined by the statute.

Many rent control ordinances contain similar provisions limiting evictions to instances of good cause. These measures effectively elevate a periodic or fixed-term tenancy to the status of an estate for life determinable at the tenant's election or upon the tenant's failure to meet normal lease obligations.

The Fair Debt Collection Practices Act and the Fair Credit Reporting Act also cover tenants. See the Chapter 4 for a discussion on these statutes.

1038 COUNSELING AND PREVENTIVE LAW IN LANDLORD/TENANT RELATIONS. Education on landlord-tenant matters is crucial. Legal assistance offices must be pro-active and not reactive. As part of a Welcome Aboard presentation, the legal assistance office should encourage new arrivals to seek legal assistance before signing a lease. Included in any written materials should be checklists (information handouts in the housing referral office) on moving into a new apartment. Encourage new arrivals/renters to include clauses that renter wants — in writing. E.g., pet clauses, waterbed clauses, etc.

Prospective tenants should realize that the law does not require them to accept every clause in a lease. They should read the lease and ask questions. Ask the landlord to explain clauses not understood.

Tenants must understand the legal aspects of security deposits. The law does not require security deposits. The deposit is used to repair negligent or intentional damage caused by the tenant or his guests. A thorough initial inspection and notation of damage can eliminate the basis for a future dispute. Another common misperception regarding security deposits is that there is an automatic forfeiture if one illegally breaks a lease. To withhold a portion of a security deposit, the landlord must prove actual damages. Statutory damages (sometimes treble the deposit amount) against a landlord are available in many states for a landlord's failure to return security deposit within a certain period of time after written demand by tenant.

Leases are normally terminated with 30 days written notice. Frequently, automatic renewal clauses will continue lease obligations if no 30-day notice is submitted. For the tenant, this could result in additional rent liability. For the landlord, this could result in the residence remaining occupied by the current tenant.

Finally, tenants must insist upon a military clause. There are no standard military clauses. Many states impose a military clause provision by statute. If the tenant does not reside in such a state, then a provision that lets the tenant out of a lease when valid PCS orders requiring a move more than 100 miles and 30 days written notice of termination should be in the lease.

PART G - BANKRUPTCY

1039 INITIAL CONTACT WITH CLIENT. The LAA should have a brief conversation to determine nature of financial pressures on debtor. Determine if suit, garnishment, or other legal action imminent or pending. Set up appointment and advise client to bring financial information so that debts can be reviewed, as well as information concerning income, living expenses, and assets.

1040 INITIAL MEETING WITH DEBTOR. Review with debtor in detail current financial problems and attempt to determine cause - ex: illness, inability to manage money, fraudulent activity, reckless spending, etc. Determine what has caused the debtor to seek legal advice with the thought of bankruptcy at this time - ex: emotional or psychological pressure from creditors or friends or family, legal proceedings being instituted, wages being garnished or property levied upon, foreclosure.

A. ***Review debtor's list of assets.***

1. Find out what the debtor has to lose if he files bankruptcy.

2. Consider exemptions, redemption, lien avoidance and reaffirmation possibilities.

3. Determine what assets the debtor wants to keep and what assets the debtor needs to keep.

B. In reviewing assets determine what ***assets are subject to liens.***

1. Determine if there is any equity in the asset.

2. Consider return of asset and replacement with similar but less expensive asset.

C. Review with debtor his ***budget information*** reflecting all sources of income and present living expenses.

1. Determine what experiences are necessary and what are extravagant.

2. Determine whether or not the debtor would have any excess income after the payment of normal reasonable living expenses to pay to creditors in a Chapter 13.

3. Determine if secured claims can be paid on contract terms or if adjustments need to be made in order to keep the collateral. If so, consider use of redemption, lien avoidance, crarn-down.

4. If debtor's personal residence is subject to hen, determine if Chapter 13 cram-down is available.

D. Factors which the attorney should consider in ***deciding when and if to file*** a bankruptcy petition include the following:

1. The general purposes of bankruptcy law–ie, a fresh financial start for an honest debtor, and the equality of distribution of a debtor's assets among his creditors.

2. The function of the debtor's attorney is to protect the debto:es assets as much as possible so that the debtor will have those assets for his fresh start, and obtain the debtor's discharge of as many debts as possible so that the debtor's fresh start will not be impeded.

3. The attorney needs to determine if the benefits of the debtor's bankruptcy will outweigh the costs to the debtor.

4. Is it possible for the attorney to achieve the same or better results for the debtor without the necessity of filing a bankruptcy petition?

5. Are there any negative tax consequences which could result from the bankruptcy or a creditor's foreclosure. If property is sold by the bankruptcy Trustee, then any tax liability resulting from the sale is a liability of the bankruptcy estate and not the debtor. Perhaps you want a foreclosure stopped in order to file a bankruptcy petition so that the bankruptcy Trustee sells the property and your client avoids a tax problem after his bankruptcy.

1041 REDEMPTION, LIEN AVOIDANCE, AND REAFFIRMATION.

A. ***Redemption***: Bankruptcy Code Section 722 permits an individual debtor, not a partnership or corporation, to redeem tangible personal property intended primarily for personal, family, or household use from a lien securing a dischargeable consumer debt, if the property is exempt under Bankruptcy Code Section 522, or has been abandoned by the trustee.

1. If the debtor wishes to exercise this option, and the property is exempt or has been abandoned, and is intended primarily for personal, family or household use, the debtor must pay the holder of the lien, in cash, the amount of the secured portion of the claim.

2. The debtor does not have the right to redeem in installments.

3. The amount of the allowed secured claim is determined pursuant to Bankruptcy Code Section 506(a), and, simply stated, is defined to be the fair market value of the collateral.

4. This provision permits the debtor to keep property which is subject to a lien and only pay the creditor what the property is worth.

B. ***Lien Avoidance:*** Bankruptcy Code Section 522(a) permits the debtor to avoid the fixing of a lien on an interest of the debtor in property to the extent that the lien impairs an exemption to which the debtor would have been entitled under the Bankruptcy Code if the lien is either (1) a judicial lien; or (2) a non-possessory, nonpurchase money security interest in household goods and furnishings; or (3) implements, professional goods, or tools of the trade of the debtor, or the trade of a dependent of the debtor, or professionally prescribed health aids of the debtor or dependent of the debtor.

1. This provision is enforceable even if the debtor may have previously waived any claim to exemptions, such as a homestead waiver.

2. If the debtor elects to avoid a lien, the creditor will receive no payment from the debtor and must release its lien on the exempt property.

3. This is different from redemption in that under redemption, the creditor's lien is not avoidable and the creditor receives payment to the extent of the fair market value of the property.

4. Judicial hens for spousal or child support or alimony, which have not been assigned to another entity, ie. such as a state department of Support and Collection, are not avoidable.

5. The lien can be avoided only to the extent that the sum of the hen, plus the amount of all other liens on the property, plus the amount of the statutorily allowed exemption, exceeds the value of the debtor's interest in the property if there were no liens.

C. ***Reaffirmation:*** Prior to the Bankruptcy Amendments and Federal Judgeship Act of 1984, the Bankruptcy Court was required to consider all motions for reaffirmation and to approve or disapprove them, in view of the best interests of the debtor and the

debtor's dependents. As a result of this recent legislation the Bankruptcy Court is no longer involved in reaffirmation agreements between the debtor and his creditors if the debtor is represented by counsel. If the debtor is not represented by counsel, the Court must consider and approve any reaffirmation agreement.

1. The reaffirmation agreement is enforceable only if (1) the agreement was made before the granting of the discharge, and (2) the agreement contains a clear and conspicuous statement advising the debtor that the agreement may be rescinded at any time prior to discharge or within 60 days after the agreement is filed with the Court whichever occurs later, by giving notice of rescission to the holder of the claim, and (3) the agreement has been filed with the Court accompanied by the declaration or affidavit of the attorney.

2. If the debtor is not represented by an attorney, then the Court must approve the agreement as not imposing an undue hardship on the debtor or a dependent of the debtor, and be in the best interest of the debtor.

3. Bankruptcy Court is not required to approve reaffirmation agreements relating to debts which are consumer debts secured by real property of the debtor.

4. All reaffirmation on agreements, even those concerning debts secured by real property of the debtor, must be filed with the Bankruptcy Court and must contain the affidavit of the attorney and the statement advising the debtor that the agreement may be rescinded at the later of any time prior to discharge or within 60 days after the agreement is filed with the Bankruptcy Court.

1042 DETERMINE IF DISCHARGE PRESENTS PROBLEM TO DEBTOR.

A. Determine from debtor if there is any basis for any creditor to object to the debtor's discharge, or if there are certain types of debts, i.e., taxes, which under most circumstances are not dischargeable.

B. Consider issues of fraud, fraudulent conveyances, false financial statements, recent credit card use, and personal injury claims resulting from drunk driving accident.

1043 DEBTOR'S FUTURE JOB AND INCOME STABILITY.

A. Determine if the debtor will become employed if not currently employed (perhaps not relevant in advising military personnel).

B. Determine the likelihood of increase in income for debtor.

C. Determine whether debtor expects any inheritance in the near future or is entitled to any tax refunds or has any claims against anyone else, since such claims may be or become assets of bankruptcy estate.

D. Determine if debtor has any cash value in life insurance available to him.

1044 DETERMINE WHETHER BANKRUPTCY IS THE ONLY MEANS TO AFFORD THE DEBTOR RELIEF AND HOW PERMANENT RELIEF WILL BE.

A. Is it possible for the debtor to obtain a loan in order to consolidate debts?

B. Is debtor likely to find himself in a similar situation shortly after filing bankruptcy because of inability to meet basic living expenses?

C. What effect will bankruptcy have on debtor's credit now and in the future?

D. Is it possible to work out an agreement directly with the debtor's creditors and avoid the necessity of bankruptcy?

E. If bankruptcy is the only form of relief, which Chapter is suitable - Chapter 7 or Chapter 13?

1045 ATTRIBUTES OF CHAPTER 7.

A. Elimination of all dischargeable debts.

B. No payments to Court.

C. Selected reaffirmation of debts.

D. Potential loss of non-exempt assets by sale of Trustee.

E. Dischargeability problems.

F. Non-dischargeability of certain student loans.

G. Liability to file Chapter 7 within next six years.

1046 ATTREBUTES OF CHAPTER 13.

A. Greater dischargeability provision permitting discharge of all debts other dm alimony and support taxes, and debts whose payments extend beyond terms of plan.

B. Payments to Court for three years.

C. Redemption in installments.

D. Cram-down of secured debt.

E. Ability to file subsequent Chapter 13 or Chapter 7 without six year bar.

F. Co-debtor stay and classification.

1047 PREPARATION, REVIEW AND FILING OF PETITION AND SCHEDULES.

A. After initial interview with client and decision has been made as to the t)W of proceeding to file, the draft schedules and statement of affairs should be provided to the debtor to take with him to prepare in draft form and to return to attorney for final review and preparation for filing with Bankruptcy Court.

B. Develop a checklist of information to be alert for in reviewing schedules and statements of affairs.

C. Review budget information to be certain of the debtor's monthly income and expenses and justify decision to file Chapter 7 or Chapter 13.

D. If Chapter 13 has been decided upon, prepare the plan, taking advantage of the ability to classify creditors (i.e., co-debtors), redemption in installments, and cramdown of secured claims.

1048 CHAPTER 13 PLAN.

The provisions of Chapter 13 of the Bankruptcy Code contemplate that only the debtor shall have the right to file a plan. Chapter 13 is considered to be a totally voluntary proceeding, and as a result Congress did not believe it appropriate to permit the debtor's creditors to file a plan which would often not fully contemplate the debtor's normal living expenses.

A. In instances where the debtor is a "wage earner," not a self-employed businessman, the debtor will need to prepare a budget reflecting his ***normal monthly living expenses***, excluding debt repayment under the plan, and his normal net monthly income.

B. Based upon these figures, the debtor will develop a plan which purpose is to pay all or a portion of his net disposable income to his creditors over ***a term of three years***.

C. The debtor's plan must provide for the payment in full of ***administrative expenses*** and priority claims, usually representing tax liability.

D. In addition, the debtor may modify the ***rights of secured creditors***.

1. Bankruptcy Code Section 1325(a)(5) provides that the debtor's plan shall be confined by the Court if the secured claims provided for by the plan have (1) accepted the plan; or (2) the plan provides that the secured creditor retain its lien and be paid the value of its claim as of the effective date of the plan, or (3) alternatively that the, debtor surrender the collateral to the secured creditor.

2. Thus, a debtor can effectively refinance secured obligations even if the secured creditor does not consent.

3. To the extent that the claim of the secured creditor is in excess of the value of its collateral (which is the amount of the allowed secured claim which must be paid under the Chapter 13 plan to the secured creditor), the balance of the claim is treated as a general unsecured claim which is entitled to be paid as an unsecured creditor (the "Cram-Down").

4. The debtor is not permitted to modify the rights of a creditor who is secured solely by real property that is the debtor's principal residence. Bankruptcy Code Section 1322(b)(2).

E. After dealing with the claims of secured creditors, the debtor may deal with the ***claims of unsecured creditors***.

1. Bankruptcy Code Section 1322(b)(1) permits the debtor to classify claims of co-debtors differently dm the claims of other unsecured creditors and permits preferential payment to those creditors who have co-debtors to whom they can look for payment.

2. In order for a plan to be confirmed, the unsecured creditors of the debtor must receive payments under the plan in an amount not less than that which they would receive in payment of their claim if the case were liquidated under Chapter 7 of the Bankruptcy Code. Once again, these payments must represent the present value, as of the effective date of the plan, of the total payments to be distributed under the plan.

3. Bankruptcy courts will no longer be confronted with the issue of whether or not the percentage pay-out to unsecured creditors represents the debtor's best efforts, or whether the plan was filed in good faith.

a. Bankruptcy Code Section 1325(b)(1) provides that if the trustee or the holder of an allowed, unsecured claim objects to confirmation of the plan, the Bankruptcy Court may not approve the plan unless, as of the effective date of the plan, the value of the property distributed under the plan on account of the claim is not less Um the amount of the claim; or the plan provides that all of the debtor's projected, disposable income to be received in the three year period beg' ' g on the date that the first payment is due under the plan will be applied to make payments under the plan.

b. Thus, if the unsecured creditor is paid in full, or if the debtor is paying to his creditors all of his projected net disposable income, the plan is deemed to have been filed in good faith and is representative of the debtor's best efforts.

c. "Net Disposable Income" as established by the Bankruptcy Code means income received by the debtor which is not reasonably necessary to be expended for the maintenance or support of the debtor or his family; or if the debtor is engaged in business, for the payment of expenditures necessary for the operation of the business.

d. This provision seems to tie in with Bankruptcy Code Section 707(b) which permits the Court, on its own motion, to refuse to grant relief to the debtor under Chapter 7 if it appears that the debtor is a consumer debtor and could qualify under Chapter 13 of the Bankruptcy Code.

4. Bankruptcy Code Section 1326 requires that payment under the plan shall begin within 30 days after the plan is filed. No payments will be distributed by the trustee until confirmation. If the plan is not confirmed, then any payments received by the trustee shall be returned to the debtor.

5. The trustee is responsible for receiving all payments to be made as provided under the plan. If payments are not timely begun, or continued under the plan after confirmation, any party in interest may bring this to the Courts attention and request that the case be dismissed.

6. If the case is dismissed, then the debtor may be prohibited from filing any other petition under any chapter of the Bankruptcy Code for a period of 180 days as a result of the prohibition against multiple filings contained in Bankruptcy Code Section 109(f).

1049 DETERMINATION OF EXEMIPTIONS AND PERFECTION OF CLAIMS.

A. Be sure to properly claim the exemptions available to the debtor either under state law, federal law, or federal bankruptcy law.

B. Note that the claim of exemptions generally must be made and perfected prior to the filing of the petition.

1050 FILING OF THE PETITION.

A. Consult local practice for the required number of copies to be filed with the Bankruptcy Court (original and one copy).

B. Filing fees for both Chapter 7 and Chapter 13 are currently $160.00.

C. If foreclosure, levy, garnishment, etc. is imminent file the petition promptly in order to stay the continuation of legal process. Foreclosures can be stayed if the petition is filed before the time the debtor loses his interest in the property, i.e., generally the time of sale; and garnishment can normally be recovered prior to the time a local court pays the funds over to the creditor.

1051 EFFECT OF SECTION 362 - AUTOMATIC STAY.

A. Upon the filing of the petition an automatic injunction granted by I I U.S.C. Section 362 becomes effective, and stays all actions by creditors against the debtor.

B. Note that his does not affect criminal prosecutions where the intent and main purpose is not the recovery of an indebtedness (ex: bad check prosecutions).

C. The filing of the petition stays repossession or other liquidation of collateral held by a secured creditor.

D. The automatic stay continues in effect until an order lifting the stay is entered by the Court or the earlier of when the discharge is granted, or the time the case is closed or dismissed.

E. If a motion to lift the stay is filed, a hearing on the motion must be concluded within 30 days after the motion is filed or the stay will automatically dissolve, unless the parties agree to an extension of the period.

F. The automatic stay must still be lifted in order for the creditor to recover its collateral.

1052 SECTION 341 - MEETING OF CREDITORS.

A. The Court will set a meeting of creditors pursuant to Section 341 of the Bankruptcy -Code to be held between 20 and 40 days after the filing of the petition.

B. The Court will appoint an interim Trustee to serve as Trustee until the meeting of the creditors at which time the creditors may elect their own trustee - this is rarely done.

C. At the meeting of creditors the Trustee will examine the debtor regarding his assets, liabilities and income in order to determine what property the Trustee has to administer.

D. The Trustee is required to ask the Debtor if he is aware of (1) the consequences of seeking a discharge in bankruptcy and the effect on his credit history, (2) his ability to file a petition under Chapter 13, (3) the effect of receiving a discharge under Chapter 7, and (4) the effect of reaffirming a debt.

E. In many jurisdictions Trustees will declare cases as "no asset" cases if the value of the property subject to their administration is less dm $1,000.

F. The debtor must attend the Section 341 meeting or the case may be dismissed.

G. The Trustee has the authority, generally separately approved by a court order, to sell non-exempt assets of the debtor free of lien and to apply the net proceeds to the payment of any liens, with any balance to be paid prorata to the claims of creditors.

1053 DISCHARGE HEARING.

A. Debtor is required to attend the discharge hearing or case may be dismissed.

B. Hearing is held approximately 75 days after Section 341 meeting.

C. If "objection to discharge" or "objection to dischargeability of a debt" (note the distinction) is filed within 60 days after Section 341 meeting, a separate hearing will be held on the creditor's complaint.

D. At the discharge hearing the Bankruptcy Judge will advise the debtor of the effect of the debtor's bankruptcy and the effect of the Order of Discharge, which is then provided to the debtor.

E. The discharge does not extinguish the debts, or void any liens, or void any judgments which became liens before the petition was filed and not set aside in the bankruptcy proceeding. The discharge only releases the debtor from his personal liability for payment of his debts and permanently enjoins any creditor from attempting to collect their debt from the debtor.

F. If a debtor receives his discharge, and is subsequently harassed or sued by a creditor whose debt has been discharged, contempt proceedings can be filed against the creditor.

CHAPTER 11

CONSUMER LAW 2: CREDIT PROTECTION

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B. 12 C.F.R. Part 205 (1995), REGULATION E 11-1
C. Pointer, "The Electronic Fund Transfer Act", The Army Lawyer, p.3, August 1990 11-1
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CHAPTER 11

CONSUMER LAW 2

PART A - ELECTRONIC FUND TRANSFER ACT (EFTA)

1101 REFERENCES

A. 15 U.S.C. § 1693-1693q (1994)

B. 12 C.F.R. Part 205 (1995), REGULATION E

C. Pointer, "The Electronic Fund Transfer Act", The Army Lawyer, p.3, August 1990

D. Copies of "Alice in Debitland: Consumer Protections and the Electronic Fund Transfer Act" can be obtained upon request by writing: Publications Services, Division of Support Services, Board of Governors of the Federal Reserve System, Washington, D.C. 20551

1102 INTRODUCTION. Congress found that the use of electronic systems to transfer funds greatly benefits consumers. However, Congress also found that consumers needed protection and therefore passed legislation governing the rights and liabilities among consumers, financial institutions and intermediaries in electronic fund transfers.

1103 PURPOSE AND SCOPE. EFTA establishes rights, liabilities, and responsibilities of consumers who use electronic money transfer services and of financial institutions that offer these services. 12 C.F.R. Part 205 implements EFTA.

A. ***Electronic transfer.*** An electronic transfer is any transfer of funds, other than a transaction by check, draft, or similar paper instrument, that is initiated through an electronic terminal, telephone, or computer or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account. The term includes, but is not limited to point of sale transfers, Automated Teller Machine transfers, direct deposit or withdrawal of funds, and transfers initiated by telephone. The term includes all transfers resulting from debit card transactions.

B. ***EFTA does not apply.*** EFTA does not apply to the following. Check guarantee or authorization services that do not result directly in a debit or credit to consumer's account. Wire transfers used primarily for transfers between financial institutions or businesses. Certain automatic transfers such as any transfer under an agreement between consumer and financial institution which provides the institution will initiate individual transfers without a specific request from the consumer between consumer's accounts within the institution (such as a

checking account to savings account) or into a consumer's account by the institution (such as the crediting of interest to a savings account), or from a consumer's account to an account of another consumer who is a family member and whose account is within the same institution. Certain telephone-initiated transfers that are initiated by telephone conversation between consumer and employee of institution, and are not under a telephone bill-paying or other prearranged plan or agreement in which periodic transfers are contemplated.

1104 ISSUANCE OF ACCESS DEVICES (15 U.S.C. § 1693h). "Access device" means a card, code, or other means of access to a consumer's account. Financial institutions may only issue access devices to consumers in response to an oral or written request or application, or as a renewal of, or substitute for, an already accepted access device. Except, a financial institution may distribute an access device to a consumer on an unsolicited basis if the access device is not validated, and the distribution is accompanied by the following. A complete disclosure of consumer's rights and liabilities that will apply if device is validated, a clear explanation that the access device is not validated and how the consumer may dispose of it if validation not desired, and the access device is validated only in response to consumer's oral or written request or application and after verification of consumer's identity by any reasonable means such as photo, fingerprint, personal visit, or signature comparison. The access device is considered validated when the financial institution has performed all procedures necessary to enable the consumer to use it to initiate an electronic fund transfer.

1105 PROTECTION FROM UNAUTHORIZED USE (15 U.S.C. § 1693g)

A. ***Definition.*** "Unauthorized use" is an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit. Unauthorized electronic fund transfer does not include electronic fund transfers initiated by one furnished with the access device to the consumer's account by the consumer, unless the consumer has notified the financial institution involved that the transfers by that person are no longer authorized. It does not include electronic fund transfers initiated with fraudulent intent by the consumer or a person acting in concert with the consumer. And it does not include an electronic fund transfer which constitutes an error committed by the financial institution or its employees.

B. ***Consumer liability for unauthorized transfers (15 USC § 1693g(a)).*** Maximum liability of $50 if the consumer reports the loss or theft of the access device within 2 business days of discovering the loss/theft. Maximum liability of $500 if consumer fails to notify institution within 2 business days and institution can show it could have stopped the unauthorized use if it had been notified. Unlimited liability if consumer fails to report within 60 business days and institution can show it could have stopped the unauthorized use if it had been notified.

The consumer cannot waive these limitations or any other protections provided by the Act. Financial institutions cannot attempt to circumvent the Acts protections by adding "fault" language in ATM agreements. For example, the financial institution MAY NOT try to limit its liability if the consumer is negligent in collocating the ATM card with the PIN number and both are stolen and used.

1106 ERROR RESOLUTION PROCEDURES. "Error" means an unauthorized electronic fund transfer, an incorrect electronic fund transfer to or from consumer's account, omission from a periodic statement of an electronic fund transfer to or from consumer's account that should have been included, computational or bookkeeping error made by financial institution relating to an electronic transfer, consumer's receipt of an incorrect amount of money from an electronic terminal, an electronic fund transfer not identified in accordance with regulations, or a consumer's request for any documentation required to be given by the financial institution, or additional clarification concerning an electronic transfer. Error does not include routine inquiry about the balance of account.

In order to limit liability, the consumer must furnish to the financial institution written or oral notice of the error within 60 days of the erroneous statement's transmittal. Notice should include the consumer's name and account number. The consumer's belief that an error exists and the amount of the error. The reasons for the consumer's belief.

Upon notification, the institution has 10 business days (20 days if the consumer is overseas) to investigate and report the results of the investigation to the consumer. The institution, at its option, may extend the report period by provisionally re-crediting the account within 10 business days of the consumer's notice. Re-crediting gives the bank 45 days (90 days if the consumer is overseas) to investigate and report the results of the investigation to the consumer.

Following completion of the investigation, the institution shall correct any errors within 1 business day. If no errors are found, the institution will so notify the consumer within 3 business days and forward copies of all documents relied upon, if requested by the consumer.

If there was no error discovered, and upon debiting a provisionally re-credited amount, the financial institution shall orally report or mail notice to consumer of date and amount of debiting and fact they will honor checks, drafts, or similar paper instruments to 3rd parties and pre-authorized transfers from consumer's account for 5 business days after transmittal of notice. The institution need only honor items that it would have paid if the provisionally re-credited funds had not been debited.

1107 PRE-AUTHORIZED TRANSFERS FROM CONSUMER'S ACCOUNT (15 U.S.C. § 1693e)

A. ***Consumer's right to stop payment.*** The consumer must notify the financial institution orally or in writing at any time up to 3 business days before the scheduled day of transfer. The financial institution may require written confirmation of the stop-payment order to be made within 14 days of an oral notification is made if the requirement is disclosed to consumer along with address to which confirmation should be sent. If the consumer does not provide written confirmation, the stop-payment order ceases to be binding 14 days after it has been made.

1108 REMEDIES (Civil and Criminal Liability–§1693m & § 1693n). One may recover actual damages, statutory damages from $100 to $1,000, court costs, and reasonable attorney's fees. ourts may impose criminal penalties of up to 1 year's imprisonment and a $5,000 fine for knowing and willful noncompliance. Criminal penalties of up to 10 years' imprisonment and a $10,000 fine may be imposed for violations affecting interstate or foreign commerce. Treble damages (3 times the consumer's actual damages) are permitted if the account is not properly provisionally re-credited, the institution fails to conduct a good faith investigation, or the institution knowingly and willfully concludes that no error exists contrary to the available evidence.

1109 CONCLUSION

PART B - FAIR CREDIT BILLING ACT (FCBA)

1110 REFERENCES

A. 15 U.S.C. § 1601 *et. seq.* (1994)

B. Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j (1994)

C. 12 C.F.R. § 226.13 – Billing Error Resolution (1995)

D. National Consumer Law Center, Truth in Lending (2d ed. 1989) and Cumulative Supplement

1111 INTRODUCTION. Congress found that a need existed to protect consumers from unfair credit billing and unfair credit card practices. The Fair Credit Billing Act (FCBA) is part of the Truth in Lending Act (TILA). The TILA is designed to remedy problems which had developed from consumers' ignorance of the nature of their credit obligations and of the costs of deferring payments. A crucial objective of the TILA is to ensure consumers access to information enabling them to compare the cost of credit.

1112 PURPOSE AND SCOPE. FCBA is part of the Federal Truth in Lending Act. It establishes procedures for complaining about billing errors and requires creditors to respond to such complaints either by correcting the error or by explaining any rejection of the billing error complaint. Regulation Z, 12 C.F.R. § 226.13 (promulgated by the Federal Reserve Board) implements the FCBA.

A. ***FCBA applies to.*** FCBA applies to open-end consumer credit transactions (i.e., credit cards, store charge accounts) involving billing errors. Billing errors (mistakes) include the following occurrences. Bills for transactions that never occurred. Transactions conducted by unauthorized people. Bills for erroneous amounts. Bills for goods/services that were not delivered or were not accepted. Failure to credit an account properly. Computation errors on the billing statement. Bills sent to incorrect addresses provided that the creditor received notice of the change of address at least 20 days before the end of the billing cycle for which the statement was sent out. (Note: Dispute over "quality" of goods must be raised as a claim or defense - it is not a billing error.)

B. ***Billing error resolution procedures.*** 12 C.F.R. § 226.13. The consumer must notify the creditor of any error in writing within 60 days of the creditor's transmittal of the bill to the consumer. If the error was a failure to transmit the billing statement, then the 60 days run from the time when the creditor should have sent it. If the error is failure to credit a payment, 60 days begins to run when the credit should have appeared on the statement. The consumer's billing error notice must include sufficient information to enable the creditor to identify the consumer, to identify his/her account number, and to understand the nature of the complaint.

The creditor may specify on the statement that the consumer should not transmit the notice of error on the payment medium. The creditor must disclose on the billing rights statement or on the periodic statement an address for billing error inquiries. The notice must be received at that place for notice to be effective.

After the consumer gives notice, he/she may withhold payment of the disputed amount or pay the amount without waiving billing error rights. However, paying the disputed amount does waive assertion of claims and defenses against the credit card issuer (see below).

C. ***Procedures creditors must follow upon receipt of the notice.*** The creditor must conduct a reasonable investigation, unless the creditor corrects the account as requested or the consumer withdraws the complaint. The creditor shall mail or deliver written acknowledgement of the complaint to the consumer within 30 days of receiving a billing error notice unless the creditor has complied with appropriate resolution procedures within that 30-day period. The creditor must comply with the resolution procedures within two billing cycles (but in no event, later than 90 days) after the creditor's receipt of the debtor's notice of error.

1. ***Resolution procedures.*** If the creditor determines that an error has occurred, the creditor shall, within the time limits above, correct the error and credit the consumer's account with any disputed amount and associated finance charges, and mail or deliver a correction notice to consumer. If, after conducting an investigation, the creditor determines that no billing error has occurred or that a different error occurred from that asserted, the creditor shall, within time limits above mail or deliver to consumer an explanation setting forth the reasons the creditor believes the alleged error is incorrect in whole or part. The creditor must furnish copies of documentary evidence of consumer's indebtedness, if the consumer so requests. If a different billing error has occurred, the creditor must correct the error and credit the consumer's account.

Creditor may seek collection of unpaid, undisputed amounts. Note: If the consumer keeps a deposit account with the creditor and has direct payment deducted automatically, the creditor may not deduct any part of the disputed amount or related finance charges if the notice of error is received any time up to 3 business days before the scheduled payment date.

Until the billing error is resolved under the FCBA procedures, the following rules apply. Creditors may not take any action to collect the amount in dispute. The creditor may not restrict or close the account in issue based upon the debtor's failure to pay the disputed amount. (Note: Creditor may decrease credit limit by amount in dispute). The creditor or its agent shall not (directly or indirectly) make or threaten to make an adverse credit report to any person about the consumer's credit standing, or report that an amount or account is delinquent, because the consumer failed to pay the disputed amount or related finance or other charges. [15 U.S.C. § 1666a; 12 C.F.R. § 226.13(d)(2)].

If, after the creditor follows the resolution procedures, and the consumer still claims there is an error, the creditor may report the delinquency to a credit reporting agency provided the creditor also reports that the amount is in dispute. The creditor must mail or deliver to the consumer the names and addresses of each person to whom creditor made the report, and promptly report any subsequent resolution of a reported delinquency to all persons to whom creditor made the report. A creditor who has fully complied with FCBA procedures is under no further responsibilities if consumer reasserts same billing error.

1113 CARDHOLDER LIABILITY FOR UNAUTHORIZED USE (15 USC § 1643). Credit card holders are liable for unauthorized use of the card only up to $50. The Truth in Lending Act limits liability for unauthorized use. A cardholder shall be liable for the unauthorized use of a credit card only if the card is an accepted credit card (accepted by the consumer), the liability is not in excess of $50.00, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, the unauthorized use occurs before the

card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise, and the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

Except as provided above, the cardholder incurs no liability from the unauthorized use of a credit card. Therefore, if the cardholder notifies issuer before unauthorized charges are made, the cardholder is not liable for anything. In an action to enforce the liability, the burden of proof is upon the card issuer to show that the use was authorized or if the use was not authorized, then issuer must show the conditions of liability for unauthorized use have been met (and then liability is only up to $50.00).

A. ***"Authorized" versus "unauthorized" use***. Unauthorized use of a card occurs only where there is no actual, implied, or apparent authority for such use by the cardholder. Many states interpret Act's definition of "unauthorized use" to protect cardholders only against theft, loss, or similar wrongdoing. Credit card issuers must police participating merchants.

1. ***Not unauthorized use***. The following do not constitute an unauthorized use. Attempts to orally limit spending. Use of card by authorized-person for unauthorized purpose. Letter to credit card issuer to limit credit limit did not shield cardholder from liability for excess charges by an apparently authorized person.

1114 REMEDIES (EFFECT OF NONCOMPLIANCE)

A. ***Civil Liability***. 15 U.S.C. § 1640. Because the FCBA is part of TILA, it carries the same remedies as TILA, except that the remedy of rescission is not available for failure to comply with billing requirements. In addition to the remedies available for TILA violations, a specific remedy is available to the debtor if the creditor fails to comply with the FCBA. If the creditor violates the billing error resolution procedures, the consumer nonetheless recovers from creditor the disputed amount and any finance charges thereon up to $50. 15 U.S.C. § 1666(e). Also, consider UDAP action at the state level.

1115 CARDHOLDERS' CLAIMS AND DEFENSES (15 U.S.C. § 1666i)

A. ***Claims and defenses***. Claims and defenses may include the unauthorized use of the card, a dispute as to quality of merchandise, the nondelivery of goods, and claims which can be asserted under the billing error resolution procedures. A consumer has a right to assert against the card issuer any claims or defenses concerning property or services purchased with a credit card if the consumer has made a good faith effort to resolve the problem with the merchant honoring the card, the amount of the initial transaction exceeds $50, the initial transaction was in the same state as the cardholder's designated address or within 100 miles of such address, and the merchant is not controlled by or is the same entity as the card issuer.

Once the criteria have been met, the consumer may withhold payment of the disputed amount to the extent of the credit outstanding on that transaction and finance charges attributable thereto. Payment of the disputed amount waives right to assert claims or defense as to the card issuer.

1. ***Application of payments.*** Payments already made shall be applied in the following order. First to late charges in the order of their entry. Then to finance charges in the order of their entry. And finally to other debits in the order of their entry. If only part of a single transaction is disputed (i.e., multiple purchases at the same time), payments shall be prorated according to prices and applicable taxes.

B. ***Relationship to billing error resolution procedures.*** Even though certain merchandise disputes, such as nondelivery of goods, may also constitute "billing errors," the protections operate independently. For example, a cardholder who asserts a billing error involving undelivered goods may institute error-resolution procedures. But whether or not the card issuer has done so, the cardholder may also assert claims or defenses. Conversely, the consumer may pay a disputed balance and thus have no further right to assert claims or defense, but still may be able to assert a billing error if notice of the error is given in the proper time and manner. An assertion that a transaction resulted from "unauthorized" use of a credit card could also be both a "defense" and a billing error. A dispute over "quality" may only be asserted as a claim or defense, not a billing error, since it is not within the billing error provisions.

State statutes may be more favorable to consumers. See Mass. G.L.A. c. 255, § 12F, which makes credit card issuers subject to all defenses a consumer may have arising from a sale or lease transaction without any condition or limitation.

1116 CONCLUSION

PART C - INDEBTEDNESS COMPLAINTS

1117 REFERENCES

A. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o

B. Truth in Lending Act, 15 U.S.C. §§ 1601-1667

C. Garnishment of Pay. Pub L. 103-94, 107 Stat. 1001, Hatch Act Reform Amendments (1993) (codified at 5 U.S.C. § 5520a). See 5 U.S.C. § 5520a(k) for statutory authority for involuntary allotment of military pay.

D. DOD Policy. DOD Directive 1344.9, Subj: Indebtedness of Military Personnel; DOD Instruction 1344.12, Subj: Indebtedness Processing Procedures for Military Personnel

E. DOD 32 C.F.R. Parts 112 and 113 - Indebtedness of Military Personnel. Indebtedness of Military Personnel, 60 Fed. Reg. 1721, 1722 (1995) (to be codified at 32 C.F.R. §§ 112-113)

F. USN: MILPERSMAN 6210140

G. USMC: LEGADMINMAN Ch. 7

H. USCG: COMDINST M1000.6A, Personnel Manual, Ch. 8-L

1118 INTRODUCTION. The uniformed services expect servicemembers to pay their just obligations in a proper and timely manner. A just obligation is normally defined as one in which their is no dispute as to the facts or the law, or one reduced to judgment which conforms to the SSCRA, if applicable.

Punitive and/or administrative actions may be taken against service members who wrongfully and dishonorably fail to pay just debts.

1119 DEBT COMPLAINTS AGAINST MILITARY MEMBERS

A. ***DOD policy.*** (DOD Directive 1344.9) Members are expected to pay just financial obligations in proper and timely manner. The services have no legal authority, except in the case of court ordered alimony, child support, or a final civil judgment, to require members to pay a private debt or to divert any part of their pay for its satisfaction. Enforcement of private obligations of a military member is a matter for civil authorities.

Processing debt complaints **will not be extended** to those: (a) who have not made a bona fide effort to collect the debt directly from the military member, (b) whose claims are patently false and misleading, or (c) whose claims are obviously exorbitant.

The military services will not assist creditors who have unfair agreements under the provisions of the DOD "Standards of Fairness." The DOD provisions for fairness require no usury (based upon the state interest cap), no excessive attorney fees (no fees unless a law suit is filed, then only 20% of obligation found due), no late charges in excess of 5% of late payment or $5.00 whichever is less, and no penalties for prepayment.

B. ***Definitions***

1. ***Just financial obligations***. A legal debt acknowledged by the military member in which there is no reasonable dispute as to the facts or the law; or one reduced to judgment which conforms to 50 U.S.C. app. § 501 (SSCRA), if applicable. (32 C.F.R. § 112).

2. ***Proper and timely manner***. A manner which under the circumstances does not reflect discredit on the military service. (32 C.F.R. § 112).

3. ***Debt collector***. An agency or agent regularly engaged in the collection of debts described under Pub. L. 95-109 (FDCPA). See 32 C.F.R. § 112. DOD does not provide assistance to debt collectors **unless** the debt collector has consent of service member, a court order or is attempting to effectuate a post-judgment legal remedy.

C. ***Creditor actions required for DOD assistance***. Upon completion of the following certifications, commanders will provide debt collection assistance outlined below.

Creditors subject to Regulation Z must provide a Certificate of Compliance with **DOD Standards of Fairness** and a copy of all disclosures made to the servicemember pursuant to the Truth in Lending Act (TILA).

Creditors not subject to Regulation Z. (e.g. public utilities) must submit with their requests for assistance a certificate that no interest, finance charge, or other fee is in excess of that permitted by law of state where obligation was incurred.

Foreign-owned companies must submit with their requests for assistance a copy of terms of the debt with English translation), and certify that they have subscribed to the DOD Standards of Fairness.

D. ***Commanders' actions***. Commanders will review the facts surrounding transaction forming the basis of complaint. This review should include the servicemember's legal rights and obligations, and any defenses or counterclaims the member may have.

The command should advise the servicemember that service regulations require just financial obligations to be paid in proper and timely manner, and financial or legal counseling services are available.

The command next notifies the creditor that the servicemember was told of complaint. The command may provide the creditor a summary of the servicemember's intentions if servicemember gives permission to release that information. Disclosure without permission may violate the Privacy Act.

Commanders may consider administrative or punitive action in appropriate cases. Actions include service record book entries, denial of reenlistment, administrative separation, or

punitive action under UCMJ, Articles 92, 123, 133, or 134. The member must be aware that failure to pay just debts may be considered evidence of irresponsibility. Observed irresponsibility can have adverse career impact. Security clearances can be revoke which may affect duty assignments.

Commanders **will not** arbitrate disputed debts, admit or deny the validity of the claim, or indicate whether any action has been taken against a servicemember as a result of the complaint. Privacy Act, 5 U.S.C. § 552a – **Never** indicate to creditor what, if any, command action was taken in response to a Letter of Indebtedness (LOI).

E. ***Processing debt complaints from "non-creditors".*** Non-creditors include "bad checks" written to supermarkets or landlords and other persons or organizations that did not extend credit. Generally those not subject to TILA.

For non-creditors, refer the matter to the servicemember. Counsel member regarding his financial responsibilities and consequences of not meeting them. Document the incident with a Page 11/13 Admin Warning. The command should respond to debtee in accordance with the sample letters in the MILPERSMAN or LEGADMINMAN, as appropriate. Finally, hold the servicemember accountable if he/she acknowledges a just debt. The command can not force a member to pay, but may take administrative or disciplinary action.

F. ***Processing debt complaints from "creditors".*** Creditors include car loans, bank loans, and installment contracts. Generally, lenders subject to TILA issues.

Before the Commanding Officer acts, the creditor must have a final civil judgment **or** prove **both** compliance with Truth in Lending Act (copy of all TILA disclosures made at the time credit agreement was signed) and compliance with DOD "Standards of Fairness" (32 C.F.R. § 112).

A creditor may prove compliance with TILA, Regulation Z and DOD Standards of Fairness by filing a Certificate of Compliance with attached copy of TILA disclosures. If the creditor's request for assistance includes no proof of compliance by creditor, then return the Letter of Indebtedness explaining deficiency and that no action will be taken pending compliance with the regulations.

In the event that the letter of indebtedness includes proof of compliance by creditor, then refer LOI to member. Counsel the member regarding their responsibilities and consequences for failure to comply. The command may respond to creditor. Finally, hold servicemember accountable.

G. ***Processing debt complaints from debt collectors.*** Debt collectors are agents of creditors. They did not originally extend credit to the debtor. Debt collectors act solely to

collect delinquent loans. The Fair Debt Collection Practices Act applies to the conduct of their business. Generally, debt collectors cannot contact third parties such as employers, including military commands, about a debt. A debtor may consent to allow a debt collector to contact an employer about debt but the consent must be given after the delinquency has occurred.

H. ***May deny assistance to creditors.*** If the claimant, having been notified of the DOD requirements, refuses or repeatedly fails to comply with TILA or Standards of Fairness, then assistance may be denied. Also, when the claimant, regardless of the merits of the claim, clearly shows an attempt to unreasonably use the processing privilege, assistance may be withheld.

I. ***Bankruptcy.*** Care must be taken not to infringe on the rights of servicemembers protected under bankruptcy law.

1120 CONCLUSION

PART D - GARNISHMENTS, INVOLUNTARY ALLOTMENTS AND CREDITOR JUDGMENTS

1121 REFERENCES

A. ***Involuntary allotment of military pay for judgment indebtedness***

1. ***Garnishment of pay***. Pub L. No. 103-94, 107 Stat. 1001, Hatch Act Reform Amendments (1993) (codified at 5 U.S.C. § 5520a). See 5 U.S.C. § 5520a(k) for statutory authority for involuntary allotment of military pay. Note: The National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 643, 110 Stat. 368 (1996) amends 5 U.S.C. § 5520a(k) by allowing for deduction from a member's military to pay the administrative costs incurred in establishing and maintaining an involuntary allotment.

2. ***DOD policy***. DOD Directive 1344.9, Subj: Indebtedness of Military Personnel; DOD Instruction 1344.12, Subj: Indebtedness Processing Procedures for Military Personnel.

3. DOD 32 CFR Parts 112 and 113 - Indebtedness of Military Personnel. Indebtedness of Military Personnel, 60 Fed. Reg. 1721, 1722 (1995) (to be codified at 32 C.F.R. §§ 112-113).

4. NAVADMIN 249/94: DTG: 310100Z DEC 94

B. ***Involuntary allotment of military pay for spousal and child support***

1. 42 U.S.C. § 665

2. DOD Directive 1340.17 (32 C.F.R. Part 54 - Allotments for Child and Spousal Support)

3. SECNAVINST 7431.1, Subj: Involuntary Allotments for Child and Spousal Support

C. ***Direct payments of retired pay for spousal and child support (or division of property)***

1. 10 U.S.C. § 1408 (Uniformed Services Former Spouses' Protection Act)

2. 32 C.F.R. Part 63 – Former Spouse Payments from Retired Pay

3. OPNAVINST 7431.1, Subj: Former Spouse Payments from Retired Pay

D. ***Garnishment of military pay and civilian employee pay for child support and alimony***

1. 42 U.S.C. § 659-662 (Social Security Act)

2. 5 C.F.R. Part 581 – Processing Garnishment Orders for Child Support and/or Alimony

3. SECNAVINST 7200.16, Subj: Garnishment of Pay of Naval Military and Civilian Personnel for Collection of Child Support and Alimony

E. ***Creditor garnishment of civilian employee pay***

1. 5 U.S.C. § 5520a. Hatch Act Reform Amendments of 1993

2. 5 C.F.R. Part 582 - Commercial Garnishment of Federal Employee's Pay

F. **DFAS**: http://www.dfas.mil

1122 INTRODUCTION. Prior to 1993, sovereign immunity prevented garnishment of federal employee pay except for family support. *See, e.g., Omega Accounts Servicing Corp. v. Koller,* 503 F. Supp. 149 (D. Md. 1980)(Consumer Credit Protection Act held not a specific waiver of sovereign immunity for garnishment.)

However, by the late 1980's, Congress realized that all federal employees, not just military members, were abusing this protection. Experts estimated that the defaulted debt approached $1.3 Billion annually. Postal Service experience estimated the number of federal employees with defaulted debt to be 2% of federal workforce including military. To reduce this abuse, Congress passed the Hatch Act Reform Amendments of 1993.

The Garnishment Equalization Act was introduced as S. 316 in 101st Congress. Its chief sponsor was Sen. Craig. The Act was reintroduced as S. 253 in 102nd Congress. It later merged into The Hatch Act Reform Amendments, P.L. 103-94; signed by the President on October 11, 1993. Now codified at 5 U.S.C. § 5520a.

These reforms waived sovereign immunity for civilian federal employee pay. The reforms directed DoD to promulgate regulations providing for involuntary allotment of military pay to account for "the procedural requirements of the Soldiers' and Sailors' Civil Relief Act . . . and in consideration for the absence of a member of the uniformed services from an appearance in a judicial proceeding resulting from the exigencies of military duty."

1123 GARNISHMENT

A. ***General.*** Garnishment is a statutory procedure to assert control over money and property due to a defendant or a judgment creditor. There are two types of garnishment. The first is a garnishment in aid of attachment. The second is a garnishment in aid of execution. Garnishment is only one of several methods to levy or execute a judgment.

B. ***Initiation procedure (generalized).*** A judgment creditor files affidavit with clerk of court. The clerk issues writ of garnishment to garnishee (employer). The garnishee is the debtor of the judgment debtor. The garnishee stands in the place of the judgment debtor.

1. ***Garnishee response.*** The judgment creditor may require garnishee to answer interrogatories about assets of the judgment debtor in the hands of the garnishee (normally within 20 - 30 days). The garnishee must start withholding garnished amount from wages of judgment debtor immediately. Some states require garnishee to interpose any defense on the part of the judgment debtor that the garnishee is aware of at the time of filing response.

2. ***Amount of garnishment.*** State law establishes amounts available and exemptions. Most states follow Consumer Credit Protection Act (below). Some states exempt all wages from garnishment (NC, SC, TX, PA). Rhode Island exempts the wages due or accruing to

any seaman from attachment. Some states limit the ability to garnish a "head of household's" income (FL - complete exemption, NE - max 15%). Judges have considerable equitable power to lower garnishment upon showing of hardship.

a. ***Consumer Credit Protection Act.*** (15 U.S.C. §§ 1671-77) established federal limits on garnishments and wage withholding orders for the first time in 1970. 75% of disposable income or 30 times the federal minimum hourly wage per week exempt from commercial garnishment. Only 35 - 50 % exempt for family support garnishment. Family support obligations take priority over commercial creditor garnishments.

3. ***Effect of garnishment order.*** The garnishee is required to make continuing deductions from obligor's wages for time necessary to satisfy judgment. Some states require renewal of the garnishment at regular periods - some as frequent as every month! The garnishee is immunized from suit if the garnishee is following a court order.

1124 GARNISHMENT AND INVOLUNTARY ALLOTMENT PROCEDURES

A. ***Family Support Garnishment.*** 5 C.F.R. § 581. Applies to both federal civilian and military employees.

1. ***Initiation procedure.*** A family support garnishment first requires a writ of garnishment. There is no requirement of court action on writ itself. State law controls procedure for issuance of writs. The writ is served on a agent designated by the department. It is accompanied by certified copy of court order.

2. ***Amount available.*** The amount available is based upon a percentage of "pay." A person's employment status determines what constitutes pay.

For civilian employees, pay includes basic pay, special and premium pay (overtime etc.), severance pay, pay for accrued leave, and cash awards. Pay excludes social security deductions, income tax withholding, health insurance premiums, "normal" retirement deductions, and "normal" life insurance premiums.

For servicemembers, military pay includes base pay, special pay including reenlistment bonus, special pay for physicians, incentive pay, and accrued leave payments. Pay excludes BAQ, BAS, TDY, DLA, FSA, and other similar entitlements. These other similar entitlements include debts to U.S., withholdings for social security/income tax, payment for servicemember's retirement home, health insurance, and SGLI.

3. ***Limitations.*** The Consumer Credit Protection Act (15 U.S.C § 1673) limits the amount that may be garnished. Garnishments may not exceed 50% if supporting another spouse/child. The garnishment may be up to 60% if there are no other support obligations. An additional 5% is available if the obligor is 12 weeks or greater in arrears. Attorney fees, court costs and interest are payable if the court orders such items as support payments and the court had the power to make such an order under state law.

4. ***Agency action.*** An agency receiving a garnishment writ must begin withholding the amount requested or a permissible percentage immediately. The agency must notify the obligor/employee NLT 15 days after service of writ. The notice should include notice that process served and the maximum deduction that can be reached through garnishment. The agency should request from the obligor/employee supporting affidavits to either substantiate amounts to withhold or to request reduction. However, the obligor/employee must be aware that submission of affidavits constitutes consent to release of information to third parties. Additionally, the agency may send to obligor copies of documents served, a statement to inform obligor that U.S. does not represent the obligor, a suggestion to secure representation by independent attorney, and information to servicemembers that the protection of the SSCRA may be available to them. The agency must respond to interrogatories within 30 days or longer if state law permits.

5. ***Agency defenses.*** The agency may assert that the process not regular on its face. The agency may notify the judgment holder that no money due and payable from the U.S. to the obligor. The agency may also inform the judgement holder that the type of pay that is due the obligor is not reachable by garnishment. Finally, if other garnishments exhaust available funds, the creditor may be informed. The agency may collaterally seek an injunction. In states that suspend garnishment while a case is on appeal, withholding my be suspended if in fact there is an appeal pending.

B. ***Involuntary allotment of military pay for family support.*** (42 U.S.C. § 665, 32 C.F.R. § 54). This allotment is available only when the total unpaid support is greater than the sum of two months payments. Also, a portion of the unpaid amount must include child support. This allotment is not available for spousal support only.

1. ***Initiation procedure.*** The unsupported family member petitions an authorized agent of the state. The state submits a request for allotment to DFAS. The request must include a certified copy of the support order. Additionally, a delinquency statement that the arrearage is at least equal 2 months support payments is necessary. The request must specify the amount of support ordered and the amount which will be applied to arrearage.

2. ***Amount available.*** Pay subject to allotment includes basic pay, BAQ (for members with dependents or for E-7 and above without dependents), BAS (for Officer's and Warrant Officer's only), special pay for physicians, dentists, optometrists, and veterinarians,

proficiency pay or special duty assignment pay, submarine pay, flight pay, career sea pay, and if outside CONUS, FSA type II and overseas extension pay. Pay excludes payment for U.S. Soldiers' and Airmen's Home, fines and forfeitures ordered by court-martial or CO, employment and income tax withholding, and SGLI.

3. ***DFAS' actions.*** DFAS must notify the member NLT 15 days after receipt of notice from state. The notice must include limits on deduction, a request for supporting affidavits, and notice that providing affidavits constitutes consent to release information to third parties. The notice must state the date the allotment will commence. Additionally, the member must be notified that legal assistance consultation is available.

4. ***Servicemember defenses.*** The member may assert that there is an error in the request or that the order has been modified. He may also claim there is insufficient evidence of arrearage.

5. ***Command action.*** Commanders must ensure the member has an opportunity to consult with legal assistance. The command must also respond to DFAS NLT 30 days after servicemember receives notice.

1125 CREDITOR GARNISHMENT OF CIVILIAN EMPLOYEE PAY

A. ***Initiation procedure.*** 5 C.F.R. § 582. As with the family support garnishment discussed previously, a creditor garnishment of civilian employee pay requires a writ of garnishment. The writ is served on a designated agent.

B. ***Amount available.*** Pay subject to garnishment includes basic pay, premium pay, payment for accrued leave, and pay for missing persons. Pay excluded from garnishment is social security deductions, income tax withholding, health insurance premiums, "normal" retirement deductions, and "normal" life insurance premiums.

1. ***Limitations.*** The Consumer Credit Protection Act (15 U.S.C § 1673) limits the amount that may be garnished. Garnishments may not exceed 25% or the maximum under state law, whichever is lower. Creditor garnishments are also subject to bankruptcy protections.

C. ***Agency action.*** The agency must begin withholding amount requested or permissible percentage immediately. The agency must notify the obligor/employee NLT 15 days after service of writ. The notice should include notice that process served and the maximum deduction that can be reached through garnishment. The agency should request from the obligor/employee supporting affidavits to either substantiate amounts to withhold or to request reduction. However, the obligor/employee must be aware that submission of affidavits constitutes consent to release of information to third parties. Additionally, the agency may send to obligor copies of documents served, a statement to inform obligor that U.S. does not represent

the obligor, a suggestion to secure representation by independent attorney, and information to servicemembers that the protection of the SSCRA may be available to them. The agency must respond to interrogatories within 30 days or longer if state law permits.

D. ***Agency defenses.*** The agency may assert that the process is not regular on its face. The agency may notify the judgment holder that no money is due and payable from the U.S. to the obligor. The agency may also inform the judgement holder that the type of pay that is due the obligor is not reachable by garnishment. Finally, if other garnishments exhaust available funds, the creditor may be so informed. The agency may collaterally seek an injunction. In states that suspend garnishment while a case is on appeal, withholding my be suspended if in fact there is an appeal pending. The agency may notify the creditor that the obligee/employee is presently under the protection of a bankruptcy court.

E. ***No employee/obligor defenses.*** The are no employee defenses listed in the regulation!

1126 INVOLUNTARY ALLOTMENTS OF MILITARY PAY FOR CREDITOR JUDGMENTS

A. ***References.*** DOD DIRECTIVE 1344.9, DOD INSTRUCTION 1344.12. (Effective 1 January 1995).

B. ***Initiation procedure.*** A judgement creditor completes DD Form 2653, NOV 94 - Involuntary Allotment Application. A copy of the final court order (certified by clerk of court) judgment is attached. The application with attachments is sent to DFAS and served on designated agent, DFAS.

The applicant must certify in the DD Form 2653 that the judgment has not been modified or set aside and is otherwise still valid. The creditor must certify compliance with the SSCRA, i.e., the member was present or represented by an attorney of the member's choosing in the proceedings; or that the judgment otherwise complies with the SSCRA. The applicant must verify that the member's pay could be garnished under applicable state law or 5 USC 5520a if the member were a civilian employee. The debt must not have been discharged in bankruptcy. The creditor must promise to promptly notification DFAS when the judgment is satisfied by involuntary allotment. Finally, the creditor must agree to repay the servicemember within 30 days if payment to creditor is erroneous.

C. ***Amounts available.*** Pay subject to allotment includes "taxable" pay only. The allotment may not be greater than 25% of disposable earnings or the state law maximum, which ever is lower.

D. ***DFAS processing of involuntary allotment applications.*** Upon receipt of the DD 2653, DFAS completes Section I of DD FORM 2654, NOV 94 - Involuntary Allotment Notice

and Processing to identify the member against whom application is filed. DFAS mails one copy of the creditor's application (DD FORM 2653) to the member. DFAS also mails one copy of DD FORM 2654 to the member's "immediate" CO and two copies of DD FORM 2653 to member's "immediate" CO.

E. ***CO's action.*** Upon receipt of the forms from DFAS, the CO will deliver a complete copy of involuntary application (DD FORM 2653) to member. Now the member should have two copies. The CO will counsel the member. During the counseling, the CO notifies the member that the member has 15 calendar days from date of notification to consent or contest involuntary allotment. CO may grant 30 day extension to respond if necessary.

The servicemember will be advised that they may contest the involuntary allotment. The contest must be based upon one or more of defenses. The member may assert that his SSCRA rights were not complied with during judicial proceeding. The member may plead that exigencies of military duties caused member's absence from judicial proceeding. If information contained in the application is false or erroneous in material part, the member may raise that. If the judgement has been wholly or partially satisfied, superseded, materially amended or set aside. The member may raise that there is a legal impediment to the establishment of an involuntary allotment, e.g., judgment debt discharged in bankruptcy. As part of this, the CO must counsel the member that if he/she contests the allotment, then any evidence supporting contention may be disclosed to applicant. Finally, the CO must inform the member that he/she may consult with a legal assistance attorney or civilian attorney at own expense. The member may request a delay to obtain legal assistance.

The CO decides whether a member has established the grounds to contest an involuntary allotment on the basis of **"exigencies"** of military duty. The member's "commanding officer" makes determination on the military exigency and must notify DFAS of decision on DD Form 2654. The CO must consider the definition of "exigencies of military duty," evidence provided by the member, any other reasonably available evidence (service record). Ultimately the CO determines whether the military duties in question were, at the time, of such paramount importance that such duties prevented making the member available to attend judicial proceedings, or rendered the member unable to timely respond to process, motions, pleadings, or orders of the court. The standard of proof is by a preponderance of the evidence. **DFAS bound by CO's exigency determination.** The creditor can appeal the "exigency" determination to the Officer Exercising General Court-Martial Authority (GCMA).

1. ***Navy: NAVADMIN 249/94: DTG: 310100Z DEC 94.*** The member's CO makes initial "military exigency" determination. CO's must **personally** sign all military exigency determinations which are **adverse** to the creditor. All other actions may be delegated to CPO or Officer. SJA's and NLSO "Command Service Officers" will assist CO's, Admin & Legal Officers. LAA's will assist individual servicemembers and family members eligible for legal assistance.

a. ***Definitions***

(1) ***Absence***. A member's lack of an "appearance," at any stage of the judicial process, as evidenced by failing to physically attend court proceedings; failing to be represented at court proceedings by counsel of the member's choosing; or failing to timely respond to pleadings, orders, or motions.

(2) ***Appearance***. The presence and participation of the member, or an attorney of the member's choosing, **THROUGHOUT** the judicial proceeding. Presence is required at **ALL** proceedings.

(3) ***Exigencies of military duty***. A military assignment or mission-essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a member from "appearance" at a judicial proceeding, or prevents the member from being able to respond to a notice of application for an involuntary allotment. **NOTE**: Exigency of military duty is normally presumed during periods of war, national emergency, or when the member is deployed.

F. ***Service member's actions***. Member's have two initial choices, either consent or contest. Before consenting, even if the member believes he is liable, he should seek legal assistance. The member may choose to contest the involuntary allotment based on the defenses noted above. If the member contests involuntary allotment on grounds other than "military exigency", the CO will return the application package and DD Form 2654 to DFAS. DFAS will decide whether the member has successfully established grounds to contest the involuntary allotment.

G. ***DFAS action***. The DFAS official reviews entire application package, DD form 2654, and any evidence submitted by member. DFAS decides all defenses except "exigency" of military duty. DFAS applies preponderance of evidence standard of proof.

Payment of an approved involuntary allotment begins 30 days after DFAS approval. The maximum amount payable is 25% of available military pay. Available pay includes basic pay, special and incentive pay, accrued leave payments (basic pay portion only), readjustment pay, severance pay, lump-sum reserve bonus, and inactive duty training pay. Pay excluded from allotment includes retired or retainer pay, separation pay (VSI, SSB), and allowances under 10 and 37 U.S.C.

If several creditors apply for involuntary allotments, they will be satisfied on a first-come, first-served basis. Family support involuntary allotments/garnishments take precedence over judgment creditor involuntary allotments.

Payments continue until judgment is satisfied, cancelled or suspended. DFAS will collect the total judgment, including interest when awarded.

1127 PROBLEMS WITH DOD 1344.9. DOD 1344.9 creates several problems. There are no time limits similar to either state garnishment actions or federal involuntary allotments. There is no sequestration of pay upon receipt of initial application. Immediate Commanders determine whether military exigency resulted in default of appearance. The enumerated defenses allow DoD to review determinations made by state courts. The DOD directive reaches significantly less pay of servicemembers than either federal and state law or federal regulations. For the creditor there is no appeal of DFAS decision.

1128 CONCLUSION

CHAPTER 12

CONSUMER LAW 3: CORRECTING CREDIT PROBLEMS

PART A - FAIR DEBT COLLECTION PRACTICES ACT

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D. NCLC Reports, "Debt Collection & Repossession Edition," National Consumer Law Center, 11 Beacon Street, Boston, Massachusetts, 02108 (617) 523-8010 12-1

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CHAPTER 12

CONSUMER LAW 3

PART A - FAIR DEBT COLLECTION PRACTICES ACT

1201 REFERENCES

A. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o

B. Federal Trade Commission Staff Commentary to FDCPA (non-binding)

C. National Consumer Law Center, Fair Debt Collection (2d ed. 1991) and Cumulative Supplement

D. NCLC Reports, "Debt Collection & Repossession Edition," National Consumer Law Center, 11 Beacon Street, Boston, Massachusetts, 02108 (617) 523-8010

1202 INTRODUCTION. Because of abusive, deceptive, and unfair debt collection practices by many debt collectors, Congress took the initiative and passed legislation protecting the consumer from such practices. The Fair Debt Collection Practices Act (FDCPA) is designed to eliminate the abusive debt collection practices by debt collectors, to ensure fair competition among debt collectors, and to promote consistent State action to protect consumers against debt collection abuses.

1203 OVERVIEW OF CIVIL DEBT COLLECTION. The debt collection process commences when the consumer fails to make scheduled payments. The creditor initially contacts the consumer to arrange payment. If payment is not forthcoming, at some point the creditor will declare the consumer to be in default. The defaulted account is referred to debt collection. Debt collection will attempt to collect the amount due. If they are unsuccessful, the account will be charged-off.

1204 THE FAIR DEBT COLLECTION PRACTICES ACT. The Act's purpose is to eliminate abusive debt collection practices.

A. ***Definitions***

1. ***Creditor.*** A creditor is a person or organization to whom or to which a debt is owed. Generally, creditors are not included within the definition of "debt collector" when collecting its own debts using its own name.

2. ***Debt collector.*** A debt collector is a person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is

the collection of any debts, or anyone who regularly collects debts owed to others. Debt collector includes attorneys.

Excluded from the definition are, among others, (there are 6 categories of excepted individuals) officers or employees of a creditor collecting debts for that creditor, any officer or employee of the U.S. or any state to the extent that collecting or attempting to collect is in performance of his/her duty, any person collecting any debt owed another to the extent such activity concerns a debt which was originated by such person, or concerns a debt which is not yet in default at the time it was obtained by such person. In other words, if the debt is already in default, then the purchaser of the debt may indeed be a debt collector.

Question: Would a LAA be considered a debt collector when contacting others regarding bad debts owed a client? Maybe What about the Navy Exchange system trying to collect from servicemembers? No

3. ***Debt.*** Any obligation, or alleged obligation, of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily used for personal, family, or household purposes, whether or not the obligation has been reduced to judgment (i.e., overdue obligations on bills, dishonored checks used to pay for goods or services intended for personal, family, or household purposes, student loans).

1205 REQUIREMENTS OF THE ACT

A. ***Validation of debts.*** A debt collector must notify the debtor of the identity of the creditor, the nature of the debt, and that the debtor may require the debt collector to cease collection efforts if the debtor chooses to require the debt collector to verify the debt. A debt collector must also notify the debtor that information provided by debtor will be used to collect debts, and provide a means by which the debtor may stop all attempts by the collector to contact the debtor in the future.

1206 PROTECTIONS OF THE ACT

A. ***Restricts contact with third parties.*** Debt collectors may contact third parties (i.e. employer!) only under if the debtor has given the debt collector (directly) consent to contact a third party, the debt collector has obtained a court order, or contact is necessary for debt collector to assert a post judgment remedy.

Debt collectors may contact third parties to acquire information regarding the debtor's location only under the additional following conditions. They identify themselves and state that they are attempting to locate the debtor. Debt collectors may not identify their employer unless third party requests such information. Debt collectors must refrain from mentioning the debt. Debt collectors must ordinarily make only one contact with each third party. Debt

collectors may not communicate with debtors by postcard. Debt collectors must not refer to nature of his/her business with debtor in any communication with third party. Debt collectors must limit their contacts to the debtor's attorney if the debt collector is aware of the representation concerning this debt, unless the attorney fails to respond.

B. ***Other restrictions imposed by the act.*** Unless the debtor consents, debt collectors may not contact the debtor (including spouse, parent or, if debtor is minor, guardian, or executor) at unusual or inconvenient times and places, (before 8:00 AM and after 9:00 PM in debtor's time zone), if the debt collector is aware the debtor is represented by an attorney and can readily ascertain the attorney's name and address, at the debtor's place of employment if the debt collector is aware that the employer prohibits employees from receiving such communication, or after the debtor notifies the collector in writing that the debtor refuses to pay, or the debtor wishes the collector to cease further communication. Note that the debt collector may still notify the debtor that collector intends to take specific legal action. Debt collectors may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with a debt. 15 U.S.C. § 1692d. A debt collector may not use any false, deceptive, or misleading representations in connection with the collection of any debt. A debt collector may not use unfair or unconscionable means to collect any debt.

C. ***Legal actions by debt collectors.*** Debt collectors must sue the consumer only in the judicial district where the consumer resides or in the judicial district which the contract giving rise to the suit was signed. Courts interpret this as the same state judicial district or, if filed in federal court, the same federal judicial district (i.e., Western District of Pennsylvania). Actions to enforce security interest on real property must be filed where the property is physically located.

1207 REMEDIES

A. ***Administrative enforcement.*** FTC may prosecute FDCPA violations as UDAP actions.

B. ***Private cause of action.*** "Any debt collector who fails to comply with any provision ... with respect to any person is liable to such person..." The Act does not define terms "with respect to any person." One may recover actual damages, statutory damages of $1000.00, attorney's fees, and costs if the debtor prevails.

C. ***Factors in awarding damages.*** The frequency and persistence of noncompliance by the debt collector, the nature of the noncompliance, and the extent to which the noncompliance was intentional weight into calculating damages.

D. ***Venue.*** U.S. District Court or any state court that has jurisdiction.

E. ***Statute of limitations***. One year except for enforcement by U.S. No criminal provisions

1208 DEFENSES. Generally, this is a strict liability statute. However, a debt collector may not be held liable if the debt collector can show by a preponderance of evidence that the violation was unintentional and it resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

1209 CONCLUSION

PART B - FAIR CREDIT REPORTING ACT (FCRA)

1210 REFERENCES

A. 15 U.S.C. §§ 1681-1681u

B. National Consumer Law Center, Fair Credit Reporting Act (2d ed. 1988) and 1994 Cumulative Supplement

C. Web site - WWW.FTC.GOV

D. Transunion - main number 800-888-4213, mailing list removal 800-680-7293

E. Equifax - main number 800-685-1111, mailing list removal 800-556-4711

F. Experian - main number 800-682-7654, mailing list removal 800-353-0809

1211 INTRODUCTION. Congress found that the banking system is dependent upon fair and accurate credit reporting and that unfair credit reporting undermines public confidence in the banking system. Additionally, consumer credit reporting agencies have assumed a vital role in evaluating credit information. There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for consumers' rights to privacy. Congress therefore passed the FCRA to ensure consumer reporting agencies adopt procedures for accurate and fair credit reporting.

In September 1996, the President signed into law substantial amendments to the FCRA. These amendments became effective on 30 September 1997. The following discussion reflects these changes. (15 USC §1681)

1212 PURPOSE AND SCOPE OF FCRA. The Fair Credit Reporting Act applies to consumer (credit) reporting agencies (CRAs) and users of consumer (credit) reports (Users). It does not apply to those furnishing information from their own dealings with the consumer, i.e., creditors.

A. ***Purpose of FCRA.*** The FCRA requires CRAs to adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information. The information must be accurate, up-to-date, and furnished only to Users for certain permissible purposes. CRAs must use procedures that are fair and equitable to the consumer with regard to confidentiality, accuracy, relevancy, and proper use of the information, and place various obligations on persons who use or disseminate credit information about consumers.

B. ***General obligations under the FCRA.*** The disclosure obligations for both CRAs and Users are designed to inform the consumer when adverse action is taken based on the report. If the information is used for credit, insurance, or employment, then the "User" must notify the consumer if adverse action taken as result of information in the consumer report.

Examples of FTC Enforcement:

Complaint, Docket No. C-3342, Electronic Data Systems Corp., Aug. 21, 1991. Corporation violated FCRA when denying applications or rescinding employment offers based on consumer reports and not advising consumers that the reports contributed to the adverse action and by not then providing name and address of consumer reporting agency supplying reports. See also, underlying Consent Order to Cease and Desist, File No. 912-3096 Electronic Data Systems Corp., Mar. 18, 1991.

Consent Order to Cease and Desist, File No. 912 3099, McDonnell Douglas Corp., Jul. 12, 1991. Order to cease and desist from failing, whenever employment is denied because of a consumer report from a consumer reporting agency, to disclose to applicant that fact. Provides letter format to use in corresponding with consumer.

Complaint, Docket No. C-3309, Nationwide Acceptance Corp., Oct. 18, 1990. Corporation violated FCRA when denying applications for credit or increasing charge for credit based on information from consumer reporting agency and not advising consumers of that fact or giving them name and address of reporting agency.

C. ***Definitions*** (15 USC §1681a)

1. ***Consumer (Credit) Reporting Agencies.*** CRAs are those businesses "who for monetary fees, dues, or on a cooperative nonprofit basis, regularly engage in . . . the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f); (e.g., TRW, Trans Union Credit Corporation, Equifax). Agencies or persons may become credit reporting agencies if they regularly furnish information beyond their own transactions to others for use in consumer transactions. (FTC Commentary, 16 C.F.R. Part 600, May 4, 1991).

NOTE: Creditors that report information about their own experiences with consumers are not credit reporting agencies, nor are they issuing a "consumer report." **BUT**, if the creditor reports any information other than that obtained in its own dealings with consumer, then it may meet definition of "consumer reporting agency."

2. ***Users.*** Users are those receiving the "consumer report" information and applying it to a consumer. Users are permitted to receive consumer reports if the reporting agency has reason to believe the information will be used for credit, insurance, employment, or other permissible purpose including response to a subpoena.

3. ***Consumer reports.*** Consumer reports are any written, oral, or other communication of any information by a CRA bearing on a consumer's credit worthiness, credit standing, credit capacity, general reputation, personal characteristics, or mode of living, which is used or expected to be used in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes, employment purposes, or other purposes authorized by §1681b.

It does not include information relating to transactions between the consumer and the person making the report. It also does not include any communications among persons affiliated by common corporate control.

4. ***Investigative consumer reports.*** Investigative consumer reports are consumer reports or portions thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates (subjective evaluations). It does not include information from the consumer's credit report.

A person may not procure or cause to be prepared an investigative report on any consumer unless it is disclosed in writing within 3 days after requesting it to the consumer that an investigative consumer report may be made, and includes a statement informing the consumer of his right to request additional disclosures, and the person certifies to CRA that they have made the disclosures.

a. ***Disclosure on request of nature and scope of investigation.*** Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required above make a complete and accurate disclosure of the nature and scope of the investigation requested. This written disclosure shall be made mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

5. ***Pre-screening services.*** Pre-screening services are mailing lists compiled by consumer reporting agencies using criteria specified by the User. Users must certify that they will extend a "firm offer" to enter into a credit or insurance relationship with each consumer on the pre-screened list. This "firm offer" may be contingent on the consumer providing additional information for final qualification for the offer.

After 30 September 1997, all consumers must be afforded the opportunity to "opt out" of this pre-screening process. To do this, CRAs must establish national toll-free number staffed during normal working hours. National bureaus must establish a system of joint notification so that when one knows of a consumer's opt out, they will all know. Every pre-screen offer must include a means to opt out of future screenings. Additionally, consumers must be informed annually of their ability to opt out.

6. ***Resellers.*** Resellers assembly consumer information from different sources and sell it to others. They may sell reports only to those with permissible purposes. They may require users to identify themselves and certify their end use. Resellers are also required to verify any of the above information.

7. ***Employment purposes.*** The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

8. ***Medical information.*** The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

A CRA shall not furnish for employment purposes, or in connection with a credit or insurance transaction or a direct marketing transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the

report.

9. ***Adverse action.*** The term "adverse action" has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act, and means (i) a denial, cancellation, increase in cost, or reduction of coverage any insurance, (ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee, (iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D) [§ 1681b]; and (iv) an action taken or determination that is made in connection with an application that was initiated by a consumer, or adverse to the interests of the consumer.

1213 PERMISSIBLE PURPOSES FOR RELEASING REPORTS

A. ***To whom may CRAs may furnish consumer reports?*** (15 U.S.C. § 1681b). CRAs may furnish consumer reports under the following four circumstances and no others. First, in response to the order of a court having jurisdiction to issue such an order or a subpoena issued in connection with proceedings before a federal grand jury. Second, in accordance with the written consent of the consumer to whom the report relates. Third, CRAs may also furnish reports to a person whom the CRA has reason to believe: (a) intends to use the report in connection with a credit transaction involving the consumer, (b) intends to use the report for employment purposes, (c) intends to use the report in connection with the consumer's insurance, (d) intends to use the report in connection with assessing the consumer's eligibility for a license or other benefit conferred by the government where the consumer's financial responsibility or status is considered, (e) intends to use the information from the standpoint of a potential investor, servicer, or current insurer, in connection with valuation or assessment of credit or prepayment risks associated with existing credit obligation, or (f) has another legitimate business need for the information in connection with a business transaction involving the consumer or reviewing whether the consumer continues to meet the terms of an existing account. Fourth, in response to a child support enforcement agency that is establishing the consumer's ability to pay support. In order to employ this last circumstance, the child support agency must have already established the paternity of the consumer and provided at least ten day's notice to the consumer. The agency must keep the report confidential and not allow its use for any other preceeding.

The business transaction must relate back to one of the other specifically enumerated transactions, i.e., credit insurance eligibility, employment, or licensing. *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144 (3rd Cir. 1986). In *Arcidiacono v. American Exp. Co.*, 1993 WL 94327 (D.N.J. 1993) American Express sold lists of categories of consumers to merchants. Categories included descriptive labels such as "low-end, value-oriented, fashion conscious, Fifth Avenue sophisticated, Rodeo Drive chic." The Court held that the list was not a "consumer report," *citing Houghton*. The reports were not compiled or used as consumer reports, but rather to target potential customers with promotional mailings.

A CRA may furnish a consumer report for employment purposes only if the User has obtained written consent from the employee/consumer. The consent disclosure form must be clear and conspicuous in a document that consists solely of the consent. The User must not use the information in violation of any Federal or State equal employment opportunity law or regulation.

If the user applies the information to a credit, insurance, or employment situation, then the user must notify the consumer when any adverse information has been taken as a result of the report, and provide the consumer with the name and address of the CRA furnishing the report.

1214 OBSOLETE INFORMATION. (15 U.S.C. § 1681c) Unless otherwise specified, the following information is considered "obsolete" and cannot be included in a consumer report. (Note: This is adverse information; favorable information that is old may be included in the report.) Bankruptcy adjudications more than 10 years old is obsolete. Any other categories more than 7 years old is also obsolete. Included in the any other information category are paid tax liens, accounts placed for collection or charged to profit and loss, records of criminal arrest, indictment, or conviction, release, or parole, suits and judgments and any other adverse item of information.

A. ***Inclusion of "adverse" obsolete information.*** "Obsolete" information CAN be included in the consumer report IF the report is intended for use involving the consumer's participation in a credit transaction of $150,000 or more; e.g. home mortgage, the issuance of life insurance coverage on the consumer of $150,000 or more, or employment of the consumer at an annual salary of $75,000 or more.

1215 CONSUMER'S RIGHTS. Upon request, the consumer can obtain (15 U.S.C. § 1681g) all data, including medical data, in the CRA's files except for credit scores. The request may be made over the phone. The consumer can also determine the identities of those who have received the report within the past 2 years for employment purposes, and within the past 12 months for other purposes.

If the consumer disputes the completeness or accuracy of the report, the CRA must investigate within 30 days information unless the CRA has reason to believe that the dispute is frivolous or irrelevant. There is a provision for a 15 day extension. Within 5 business days of a dispute, the CRA must notify the source of the disputed information. After reinvestigation, CRAs must provide consumers a written notice of the results of the reinvestigation and provide a copy of the revised report. Additionally, if a credit bureau is nationwide, the CRA must set up a system so that the results of the reinvestigation go to all other nationwide CRAs. Any information removed may not be reinstated unless the source certifies it is accurate and complete. If any previously deleted information is reinserted, the CRA must notify the consumer in writing that the information has been reinserted and tell the

consumer the identity of the source certifying its accuracy.

If the investigation does not resolve the dispute, the consumer may file a statement of not more than 100 words, and in future reports, the CRA must note that the consumer disputes the entry and provide the consumer's statement. If the investigation reveals that the disputed entry is inaccurate or can no longer be verified, the CRA must delete the information. Following either correction of the report or receipt of a consumer's statement in rebuttal, the CRA must furnish a copy of the annotated report (and the consumer's statement where appropriate) to "any person specifically designated by the consumer" who has received the report within the past 2 years for employment purpose and within the past 6 months for other purposes. (15 U.S.C. § 1681i)

Consumers are entitled to a free report annually if they are unemployed, receiving public assistance, or have reason to believe their report is inaccurate due to fraud. Consumers are entitled to a free report upon request to a CRA within 60 days of being denied credit, insurance, or other adverse action. Consumer may also purchase reports for a fee not greater than $8. This fee is subject to increase based upon changes in the Consumer's Price Index (CPI).

1216 REMEDIES

A. ***Liability***. If found civilly liable for willful noncompliance (15 U.S.C. § 1681n), CRAs will be responsible for actual damages or damages between $100 and $1,000, punitive damages, court costs and reasonable attorneys fees if the consumer prevails. If found civilly liable for negligent noncompliance (15 U.S.C. § 1681o), CRAs will be responsible for actual damages plus court costs and reasonable attorney's fees if the consumer prevails. No strict liability for all inaccuracies.

B. ***Defenses***. Agencies can escape liabilityby proving an inaccurate report was generated following reasonable procedures designed to preclude errors.

1. ***Two approaches***

a. ***Technical accuracy***. An agency satisfies its duty if it produces a report containing factually correct information about a consumer that might nonetheless be misleading or incomplete in some respects. *See, Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151 (11th Cir. 1991)(In order to make out a prima facie violation of § 1681e(b), i.e., that the CRA failed to follow reasonable procedures assuring "maximum possible accuracy," the consumer must present evidence tending to show the CRA prepared a report containing "inaccurate" information).

b. ***Maximum accuracy.*** CRA must show it generated a report containing information of "maximum accuracy". *See Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37 (D.C. Cir. 1984), *but cf., Grant v. TRW, Inc.*, 789 F. Supp. 690 (D. Md. 1992)(The District Court Judge disagreed with *Koropoulos* and found that the "maximum possible accuracy" standard did not include a "completeness" standard. The CRA had reported that the Mr. Grant had a judgment entered against him without indicating that Mr. Grant was the net overall winner in a prior law suit where Mr. Grant was awarded a judgment on his counterclaim which exceeded the judgment entered against him. Mr. Grant still had an action under § 1681i(a) for the CRAs failure to provide a complete statement after Mr. Grant notified the CRA that its statement was incomplete.).

C. ***Statute of Limitations (15 USC § 1681p).*** The statute of limitations is two years from the date a liability arises with limited exceptions. The limitations period for a FCRA suit alleging negligence commences when a report issued to a user causes injury to a consumer. The limitations period for a suit asserting intentional violation of Act begins at same time or, if consumer is not aware of issuance of report, when the consumer later discovers it. *Hyde v. Hibernia Nat. Bank*, 861 F.2d 446 (5th Cir. 1988), *cert. denied*, 491 U.S. 910 (1989). A consumer has the burden to prove that the inaccurate credit report is causally connected to the denial of credit or employment or other consumer benefit. *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151 (11th Cir. 1991).

D. ***Criminal penalties.*** The criminal penalty for obtaining information under false pretenses (15 U.S.C. § 1681q) includes a fine of not more than $5,000 or imprisonment for not more than 2 years, or both.

1217 TED WEISS CHILD SUPPORT ENFORCEMENT ACT OF 1992. Pub. L. No. 102-537, § 1, Oct. 1992, 102 Stat. 3531 (amending 15 U.S.C. § 1681a, et.seq.) effective January 1, 1993. CRAs will include in consumer reports furnished by the agency any information on the failure of the consumer to pay overdue support which is provided to the CRA by a state or local child support enforcement agency, or to the CRA and verified by any local, state, or federal government agency, and antedates the report by 7 years or less.

1218 CONCLUSION

CHAPTER 13

INCOME AND ESTATE TAXES

FEDERAL INCOME TAXATION

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CHAPTER 13

INCOME AND ESTATE TAXES

FEDERAL INCOME TAXATION

1301 INTRODUCTION. All references to the Internal Revenue Code (IRC) can be found at 26 U.S.C. §1 and following. The Federal government taxes the income, both earned and unearned of all U.S. citizens and residents. All U.S. citizens are taxed on all income they receive from whatever source unless the income is specifically excluded in the Internal Revenue Code. For instance, gifts or inheritance received are not taxed as income.. Foreign source income is taxed in the same manner as U.S. source income. However, a foreign tax credit or exclusion of foreign source income maybe provided under the appropriate circumstances. This means that all U.S. citizens and individuals considered residents by the IRS must pay taxes and file an income tax return annually. Some taxpayers, depending on filing status, are not required to file an income tax return and owe no tax if their income is a certain level or below. Self-employed taxpayers must file when their net earnings are $400.00 or more. For a taxpayer who is a dependent of another taxpayer, he/she must file a tax return when his/her unearned income is over $4000.00 regardless of earned income and must file when earned income is over $1.00 if the total of earned and unearned income is over $650.00 for 1996. Other taxpayer filing requirements are dependent on income and filing status.

1302 DEFINITIONS. Some basic tax term definitions follow.

A. *Adjustments.* Amounts either added to or subtracted from a given amount.

B. *Adjusted Basis.* Tax basis of property, which has been adjusted by an amount either added to or deducted from the original tax basis based on permanent improvements or losses, for example depreciation.

C. *Adjusted Gross Income.* Gross Income from which allowable amounts have been deducted to reduce gross income.

D. *Capital gains/losses.* Amounts of gain or loss above or below the tax basis when investment property is disposed. Capital gains are taxed at a lower rate than ordinary income.

E. *Constructive receipt.* Income that, although not actually physically in the taxpayer's possession, the taxpayer has control over the use of.

F. *Credits.* Amount allowed as a dollar for dollar reduction of the tax owed. The earned income credit is a refundable tax credit. A refundable credit allows a taxpayer to get a

tax credit that completely offsets the tax due and may refund the taxpayer money up to the maximum of the credit.

G. *Deductions.* Expenses that reduce a taxpayer's adjusted gross income to yield taxable income. The standard deduction is a set amount based on the filing status of the taxpayer. Itemized deductions are allowable expenses a taxpayer takes as deductions in lieu of the standard deduction.

H. *Depreciation.* An expense allowed annually as an adjustment to gross income for a business owner to compensate the business for the wear and tear to the property used in that business. Only property that has a determinable useful life over one year is depreciable. Useful lives of property are set by the IRC. Land is not depreciable.

I. *Exemptions.* A fixed amount deducted from adjusted gross income. Each person is entitled to a personal exemption unless that person can be claimed on someone else's income tax return as a dependent. A taxpayer is entitled to take a dependent exemption for an adult or minor child if the person qualifies as a dependent of the taxpayer.

J. *Filing status.* The status a taxpayer uses to file his/her income tax return. Filing status will be determined based on marital status and whether the taxpayer has dependents. There are five filing statuses. They are Single, Married Filing Jointly, Head of Household, Qualifying Widow/er, and Married Filing Separately.

K. *Gross income.* All income that must be included on a taxpayer's income tax return. There are some items of income that are excluded from inclusion in a taxpayer's income tax return such as income interest from state and municipal bonds, life insurance proceeds, gifts, and military allowances for quarters and subsistence.

L. *Individual Retirement Account.* An account established by document through a qualified financial institution, this may be a bank, credit union or stock broker that permits a taxpayer to deposit up to $2000.00 per year. The interest earned on the funds in the account is tax deferred or excluded from tax depending on the type of IRA. If distributions are received before age 59 ½ the taxpayer may have to pay penalties in addition to tax. Depending on the type of IRA, the $2000.00 contribution maybe deductible from gross income.

M. *Investment income.* All income other than salaries, wages and other compensation income. This includes interest and dividend income, capital gains, social security payments, and pension payments.

N. *Ordinary income.* Ordinary income is a tax theory term that is used primarily to distinguish wage and compensation income from all other types of income such as investment or capital income.

O. *Residency.* A taxpayer is subject to tax on all the income he/she earns worldwide if that taxpayer is an U.S. citizen or considered a resident alien by the IRC. To be considered a resident alien for taxing purposes an individual must have resided in the U.S. for at least 31 days in the current tax year and 183 days over the two preceding tax years. Nonresident aliens may be required to pay tax on any U.S. source income.

1303 FILING FEDERAL INCOME TAX RETURNS. There are three types of personal income tax returns for taxpayers to use. The 1040EZ is available to single and married taxpayers filing a joint return who do not claim any dependents. This return can be used if the taxpayer has interest income of less than $400.00 and does not have any adjustments to his/her gross income. The only credit available with the 1040EZ is the earned income credit. For taxpayers who have dependents and an IRA deduction a 1040A may be available. Credits such as the child care credit, the credit for the elderly or disabled, and the earned income credit are available using the 1040A. A taxpayer may not itemize deductions on the 1040A and the only adjustment available is an IRA deduction. The 1040 is the most complex of the income tax returns. In addition to providing for all filing statuses and dependents as the 1040A does, the 1040 provides for many different types of income, a number of different adjustments, and allows a taxpayer to itemize deductions.

1304 TAXPAYER FILING STATUS (§§ 1 & 2). There are five filing statuses. A taxpayer's filing status depends primarily on his/her marital status. A taxpayer uses a certain filing status to file his/her income tax return. A taxpayer's filing status is determined by his/her marital status and number of dependents. A taxpayer's filing status determines that tax rates that are applied to his/her taxable income.

A. *Single.* A taxpayer may file as a single taxpayer only if he/she is in fact unmarried at the end of the tax year. For 1996, a single taxpayer, under 65, must file a return when his/her gross income is $6,550.00 or more. Typically, only one personal exemption will be allowed on the return unless the taxpayer may be able to claim a dependent by virtue of the person living in the taxpayer's household or the taxpayer providing over 50% of the person's support. There are specific requirements that must be met. Those will be discussed below in the Exemptions subsection. If a single taxpayer does have dependents he/she may be able to file another status that provides more advantageous tax rates.

B. *Married filing jointly.* For 1996, married taxpayers, both under 65, filing jointly must file a tax return if their combined gross income is $11,800.00 or more.

1. *Marriage requirement.* If a taxpayer is married at the end of the tax year he/she may file a married filing jointly return. The end of the tax year is 31 December therefore all taxpayers file their personal income tax returns on a calendar year basis. If a taxpayer's spouse died during the tax year and the taxpayer did not remarry before the end of the tax year, that

taxpayer can file a married filing jointly return with the deceased spouse. If the taxpayer remarried, he/she may file a joint return with his/her new spouse. If the taxpayer is still married at the end of the year even though he/she is living separate from his/her spouse or is legally separated, the taxpayer may still file a joint return with his/her spouse. To file a joint return, both spouses must sign the return. The exceptions to this, are 1) when one spouse provides the other a limited or special power of attorney to sign the joint income tax return and 2) when a spouse has died during the tax year. Any extensions of filing requirements that apply to one spouse taxpayer will be applied to the other if the two file a joint return.

2. *Joint and several liability.* Filing a joint return with a spouse makes both taxpayers jointly and severally liable for the taxes owing during the tax year. There are only two ways to avoid joint and several liability for the tax owed. Filing separately for that tax year or one spouse can claim to be an Innocent Spouse.

3. *Innocent Spouse determination.* An Innocent Spouse is one who will not be held liable for his/her spouse's tax liability because he/she had no reason to believe that the amount of income claimed on the tax return was in error or that the tax paid for the year was incorrect. The IRS makes the initial determination on this liability. Generally, this situation arises through the audit process. The IRS determines that the taxpayers owe more tax than they had paid based on income the IRS has determined should have been included on the return. The IRS then determines there has been a deficiency in the tax paid. The IRS determines whether the taxpayer spouse may be eligible to be considered an Innocent Spouse. The IRS bases its determination on the reasonableness of the alleged innocent spouse's claim. Typically the IRS looks to the life style that the couple lives and finds that it is unreasonable for the innocent spouse claimant to have believed that, for example, the couple only had $30,000 of gross income when they live in a $500,000 house and drive two $40,000 cars. If the innocent spouse claimant insists that he/she should not be liable for any portion of the additional tax, there is formal procedure that involves the IRS issuing a 90-day letter (the Notice of Deficiency). At that point, the taxpayer can pay the tax or contest the deficiency in the U.S. Tax Court system. If after the 90 days has run the taxpayer has not petitioned the Tax Court or paid the tax, the IRS will move to assess a tax liability and start collections on it. For a spouse to contest his/her liability for a portion of the tax due, the taxpayer spouse must file with the Tax Court or pay the tax and file a petition in the U.S. District Court for a refund. The U.S. Claims Court can also be used.

4. *Statute of limitations.* Because there is joint and several liability for both spouses with a joint tax return, the statute of limitations will run the same for both spouses. The normal statute of limitations for all tax returns is three years. If there is a deficiency of 25% or more then the statute is extended to six years. If the IRS determines that fraud was involved in filing the return the statute of limitations does not run.

5. *Injured spouse rule.* If a taxpayer spouse owes back taxes, has some other deficiency owed to the federal government, or owes back child/spousal support, the IRS will

retain any refunds owed to the joint filing taxpayers. The IRS will retain the whole refund even though a portion of the refund may be owed to the spouse that does not owe the debt. For the spouse not owing the debt to be entitled to his/her portion of the refund, he/she must file an Injured Spouse Form 8379. For the "Injured Spouse" to claim a portion of the refund, the spouse must have income for the tax year, had income taxes withheld from that income, and filed a joint return with the spouse owing the debt.

C. *Married filing separately.* The taxpayers must be married at the end of the year, but have made a decision that they do not want to file a joint tax return. The married filing separately tax rate is the highest tax rate of all the filing statuses. Because the tax rates are the highest, this status is generally not recommended. If spouses decide to file separately, they will not be held liable for each other's tax liability. Each spouse will only be responsible for his/her own tax liability. In 1996 for taxpayers filing separate returns, if the taxpayer has more than $2,550.00 of gross income, he/she must file a return. There are other times because of one spouse's potential deductions that it might become advantageous to both spouses for them to file separately.

Most of the time, however, there is a "penalty" associated with filing separately while married. For example, a spouse who files separately, is employed and participates in an employer sponsored pension plan, can deduct an IRA contribution only if he/she has under $10,000.00 adjusted gross income that year. A couple filing a joint return can have up to $50,000.00 of adjusted gross income and a single individual can have up to $35,000.00 adjusted gross income before their IRA deduction is zeroed out.

D. *Qualifying widow/er.* To file as a qualifying widow/er and take advantage of the more favorable married filing jointly tax rates, the taxpayer must have a dependent child, pay over half of the support for the dependent child and not remarry. If the taxpayer continues to qualify, he/she can use this status for filing up to two years after the death of the spouse. A taxpayer, under 65, filing this status must file a return in 1996, if his/her gross income was $9,250.00.

E. *Head of household.* In 1996, a taxpayer, under 65, filing as a head of household must file a return only if his/her gross income is $8,450.00 or more. A taxpayer must be unmarried, or considered unmarried, at the end of the year and pay more than half of the support of a keeping a home for a qualified relative during the year. Marital status is determined on 31 December of the tax year.

1. *"Unmarried" requirement.* A married taxpayer can be considered unmarried if 1) the taxpayer files a separate return, 2) the taxpayer paid more than half the costs of maintaining a home for the year, 3) the taxpayer's spouse did not reside with him/her during the last six months of the year, and 4) the taxpayer's home was the home for the taxpayer's child.

The taxpayer's child must be claimed as the taxpayer's dependent or not claimed as a dependent solely because the noncustodial parent may claim the child as a dependent.

2. *Qualifying relative.* The qualifying relative must be a single child of the taxpayer, a married child the taxpayer claims as a dependent or immediate family relatives including grandparents and aunts, uncles, nephews and nieces related by blood. The qualifying relative must live with the taxpayer. The exception to this requirement is for parents of the taxpayer. If the taxpayer paid for more than half the costs of his/her parent(s) support for the entire year, the parent(s) do not have to live with the taxpayer. The tax rate for Head of Household filing status is more advantageous than single and married filing separate filing status.

1305 EXEMPTIONS (§§ 151-153). An exemption is provided on a personal income tax return for each taxpayer. If taxpayers are married there is a personal exemption for both the taxpayer and his/her spouse so long as they are married on the last day of the year. If the taxpayer and his/her spouse do not file a joint return for the tax year, they may only take personal exemptions for themselves on each return. A taxpayer may be able to claim an exemption for a spouse on a separate return, but only if the spouse had no U.S. income. If the taxpayer's spouse died during the year, the taxpayer can claim the personal exemption for the deceased spouse so long as the taxpayer did not remarry during the year. However, if a taxpayer is claimed as a dependent on another taxpayer's return then the taxpayer will not be able to claim a personal exemption because each person is entitled to only one exemption.

A. *Qualifying dependents.* In addition to personal exemptions for each taxpayer, a taxpayer may claim exemptions for each qualifying dependent of the taxpayer. To take an exemption for a dependent, the dependent must meet a five-part test outlined in § 152. For a person to be a qualifying dependent, 1) that person has to be a relative or live in the taxpayer's household all year. Relatives as distant as cousins or more removed do not qualify as relatives for the dependency exemption test. 2) The dependent cannot file a joint return with someone else unless it is only to claim a tax refund. 3) The dependent must be an U.S. citizen or resident of Mexico or Canada. 4) The taxpayer must provide over half of the dependent's total support for the year. 5) The dependent must not have more that $2,550 for 1996, $2,650 for 1997 of gross income during the year. If the taxpayer's dependent does have more than $2,550 for 1996, $2,650 for 1997, of gross income in a year the dependent must be the taxpayer's child and under 19, or if over 19 the child must be a full time student for a least five months of the year and under 24.

1. *All qualifying dependents must have a social security number.* For any dependent child born during the year, the taxpayer must have a social security number for the child unless it was born during the last month of the year. If the dependent is a resident or nonresident alien who is not eligible for a social security number, the IRS will issue the dependent an individual taxpayer identification number (ITIN). The taxpayer should use a Form

W-7 to apply for an ITIN for a dependent. If a qualified dependent died during the year the taxpayer may still claim the exemption on the return for the year.

2. *Support requirement.* If a number of people combine to provide over half of a person's total support for the year, but one person provides over 10% of the support, all supporting taxpayers can agree in writing or on Form 2120 who will claim the personal exemption for the dependent for that year. If parents of a dependent child are divorced, the IRS presumes that the parent the child lives with primarily provides more than half of the dependent's support for the total year. Because of this presumption, if the custodial parent has agreed in the divorce decree or separation agreement, he/she can transfer the dependency exemption to the noncustodial parent by using a Form 8332. Personal and dependency exemptions are phased out when the taxpayer has a certain level of adjusted gross income. The level of adjusted gross income depends on the filing status of the taxpayer.

1306 GROSS INCOME (§ 61). Almost all types of income are included as gross income for a taxpayer. Section 61 of the IRC guides the taxpayer in determining what is included in income. All earned income from wages, salaries, tips, etc. must be included as gross income on an income tax return. Passive income, income which a taxpayer does not actually earn, such as interest income is also included on the 1040.

Other types of income that are taxable are as follows: alimony (§ 71), dividend interest, state and local tax refunds (if taxpayer itemized deductions in previous tax year), capital gains, pension distributions, some fringe benefits (§ 132), some scholarships, self-employment income, some social security payments (§ 86), value of prizes and awards (§74), unemployment compensation (§ 85), rents and royalties, reimbursed moving expenses (§ 82), some disability payments and income from a discharge of indebtedness. Moving and storage reimbursements are included in gross income under § 82 but § 217 allows for a deduction for expenses of moving and storage if the move qualifies. Capital gains, those gains received by an individual or entity when long term investment property is disposed of, are also included in gross income. Capital gains have historically been taxed at a lower rate that other income. This has been considered an incentive to investors to turn their capital or long-term holdings over periodically to renew the capital in the U.S. economy.

1307 EXCLUDED INCOME *(§§ 101-137).* The types of income that are excluded from being taxed as income are listed in IRC §§ 101-137. Allowances received by military members are excluded. Interest from state and municipal bonds is excluded. Proceeds received as a beneficiary of a life insurance policy are tax exempt, unless the beneficiary was the deceased taxpayer's estate. Most disability payments are excluded. Child support and public assistance are excluded. Basic pay, up to the maximum enlisted amount, received while serving in a combat zone or designated hazardous duty area is excluded. Section 132 provides for specific types of fringe benefits that are not taxable. If the fringe benefit received does not fit within this section or any other provision specifically excluding it from income, it will be taxable. Interest

on money earned in a Roth IRA, starting in 1998, is excluded from income. Interest on money earned in a deductible Individual Retirement Account (IRA) is tax deferred. Tax deferred is not tax exempt (excluded from taxation). Tax deferred income is income on which the IRC has provided provisions to tax the income later rather than sooner. Interest income in a deductible IRA will be taxable when the individual receives distributions from the IRA.

A. *Capital gains from sale of a principal residence* (§ 121). For taxpayers who sell their principal residence after May 6, 1997, any capital gains earned up to $250,000 for single taxpayers ($500,000 for qualifying married filing jointly taxpayers) are excluded from income. The home the taxpayer sells must be his principal presence. This means he must have lived in the home for an aggregate of at least two years out of the last five years. For a married couple to claim a $500,000 exclusion they must both meet the use requirement of two out of the last five years and one of them must meet the ownership requirement. Congress specifically intended that spouses should be able to use the $250,000 exclusion, together or separately depending on who qualifies for the provision. Additionally, the taxpayer can only sell one principal residence in a two-year period to claim the full exclusion. If either the taxpayer sells more than one house in a two-year period or fails to live in the home for at least two out of the last five years because of health or employment reasons, a portion of the exclusion may still be available. The portion excludable is # of months in the home/24 months. This change to the IRC also repeals §1034 relating to rollover of capital gains on the sale of a principal residence on 5 August 1997 and subsumes prior §121 relating to exclusion of gain for homeowners over age 55.

1308 REPORTING INCOME. An employer will report wage, tip and other compensation income on a Form W-2. Generally, all other income received will be reported on a Form 1099. Income from a business or profession must be reported on Form 1040, Schedule C by the taxpayer. Taxpayers report capital gains and losses on a Form 1040, Schedule D. Income from rents and royalties are reported on a Schedule E. Income is included on a return based on the type accounting method the taxpayer is on. Individual taxpayers are always considered cash accounting method taxpayers. The cash method requires taxpayers to include income when it is received or constructively received. The other method of accounting is the accrual accounting method. This method allows the taxpayer to account as received or as paid money that the taxpayer has obligated.

A. *Capital Gains Income* (§1). A taxpayer will earn capital gains income from the sale or exchange of a capital asset. A capital asset is one that is not held as inventory for sale in a business and is one that is typically held by an individual for its investment qualities. Capital assets typically have a useful life of over one year. Some examples of capital assets are stocks and bonds, real estate, personal residence, or a piece of business equipment used in business. The Taxpayer Relief Act of 1997 revised the tax rates on gains earned from the sale or exchange of a capital asset. The changes are effective beginning 7 May 1997. Capital gains are now taxed at differing rates depending on the length of time the taxpayer has held the property. Property held under 12 months is considered short-term property and is taxed at the same rate as before

the Taxpayer Relief Act of 1997. This rate was a maximum of 28%. Mid-term property is property held between 12-18 months. This category of property is taxed at a maximum rate of 28%. Long-term property, that held over 18 months, is taxed at a maximum of 20% for taxpayers in a 28% tax bracket or higher. It is taxed at 10% for taxpayers in tax brackets lower than 28%. A five-year property category will become effective in 2000 and will be taxed at 18% and 8% respectively. Capital losses should be netted against capital gains in each holding category and then netted against each other.

1309 ADJUSTMENTS TO INCOME (§62). The IRC provides for deductions to be taken from a taxpayer's gross income. These adjustments are outlined in §62 of the IRC. The primary adjustments to income on the 1040 are contributions to an IRA and one-half of self-employment taxes. Other adjustments to adjusted gross income (AGI) are moving expense, alimony paid to a former spouse, self-employed health care insurance premiums and pension contributions, and penalties imposed on early withdrawals from savings.

A. *Individual Retirement Accounts* (§§ 219; 408; 408A & 530)

1. *Deductible IRAs.* An individual may establish 3 different types of individual retirement accounts. Only the standard deductible IRA provides for deductibility of contributions. The other types of IRAs, a Roth and an Educational IRA will be discussed below. The following relates to deductible IRAs.

a. *Contributions.* There are restrictions on the deductibility of IRA contributions. Currently, a taxpayer that has earned income in a year can make an IRA contribution. Income from rent, pensions and interest is not considered earned or compensation income. Additionally, income earned in combat-zone tax exempt area is not considered earned income. 26 U.S.C. §3401(a)(1). The amount of contribution is limited to the amount of earned income to a maximum of $2000. For married taxpayers where only one taxpayer has earned income, the couple can contribute the amount of earned income up to $4000 a year. Contributions can be made into an IRA account until a taxpayer is 70 1/2. A taxpayer may make contributions to an IRA until 15 April of the following year to qualify as a contribution for the previous year. A taxpayer may start withdrawing amounts from an IRA at age 59 1/2 without any penalties. Any amounts withdrawn before that age are subject to a 10% penalty unless the amount is withdrawn to pay for medical insurance for the taxpayer and his/her spouse and children or to pay unreimbursed medical expenses that exceed 7 1/2% of the taxpayer's AGI. There are also limits on the amount a taxpayer may withdraw from his/her IRA account in a year once distributions begin. The excess distribution penalty of 15% has been suspended until the year 2000.

b.. *Deductibility of contributions.* The deductibility of the amount contributed is limited if the taxpayer works for an employer that provides a pension plan. Even

though the military members are not vested in a military retirement until 20 years (between years 15-20 early retirement may be available in limited circumstances), active duty military (reserve and regular) members are considered participating in an employer-sponsored pension plan. Reserve members of the armed forces are not considered covered. Spouses not participating in an employer sponsored pension plan are not limited in their ability to deduct an IRA contribution. The spouses' deduction for the contribution is limited by the taxpayers AGI on their return. This means that deductibility of IRA contributions will be limited once the taxpayer has an adjusted gross income (AGI) that reaches a certain level. Currently, a decrease in the deductibility begins at $25,000 for single taxpayer, $40,000 for married taxpayers filing a joint return. The adjustment is completely disallowed for single taxpayers whose AGI is over $35,000 and $50,000 for married taxpayers filing a joint return. If the taxpayer is married filing a separate return no deduction is permitted. I

2. Roth Individual Retirement Accounts (§408A). Roth IRAs were established by the Taxpayer Relief Act of 1997. A Roth IRA may be established beginning in tax year 1998.

a. *Contributions.* Contributions made to a Roth IRA are not deductible. Any amount up to $2000.00 of earned income may be contributed in a year. The maximum contributions for all tax payer IRAs is $2000.00 a year. The Educational IRA is not included in this $2000.00 limit. Rollover contributions may be made into a Roth IRA from a deductible IRA at any time after a taxpayer establishes a Roth IRA so long as the taxpayer's AGI is less than $100,000.00. When rolling contributions from a deductible IRA into a Roth IRA, a taxpayer will have to pay tax on any contributions that were deductible when made and on any earnings from the contributions. If a rollover is completed by 1999, the income a taxpayer would recognize for that tax year may be included ratably over a four-year period. Taxpayers with up to $95,000.00 AGI ($150,000.00 - MFJ) can contribute to a Roth IRA. No contributions are permitted for married couples filing separately. Taxpayers are permitted to contribute to a Roth IRA after age of 70 ½ unlike a deductible IRA.

b. *Distributions.* Distributions from a Roth IRA are not taxable. Distributions made from any IRA before age 59 ½ will be subject to a 10% penalty tax unless the distributions are for permitted purposes such as for medical expenses, higher education, or qualified first-time home buying. Additionally, distributions may not be made from a Roth IRA until contributions have been made for five (5) years. There are no mandatory distribution rules before the death of the owner of the IRA.

3. *Educational IRA* (§530). Beginning in 1998, a taxpayer may establish an Educational IRA for a beneficiary under age 18. Contributions are limited to $500.00 a year. The contributions are not deductible. If the distributions are used to pay the expense of higher education then the earnings are not taxable. Any distribution not used for higher education

expenses is subject to tax and a 10% penalty tax. Any funds remaining in an Educational IRA for a beneficiary must be either distributed to that beneficiary by age 30 or rolled over into another Educational IRA for a beneficiary still under age 18. If the remaining funds are distributed to the beneficiary the beneficiary will pay tax on the earnings and the 10% additional tax penalty.

B. *Moving Expenses* (§ 217). Moving expenses are an adjustment to income, and as such taxpayers may deduct moving expenses without having to itemize their deductions. A taxpayer must have moving expenses related to starting work at a new location. These expenses are usually incurred within a year after starting work at the new location, but the one-year rule is not an absolute. To deduct moving expenses, a taxpayer must meet both a distance and time test.

1. *Distance test.* The distance test requires that a taxpayer's new work location be at least 50 miles farther from the old home than the old work location. If it is a first time job then the job location must be at least 50 miles from the taxpayer's previous home. The time test requires that if the taxpayer is an employee, he/she must work at least 39 weeks of the first 12 months after moving. For the self-employed, a taxpayer must work 39 weeks during the first 12 months and 78 weeks during the first 24 months after moving. Military members moving pursuant to permanent change of station orders do not have to meet the distance or time test. Any amounts reimbursed by an employer are not deductible.

2 *Deductible expenses.* The costs of moving household effects, pets, and cars are deductible. The costs of traveling with the family to the new location and lodging costs along the way are also deductible expenses. The costs of pre-move house-hunting trips, temporary lodging at the new location, and meals are not deductible expenses. Some costs associated with selling and buying a home that were previously deductible as moving expenses are no longer deductible. These expenses may still be deductible as itemized deductions associated with selling and buying a home.

C. *Alimony* (§§ 71 & 215).. Alimony is also an adjustment to income. If a taxpayer is receiving alimony, he/she must report the alimony received as income. So long as the taxpayer receiving the alimony is reporting it as income, the taxpayer paying alimony can subtract the alimony paid from his/her gross income. If alimony is paid pursuant to divorce decree or written separation agreement it will be deductible. The payor will need to include the payee's social security number so that the IRS can verify that someone is paying taxes on the money. Life insurance premiums, partial home mortgage payments, and some types of payments to a third party for expenses may be deductible as alimony.

1 *Deductibility requirements* (§215). Any payments to be designated as alimony should be so designated in writing. Other requirements for alimony to be deductible are that it must be in cash, the divorce decree, separation agreement or other written instrument

does not designate the payments as something other than alimony, the spouses do not live in the same household, the payor is not required to make payments after the death of the payee, and the payment is not otherwise treated as child support. To ensure that alimony is not treated as child support it payment and/or amount cannot be linked in any way to a child. The alimony cannot decrease upon the emancipation, marriage, reaching the age of majority or completion school by a child. If alimony is front-loaded into the first or second year after separation/divorce or not paid out over more than a three-year period, it may be subject to the recapture rule. The recapture rule prohibits the payor from being able to deduct some of the alimony paid and allows the payee to deduct the amounts from his/her income.

D. *Business expenses* (§ 162). Generally expenses owning and operating a business are deductible as an adjustment to income. Taxpayers who are employees cannot deduct unreimbursed business expenses here. Those must be deducted as an itemized deduction. However, taxpayers who own and operate their own business can deduct many of the expenses in running that business.

1. *Home office deduction* (§280A). Beginning in 1999 it will be easier for taxpayers to deduct costs associated with running a business out of their home. Currently the law requires that for a taxpayer to deduct home office expenses, the home office must be the most important or significant place for the business. *Commissioner v. Soliman*, 113 S.Ct.701, 1992. If a taxpayer meets customers or clients outside the home, the home is not the most important place of the business. Starting January 1, 1999, a taxpayer may deduct expenses associated with maintaining a home office if the home office is used for administrative or management activities of the business so long as there is no other fixed location of the business where the taxpayer conducts substantial administrative or management activities of the business.

1310 DEDUCTIONS (§§63 & 161). Generally, a taxpayer takes either the standard deduction or itemizes deductions to decrease his/her adjusted gross income to determine the amount of tax he/she owes. The amount of income a taxpayer has after the standard or itemized deductions have been subtracted is called taxable income. This is the income on which the tax due is calculated.

A. *The standard deduction*(§63). A taxpayer will take the standard deduction when his/her itemized deductions do not exceed the standard deduction amount. The amount of the taxpayer's standard deduction depends on filing status, age and eyesight. The standard deduction for taxpayer's who file married filing jointly or qualifying widow/er for 1997 is $6,900. For single taxpayer's, the standard deduction amount is $ is $4,150 for 1997. For head of household filers, the standard deduction amount is $6,050 for 1997. For taxpayers filing married filing separate returns, the standard deduction amount is and is $3,450 for 1997. However, if a taxpayer files a separate return from his/her spouse and the spouse itemizes deductions, the other spouse must also itemize. In this situation, the taxpayer spouse who does not wish to itemize does not get a standard deduction. The standard deduction is higher if the

taxpayer or his/her spouse is over 65 or blind during the year. Taxpayers who cannot take the standard deduction or who's itemized deductions are greater than the standard deduction should itemize.

B. *Itemized deductions* (§161). The amount allowed for itemized deductions may be limited depending on the type of deduction. Additionally, if the taxpayer's adjusted gross income exceeds $117,950.00 (Single), $176,950.00 (Married Filing Joint) for 1996, or $88,475.00 for married taxpayers filing separate returns, the total amount of itemized deductions may be limited. A taxpayer itemizes deductions by filing a Schedule A with the Form 1040.

C. *Medical and dental expenses* (§213). Medical and dental expenses are the first expenses allowed on the Schedule A. A taxpayer can claim medical and dental expenses incurred by the taxpayer for himself, his spouse, and his dependents. If a divorced taxpayer has medical or dental expenses from a child that could be claimed by either parent as a dependent, then each parent can take the medical or dental expenses that each paid as an itemized deductions. Costs of transportation, unreimbursed medical or dental insurance premiums and prescription medications are included as medical or dental expenses. Costs of stop-smoking programs, cosmetic surgery and disability insurance are not included as medical expenses. The amount of medical or dental expenses that are deductible is limited to the amount that is in excess of 7.5% of the taxpayer's AGI. A taxpayer must determine what 7.5% of his/her AGI is and then subtract that amount from the medical or dental expenses. If the expenses incurred does not exceed this amount, then none of those expenses are deductible.

D. *Taxes* (§164). Taxes paid by the taxpayer during the year are deductible. State and local income taxes are deductible, and state and local real estate taxes are deductible. Additionally, state and local personal property taxes are deductible. A taxpayer cannot deduct federal income taxes. The taxpayer gets credit for any federal income tax already withheld when calculating whether the taxpayer owes more taxes or is entitled to a refund.

1. *Real estate taxes.* Homeowners usually pay their real estate taxes into an escrow account sometimes paying up to a year in advance of when the taxes are due. A taxpayer can only deduct the amount of real estate taxes actually paid during a year, which may not be equivalent to the amount in the escrow account.

2. *State and local taxes.* For a taxpayer that itemizes deductions and deducts state or local income taxes paid, if the taxpayer receives a refund of state or local income taxes paid for that tax year then the taxpayer must add the amount refunded into his/her gross income for the next year.

E. *Interest expenses* (§163). Generally, personal interest expenses are not deductible. The following are two exceptions. The home mortgage interest exception has

existed for many years as an incentive for individuals to invest in capital assets and real property. The educational loan interest exception was enacted as part of the Taxpayer Relief Act of 1997.

1. *Home mortgage interest.* Interest expense incurred on a home mortgage or home equity loan is deductible.. For the home mortgage interest to qualify as deductible, it must be interest on a loan of $1,000,000.00 or less. The mortgage must be a loan acquired for buying, building, or improving the taxpayer's home. This type of a loan is called home acquisition debt. A taxpayer may also deduct the interest expense from a loan on a second home. The maximum loan amount is still $1,000,000.00. A taxpayer can also deduct interest expense incurred on a home equity loan of up to $100,000.00. This is a loan that the taxpayer takes based on his/her equity in the home but not used to buy, build or improve the home. The housing allowances received by military taxpayers do not limit their ability to deduct this interest expense. If a taxpayer pays a loan off early and incurs a prepayment penalty, that penalty can be deducted as interest expense.

2. *Points as interest.* Points paid by a borrower to get a loan are deductible as interest expense. The general rule is that points must be deducted over the life of the loan, but the exception usually overtakes the rule and permits deduction in the year paid. One of the requirements to satisfy the exception is that the buyer provides funds at closing at least equal to the points paid to be able to deduct the points. Most buyers who finance with Veteran's Administration loans are not required to pay any funds at closing. Points are the amount a finance company charges the borrower to provide the loan. Points are also called loan origination fees. Points are usually equivalent to 1% of the loan amount. The borrower will be able to deduct points paid by the home seller if the points were paid to obtain the loan. The seller can not deduct the points paid as interest. However, it is a selling expense the seller can use to potentially reduce the gain on the sale. The buyer must reduce his/her tax basis in the home by the amount of the points deducted.

3. *Education Loan Interest* (§ 221). Starting in 1998, individuals may deduct interest expenses paid on educational loans. The loan must have been taken to pay expenses for higher education. The loan may have been taken out by the taxpayer for himself, his spouse or his dependent children. An interest deduction may only be taken for the first 60 months the taxpayer is paying interest on the loan. The deduction is limited to $1000.00 in 1998; $1500.00 in 1999; $2000.00 in 2000; $2500.00 in 2001. Additionally, the deduction is limited by the taxpayer's AGI.

F. *Charitable contributions* (§170). Gifts to charities are generally deductible as an itemized deduction. Gifts are deductible so long as the gift is given to an organization that qualifies under 26 U.S.C. § 170(c). Generally, an organization must be operated for nonprofit purposes if a contribution to the organization is to be deductible. Gifts to other organizations such as war veteran's organizations, fraternal societies organized in the U.S., if the contributions are used solely for nonprofit purposes, certain nonprofit cemeteries and gifts to the U.S. or any

state or local government are deductible. An organization operated for nonprofit purposes is exclusively operated for "religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition, " or for the prevention of cruelty to children or animals." 26 U.S.C. § 170(c)(2)(B), see also 26 U.S.C. § 501(c)(3). For any contributions of $250.00 or more a taxpayer must have written acknowledgment of the contribution for it to be deductible. This is only applicable for a one-time contribution of $250.00 or more. If a series of contributions adds up to over $250.00 the documentation is not necessary. If a taxpayer makes a contribution of $75.00 or more that is partly contribution and partly goods and services received, the taxpayer must have a written statement outlining what part of the payment was contribution. A taxpayer cannot deduct the value of his/her services if he/she does volunteer work for a charitable organization. A taxpayer can deduct the expense of traveling to and from the place where he/she volunteers. If a taxpayer gives property to a charity, he/she can deduct the fair market value of that property. There are some exceptions to this general rule. There may be occasions when property has increased in value but the deduction available to the taxpayer will only be what the taxpayer paid for the property. For noncash contributions, a taxpayer must get a receipt from the charity. For noncash contributions of a value over $500.00 a taxpayer must attach Form 8283. Contributions can only be deducted in the year they are made. Contributions can only be deducted up to 50% of a taxpayer's AGI. There are certain charitable deductions that can only be deducted up to 30% or 20% of the taxpayer's AGI depending on the type of charity the contribution is made to or the type of property contributed. The 50% charities are listed in 26 U.S.C. § 170(b).

G. *Personal casualty and theft losses* (§165). This type of loss is one where the value of the property is lost due to theft or diminished by a casualty. A casualty includes fires, earthquakes, tornadoes, car accidents and other sudden, unexpected events that cause a loss of property. Deterioration from insect infestation or disease does not qualify as a sudden, unexpected event. If a taxpayer receives insurance to cover his/her loss then no loss has occurred. Only any unreimbursed loss is deductible. The loss must exceed 10% of the taxpayer's AGI and $100.00. Only losses above this amount are deductible.

H. *Miscellaneous deductions* (§67). Unreimbursed job expenses such as travel expenses, union dues, and job education expenses are deductible as miscellaneous itemized deductions. State bar association dues are deductible here. However, the courts have determined that the costs of studying for and taking a bar exam are not deductible because a taxpayer is starting a new business. A military taxpayer may deduct the cost of uniforms that cannot be worn off base. This includes dungarees, cotton khakis (only worn on ships, e.g. long sleeve khaki shirt), and Battle Dress Utilities (BDU). This is also the section where business related entertainment expenses are deductible. However, only 50% of these expenses will be deductible. Other costs such as tax preparation fees, legal fees related to determining tax liability or tax planning, fees of investments, and safety deposit boxes are deductible. All miscellaneous itemized deductions are subject to the two- percent floor. This means that the sum of all miscellaneous itemized deductions must exceed 2% of the taxpayer's AGI. If the sum does not,

none of these items are deductible. If the sum does exceed 2% of the taxpayer's AGI only that portion that exceeds the 2% will be deductible.

I. *Tax computation.* After a taxpayer determines whether he/she will benefit from taking the itemized deductions or staying with the standard deduction, the taxpayer will subtract the appropriate amount from his/her AGI. This is also the point in the tax computation where personal and dependent exemptions are subtracted out of the taxpayer's AGI. The taxpayer will multiply the number of exemptions he/she is permitted by and $2,650 for 1997. With the deduction and the exemptions subtracted from AGI, the remaining amount is the taxpayer's taxable income. The taxpayer uses his/her taxable income to determine how much tax he/she owes. Using the tax tables, a taxpayer finds the income table corresponding to his/her taxable income and determines based on his/her filing status what tax he/she owes. After determining the amount of tax due the taxpayer will determine if he/she is entitled to any tax credits.

1311 TAX CREDITS. Tax credits actually reduce the amount of tax owed. For every dollar of tax credit the taxpayer is entitled to, his/her tax burden is reduced by a dollar. The tax credits that are available to a taxpayer are the child care credit, the credit for the elderly or disabled, the foreign tax credit, other infrequently used credits, and the earned income credit. The earned income credit does not appear in the tax credits section of the 1040. It appears below this section on the Form in the Payments section because it is a refundable tax credit. The other credits available are not refundable credits.

A. *Child and dependent care credit* (§21). To qualify for the Child and Dependent Care credit a taxpayer must have a dependent under age 13, a dependent who is physically or mentally incapable of self-care, or a spouse who is incapable of self-care. The taxpayer must have incurred dependent care expenses while working or looking for a job. The taxpayer must have earned income from work and may not file separately, if married. The credit amount is based on the lower paid spouse's earnings and actual expenses paid up to a allowed maximum of expenses paid of $2400.00 for one dependent, $4800.00 for two or more. A nonworking spouse can be considered as having worked if he/she is a full time student or is incapable of self-care. If the taxpayer had any of his/her child care expenses reimbursed by an employer, the taxpayer must exclude those reimbursed expenses. The taxpayer must have paid a care provider that the taxpayer cannot claim as a dependent. The maximum credit for a taxpayer whose AGI is $10,000.00 and under is 30% of the child care expenses. This credit is phased down to 20% by the point that the taxpayer's AGI reaches $28,000.00. To claim the credit a taxpayer will use Form 2441 with the 1040 and Schedule 2 with a Form 1040A. The taxpayer must provide the name and social security number or tax identification number of the care provider.

B. *Credit for the elderly or disabled* (§22). This credit can only be used if the taxpayer's AGI is below certain levels dependent on the taxpayer's filing status. For the elderly part of the credit a taxpayer must be 65 or older. For the disabled part of the credit, a taxpayer under 65 must be retired on permanent and total disability and receives taxable disability

income. The taxpayer must complete a Schedule R for the 1040 and a Schedule 3 for the 1040A.

C. *Foreign tax credit* (§27). The foreign tax credit may be available if the taxpayer has foreign sourced income that was subject to taxation by a foreign country. Taxpayers living overseas with spouses that work on the local economy may need to use this credit to help offset the taxes paid to the foreign country. Simply because a U.S. citizen is not living in the United States does not mean that the person is not subject to income taxation on all of his/her income wherever it is sourced. Form 1116 is the appropriate form to use for the foreign tax credit.

D. *Earned Income Credit (EIC)* (§§32 & 3507). A taxpayer will find the earned income credit in the Payments section of the 1040. The earned income credit is an earnings subsidy for the working families. Unlike the federal and state welfare programs, the earned income credit provides an income subsidy to wage earners and primarily those with parental responsibilities. Many enlisted members can qualify for the EIC particularly when they have children they are supporting in their household. A taxpayer does not have to have children or have to be married to qualify for the EIC. The amount of the credit is based on earned income and AGI of the taxpayer and the number of qualifying children the taxpayer supports. The maximum credit available in 1996 for a taxpayer without a qualifying child is $323.00. In 1996 for taxpayers with one qualifying child the maximum credit is $2152.00. For taxpayers with two or more qualifying children the maximum credit in 1996 is $3556.00. All qualifying children must have social security numbers if the children were born before December 1 of the year the taxpayer is filing for. A taxpayer's investment income cannot be over $2,200.00 for the year if the taxpayer is to remain eligible for the EIC. Investment income includes taxable interest and dividend income, capital gains, and tax-exempt interest income.

1. *Earned Income Credit requirements.* For taxpayers who do not have a qualifying child the taxpayer may receive the credit if: 1) the taxpayer had earned income; 2) the earned income and AGI are each less than $9,500.00; 3) the taxpayer and spouse, if filing jointly, are at least 25 years old and not yet 65 years old; 4) if the taxpayer's principal residence was in the United States for at least six months of the year; 5) the taxpayer is not filing a separate return from his/her spouse; and 6) the taxpayer cannot be the dependent or qualifying child of another taxpayer. For taxpayers with at least one qualifying child, the taxpayer does not have to fit within the age requirements but the qualifying child must have lived with the taxpayer for more that six months of the year and the taxpayer cannot be a qualifying child of another. With qualifying children the taxpayer's earned income and AGI must be less than $25,078.00 with one child and $28,495.00 with two or more children. All the other requirements are the same. A qualifying child who was born or died during the year is considered to have lived with the taxpayer the entire year. For a child to be a qualifying child, the child must be a son, daughter, adopted child, grandchild, stepchild, or foster child. The child must be under age 19, or under 24 if a full time student, or the child can be any age if the child is permanently and totally disabled. The child must have lived with the taxpayer in the taxpayer's main home in the United

States for at least six months of the year (12 months for foster children). Temporary absences such as vacations and attending school count as time the child was living in the home.

To receive the credit, first and foremost, the taxpayer must have earned income. This is wage or compensation income. This does not include interest and dividend income, social security and welfare benefits, pension and annuity income, veteran's benefits, worker's compensation, alimony, child support, unemployment compensation, taxable scholarships and variable housing allowance for military members. Earned income includes other non-taxed benefits military members receive like quarters and subsistence allowances, pay earned in a combat zone, the value of meals or housing provided by an employer, and anything else of value received for services performed. The taxpayer must have lived over half of the year in the United States. However, military members on extended active duty (over 90 days) serving overseas on orders are considered to live in the U.S. for that period of time.

E. *Child Credit* (§24). Beginning in 1998, taxpayers may take a $400.00 dollar credit for each child. In 1999, this credit increases to $500.00 a child. The credit for taxpayers who have one or two children is not refundable. For taxpayers with 3 or more children it may be refundable if tax liability is reduced below zero. To qualify for the credit a taxpayer must have a qualifying child. A qualifying child is one that is under 17, is a child, stepchild, foster child or grandchild of the taxpayer. The taxpayer must support the child to the extent that the taxpayer can claim the child as a dependent and is an U.S. citizen. The credit is phased out if the taxpayer's AGI is too high. This phase out is at a rate of reduction of $50.00 of credit for every $1000.00 of AGI that the taxpayer has over set amounts. The amounts are for single taxpayers - $75,000, for married filing jointly taxpayers - $110,000 and for married filing separately taxpayers - $55,000.

F. *Hope and Lifetime Learning Credits* (§25A). The Taxpayer Relief Act of 1997 enacted two higher education tax credits that become effective in 1998. Hope educational credit is available after January 1, 1998; the Lifetime Learning credit becomes available starting on July 1, 1998. These credits cannot be taken together. A taxpayer will have the option of either taking the Hope credit, the Lifetime Learning credit or a distribution from an Education IRA.

1. Hope Education Credit. The Hope credit is available for 100% of tuition and expenses for post-secondary education up to $1000. Additionally, it can be used for 50% of the next $1000 of tuition and expenses. The maximum credit per year per student is $1500. This credit can only be used for tuition and expenses for the first two years of post-secondary education. The student must be at least a half-time student. The credit is phased out for single taxpayers with an AGI of $40,000 - $50,000 ($80,000 - $100,000 for married taxpayers filing jointly).

2. Lifetime Learning Credit. The Lifetime Learning credit is available for tuition and expenses for higher education paid after June 30, 1998. The credit is 20% of tuition and expenses up to $5000 ($10,000 starting January 1, 2003). The student must be at least a half-time student unless the expenses are for classes to acquire or improve job skills. This credit is per taxpayer, not per student. It can, however, be claimed for an indefinite number of years. This credit is also phased out between $40,000 - $50,000 AGI ($80,000 - $100,000 for married taxpayers filing jointly).

1312 OTHER TAXES. In this section of the income tax return, if a taxpayer received an advanced earned income credit payment the taxpayer would include it here. This section is for the taxpayer to include all other taxes listed that the taxpayer owes the federal government. The taxes listed each have their own Form or Schedule to complete and attach to the 1040. Most military clients will not utilize this section of the 1040 except possibly the payment of advanced earned income credit and tax on qualified retirement plans including IRAs. After reducing the tax owed by any allowable credits, except for the earned income credit, the taxpayer will then add any amounts from this section back to the tax owed to come up with the total tax.

1313 PAYMENTS, REFUNDS AND AMOUNT OWED. In the last three sections of the 1040, the taxpayer determines what, if any, tax he/she owes above what has been withheld from his/her income. After adding the amount of federal income taxes already withheld and any earned income credit with any other tax payments already made the taxpayer determines the amount of tax he/she has already paid for the year. This sum will be subtracted from the total tax amount. A resulting negative number will mean that the government owes the taxpayer a refund, but if the total tax is still larger than the payments made the taxpayer will owe the government some money.

A. *When taxes are owed.* If the taxpayer owes the government money, depending on the amount owed, he/she may be liable for penalties for not having made estimated tax payments during the year. Most taxpayers who have primarily wage or compensation income can adjust their withholding on a Form W-4 to insure that sufficient amounts are withheld monthly. However, for taxpayers who are self-employed or whose spouses are, he/she may be required to make estimated tax payments four times a year beginning in January. Self-employed persons are required to pay federal income tax, social security tax, and Medicare tax on their earnings. These tax payments should be made four times a year based on the taxpayer's expected annual income. Sometimes this is difficult to do especially in the start-up years of a business. If the taxpayer does not make estimated tax payments or the payments are not sufficient the taxpayer maybe subject to a penalty. No penalty will be imposed for an underpayment of taxes if the amount owed in the current tax year is no more than 10% of the tax liability for the current year, the total tax minus the withholding for the year is less than $500.00, or the taxpayer did not owe any tax in the previous year. Generally, a taxpayer will not owe a penalty so long as the amount of tax withheld or paid through estimated payments for the current

year is 90% of the tax owed or the amount withheld or paid is 100% of the tax owed for the previous year.

1314 PROVISIONS AFFECTING MILITARY TAXPAYERS

A. *Income Issues.* For military members certain types of income are included, but other types of income are excluded. Specialty pay, like nuclear pay, medical and dental pay, sea duty pay, hazardous duty pay, and reenlistment bonus are included in gross income. A general rule of thumb is that any amount ending in the term "pay" will be included in gross income. One of the primary exceptions to this rule of thumb is the personal money allowance provided to flag officers to defray expenses associated with their official positions. The personal money allowance is included in income.

B. *Death benefit.* Death benefits or gratuities that are paid by an employer are now included in gross income. The IRC section providing a $5,000.00 tax-free employer provided death benefit was repealed in August 1996. The $6,000.00 death gratuity that the military pays to a member's survivors is now partially taxable. Only $3,000.00 of the death benefit is taxable because of § 134. At the time § 134 was enacted, it protected all military benefit exclusions from tax at that time. At that time, a death gratuity of $3,000.00 was paid to survivors.

C. *Moving expenses (§§ 82 & 217).* Section 82 includes reimbursements for moving expenses in income. Section 217(g), however, provides that reimbursements to members of the armed forces moving on permanent change of station orders are not taxable. This section also provides that if the member has any unreimbursed expenses, he/she may be able to deduct those regardless of whether the move satisfies the other requirements nonmilitary members would have to satisfy to deduct their costs.

D. *Homeowner's Assistance Program (HAP).* This program helps sell or buy a homeowner's home that he/she cannot sell. The program was established in response to the reduced property values that occurred in areas where the military had a long term presence but the presence was being terminated due to a base closure. In many communities where the local Navy, Army or other military base was closing home values decreased significantly in just a few years. The HAP was instituted to aid military members who were moving out of the area and were unable to sell their home for the amount they had purchased it for because of a decrease in the value of the home. The decrease in value had to occur because of the base closure. A taxpayer/homeowner may receive a cash payment for losses sustained in the private sale of the home. The maximum amount cannot exceed the difference between 95% of the value of the home before the base closure announcement and the sale price of the home. If the taxpayer/homeowner is unable to sell the home privately or decides not to, the taxpayer may sell his/her home to the government for an amount not to exceed 90% of the value of the home before the announcement or the amount of the outstanding mortgage, whichever is greater. The

amounts the taxpayer/homeowner receives from the government in excess of the current market value of the home are considered ordinary income for the taxpayer.

1. *HAP example.* A taxpayer buys a condo in Alameda, California in 1988 for $125,000.00. In 1990 when the base closure list is announced, Naval Air Station (NAS) Alameda is on the Base Realignment and Closure (BRAC) list. Property values start dropping and in 1992 when the member/taxpayer is changing his duty station he decides to sell the condo. Its market value now is $95,000.00. After trying for a few months to sell unsuccessfully, the member decides to let the government buy the home under the HAP. His outstanding mortgage on the property is $115,000.00. The government will purchase the home for the amount of his mortgage but the $20,000.00 difference between the home's market value and the mortgage amount is considered income to the member. This amount is not considered capital gains but is considered ordinary income.

E. *Items excluded from income.* Military members receive certain amounts that are excluded from taxable income. These items of income are excluded from taxable income by section 134 which provides that qualified military benefits are excluded from taxable income.

1. *Qualified military benefits (§ 134).* Some items a member might consider pay are not included in gross income because they are considered allowances. The general rule of thumb here is, if it is called an allowance, it is probably not taxable. The personal money allowance for flag officers is an exception. Other allowances are excluded from gross income under § 134. This code section provides that gross income does not include any qualified military benefit and defines a qualified military benefit. A qualified military benefit is an allowance or in-kind benefit received by a military member by reason of his/her status in the military and a benefit that was excluded from gross income on 9 September 1986. These items are all housing allowances, including cost of living allowances overseas, whether received in cash or in-kind, subsistence allowances, ROTC educational and subsistence allowances, uniform allowances, dislocation allowances, and family separation allowances. Scholarships provided by the armed forces may be taxable, but when the government picks up the costs of a taxpayer's professional education, for example, continuing legal education or a masters of law degree, these expenses are excluded from income to the taxpayer receiving the education. Generally, per diem received by a member when on temporary additional duty (temporary duty) is not taxable. It is considered a reimbursement of expenses and there are no tax implications to the receipt of per diem or expenses incurred while on travel. Unreimbursed employee expenses may be deductible as an itemized deduction. If per diem is paid to a taxpayer for over one year, the temporary duty or temporary job location is considered permanent by the IRS and the per diem becomes taxable from that point forward.

F. *Disability pay (§ 104).* Most disability pay is excluded from gross income. Disability payments are available to former service members based on the degree of permanent disability from an injury or illness incurred while on active duty. All disability payments to a

former member paid out by the Department of Veteran's Affairs (V.A.) are tax-free. 26 U.S.C. 104(a)(4); 38 U.S.C. §3101(a). The member receives a disability pension from the V.A. only after application to the V.A. The V.A. makes a determination independent of the one made by the military that provided the former member with a disability payment or pension. See generally *Parks v. Commissioner*, 38 T.C.M. 759 (1979).

1. *Military disability pay (§ 104(a)(4)&(b)).* The military determination of permanent disability is made through an administrative process called a Physical Evaluation Board (PEB). SECNAVINST 1850.4. A JAGMAN Investigation Line of Duty/Misconduct determination is binding on the PEB. JAGMAN § 0222b. A service member must have been injured in the Line of Duty to be eligible for military disability benefits. 10 U.S.C. §§ 1201, 1203, 1204, 1206, 1207. The disability pay received by a former member (retired or separated) from the military is only excluded from gross income up to the amount the V.A. would provide. The former member does not actually have to apply to the V.A. and receive a V.A. disability payment. The exception to this is if the disability is a combat-related injury or sickness. 26 U.S.C. § 104(b). Disability payments resulting from a combat-related injury or sickness are not taxable. To be combat-related the injury or sickness had to be incurred as a direct result of armed conflict; incurred while engaged in unusually hazardous service; incurred under conditions that simulate war (maneuvers or exercises); or caused by an "instrumentality of war," such as a weapon. Whether an injury or sickness is combated-related is determined by the IRS. The taxability of the disability payment is not determined on whether a member is paid in a lump-sum vice a periodic payment. See *St. Clair v. U.S.*, 778 F.Supp. 894 (E.D. Va. 1991). However, if a member is still on active duty and is placed in a limited duty status, the pay he/she receives during that limited duty status is not tax-free disability pay. *Hernandez v. Commissioner*, 72 T.Ct. 1234 (1979).

G. *Combat zone pay (§ 112).* Pay earned by a member while serving in a combat zone or designated hazardous duty area is excluded from gross income. If a member is injured in a combat zone and hospitalized, the pay he/she earns while hospitalized is also excluded from gross income. Any service in a combat zone during a month excludes the pay for that whole month from gross income. This includes a member's base pay and any other specialty pays he/she may earn. Leave accrued during service in a combat zone is also tax-free. Defense Finance and Accounting Service (DFAS) uses a last-in, first-out (LIFO) method of determining which leave was earned in the combat zone. Enlisted members entire amount of pay will be excluded from gross income. Officers exclude up to the highest enlisted amount of pay. The amount excludable is equal to an E-9 over 26 years base pay. Warrant officers are considered enlisted and so can exclude their entire pay while serving in a combat zone. The service does not have to be within the combat zone itself. The service may be in direct support of operations in the combat zone. Re-enlistment bonuses are tax-free when a member re-enlists while serving in a combat zone regardless of when he/she actually receives the bonus.

1. *Combat zone areas* (§112(c)). The combat zone has to be designated by the President by Executive Order (E.O.). 12744 designated the Persian Gulf, the Red Sea, the Gulf of Oman, other bodies of water in that area, and the lands of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qaatar, and the United Arab Emirates as a combat zone. The former Republic of Yugoslavia was designated as a qualified hazardous duty area on 21 November 1995. This qualified hazardous duty area is treated as a combat zone for income tax exclusion. Vietnam was terminated as a combat zone by E.O. 13002.

2. *POW/MIA status* (§112(d)). Income earned while in a POW/MIA status is excluded from taxation.

H. *Section 1034 rollovers.* Prior to 5 August 1997, taxation on capital gains from the sale of a principal residence could be deferred from current taxation. Section 1034 provided for a deferral of taxation on capital gains from the sale of a principal residence if another principal residence was purchased within a required period of time and was sufficiently expensive to rollover part of or the entire gain on the sale. Generally, capital gains could be rolled-over for individuals who purchase a new principal residence either one year before and up to two years after the sale of the individual's current principal residence. For military members the period in which to replace a principal residence was extended for two years. An active duty military member had four years from the date of the sale of the initial home to purchase a new home and live in it.

1. *1034 Rollover repealed* (§121). The Taxpayer Relief Act of 1997 repealed §1034 on 5 August 1997. Beginning on 7 May 1997, homeowners who owned and used their home as a principal residence for at least two out of the last five years can exclude up to $250,000 of gain $500,000 if married couples file jointly and both satisfy the two-year use requirement. Between 7 May and 5 August, taxpayer who sell their home may elect to use either the exclusion of gains under §121 or the rollover under 11034. If the rollover is used, the homeowner will be required to replace the home within four years of the sale if the taxpayer is on active duty. For home sales after 5 August 1997, §1034 has been repealed.

I. *Income taxes on death.* If a military member dies in a combat zone or qualified hazardous duty area the member's estate will not have to pay income taxes on any income earned during the tax year of the member's death. The military member must either die in the combat zone or from injuries or a disease contracted while serving in a combat zone. 26 U.S.C. § 692.

J. *Joint income tax returns.* Section 6013(f) provides that if a military member is declared missing as a result of service in a combat zone but has not been determined to be dead, the member's spouse may file a joint tax return during the member's missing status. The spouse may file jointly returns until the spouse is declared dead or two years after termination of the area as a combat zone.

K. *Extension of time to file.* In addition to income earned while serving in a combat zone being excluded from taxable income, section 7508 provides that a military member has 180 days from the date the member completes service in the combat zone to file his tax returns, pay taxes, claim refunds and to file suit.