



California National Guard

Legal Guide

Version 1.1 – 19 December 2011



Contact Information for JAG Offices and Other Key Personnel

Below is a list of full-time judge advocates and subject matter experts who can provide individualized advice and guidance.

Trial Defense Services

(916) 854-3496

<https://portal.ca.ngb.army.mil/sites/TDS/default.aspx>

Legal Assistance Program

(310) 478-5798

<http://www.calguard.ca.gov/sja/LA/Pages/default.aspx>

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INTRODUCTION

The intent of this manual is to provide commanders, staff officers, and service members of all levels an overview of legal issues in the California National Guard . This manual is not intended to replace the advice of your unit command judge advocate (CJA) or staff judge advocate (SJA).

At a minimum, it is recommended that commanders, staff officers, and service members have the following publications, in addition to this Guide, as references on military justice and other legal matters:

1. Manual for Courts-Martial, 2008
2. AR 27-10, Military Justice, dtd 16 November 2005
3. AR 15-6, Procedure for Investigating Officers and Boards of Officers, dtd 2 October 2006
4. AR 600-20, Army Command Policy, dtd 18 March 2008
5. AR 135-178, Enlisted Administrative Separations, dtd 13 march 2007
6. AR 27-3 Legal Assistance Program

(10) SITUATIONS WHEN YOU SHOULD ALWAYS CONSULT YOUR JUDGE ADVOCATE:

- 1. Appointing an investigating officer:** If you need to initiate a commander's inquiry, an AR 15-6 informal or formal investigation (including EO investigations), or a line of duty or report of survey, ask your Command Judge Advocate (CJA) for assistance. Your CJA can offer advice on the appropriate type of investigation as well as assist in drafting the appointment memorandum that keeps the investigation on target.
- 2. After receiving a family support complaint or a report of domestic violence:** Your CJA can identify what type of support is required, identify if an exception exists, identify if "payment in kind" is appropriate, and assist in doing "the math" when formulas must be used in the context of multiple children located in various households. Additionally, they can confirm that the letter you draft within (14) days meets the requirements of AR 608-99. Do not sit on domestic violence reports; they concern life, health and the safety of innocents and require higher level reporting.
- 3. Before initiating any initial acquisition of services or supplies:** Your CJA can ensure that all Field Ordering and Contracting Officers are briefed properly and that acquisition and fiscal laws are followed.
- 4. Before conducting any search (drug test, breath test, barracks, etc.):** Your CJA can confirm whether you have sufficient information (or probable cause) to conduct the search and thus be able to use the search results in follow-up administrative, non-judicial or courts-martial proceedings.

5. **Before approving a raffle, bake sale, or other fundraising activity:** Fundraising approval authority is subject to local state laws and current installation policy.
6. **Before "thinking" about soliciting a company for a gift (or your FRG soliciting for a gift):** Your CJA can review any solicitation to ensure that there is no appearance of government endorsement, improper solicitation by a DoD employee, or other embarrassing situation to the command.
7. **Before providing support to any private organization (PO) or Non-Governmental Organization (NGO):** Support to NGOs and POs are limited by the Joint Ethics Regulation (JER) and subject to the proper approving authority. All POs and NGOs must be supported equally with no preferential treatment. Special rules apply to the American Red Cross.
8. **Before collecting monies for departure gifts:** Your CJA can define a "donating group" and inform you of the limitations for soliciting in the government workplace. Furthermore, he or she can make suggestions to ensure there is no improper pressure on subordinates or an appearance of impropriety.
9. **Before inviting foreign forces to come train with you.** Your CJA can inform you of the proper steps for doing so, ensuring that there are no later misunderstandings when the host nation approving authority chooses to spend security assistance or similar monies for other individuals/units.
10. **Before entering into any contractual agreement:** For example, your CJA can assist in establishing an administrative procedures agreement, a document used to list agreed terms between a PDSS team and host nation personnel in support of an upcoming JCET, or a memorandum of agreement for area support to another military component.

SECTION I

Legal Assistance & Preventative Law

Chapter One. Legal Assistance in the California National Guard

References:

AR 600-20 Army Command Policy, dtd 18 March 2008

AR 27-3 The Army Legal Assistance Program, dtd 21 February 1996

Employer Support of the Guard and Reserve: www.esgr.mil, (562) 936-1746

A. Introduction

Legal Assistance Program is a Commander's Program. The Program is based on the needs of the Army to ensure, Readiness, Morale, Discipline and a Quality Force. Personal legal difficulties may cause low morale and disciplinary problems that may affect combat and mission readiness. Within the scope of the regulation(s) and available services, the Legal Assistance Program attempts to meet the needs for providing information on and resolution of personal legal matters and provide support for certain military administrative actions to eligible service members.

Commanders should be knowledgeable when their soldiers are entitled to legal assistance and be confident that referral to a legal assistance counsel meets the needs of the unit and the National Guard. There are some situations that a Commander should always refer a Soldier to the Legal Assistance Program, including but not limited to, Lautenberg matters, Family Care Plans, FLIPL Rebuttals, and requests for preparation of wills and powers of attorney.

Commanders should coordinate with their servicing Staff Judge Advocates and Command Judge Advocates to establish plan to receive and track unit legal assistance requests from MDAY and Full Time soldiers during Inactive Duty Training and Annual Training. Requests for legal assistance should be received and evaluated by the units' supporting legal office/section. Full time Division, Brigade and Battalion legal paralegals will be the initial point of contact for soldiers assigned to the unit. Thereafter, if a legal assistance matter cannot be handled at the unit level, then referral to the State Legal Assistance Program coordinator is appropriate for further evaluation and support.

The State Legal Assistance Program will establish and make available all necessary training and tracking programs to ensure all units properly evaluate and service requests for legal assistance. Ensuring that units are the initial source for legal assistance requests provides Commanders with the necessary information to learn and understand the legal issues and concerns facing their soldiers and fulfill the requirements of AR 27-3 and AR 600-20.

The State Legal Assistance will provide training on the current US Army tracking system which will properly account for and give credit for the servicing unit, i.e., the Client Information System. All unit paralegals and servicing Judge Advocates (full time and MDAYs) are responsible to inputting legal assistance actions into CIS.

Legal Assistance attorneys are not advisors to the Commander. Legal assistance attorneys enter into an attorney-client relationship with the soldiers and information disclosed by a soldier to an attorney is privileged and cannot be disclosed to the Command. The State Legal Assistance Program will provide all necessary support to avoid conflicts and attempt to provide the necessary legal services that cannot be provided at the unit level.

All referrals for the State Legal Assistance Program must be made through the State Legal Assistance Portal: <http://www.calguard.ca.gov/sja/LA/pages/default.aspx>. Thereafter, the State Legal Assistance Coordinator will track the matter.

The Legal Assistance Program will make every attempt to provide legal services to all National Guard soldiers/airmen within the available resources and mission priorities. There are instances wherein legal services cannot be provided due to limited personnel and/or legal expertise. Every effort will be made to refer Soldiers to civilian attorneys with the requisite legal experience in the area of law at issue. Additionally, the State Staff Judge Advocate has the responsibility to set the priority for legal assistance service at the State level based on mission requirements.

B. Limitations on Legal Assistance

There are some clear cut limitations on legal assistance for soldiers that include advice and/or representation on UCMJ/civilian criminal cases; all separation actions; private business matters; litigation against the United States; and employment matters, other than those involving rights afforded under USERRA and/or under the California Military and Veterans Code.

Any matter outside the scope of legal assistance will be acknowledged and the appropriate referral and/or guidance for further support will be made. The Commander's servicing legal section will be able to make the proper determination what is and what is not within the scope of legal assistance that is consistent with AR 27-3. All military justice and separation actions should be referred Trial Defense Services.

Chapter Two. Sexual Assault Response Coordinator (SARC)

References:

Cal Guard SARC Website <http://www.calguard.ca.gov/j1/Pages/SAPRP.aspx>

- A. If You Have Been Sexually Assaulted:** Go to a safe location away from the attacker.
- 1. General Information:** You do not have to report it through your military chain of command unless you choose to do so.
- a. Call 911 or your 24 hour local rape crisis center, or
 - b. Enter your zip code to locate the nearest Rape Crisis Center at:
<http://www.calcasa.org>
- B. Objectives:** The mission of the Sexual Assault and Prevention Program is to prevent sexual assaults within the California National Guard through increasing awareness of the frequency of sexual assault in the military, educating all service members about sexual assault prevention, and protecting the rights and dignity of victims. The California National Guard is dedicated to this mission. Sexual assault is a crime, demeans the value of others, and erodes the basic foundation of trust so vital to the success of every military mission.
- C. For Information on what to do, you can call the following personnel with confidentiality:**

State Sexual Assault Response Coordinator:	916-869-0787
State Chaplain:	916-854-3398
State Mental Health Director:	916-854-3019
Military One Source:	800-342-9647
Toll Free SARC Helpline:	855-225-7277

SECTION II

TRIAL DEFENSE SERVICES

Chapter Three. Trial Defense Services

Website:

<https://portal.ca.ngb.army.mil/sites/TDS/default.aspx>

A. Trial Defense Services in General: The mission of the California National Guard Trial Defense Services is to provide specified defense counsel to California National Guard soldiers whenever required by law or regulation and authorized by the California National Guard Trial Defense Services. These services are: (1) representing soldiers charged with military criminal offenses at trial, (2) representing soldiers during criminal investigations and before elimination or grade reduction boards and, (3) counseling soldiers regarding pretrial restraint, non judicial punishment, and various adverse administrative actions taken pursuant to military regulations.

B. Who Trial Defense Services Can Represent: The California National Guard trial defense services will defend California National Guard service members in Arizona, Guam, California, and Hawaii who are in the following statuses: (1) AGR, (2) SAD, (3) ADSW, and (4) M-day. TDS will not represent California National Guard soldiers who are in Title 10 Status. Soldiers who are in a Title 10 Status need to contact USA Trial Defense Services for consultation/representation.

C. Actions Trial Defense Services Defends Against:

1. Article 15-6 investigations: CID investigations, Commander's Inquiry
2. Enlisted Administrative Separations Under AR 135-178
3. Chapter 7 - Defective enlistments and reenlistments
4. Chapter 8 - Entry Level Performance and Conduct
5. Chapter 9 - Unsatisfactory Performance
6. Chapter 11 - Substance Abuse Rehabilitation Failure
7. Chapter 12 - Misconduct
8. Chapter 13- Unsatisfactory performance in the Ready Reserve

9. Chapter 14 - Secretarial Plenary Authority 10.

Chapter 15 - Separation for other reasons

11. Chapter 16 - Failure to Meet Body Fat Standards

12. All levels of courts martial

13. General Officer Letter of Reprimand

14. Letter of Reprimand

D. How to Request Counsel from Trial Defense Services: All requests for counsel *must* be submitted online. The soldier requesting counsel shall complete as much of the form as possible, including the general nature of the offense. The soldier shall, to the best of their abilities, ensure that the information on the form is correct. The soldiers should not disclose confidential or secret matters pertaining to their case.

After the form is submitted online, a confirmation notice is generated and an attorney or full time paralegal will contact the soldier. If the soldier has not heard from the Trial Defense Services within three to five business days, the soldiers should either resubmit their request or call Trial Defense Services headquarters in Sacramento at (916) 854-3496.

To Access the Request for Counsel form, go to:

<http://www.calguard.ca.gov/tds>

E. Defense counsel will provide the following services and counseling in order priority:

Priority I	Priority II	Priority III
General Courts-Martial (GCM) representation	Article 15, UCMJ	AR 15-6 Investigations
Special Courts-Martial (SPCM) representation	Summary Courts-Martial (SCM)	CID Investigations
Article 32	Involuntary Enlisted Separations under AR 135-178	Commander's Inquiry
Pretrial confinees	Reduction Boards (Misconduct)	IG Investigations
	Officer Eliminations/Resignations	Suspects Rights
	AGR Separations	

SECTION III

Chapter Four. Introduction to Military Justice

REFERENCES:

California Military and Veterans Code §450 - 475

Manual for Courts-Martial, 2008 Edition

AR 27-10, Military Justice, dtd 16 November 2006

Memorandum From The Adjutant General, Subject: Withhold Jurisdiction on Misconduct Cases for Commissioned Officers, Warrant Officers, and Senior Enlisted Non-Commissioned Officers, 26 January 2011

I. Overview

A. Withholding of Authority:

1. The Adjutant General has withheld to his level the disposition of all officer and warrant officer misconduct.
2. Misconduct by enlisted soldiers in the grade of E-7 and above is withheld to the Commander of The Army Guard or The Air Guard, respectively.

B. Commanders' Roles: Commanders play a major role in the military justice system by setting policies and enforcing discipline. Strong leadership at the Noncommissioned Officer and Officer level is essential in enforcing discipline. Commanders should ensure that soldiers receive proper leadership, motivation, assistance, and attention to their legitimate needs. When those avenues prove ineffective, commanders have at their disposal a variety of administrative and disciplinary options.

C. Commanders' Options: The following are only some of the options available to commanders in administering disciplinary measures.

1. Informal and Formal Counseling
2. Reprimands and Admonitions
3. Withholding of Privileges
4. Corrective Training

5. Bar to Reenlistment
6. Non-judicial Punishment
7. Administrative Reduction
8. Administrative Elimination
9. Court-Martial

D. Unlawful Command Influence: Unlawful command influence is defined as any action by which a commander intentionally or inadvertently impedes the fair and impartial administration of military justice.

1. Commanders must fulfill their roles and exercise their judgment in the Military Justice system independently, free of the fear of reprisal or retaliation from their superiors. Both Article 37 of the Uniform Code of Military Justice (UCMJ) and Rule for Courts-Martial 104 prohibit commanders from interjecting unlawful command influence into the military justice process. Army Regulation 27-10 extends this prohibition to non-judicial punishment administered pursuant to Article 15, UCMJ.

2. The Ten Commandments of Unlawful Command Influence:

- a. Commanders must not order subordinates to dispose of a case in a certain manner.
- b. Commanders must not adopt an inflexible policy on the disposition of cases, or on punishment.
- c. Commanders, if accusers, may not refer cases to courts-martial.
- d. Commanders may not select or remove courts-martial panel members or administrative separation board members in order to obtain particular results in particular cases.
- e. Commanders may not place outside pressures on the Military Judge, courts-martial panel members, or administrative separation board members to encourage them to arrive at a particular decision.
- f. Witnesses may not be intimidated or discouraged from testifying.
- g. Accused soldiers may not be punished prior to trial or receiving

non judicial punishment.

- h. Commanders must ensure their subordinates do not exercise unlawful command influence on their behalf.
- i. Commanders must not adopt inflexible attitudes toward clemency.
- j. Commanders must not adopt policies suggesting mandatory minimum punishments in response either to certain types of offenses or to offenses committed by soldiers of certain rank.

II. Corrective Training

- A. **What is Corrective Training:** Corrective training is training conducted *outside of normal duty hours, directly related to a soldier's observed deficiency, and oriented toward improving his performance* in the identified problem area. When used correctly, it can be an extremely effective, non-punitive, disciplinary measure. Either a soldier's commander or any NCO in the soldier's chain of command may authorize or direct it.
- B. **What Corrective Training Is Not:** Corrective training is not punishment. Commanders may not impose it to avoid the procedural safeguards afforded a soldier during the non-judicial punishment process.
- C. **Examples of Corrective Training:**
 - 1. Soldiers who fail to be present at their place of duty at the designated time may be required to take additional instruction in reporting to the proper place at the proper time.
 - 2. Soldiers who fail to maintain barracks or work areas properly may be required to perform additional maintenance or cleaning of those areas.
- D. **Duration of Corrective Training:** Once deficiencies are satisfactorily corrected, corrective training should end.

Chapter Five. Non-Judicial Punishment

REFERENCES:

California Military and Veterans Code §450.1

Manual for Courts-Martial, 2008 Edition

AR 27-10, Military Justice, dtd 16 November 2006

Memorandum From The Adjutant General, Subject: Ratification of Delegation of Promotion Authority, 2 December 2006

- A. Imposing Authorities:** Only commanders may impose non-judicial punishment (NJP).
- B. Procedures:** Commanders should use the script provided in AR 27-10, Appendix B. The following is a synopsis of NJP procedures under the California Military and Veterans Code.
 - 1. Notification:** Commander (or a delegated representative in the grade of E-7 or above who is senior to soldier to be punished) informs the soldier of:
 - a.** Intent to punish under NJP;
 - b.** Right to remain silent under Article 31b, UCMJ;
 - c.** Right to examine evidence;
 - d.** Right to consult with counsel;
 - e.** Right to demand trial by court-martial, in lieu of proceeding with NJP;
 - f.** Right to present witnesses and/or present evidence;
 - g.** Right to have a personal representative during NJP proceedings;
 - h.** Maximum punishment possible under Article 15; and
 - i.** Right to request that NJP proceedings be open to public.

If a commander delegates the “notice” authority, he or she must still sign and date the signature block of the DA Form 2627, Record of Non-judicial Punishment.

2. Consultation with Counsel: Normally, soldiers should be given at least 48 hours in order to consult with counsel and decide whether to proceed under NJP. This time may be extended, depending on the availability of counsel, and the facts in the case.

3. Demand for Trial: If, after consultation with counsel, the soldier elects to proceed via trial by court-martial rather than with NJP, commanders should take no further NJP action and immediately consult their Group Judge Advocate. Commanders may proceed with a court-martial or, in their discretion, grant a later request by the soldier to withdraw his request for trial by court-martial and proceed with NJP.

4. No Demand for Trial: If the soldier does not demand trial by court-martial, he or she will then be allowed to present to the imposing commander matters in defense, extenuation, and mitigation.

a. Spokesperson: The soldier may request a spokesperson to speak on his or her behalf. The soldier may request that a civilian attorney act as his or her spokesperson, at no cost to the government.

b. No Right to Examine Witnesses: Because NJP proceedings are not adversarial in nature, the commander may, but does not have to, permit the soldier to examine or cross-examine witnesses.

c. Determining Guilt or Innocence: Soldiers must be found guilty *beyond a reasonable doubt*. If, after listening to all evidence, the commander believes a soldier is guilty, he or she may listen to the soldier's matters in extenuation and mitigation and then impose punishment and announce it to the soldier. If the commander does not believe the NJP is warranted, he or she will notify the soldier that the proceedings are terminated, and that the DA Form 2627 will be destroyed.

C. Imposition of Punishment: Any commanding officer may impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial. NJP includes any, or a combination of, the following, depending on the type of NJP imposed and the soldier's rank. (*See*, Table 5-1, Table 5-2, and Table 5-3).

D. Effective Dates of Punishments: The punishments described above may be imposed only during annual active duty for training or active state service, except extra duty may be imposed upon enlisted personnel while in armory drill status for two hours for two consecutive drills. NJP is effective on the date imposed, unless the commander otherwise indicates on the NJP form. Once punishment of extra duty or restriction starts, it continues until completed, except where interrupted due to the fault or physical incapacity of the soldier, or an appeal is not acted on in a timely manner.

E. Suspension of Punishments: The Officer who imposes the punishment, or his or her successor in command, may suspend any NJP, *at the time it is imposed or at a later date*. This serves as a “probationary” period for the soldier, enabling him or her to show rehabilitative signs.

F. Vacation of Suspended Punishments: The Officer who imposes the punishment, or his or her successor in command, may vacate suspended punishment (provided the punishment is of a type and amount the Officer could impose) if he or she determines that a soldier has committed a UCMJ offense during the suspension period. Soldiers may not appeal decisions to vacate a suspension. Misconduct prompting the vacation of suspended punishment may also be the basis for new NJP or court-martial action.

G. Mitigation and Remission of Punishments:

1. Mitigation: The Officer who imposes the punishment, or his or her successor in command, may *at any time* remit or mitigate any part or amount of the unexecuted punishment imposed. Mitigation is the reduction in quality or quantity of punishment (*e.g.*, reduction of restriction from 20 to 10 days). It is appropriate when the soldier merits, through good conduct, a reduction in the severity of the punishment or when the originally-imposed punishment was disproportionate to the offense. When mitigating punishment (other than reduction in grade) the punishment shall not be for a greater period than the punishment mitigated. When mitigating reductions in grade to forfeiture of pay or detention, the amount of fines or detentions shall not be greater than the amount that could have been imposed initially under the CMVC.

2. Remission: Remission is the complete cancellation of any *unexecuted* NJP. It is appropriate under the same circumstances as mitigation (above).

H. Setting Aside of Punishments: Either executed or unexecuted NJP may be set aside, and all rights, privileges, and property affected by the punishment may be restored. The basis for setting aside punishment is that a “clear injustice” resulted in the punishment (*e.g.*, the discovery of new evidence that clears the soldier).

I. NJP Appeals: NJP appeals *normally* must be submitted within 5 calendar days of the imposition of punishment. The commander superior to the imposing commander may, in his or her discretion, grant an extension to this 5-day period. Only one appeal is permitted, and no appeals from the vacation of previously-suspended punishments are permitted. The imposition and enforcement of a disciplinary punishment for any act or omission by a NJP is not a bar to a trial by court-martial for a serious crime or offense that grows out of the same act or omission, and is not properly punishable by the NJP; but the fact that a disciplinary punishment has been enforced by NJP may be shown by the accused at trial, and when so shown, shall be considered in determining the measure of punishment to

be adjudged in the event of finding of guilt at trial by court martial. (*See California Military & Veterans Code § 450.1(f)*).

- 1. Who May Act on Appeals:** The next superior authority to the imposing commander normally acts on appeals. If, at the time of appeal, the soldier is no longer of the imposing commander's command, the authority next superior to the soldier's *present* commander acts on the appeal.
- 2. Appeals Procedures:** Appeals will be made on the face of the NJP document and forwarded through the imposing commander to the superior authority. Soldiers may attach documents for consideration to the appeal, and may, in the discretion of the appellate authority, request to appear personally before the commander acting on the appeal. The authority who is to act on appeal shall refer the case to a judge advocate of the California National Guard for consideration and advice, and may so refer the case upon appeal from any punishment imposed by a NJP.
- 3. Actions on Appeal:** Either the imposing commander or his successor-in-command may take any action on appeal that the superior authority could take.
 - a. Actions by the Imposing Commander:** If the imposing commander or his or her successor-in-command suspends, mitigates, remits, or sets aside any part of the punishment, he or she must record this action on the face of the NJP document. The soldier will then be advised of this action and asked whether he or she wishes, in view of this action, to withdraw the appeal. If the soldier wishes to continue the appeal, the imposing commander will forward the NJP document and all accompanying papers to his or her superior authority. Imposing commanders forwarding an appeal to the superior authority may attach any matter in rebuttal to the soldier's assertions.
 - b. Actions by the Superior Authority:** Superior authorities in receipt of appeals should act on them normally within 5 calendar days. Superior authorities may conduct independent inquiries, in their discretion, and may refer appeals to any Judge Advocate for consideration and advice. Superior authorities may exercise the same powers with respect to punishment imposed as may be exercised by the imposing commander. Superior authorities may not, however, change filing determinations imposed by the imposing commanders.
- 4. Suspending Punishment Pending Appeal:** NJP that has been imposed may continue while the soldier's appeal is pending, *except* if action is not taken on the appeal within 5 days (3 days for summarized NJP) after submission of the appeal.

J. Publication of NJP Results: Publication of NJP results often serves a useful deterrence function, and helps preclude perceptions of unfairness of punishment. If commanders choose to publicize results, they should publicize *all* results, with special consideration given to punishment involving soldiers in the grade of E-5 and above (*see below*).

- 1. Verbal Announcement:** Commanders may announce NJP at unit formations after the imposition of the punishment or, if appealed, after a decision on the appeal.
- 2. Posting:** Commanders may post results of NJP on unit bulletin boards, after removing Social Security Numbers and other relevant privacy information regarding the punished soldier.
- 3. Special Considerations Regarding Soldiers in the Grades of E-5 and Above:** Commanders should consider such factors as the nature of the offense, the soldier's military record and duty position, and the impact on unit morale when determining whether to publicize NJP results regarding soldiers in the grades of E-5 and above.

MAXIMUM PUNISHMENT FOR ENLISTED MEMBERS

TABLE 5-1

Punishment	Imposed by Company Commanders	Imposed by Battalion Commanders and Above
Reduction of Grade	(see TABLE 5-2)	(see TABLE 5-2)
Extra Duties	14 days	45 days
Restriction	14 days	60 days
Forfeiture	14 days	15 days per month for 3 months

MAXIMUM REDUCTION FOR ENLISTED MEMBERS

TABLE 5-2

Command Authority	Can Reduce From	Maximum Grade Reduction
The Adjutant General	Command Sergeant Major	2 Grades
The Army or Air Guard Commander	Sergeant Major	2 Grades
Brigadier General	Master Sergeant	2 Grades
Colonel	Staff Sergeant	2 Grades
Lieutenant Colonel	Sergeant	2 Grades

MAXIMUM PUNISHMENT FOR OFFICERS

TABLE 5-3

Punishment	Duration
Restriction	60 days
Fine	15 days per month for 2 months
Forfeiture	15 days per month for 3 months

Chapter Six. Courts-Martial

REFERENCES:

AR 27-10, Military Justice, dtd 16 November 2005

California Military and Veterans Code 450-474

Manual for Courts-Martial California, 2007 Edition

Manual for Courts-Martial, 2008 Edition

A. Introduction: Courts-martial have exclusive power to hear and decide military offenses, and, in some circumstances, offenses violating state law. Once commanders conduct a preliminary inquiry into alleged acts of misconduct, they may decide that other, less severe, options cannot address adequately the seriousness of misconduct.

The offenses which can be tried under courts martial are described in the California Military and Veterans Code (CMVC). The offenses listed in the CMVC are almost identical to those listed in the UCMJ. There are significant differences, however, regarding the maximum punishment allowed under the various types of court martial. The differences are explained below.

B. Terms and Definitions

- 1. General Court-Martial Convening Authority (CA):** The President of the United States, Governor, or the Adjutant General.
- 2. Summary Courts-Martial Convening Authorities (SCMCAs):** Brigade Commanders, 40th ID Commander, and Commanders of Army Division and Air Division.
- 3. Special Courts-Martial Convening Authorities (SPCMCAs):** Brigade Commanders, 40th ID Commander, and Commanders of Army Division and Air Division.
- 4. Charge Sheet:** The charge sheet is a document (CA NG Form 458) upon which personal information of an accused soldier, the UCMJ charges against him, and other administrative data is recorded. Legal specialists normally prepare this form, and Command Judge Advocates review it for correctness. It is used to record the preferral of charges against a soldier.
- 5. Preferral of Charges:** Preferral of charges constitutes placing an accused soldier on notice of the UCMJ charges against him or her. It is recorded on the face of the charge sheet, and normally is accompanied by the verbal reading of the charges to the soldier, in person. Any person

subject to the UCMJ may prefer charges. The soldier's immediate commander normally performs this function, however, after the conduct of a commander's inquiry.

6. Commander's Inquiry: A commander's inquiry is an investigation into the suspected offenses, conducted IAW Rule for Courts-Martial 303. The soldier's commander must either conduct, or cause to be conducted, this inquiry. It may be as detailed as necessary, provided that the commander is satisfied that he or she has enough information to make an informed decision regarding the proposed disposition of the charges.

7. Article 32 Investigation: An investigation under Article 32 of the UCMJ is a preliminary investigation into the truth of the matters set forth in the charge sheet and the correctness of the form of the charges. It also serves to secure information upon which to determine disposition of a proposed court-martial. It is similar in function to a civilian grand jury. This investigation normally takes place after the preferral of charges, and must be conducted by a mature commissioned officer, who serves as the Investigating Officer. No charges may be referred (or directed) to a General Court-Martial unless an Article 32 investigation has been conducted, or waived by the accused soldier.

8. Referral of Charges: Referral of charges is the direction of charges by a convening authority to a certain level of court-martial. Convening authorities may not refer charges to courts-martial that they are not empowered to convene. Consult local practice and regulation to determine convening authorities and the authority to refer charges.

C. Levels of Courts-Martial and Maximum Punishments

1. Summary Courts-Martial (SCMs): A SCM is the lowest level of court-martial. It normally addresses relatively minor offenses, and may try only enlisted personnel. SCMs may only confine soldiers in the grade of E-4 and below, and then only for a maximum period of 30 days. It is composed of one officer in the grade of O-3 or above. No soldier may be tried by SCM over his or her objection, and soldiers have no right to representation by military counsel. Maximum punishment that may be imposed at a SCM includes the following:

Summary courts-martial have power:

- a. To try enlisted members of the active militia unless they object.
- b. To adjudge any punishment authorized for a summary court-martial handling analogous charges under the Uniform Code of Military Justice and the federal Manual for Courts-Martial, including, but not limited to, up to 30 days in confinement.

2. Special Courts-Martial (SPCMs): SPCMs are intermediate levels of courts-martial. Enlisted soldiers may receive punishment including reduction to the grade of E-1, forfeiture of 2/3 pay per month for 12 months, and confinement for 12 months. Officers may not be confined at SPCMs. No soldier can receive a discharge at a SPCM that is *not* empowered to adjudge a Bad-Conduct Discharge.

Special courts-martial have power:

- a. To try commissioned officers, warrant officers, and enlisted members of the active militia.
- b. To adjudge any punishment authorized for a special court-martial handling analogous charges under the Uniform Code of Military Justice and the federal Manual for Courts-Martial, but in no case more than 180 days in confinement.

3. General Courts-Martial (GCMs): A GCM is the highest level of military trial. It normally is reserved for the most serious criminal offenses. No soldier may be tried at a GCM unless either an Article 32 Investigation or its substantial equivalent is conducted, or the soldier waives the investigation.

General courts-martial have power:

- a. To try commissioned officers, warrant officers, and enlisted members of the active militia.
- b. To adjudge:
 - (1) Dismissal, in the case of a commissioned or warrant officer.
 - (2) Dishonorable discharge, in the case of an enlisted member.
 - (3) Any other punishment authorized for a special court-martial handling analogous charges under the Uniform Code of Military Justice and the federal Manual for Courts-Martial, including, but not limited to, up to one year in confinement.

D. Preferral of Charges: Once the decision to prefer charges has been made (following the conduct of a commander's inquiry), the commander should immediately consult his Command Judge Advocate. The issues discussed below will help ensure the quick and efficient preferral of charges.

1. Charge Sheet: The charge sheet should correctly identify the accused's personal information in blocks 1-8. This information should be compared to the accused's personal information on his DA Form 2-1 and ERB or ORB, as appropriate. The charges and specifications should correctly allege offenses under the California Military and Veteran's Code.

2. Flags: Commanders should ensure that Flags are initiated against soldiers against whom courts-martial charges have been preferred. (In most instances, it is proper to Flag soldiers once they are under investigation for the commission of a UCMJ offense; the Command Judge Advocate should be consulted regarding the propriety of initiating a Flag on a soldier). Once initiated, this Flag should remain in place until final disposition of the case, or until charges against the soldier have been dismissed or otherwise resolved. Flags are discussed in more detail in Chapter IX of this Guide.

3. Informing the Accused: Whenever possible, preferral of charges should be done in the presence of the accused soldier and his immediate chain of command. It is accomplished by swearing in of the soldier who prefers the charges, followed by the completion of administrative data on the face of the charge sheet. The accused should be provided a copy of the signed charge sheet after preferral, and arrangements should be made to afford him or her an opportunity to consult with defense counsel as soon as possible after preferral.

4. Transmittal of Charges: Company commanders who prefer charges should promptly forward the charges and all accompanying documents to the next commander in the accused's chain of command. Legal specialists normally will prepare memoranda of transmittal for the different-level commanders' signatures.

5. Review of Pretrial Restraint: Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. The Adjunct General of California, the Commander of the California National Guard, and the Commander of the California Air National Guard are the only people authorized to order pretrial confinement for a California National Guard member facing trial by a court-martial.

E. Article 32 Investigations: No case may be referred to a GCM unless an investigation under UCMJ, Article 32 is conducted, or the accused waives it. Article 32 Investigations are governed by Rule for Courts-Martial 405 and DA PAM 27-17.

1. Appointment of Article 32 Investigating Officer (IO): The SPCMCA (Brigade Commander) normally appoints the Article 32 IO. This IO must convene a hearing, at which the accused soldier, his or her defense counsel, and Government prosecutors are present. The IO will inquire into the truth of the matters contained in the charges, and recommend a

disposition for the case. The IO should consider the conduct of the investigation his or her primary duties until it is completed. The IO uses DA PAM 27-17 as a procedural guide in conducting the investigation. An impartial legal advisor will assist the IO in resolving issues arising during the conduct of his or her investigation.

2. Conduct of Article 32 Investigation: The IO, Government, and Defense are entitled to produce, examine, and cross-examine witnesses, subject to some limitations. Documents and other evidence also may be introduced by either side, subject to certain limitations. Based upon information developed during the investigation, the IO prepares a report of his or her findings and recommendations for the consideration of the SPCMCA. Either summarized or verbatim transcripts of the proceedings will be prepared. The SPCMCA normally is the decision authority regarding whether verbatim transcripts will be prepared.

3. Procedures Following Investigation: Based upon information developed during the investigation and the IO's findings and recommendations, the SPCMCA may decide to forward the case with a recommendation for trial by GCM or BCD SPCM; refer the case to a SCM or SPCM; to impose NJP; to take administrative action against the accused; or to dismiss the charges without further action against the accused.

F. Disposition of Charges: In determining whether to forward charges to a higher level commander, to refer them to trial, or to take any other action, commanders should consider the following non-inclusive criteria:

1. Correctness of Charges: Commanders should ensure that the preferred charges allege an offense under the UCMJ. Command Judge Advocates will assist in preparing and reviewing charge sheets to ensure charges are in the correct form.

2. Evidence Supporting Allegations: At court-martial, the Government must prove each element of a charged UCMJ offense. Sufficient evidence must exist to support the allegations and prove each element of the offense. However, charges may be preferred and/or forwarded to higher-level convening authorities pending the outcome of lab tests or the receipt of supporting evidence.

3. Individual Soldier's Background and Performance: Commanders should inform themselves regarding an accused soldier's background, history of duty performance and discipline, and potential for rehabilitation and continued service in the California National Guard.

4. Victims: Commanders should ensure that all victims of alleged misconduct are in contact with the unit's victim advocate.

Chapter Seven. Pretrial Restraint and Confinement

REFERENCES:

Manual for Courts-Martial, 2008 Edition

Manual for Courts-Martial California, 2007 Edition

AR 27-10, Military Justice, dtd 16 November 2005

AR 190-47, Army Corrections System, dtd 15 June 2006

A. Overview: *Pretrial restraint and confinement is not a tool for punishment, and may not be used as a form of punishment.* Its primary purpose is either to ensure the presence of an accused at trial or to contain a soldier who is a danger to his or herself, or others. It may be administered against soldiers who are deemed flight risks, or who otherwise foreseeably may commit misconduct pending the disposition of their cases.

1. Difference Between Restraint and Confinement: Pretrial restraint constitutes the imposition of certain limits on a soldier's freedom of movement, short of physical restraint. Pretrial confinement deprives a soldier of his or her freedom, pending disposition of the offenses.

2. Significance: *Commanders must keep their Command Judge Advocate informed regarding any restriction they place on soldiers who are under investigation for courts-martial offenses.* A command's imposition of pretrial restraint or confinement against an accused soldier starts the Government's "speedy trial" clock in court-martial cases in which charges have not yet been preferred.

3. "Speedy Trial Clock": The "speedy trial" rule requires that the Government accused soldiers bring to trial within *120 days* (excluding certain authorized periods of delay) of the preferral of charges or imposition of restraint, *whichever is earlier*. If the Government does not do so, court-martial charges against the accused potentially can be dismissed, barring further prosecution of the accused for his or her offenses.

4. Effects of Misuse of Pretrial Restraint and Confinement: Commanders should ensure that they impose the least restrictive form of restraint on a soldier possible, consistent with ensuring his or her presence at court-martial. This is consistent with the notion that accused soldiers are innocent until proven guilty at their courts-martial. Additionally, the improper imposition of such restrictions may entitle the accused to receive day-for-day, or more than day-for-day, credit against any sentence to confinement that he or she receives at the court-martial.

B. Types of Pretrial Restraint: Rule for Courts-Martial (RCM) 304 details four types of pretrial restraint imposed on a soldier. One of these, *pretrial confinement*, is discussed further in subparagraph C, below.

1. Conditions on Liberty: This is the least restrictive form of restraint. It may be imposed separately or in conjunction with other restraint. It is an order directing a soldier to do, or refrain from doing, specified acts. Normally, the mere imposition of conditions on liberty do not trigger the Government's "speedy trial" clock. Whenever possible, these orders should be reduced to writing, and a copy given to the soldier. Examples include the following:

- a. Requirements to report periodically to the CQ;
- b. Orders to refrain from going certain places (*e.g.*, the scene of the alleged offense); and
- c. Orders not to contact certain persons ("No Contact Orders") (*e.g.*, alleged victims or potential witnesses).

2. Restriction: This is a more severe form of restraint, consisting of orders directing the soldier to remain within certain specified limits (as opposed to remaining away from certain places, such as a crime scene). Soldiers placed on restriction normally should perform full military duties. The mere withdrawal of pass privileges normally does not constitute "restriction." Violations of legally-imposed restrictions are separately punishable under Article 134, UCMJ, as breaking restriction. As with conditions on liberty, orders restricting a soldier's movement should be reduced to writing, and a copy provided to the soldier. Examples include the following:

- a. Restriction to the limits of the military installation; and
- b. Restriction to the barracks, dining facility, place of worship, and place of duty.

3. Arrest: Arrest is an order to remain within specified limits. Soldiers under "arrest" normally do not perform full military duties. Soldiers in arrest status may not exercise command, bear arms, perform guard duty or perform other duties inconsistent with the status of arrest.

C. Pretrial Confinement: Pretrial confinement is physical restraint depriving a soldier of freedom pending the disposition of his or her offenses. It is the most severe form of restraint, and normally is served in an authorized confinement facility. *Soldiers in pretrial confinement who later are convicted at court-martial of the offense(s) for which they were confined will receive day-for-day credit against their court-martial sentence to confinement.*

1. **Servicing Confinement Facilities:** Contact the resident MP Brigade to determine the location of confinement facilities.
2. **Decision and Standard for Confinement:** A soldier's immediate commander normally decides whether to place a soldier in confinement. The person ordering confinement must have a reasonable belief of the following:
 - a. The accused committed a court-martial offense;
 - b. Lesser forms of restraint are inadequate; *and*
 - c. Confinement is necessary because *either*:
 - (1) The accused is a flight risk; *or*
 - (2) It is foreseeable that the accused will engage in serious criminal misconduct.
3. **Consideration of Lesser Forms of Restraint:** The commander ordering pretrial confinement must always consider whether lesser forms of restraint will be adequate to prevent the occurrences in subparagraphs (1) & (2), above. However, there is no need to actually *try* lesser forms of restraint and fail, before imposing pretrial confinement. Nevertheless, decisions to impose pretrial confinement will be reviewed by a Military Magistrate within 48 hours of the imposition of confinement, in order to determine if continued confinement is warranted.
4. **Confinement Policy:** Because the confinement is ordered by the State of California, the confinement facility will be a California county jail, such as the Santa Ana Jail. The Command Judge Advocate will assist with the confinement process.
5. **Military Magistrate's Review of Pretrial Confinement:** Within 48 hours of the placing of a soldier in pretrial confinement, a Military Magistrate must review the adequacy of the probable cause to believe the soldier committed the charged offense and the necessity for continued confinement. The soldier and his or her defense counsel may appear at this hearing, when practicable. A Command Judge Advocate and a member of the soldier's command also will appear before the Magistrate.
6. **Required Monthly Visits to Confinee:** Commanders, another officer, or an NCO in the chain of command must visit confinees in the confinement facility at least once each month.

Form 7-1

CHECKLIST FOR PRETRIAL CONFINEMENT			
For use of this form, as AR 27-10; the proponent agency is OTJAG			
NAME		GRADE	UNIT
AGE	ETS		TOTAL SERVICE TO DATE
MARRIED ___ YES ___ NO	WIFE/HUSBAND IN LOCAL AREA ___ YES ___ NO		NUMBER OF CHILDREN ___ 1 ___ 2 ___ 3 ___ OTHER <i>(Specify)</i>
NUMBER OF ARTICLE 15's:			
	DATE	OFFENSE	PUNISHMENT
NUMBER OF PREVIOUS CONVICTIONS:			
TYPE OF COURT	DATE	ARTICLE	PUNISHMENT
NUMBER OF PRESENT OFFENSES:			
ARTICLE	DATE	DESCRIPTION OF OFFENSE <i>(if AWDL, from-to, etc., and whether surrendered or apprehended)</i>	
<p>PRETRIAL CONFINEMENT IS APPROPRIATE BECAUSE:</p> <p><i>s. There is probable cause to believe an offense has been committed by the accused. (List specific reasons why it is believed an offense has been committed by the accused.)</i></p>			

b. To ensure the accused's presence at trial, pretrial hearing or investigation. *(List specific reasons why it is believed the accused may not be present and summarize the conduct of the accused which warrants pretrial confinement and tends to indicate the accused is not likely to be available for trial, pretrial hearing or investigation.)*

c. To prevent foreseeable serious criminal misconduct including any efforts at obstructing justice. *(List specific reasons why it is believed the accused may commit acts of serious criminal misconduct if not incarcerated, particularly if these acts pose a threat to others, the command or national security, and summarize the conduct of the accused which warrants pretrial confinement and tends to indicate the accused may commit future acts of serious criminal misconduct.)*

d. Lesser forms of restraint are inadequate. *(List the alternatives that have proven inadequate or summarize the reasons why it is believed such alternatives would be inadequate.)*

DATE (YYYYMMDD)	TYPED NAME, RANK, AND ORGANIZATION OF COMMANDER	SIGNATURE
DECISION OF MILITARY MAGISTRATE		
TO: <i>(Addressee(s))</i>		
<p>On _____, I reviewed the circumstances concerning the continued pretrial confinement of <i>(Date) (YYYYMMDD)</i></p> <p>_____. Based upon this review, I: <i>(Check appropriate statement)</i></p> <p>_____ <i>(Name)</i></p> <p>_____ Determined that continued pretrial confinement is warranted.</p> <p>_____ Determined that continued pretrial confinement is not warranted and order his/her release from pretrial confinement.</p>		
TYPED NAME, GRADE, AND BRANCH OF MILITARY MAGISTRATE		SIGNATURE

Form 7-2

CONFINEMENT ORDER				
1. PERSON TO BE CONFINED				2. DATE (YYYYMMDD)
a. NAME (Last, First, Middle)			b. SSN	
c. BRANCH OF SERVICE	d. GRADE	e. MILITARY ORGANIZATION (From):		
TYPE OF CONFINEMENT				
3.a. PRE-TRIAL		<input type="checkbox"/> NO	<input type="checkbox"/> YES	b. RESULT OF NJP
		<input type="checkbox"/> NO	<input type="checkbox"/> YES	<input type="checkbox"/> NO
		<input type="checkbox"/> YES		
c. RESULT OF COURT MARTIAL:				
TYPE: <input type="checkbox"/> SCM <input type="checkbox"/> SPCM <input type="checkbox"/> GCM <input type="checkbox"/> VACATED SUSPENSION				
d. DNA PROCESSING <input type="checkbox"/> IS <input type="checkbox"/> IS NOT REQUIRED UNDER 10 U.S.C. 1565.				
4. OFFENSES/CHARGES OF UCMJ ARTICLES VIOLATED:				
5. SENTENCE ADJUDGED:				b. ADJUDGED DATE (YYYYMMDD):
6. IF THE SENTENCE IS DEFERRED, THE DATE DEFERMENT IS TERMINATED:				
PERSON DIRECTING CONFINEMENT				
a. TYPED NAME, GRADE AND TITLE:		b. SIGNATURE		c. DATE (YYYYMMDD)
				d. TIME
8.a. NAME, GRADE, TITLE OF LEGAL REVIEW AND APPROVAL		b. SIGNATURE:		c. DATE (YYYYMMDD)
MEDICAL CERTIFICATE				
9a. The above named inmate was examined by me at _____ on _____ and found to be <input type="checkbox"/> Fit <input type="checkbox"/> Unfit <small>(Time) (YYYYMMDD)</small> for confinement. I certify that from this examination the execution of the foregoing sentence to confinement <input type="checkbox"/> will <input type="checkbox"/> will not produce serious injury to the inmate's health.				
b. The following irregularities were noted during the examination (if none, so state):				
c. HIV Test administered on (YYYYMMDD): _____				
d. Pregnancy test administered on (YYYYMMDD): _____ <input type="checkbox"/> N/A				
EXAMINER				
a. TYPED NAME, GRADE AND TITLE:		b. SIGNATURE		c. DATE (YYYYMMDD)
				d. TIME
RECEIPT FOR INMATE				
11.a. THE INMATE NAMED ABOVE HAS BEEN RECEIVED FOR CONFINEMENT AT: _____ <small>(Facility Name and Location)</small> ON _____ AND TIME: _____ <small>(YYYYMMDD) (Time)</small>				
b. PERSON RECEIPTING FOR INMATE TYPED NAME, GRADE AND TITLE:		c. SIGNATURE:		d. DATE (YYYYMMDD)
				e. TIME

Chapter Eight. Search and Seizure, and Inspections

REFERENCES:

Manual for Courts-Martial, 2008 Edition

AR 27-10, Military Justice, dtd 16 November 2005

Military Rules of Evidence, Rule 313

A. Overview: *Because searches of soldiers and personal places generally are an invasion of individual privacy, commanders should contact their Command Judge Advocate before initiating any search for evidence of a crime. Evidence obtained during an illegal search is not admissible at a court-martial, in Article 15 proceedings or in administrative separation proceedings.*

B. Difference between Searches and Inspections:

1. Searches: Searches of a person, place, or thing are conducted to obtain evidence of a crime. Searches generally must be based on one of three grounds:

a. *Consent* of a soldier authorized to provide consent (discussed in subparagraphs C6 & E, below);

b. *“Probable cause,”* and the proper authorization of a commander or Military Magistrate or Judge (discussed in subparagraphs C1 & F, below); or

c. *Exigencies* (*i.e.*, time constraints, due to a rapidly-changing situation, that prohibit obtaining authorization from a commander or magistrate) (*e.g.*, hot pursuit into the barracks room occupied by a soldier who is suspected of just having stolen something that he or she can destroy or get rid of, before proper authorization is obtained).

2. Inspections: Inspections and inventories are conducted for administrative purposes, such as the preservation of health, morale, welfare or readiness. Unlike searches, inspections are not conducted to obtain evidence for the specific purpose of using it as evidence in criminal proceedings. In many situations, however, contraband seized during an inspection may be used in later criminal proceedings. Inspections are discussed in more detail in subparagraph J, below.

C. Key Principles in Search and Seizure

1. Probable Cause: “Probable cause” to conduct a search exists when there are *reasonable grounds* to believe evidence of a crime is located in the place or on the person to be searched. Probable cause must be based on *specific facts* that would lead a *reasonable person* to believe that the evidence is located where it is suspected to be.

2. Rights Warnings: Rights warnings (also known as Article 31, UCMJ warnings) are warnings provided to a person suspected of having committed a crime (*e.g.*, the right to remain silent).

3. Common Areas: Common areas are areas of a room, building or other area not personally “owned” or occupied by any one individual. There is community ownership, occupation or use in this area (*e.g.*, a barracks bathroom serving four soldiers, or a Team Room).

4. Scope of a Search: The “scope” of a search is the extent to which a person, place or thing properly may be searched, depending on the circumstances. (For instance, if there is probable cause to believe that a stolen rifle is located in a barracks room, it is unreasonable to open small jewelry boxes in the course of the search for the weapon). Exceeding the “scope” of a legal search may render evidence of a crime inadmissible in future criminal proceedings.

5. Authorization to Search: Authorization to conduct a search may be provided *either* by a *commander of at least a company-sized element* who has ownership or control over a person, place or thing, *or* by a Military Magistrate or Judge, who can issue a *search warrant*. Proper authorization depends on the existence of “probable cause,” as determined by the person authorizing the search.

6. Consent: Consent to allow a search may be granted by the person to be searched, or by the person with an ownership or other privacy interest in the place or thing to be searched (*e.g.*, a soldier who uses a dresser in a barracks room for his personal use). Consent to search is not valid if it is *coerced* by someone in a position of authority over the person who consents.

7. Plain View: Objects in “plain view” are those that are exposed for anyone to see. They may be seized as evidence of a crime, provided that the person seizing them is on the premises lawfully, and he has probable cause to believe they are evidence of a crime.

D. Searches: The type of search to conduct depends on the situation. When commanders believe that evidence of a crime will be found, *they should always attempt to obtain consent to search*. If consent cannot be obtained or is not granted, they may still conduct a search based on “probable cause,” after obtaining authorization from proper authorities.

E. “Consent” Searches: These are always the best option. Consent searches do not have to be based on “probable cause” to believe that evidence of a crime will be found. All that is required is valid consent from a person authorized to provide it. Commanders should take the following actions in conducting a “consent” search:

- 1. Do not Coerce the Soldier:** Ask for consent to search for the particular item(s) you are looking for, and tell the soldier that he or she does not have to provide it. Do not threaten the soldier or advise him or her of the consequences if consent is not provided, however (*e.g.*, do not suggest that “If you don’t let me search for the weapon, I’ll just go get the commander’s authorization/you’ll just get written up/I’ll search anyway.”).
- 2. Rights Warnings are not Required:** Valid consent by a soldier removes the need to advise him or her the right to remain silent.
- 3. Barracks Rooms:** Soldiers generally have a limited right to privacy regarding their barracks rooms. However, they may consent to a search of either areas of those rooms that they *personally and only* use (*e.g.*, their own personal computers, dresser drawers, or closets) or that are common areas.
- 4. Common Areas:** Consent from at least one person with an ownership interest in a room is sufficient to search the common areas (but not personal areas) of the entire room. For instance, a soldier-roommate may not consent to the search of his or her roommate’s dresser drawers, personal closet or computer; he or she *may* consent to a search of the shared areas of the room, however.
- 5. Scope of a Search:** If the soldier only consents to searches of *certain areas or things*, only those areas or things are subject to a *consent* search. If the command wishes to search other areas or things to which the soldier has not consented, the search must be based on “probable cause.”
- 6. Soldiers May Withdraw Consent at any Time Prior to Discovery of the Evidence:** Prior to the completion of a consent search, the soldier has the right to withdraw his or her consent to the search, either verbally or in writing. When this happens, all search attempts should immediately cease. Any further search must be based on “probable cause.” The area to be searched may be secured, however, pending the receipt of a valid search authorization.

F. Search Based on Probable Cause: “Probable cause” searches require *both* a reasonable belief that evidence of a crime will be found where searched (this is “probable cause”) *and* authorization from someone who properly may grant the request to search. When determining whether “probable cause” exists, consider the following three factors:

- 1. Tips and Rumors:** Consider the reliability and trustworthiness of

the source. Details should be corroborated, when possible.

2. Eyewitnesses and First-Hand Knowledge: Consider the reliability and trustworthiness of the source. How specific is the description of what was observed?

3. Type of Evidence to be Searched For: Consider the likelihood that the evidence is still there. For instance, there *may* not be “probable cause” to search a room, where an eyewitness states that he or she saw a single marijuana joint in that room two weeks ago.

In addition, *authorization* to search must be granted. Company commanders are the lowest level of commander who may authorize the search of a person, place, or thing. Commanders who may authorize the search must adhere to the following principles:

4. Authority Over the Person, Place or Thing: Commanders must be signed for or exercise control over the place or thing to be searched. For instance, a commander can authorize the search of a barracks room for which he or she is signed. A commander cannot, however, authorize the search of a barracks room on the property books of another commander.

a. When in Doubt, Move Up: If there is any doubt as to the ownership or control over a place or thing to be searched, it is advisable to obtain authorization from the next-higher commander. For instance, when two company commanders are in doubt as to who has control over a barracks building, they may obtain proper authorization from the battalion, or even the group, commander.

b. Shared Control Over an Area: In some circumstances, commanders jointly exercise control over an area to be searched (*e.g.*, cars in a parking lot that is shared by two battalions). In these circumstances, it may be possible to obtain authorization from *either* commander to search. However, the better course of action is to obtain authorization from the *next-higher* commander having control over that area.

5. No Delegation of Authority: Commanders may not delegate authority to authorize searches (*e.g.*, to the Executive Officer or to ODA commanders). But, “acting commanders” may authorize a search.

6. Commanders Should Not Conduct or Orchestrate the Search: A commander, after authorizing a search, should allow law enforcement or other military personnel from his or her unit to conduct the search.

G. Searches Based on a Search Warrant: When it is impossible to obtain authorization from a commander empowered to authorize a search, or when the facts are questionable as to whether “probable cause” exists, Military Magistrates or

Military Judges may grant search warrants in appropriate cases. Search warrants, like other authorized searches, are based on “probable cause.” The analysis of what constitutes “probable cause” is the same as discussed in the previous section – *a reasonable belief, based on specific facts, that the evidence to be searched for will be found where searched.*

1. Procedure for Obtaining Search Warrants: AR 27-10, chap 9, sec III, governs procedures for obtaining search warrants. Group Judge Advocates play a key role in obtaining search warrants from Military Magistrates. The Magistrates must obtain sufficient credible evidence from the command that they are satisfied that “probable cause” exists. Each military installation has one or more appointed Military Magistrates. Commanders should consult their Group Judge Advocates when the need for a Military Magistrate arises.

2. Procedures After Obtaining a Search Warrant: AR 27-10, chap 9, governs procedures for conducting searches based on a warrant. In general, the warrant will instruct those conducting the search regarding the *scope* of the search, and the proper disposition of any items seized.

H. Exigencies Removing the Ability to Obtain Authorization: In rare instances, it may not be possible to obtain authorization to conduct a search, and consent from a soldier cannot be obtained. These situations most likely occur in the context of “hot pursuit” of a suspected criminal, or where it is probable that evidence of a crime will disappear or be destroyed before proper authorization can be obtained (*e.g.*, a CQ smells marijuana coming from a barracks room). In these situations, a search may be conducted, as long as “probable cause” exists.

I. Searches of Government Property: Government property used by soldiers, *and in which they have no reasonable privacy expectation*, may be searched without probable cause or consent. Examples of such places include office desks, government vehicles, and toolboxes. However, other items of government property, such as footlockers and wall lockers, often are used for storage of soldiers’ personal belongings. These items may not be searched without consent or proper authorization.

J. Inspections: Commanders have an inherent right to inspect their soldiers, and the barracks and equipment used by their soldiers, to ensure the health, morale, readiness, and welfare of the soldiers. As long as the primary purpose of the inspection is to maintain these standards, contraband seized during an inspection is admissible against a soldier in future criminal, NJP, or administrative proceedings.

1. “Primary Purpose”: Inspections cannot be conducted as a *pretext* for the search for evidence of a crime. In determining whether an inspection was merely a *pretext* for an otherwise unauthorized search, military courts will consider the following circumstances, among others:

- a. **Timing of Inspection:** Whether the inspection was directed immediately following the report of a crime involving a particular soldier;
- b. **Targeting of Specific People or Places:** Whether only certain persons or places were selected or targeted for inspection; and
- c. **Method of Inspection:** Whether different soldiers were subjected to substantially different or more detailed inspections.

For instance, a commander who believes that a particular soldier has drugs stored in his wall locker should conduct a consent or a “probable cause” *search* of that soldier’s locker; the commander should not immediately “inspect” the entire unit, fully expecting to discover drugs in that particular soldier’s locker.

Similarly, a commander who believes that one of his other soldiers recently used drugs should *not* immediately order a urinalysis inspection of the entire company; the commander should conduct a “probable cause” urinalysis of that particular soldier (*see* Chapter VIII of this Guide), if the soldier does not consent to provide a urine sample.

2. Evidence Seized During an Improper Inspection: Commanders who conduct an improper inspection, targeting a particular soldier or soldiers, may still seize any evidence of a crime that they discover. However, this evidence likely will not be admissible in proceedings against the soldier.

3. Drug Inspections in Barracks: Installation Provost Marshall Offices have narcotics detector dog units available for the use of commanders in conducting health and welfare inspections of their units. Commanders wishing to coordinate inspections using these resources should contact their Group Judge Advocates to arrange for them.

K. Safeguarding Evidence of a Crime: Commanders should ensure that any evidence of a crime seized during an inspection or search is safeguarded. As few persons as possible should handle the evidence, and the evidence should be turned over to proper military law enforcement authorities as soon as possible after it is seized.

Chapter Nine. Statements and Confessions

REFERENCES:

Manual for Courts-Martial, 2008 Edition

A. Overview: *Like evidence obtained from illegal searches and seizures (discussed in Chapter VI, above), incriminating statements and confessions taken from soldiers who have not been provided proper rights warnings generally are inadmissible against the soldiers. For this reason, commanders should always consult their Command Judge Advocate when contemplating taking a statement from a soldier suspected or accused of committing a crime.*

B. Right Against Self-Incrimination: Article 31(b) of the UCMJ and the Fifth Amendment of the U.S. Constitution protect soldiers from being forced to incriminate themselves. This right against self-incrimination bars the *coercion* of incriminating statements from soldiers, but not the use of *free and voluntary* statements that soldiers make.

C. Article 31(b), UCMJ: Article 31(b) of the UCMJ requires that soldiers suspected or accused of committing a crime be informed of their right against self-incrimination before any *official questioning* takes place. For purposes of this rule, the following four issues are important:

1. **When Rights Warnings must be Given;**
2. **Who must be Warned;**
3. **Who must Give Rights Warnings; and**
4. **Contents of the Rights Warning.**

D. When Rights Warnings Must be Given: Warnings must be given to a soldier suspected or *accused* of committing a crime (*see* subparagraph E, below) before he or she is *asked or instructed* to make a *statement*. “Statements,” for this purpose, include either written or verbal statements.

1. Exception - Passive Listening: Rights warnings generally do not have to be given by persons who only *listen* to what a suspect or accused soldier says. For instance, there is no need to provide rights warnings to a soldier who voluntarily and spontaneously admits to a crime, as long as the person who receives the information does not question him or her, or otherwise do something that would reasonably be expected to produce an incriminating statement.

2. Cleansing Warnings: Often, soldiers make incriminating statements in situations in which they should have been initially read their

rights. This information is then used as the basis for further questioning of the soldiers at a later time. Both the initial incriminating statement and any other statement the soldiers make potentially may be excluded as evidence in later criminal proceedings.

a. In these situations, soldiers must be provided “cleansing warnings.” These warnings should contain all of the information referenced in subparagraph G3, below, but should be prefaced with the following statement:

b. *“You previously made a statement to _____ without the benefit of a rights warning under Article 31(b) of the UCMJ. This statement incriminated you in the offense of _____. That statement may not be admissible against you in criminal proceedings under the UCMJ. As a result of your prior incriminating statement, you are not obligated to answer any further questions, after properly being advised of your Article 31(b) rights.”*

E. Who must be Warned: Soldiers *suspected or accused* of committing a crime must be warned that they are suspected or accused of committing a crime. Determining who reasonably should be considered a “suspect,” for this purpose, depends on the circumstances surrounding the known or suspected crime, and the soldier’s suspected role in the crime. The following are some examples:

1. A soldier’s First Sergeant asks the soldier if everything is alright, because the soldier appears troubled by something. The soldier replies that he “needs to go to jail,” because he just stole from his roommate. The First Sergeant was not required to provide a rights warning, because his question was motivated only out of concern for the soldier’s welfare, and was not based upon a suspicion that the soldier had committed a crime. (However, once the soldier makes the incriminating statement, the First Sergeant must preface any *further* questioning of the soldier with a rights warning).

2. A soldier tells his First Sergeant that she could not make an earlier formation because she had car trouble. The First Sergeant knows, however, that the soldier did not have car trouble, but overslept. The First Sergeant should provide the soldier a rights warning before questioning the soldier any further on this subject, based on his belief that the soldier has lied to him.

3. During an AR 15-6 investigation into the theft of a weapon, the Investigating Officer (IO) asks a soldier *whom she does not suspect of larceny* or wrongdoing some general questions regarding the last time the soldier saw the weapon. The soldier states that he never saw the weapon. However, based on the statements of other soldiers who saw him with the weapon, the IO believes that this is not true. *At this point, the IO should provide the soldier a rights warning because she is now aware of facts indicating that the soldier has made a false statement..*

F. Who Must Give Rights Warnings: Persons who are *subject to the CMVC*, and who hold a *position of authority* over a soldier whom they *suspect has committed a crime*, must provide rights warnings when they question the soldier in an *official capacity*. For this purpose, “positions of authority” include, but are not limited to, personnel performing the functions of, or serving as agents of, law enforcement or investigative authorities; and soldiers senior in rank or higher in position to the soldier being questioned. The following is an example:

A Team Sergeant asks a junior member of his team whom he believes had stolen a weapon from the arms room whether or not he took the weapon. Rights warning should be given: the Team Sergeant *suspects* the junior team member, and is *senior in rank, and higher in position, to the subordinate*.

G. Contents of the Rights Warning: The contents of rights warnings have been reproduced both on DA Form 3881 and Graphic Training Aid (GTA) 19-6-6, a card easily carried in a soldier’s wallet.

- 1. DA Form 3881:** Whenever possible, the form should be completed by the questioner and soldier to be questioned before initiating questioning of a suspect/accused.
- 2. Contents of Rights Warnings:** In the absence of use of DA Form 3881, rights warnings must inform the suspect/accused of:
 - a. The rank and duty position of the questioner;
 - b. The nature of the offenses the soldier is suspected of committing;
 - c. The right not to answer any questions or say anything;
 - d. The fact that anything the soldier says or does may be used as evidence against him or her in a criminal trial;
 - e. The right to speak to an attorney before, during, and after questioning, and to have an attorney present at questioning;
 - f. The right to have this attorney be a civilian, arranged for at no expense to the Government, or a military attorney detailed to the soldier at no expense to him or her; and
 - g. The right (if the soldier agrees) to waive his or her rights and discuss the offenses, to stop answering questions at any time, or to speak privately with an attorney before answering (even if the soldier initially waives his or her rights).

Furthermore, after the reading of these rights, the soldier should be asked the following two questions:

- h.** Whether he or she wants an attorney at this time; and, if not,
- i.** Whether he or she is willing to discuss the offense(s) of which he or she is suspected, and willing to make a statement without speaking to an attorney or having one present.

3. Tips in Taking a Written or Verbal Statement:

- a.** Where possible, a trained investigator should question soldiers suspected of committing serious offenses.
- b.** Have a witness (in addition to the questioner) present during the reading of the rights and questioning of the suspect/accused.
- c.** Complete DA Form 3881 as soon as possible, when only verbal rights warnings initially were given to the suspect/accused.
- d.** Stop all questioning if the suspect/accused changes his or her mind and says he or she wants an attorney.
- e.** Sworn, written statements should be taken on DA Form 2823, whenever possible.

Form 9-1

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE <small>For use of this form, see AR 190-30; the proponent agency is ODCSOPS</small>			
DATA REQUIRED BY THE PRIVACY ACT			
AUTHORITY:		Title 10, United States Code, Section 3012(g)	
PRINCIPAL PURPOSE:		To provide commanders and law enforcement officials with means by which information may be accurately identified.	
ROUTINE USES:		Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.	
DISCLOSURE:		Disclosure of your Social Security Number is voluntary.	
1. LOCATION	2. DATE	3. TIME	4. FILE NO.
5. NAME <i>(Last, First, MI)</i>		8. ORGANIZATION OR ADDRESS	
6. SSN	7. GRADE/STATUS		
PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE			
Section A. Rights			
<p>The investigator whose name appears below told me that he/she is with the United States Army _____ and wanted to question me about the following offense(s) of which I am suspected/accused: _____</p> <p>Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:</p> <ol style="list-style-type: none"> I do not have to answer any question or say anything. Anything I say or do can be used as evidence against me in a criminal trial. <i>For personnel subject to the UCMJ</i> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both. - or - <i>For civilians not subject to the UCMJ</i> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below. 			
5. COMMENTS <i>(Continue on reverse side)</i>			
Section B. Waiver			
I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.			
WITNESSES <i>(if available)</i>		3. SIGNATURE OF INTERVIEWEE	
1a. NAME <i>(Type or Print)</i>			
b. ORGANIZATION OR ADDRESS AND PHONE			
2a. NAME <i>(Type or Print)</i>	4. SIGNATURE OF INVESTIGATOR		
b. ORGANIZATION OR ADDRESS AND PHONE	5. TYPED NAME OF INVESTIGATOR		
		6. ORGANIZATION OF INVESTIGATOR	
Section C. Non-waiver			
1. I do not want to give up my rights <input type="checkbox"/> I want a lawyer <input type="checkbox"/> I do not want to be questioned or say anything			
2. SIGNATURE OF INTERVIEWEE			
ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT <i>(DA FORM 2823)</i> SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED			

PART II - RIGHTS WARNING PROCEDURE	
THE WARNING	
<p>1. WARNING - Inform the suspect/accused of:</p> <ul style="list-style-type: none"> a. Your official position. b. Nature of offense(s). c. The fact that he/she is a suspect/accused. <p>2. RIGHTS - Advise the suspect/accused of his/her rights as follows: "Before I ask you any questions, you must understand your rights." <ul style="list-style-type: none"> a. "You do not have to answer my questions or say anything." b. "Anything you say or do can be used as evidence against you in a criminal trial." c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer </p>	<p>can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both." - or - <i>(For civilians not subject to the UCMJ)</i> You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins." <ul style="list-style-type: none"> d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate." <p>Make certain the suspect/accused fully understands his/her rights.</p> </p>
THE WAIVER	
<p>"Do you understand your rights?" (If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)</p> <p>"Have you ever requested a lawyer after being read your rights?" (If the suspect/accused says "yes," find out when and where. If the request was recent (<i>i.e.</i>, fewer than 30 days ago), obtain legal advice whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)</p>	<p>"Do you want a lawyer at this time?" (If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)</p> <p>"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" <i>(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)</i></p>
SPECIAL INSTRUCTIONS	
<p>WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.</p> <p>IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.</p> <p>PRIOR INCRIMINATING STATEMENTS:</p> <ul style="list-style-type: none"> 1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions. 	<ul style="list-style-type: none"> 2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal. <p>NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.</p> <p>WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS: If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")</p>
COMMENTS <i>(Continued)</i>	

Form 9-2

SWORN STATEMENT			
For use of this form, see AR 190-45; the proponent agency is PMG.			
PRIVACY ACT STATEMENT			
AUTHORITY:	Title 10, USC Section 301; Title 5, USC Section 2951; E.O. 9397 Social Security Number (SSN).		
PRINCIPAL PURPOSE:	To document potential criminal activity involving the U.S. Army, and to allow Army officials to maintain discipline, law and order through investigation of complaints and incidents.		
ROUTINE USES:	Information provided may be further disclosed to federal, state, local, and foreign government law enforcement agencies, prosecutors, courts, child protective services, victims, witnesses, the Department of Veterans Affairs, and the Office of Personnel Management. Information provided may be used for determinations regarding judicial or non-judicial punishment, other administrative disciplinary actions, security clearances, recruitment, retention, placement, and other personnel actions.		
DISCLOSURE:	Disclosure of your SSN and other information is voluntary.		
1. LOCATION	2. DATE (YYYYMMDD)	3. TIME	4. FILE NUMBER
5. LAST NAME, FIRST NAME, MIDDLE NAME	6. SSN	7. GRADE/STATUS	
8. ORGANIZATION OR ADDRESS			
9.			
I, _____, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:			
10. EXHIBIT	11. INITIALS OF PERSON MAKING STATEMENT		PAGE 1 OF _____ PAGES
ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____"			
THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT, AND PAGE NUMBER MUST BE INDICATED.			

USE THIS PAGE IF NEEDED. IF THIS PAGE IS NOT NEEDED, PLEASE PROCEED TO FINAL PAGE OF THIS FORM.

STATEMENT OF _____ TAKEN AT _____ DATED _____

9. STATEMENT *(Continued)*

INITIALS OF PERSON MAKING STATEMENT

PAGE OF PAGES

STATEMENT OF _____ TAKEN AT _____ DATED _____

9. STATEMENT (Continued)

AFFIDAVIT

I, _____, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1, AND ENDS ON PAGE _____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this _____ day of _____, _____ at _____

ORGANIZATION OR ADDRESS

(Signature of Person Administering Oath)

ORGANIZATION OR ADDRESS

(Typed Name of Person Administering Oath)

(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE OF PAGES

Chapter Ten.

Urinalysis, Drug and Alcohol Policies

REFERENCES:

Manual for Courts-Martial, 2008 Edition

AR 190-5, Motor Vehicle Traffic Supervision, dtd 22 May 2006

AR 600-8-24, Officer Transfers and Discharges, dtd 12 April 2006

AR 600-85, Army Substance Abuse Program (ASAP), dtd 2 February 2009

AR 135-178, Enlisted Administrative Separations, dtd 27 April 2010

A. Overview: Soldiers may be identified as possible drug or alcohol abusers in a number of ways, including voluntary self-referral to an installation's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP), urinalysis testing, breathalyzer testing, investigation, and apprehension. In response to verified cases of drug abuse, California National Guard policies require commanders to take certain actions. Commanders also may take other actions, at their discretion.

B. Inspections:

1. Purposes: Maintain soldiers' health and welfare or determine soldiers' fitness for duty.

a. Health and Welfare Inspection: There is no limitation on the use against a soldier of validly-obtained, positive drug test results.

(1) Must Be Random: Specific soldiers must not be *targeted* during the course of a urinalysis. These inspections must not be a *pretext* for an otherwise illegal search. *See* Chapter VI of this Guide for a discussion of proper searches and seizures.

(2) Coordinate through Unit Alcohol and Drug Coordinators (UADCs): Commanders should follow the procedures in AR 600-85 in coordinating Health and Welfare inspections with their UADCs.

b. "Fitness for Duty" Inspection: Must be based on a commander's *reasonable suspicion* that a soldier has used illegal drugs or alcohol. "Reasonable suspicion" to believe a soldier used illegal drugs or alcohol is a lower standard than "probable cause." *Positive test results of a "fitness for duty" inspection may be used only for limited purposes. They may NOT be used for:*

- (1) Courts-Martial or Article 15 Actions; or
- (2) Characterization of Soldier's Service (*e.g.*, Honorable, General, or Other Than Honorable) During Administrative Separation Proceedings.

C. Searches Based on Probable Cause:

1. **Purpose:** Obtain evidence of criminal misconduct (*i.e.*, illegal drug or alcohol use).
2. **"Probable Cause" Determination:** *See* Chapter Six of this Guide, regarding "probable cause" standard.
3. **Proper Authorization Required:** Either the soldier's commander (company-level or higher) or a Military Magistrate must authorize test based on probable cause.
4. **No Limitation on Use of Positive Drug or Alcohol Test Results:** *Compare* with results of "fitness for duty" inspections, in subparagraph B, above.

D. Medical Review Officers (MROs) – Cases of Positive Drug Test Results:

If soldiers test positive for the presence of drugs that could have resulted from the legal use of the substance, AR 600-85, paragraph 3-6, requires that a trained MRO evaluate the positive test results to determine if the drugs have a valid medical use. Commanders should ensure that in these cases, the required MRO evaluation is completed before forwarding the results for the issuance of a General Officer Memorandum of Reprimand (*see* subparagraph G, below) or otherwise taking adverse action against the soldier. Each installation's servicing military hospital will have one or more MROs who review such positive drug test results.

E. Rehabilitation and Treatment of Drug or Alcohol Abuse:

1. **Referral:** Referral of soldiers to a substance abuse program is appropriate when there is any reason to suspect an alcohol or drug problem. This includes Driving While Impaired convictions and other drug or alcohol incidents.
2. **Referral Procedures:** Commanders should follow the procedures contained in AR 600-85, para 3-7.
3. **Rehabilitation Tracks:** The California National Guard's rehabilitation program is based upon the degree of severity of the soldier's involvement with illegal substances. *See* AR 600-85, para 4-6.

4. Referral Does Not Necessarily Preclude Other Administrative or UCMJ Actions: Commanders contemplating initiation of adverse administrative or UCMJ actions against soldiers who exhibit alcohol or drug problems should consult their Group Judge Advocates and review their options.

F. Commanders' Actions Following Positive Urine Analysis:

1. Mandatory Initiation of Separation Actions: AR 135-178 requires that Commanders *process for separation*, in accordance with applicable regulations, soldiers who test positive on Urine Analysis test. ("Process for separation" means the initiation of separation action and processing of that action through the chain of command to the appropriate separation authority for a decision regarding whether to retain or separate the soldier).

2. Discretionary Actions:

a. Denial of Pass or Leave Privileges.

b. Prohibitions on the Consumption of Alcohol: This may be appropriate in cases of alcohol offenses.

c. Confiscation of Drug-Related Contraband.

G. Other Actions Following Substantiated Instances of Illegal Drug or Alcohol Use:

1. Issuance of General Officer Memorandum of Reprimand (GOMOR) – Alcohol Offenses: AR 190-5, para 2-7 requires the issuance of a GOMOR to officers and to NCOs in the grades of E-4 and above for the following offenses:

a. Conviction of Intoxicated Driving or Driving Under the Influence or Other Drugs;

b. Refusal to Take or Failure to Complete a Lawfully Requested Test to Measure Alcohol or Drug Content of the Blood, Breath, or Urine;

c. Driving or Being in Physical Control of a Motor Vehicle on Post When the Blood Alcohol Content (BAC) is 0.10 Percent or Higher, or Off-Post When the BAC Violates State Laws; and

d. Driving or Being in Physical Control of a Motor Vehicle When Lawfully Requested, Chemical Tests Reflect the Presence of Illegal Drugs.

SECTION IV

Adverse Administrative Actions

Chapter Eleven. Suspension of Favorable Personnel Actions (Flags)

REFERENCES:

AR 600-8-2, Suspension of Favorable Personnel Actions (Flags), dtd 23 December 2004

- A. Overview:** Flags *must be initiated immediately* when a soldier's status changes from favorable to unfavorable (*see* subparagraphs E & F, below). The flagging process is a personnel action, normally performed by unit personnel support centers. Nevertheless, it is a *command responsibility* to ensure that flags are initiated and removed IAW the guidance contained in AR 600-8-2. Flags are initiated on a DA Form 268.
- B. What Flags Prohibit:** With few exceptions, flags prohibit such actions as reassignment, promotion, the receipt of awards, attendance at civil or military schools, assumption of command, and retirement. Exceptions regarding flags initiated due to APFT failures and entry into the weight control program, reassignment of soldiers, advance or excess leave, resignation, and the receipt of awards are contained in AR 600-8-2, para 1-15.
- C. Effective Dates of Flags:** The effective date of a flag is the date *either* of the incident prompting the flag (*see* paragraphs E & F, below), or the date the commander initiates the flag, *whichever is earlier*. Thus, flags may be retroactive from the date that the flag paperwork actually is initiated.
- D. Categories of Flags:** Flags are categorized as either *transferable* or *non-transferable*. Transferable flags permit the moving of the flag to another unit, at the same time as the soldier moves. Non-transferable flags may not be moved to another unit, and thus preclude a flagged soldier's transfer to another unit, except in limited circumstances, as discussed below.
- E. Non-Transferable Flags:** These flags *must* be initiated (and lifted) against soldiers under the following circumstances:
- 1. Initiation of Investigations:** Lift the flag when the soldier is cleared without charges, charges are dropped, or punishment is completed.

2. **Initiation of Charges or Restraint:** Lift the flag when the soldier is released without charges, charges are dropped, or punishment is complete.
 3. **Initiation of Court-Martial Proceedings:** Remove the flag upon completion of punishment.
 4. **Initiation of Non-judicial Punishment:** Remove the flag upon completion of punishment, to include any term of suspension.
 5. **AWOL:** Remove the flag upon completion of any punishment imposed.
 6. **Administrative Reduction:** Remove the flag on the day of reduction.
 7. **Initiation of Letter of Reprimand, Admonition, or Censure, which is not Administered as Non-judicial Punishment:** Remove the flag upon completion of filing instructions. However, a flag for a soldier on a NGB promotion list (officer promotable to 03–06, warrant officers promotable to CW3–CW5, and enlisted soldiers promotable to E7–E9) who is flagged for one of these memorandums can only be removed by NGB (AHRC-Alexandria-MSP-S). Forward a copy of the initial DA Form 268 along with supporting documentation to NGB (AHRC-Alexandria-MSP-S).
 8. **Elimination Initiated at the Field (As Opposed to DA) Level:** Remove the flag when the soldier is reassigned to a transition point.
 9. **Removal from Promotion, Command, or School Selection List Initiated in the Field:** Remove the flag on the day NGB’s decision is received.
 10. **Referred Officer Evaluation Report When on a Promotion List:** Remove the flag when the OER is received and accepted by NGB.
 11. **Security Violations:** Most flags are removed upon direction of the commander. Consult AR 600-8-2, para 1-12e, for further guidance.
 12. **NGB-Initiated Elimination or Removal from Promotion, Command, or School Selection List:** NGB will remove the flag.
- F. **Transferable Flags:** These flags *must* be initiated (and lifted) against soldiers under the following circumstances:
1. **NGB-Directed Reassignment of Flagged Soldier:** Remove the flag IAW NGB guidance.

2. **Movement of Adverse Action into Punishment Phase:** Remove the flag according to the guidance contained in AR 600-8-2, para 1-13a.
 3. **APFT Failure, or Failure to Take APFT:** Remove the flag on the day the soldier passes the APFT or at ETS.
 4. **Entry into Weight Control Program:** Remove the flag on the day the commander decides that the soldier complies with the Weight Control Program.
 5. **Referral to the Army Substance Abuse Program:** Soldiers who are command referred to the Army Substance Abuse Program (ASAP) in accordance with AR 600–85, paragraph 5–7.
- G. Retaining Soldiers Past their ETS Dates:** Soldiers will not be retained past their ETS/ESA/MRD because they are flagged. All actions must be executed prior to ETS/ESA/MRD.

Chapter Twelve. Administrative Reprimands

REFERENCES:

AR 27-10, Military Justice, dtd 16 November 2005

AR 600-37, Unfavorable Information, dtd 19 December 1986

California Military and Veterans Code Sections 450 thru 474

A. Overview: Administrative Reprimands are censures given to soldiers for failure to comply with established standards. They can be either written or verbal and may accompany, or be separate from, any punishment allowed under the California Military and Veterans Code. This Chapter addresses written Memorandum of Reprimand (MOR).

1. Local and General Officer Reprimands: Commanders at any level may issue an MOR. With some exceptions, commanders at any level also may file these memoranda in a soldier's unit file or request that they be filed in his or her Official Military Personnel File (OMPF).

a. Local MOR: Local memoranda are generally those *not* initiated by General Officers.

b. General Officer Memorandum of Reprimand (GOMORs): GOMORs are initiated by a General Officer.

2. Incidents that May Prompt the Issuance of an MOR: Proper subjects for an MOR may include, for example, instances of substandard leadership, poor judgment, lack of integrity, and other minor misconduct.

B. Procedures for Local Issuance of Reprimands:

1. Write and Sign the MOR: Commanders should ensure that the facts contained in the MOR are supported by sufficient evidence. Additionally, depending upon where the MOR is filed, specific language and information is often required to be included in the document. Thus, commanders are strongly encouraged to consult the Command Judge Advocate when drafting an MOR.

2. Issue the MOR: Commanders should present the soldier with copies of the MOR and all supporting documents (*e.g.*, sworn statements, MP reports, etc.), and retain all original documents.

3. Provide the Soldier a Period to Rebut the MOR: No filing decision should be made until a soldier has had an opportunity to rebut an MOR. Moreover, an MOR will not be filed in an OMPF unless the recipient has been given the chance to review the documentation that serves

as the basis for the proposed filing and makes a written statement to rebut, explain, or mitigate the unfavorable information contained in the MOR (or decline in writing to make such a statement). Thus, soldiers should be allowed a reasonable period of time to provide such a statement. Commanders should grant reasonable requests for a delay of the rebuttal period in order to allow the soldier receiving the MOR an opportunity to consult with appropriate counsel, and ensure that the soldier knows how to contact Trial Defense Service or Legal Assistance Attorneys servicing the soldier's installation or unit.

4. Consider the Soldier's Rebuttal: A soldier's rebuttal may contain information disputing the facts contained in the MOR, matters in extenuation and/or mitigation, or a combination of the two. The commander should consider these matters when making a filing decision.

5. Determine Whether and Where to File the MOR: When considering any rebuttal the soldier wishes to make, commanders are encouraged to consult the soldier's immediate chain of command and their command Judge Advocates in determining a fair filing disposition. Filing determinations must be in writing, and signed by the commander.

a. Rescinding the MOR without Filing: This may be appropriate when the commander is convinced that the soldier did not commit the misconduct for which he or she was reprimanded, that the soldier's conduct was justified or otherwise excused, or that the soldier otherwise does not deserve to have it filed. In these cases, the reprimand and all copies should be destroyed.

b. Local Unit Filing: Filing of MOR in these files will be directed for a period of three years, or until the soldier is reassigned to another brigade, whichever occurs first. In this case, a soldier's transfer to another battalion or company within the *same or different brigade*.

c. Permanent Filing: Only a General Officer (GO) can direct a MOR to be filed in the soldier's OMPF. When circumstances warrant, lower level commanders can request an order of permanent filing from the first GO in their chain of command.

Chapter Thirteen. Reliefs for Cause

REFERENCES:

AR 15-6, Procedure for Investigating Officers and Boards of Officers, dtd 2 October 2006

AR 623-3, Army Command Policy (Section 3-58), dtd 10 August 2007

AR 600-20, Army Command Policy (Chapter 2), dtd 18 March 2008

A. Overview: Relief for cause is one of the most serious steps a commander can take. It may be appropriate in cases involving misconduct or substandard duty performance, and ultimately is based on a commander's loss of trust and confidence in his or her subordinate.

B. Procedures: The procedures for relieving an individual depend on the basis for his or her relief. In all cases, however, relief should be preceded by formal counseling by the commander, unless he or she deems it impossible in order to ensure the integrity of the unit. Commanders should adhere to the following general procedures, and coordinate with their Command Judge Advocate, when contemplating a relief for cause action.

1. Relief for Misconduct: Commanders must decide initially whether to temporarily suspend the individual, pending an investigation into the misconduct, or to immediately relieve the soldier. In instances involving complex facts and circumstances, commanders should consider temporary suspension, pending a thorough investigation.

2. Relief Based on Findings in an Informal AR 15-6 Investigation: Commanders must first afford the soldier an opportunity to review the results of the investigation and, if the soldier desires, to comment. This "notice and comment" procedure does *not*, however, preclude the soldier's temporary suspension from assigned duties.

- i. Informal Investigation - In an informal investigation or board, the report will be written unless the appointing authority has authorized an oral report. Written reports of informal investigations will use DA Form 1574; however, its use is not required unless specifically directed by the appointing authority.

3. Relief Based on Substandard Duty Performance: Unless the commander deems it inappropriate, relief based on this should be preceded with formal counseling and an opportunity to rehabilitate. By thoroughly documenting instances of substandard duty performance, commanders may ultimately avoid the need for a later investigation into the circumstances surrounding the relief action.

4. Relief of Officers from Command Positions: All commanders may temporarily suspend subordinate commanders from command. However, final action to relieve a commander at any level will not be taken until the first General Officer in the chain of command provides his or her written approval. Any action purporting to finally relieve an officer from any command position prior to the required written approval will be considered for all purposes as a temporary suspension from assigned duties rather than a final relief from command for cause.

Chapter Fourteen.

Adverse Evaluation Reports

REFERENCES:

AR 15-6, Procedure for Investigating Officers and Boards of Officers, dtd

2 October 2006

AR 600-20, Army Command Policy, dtd 18 March 2008

AR 623-3, Personnel Evaluation Reporting System, dtd 13 August 2007

A. Overview: Timely and proper completion of OERs and NCOERs is a command responsibility, in conjunction with the servicing personnel service center. This chapter addresses common problems arising when completing adverse OERs and NCOERs.

B. OERs:

1. Referred Reports: An officer in receipt of one of the following types of OERs must have the OER referred to him or her for comment before it is forwarded to NGB:

- a. Relief for Cause OER.
- b. OER with negative comments about the officer's values or Leader Attributes/Skills/Actions.
- c. OER with performance and potential evaluation in Part Va of "UNSATISFACTORY PERFORMANCE, DO NOT PROMOTE", or narrative comments from his rater to that effect.
- d. OER with a Senior Rater promotion potential evaluation of "DO NOT PROMOTE" in Part VIIa.
- e. OER with negative comments in Parts Vb (Rater's narrative), VI (Intermediate Rater's narrative) or VIIc (Senior Rater's narrative).

2. Referral Procedures:

- a. Senior Rater places an "x" in appropriate box in Part IId of the OER, provides a copy to the rated officer, and has rated officer sign and indicate whether he wants to provide written comments.
- b. Rated officer submits written comments if he or she desires. *The rated officer's acknowledgment and comments regarding the*

referred report must be enclosed with the OER when it is processed to NGB.

c. Senior Rater determines whether the rated officer's comments provide significant new facts that could affect the OER rating.

(1) If so: Senior Rater may refer the comments to the other rating officials for reconsideration, and reconsider his or her own evaluation. The Senior Rater may not pressure other officials to change their ratings. *Note that an OER evaluation may NOT be lowered because of the rated officer's rebuttal comments.*

(2) If not: Senior Rater continues to process the OER through to NGB, IAW AR 623-3.

d. OERs still requiring re-referral, even after rating officials change their ratings in response to a rebuttal, must be *re-referred* to the rated officer. Only the latest acknowledgment and comments (if submitted) will be forwarded to NGB, however.

3. Relief for Cause (RFC) OERs:

a. Based on Informal AR 15-6 Investigations: The "notice and comment" procedures contained in AR 15-6 must be followed prior to initiating or directing the relief of an officer for cause. *This rule does not apply to relief following other types of inquiries (e.g., commander's inquiries) not conducted pursuant to AR 15-6.* In any event, this rule does not preclude the officer's temporary suspension from duties pending these procedures.

b. Relief from Command Positions: The first General Officer in a commander's chain of command must authorize in writing that commander's relief, before relief is initiated.

c. Specific Instructions in Completing RFC OERs:

(1) The potential evaluation in Part Va must reflect "DO NOT PROMOTE" or "OTHER", unless the rater is not the officer who directed the relief and does not agree with the relief.

(2) The OER must identify the rating official who directed the relief, and the reasons for the relief.

d. Reliefs Based on Information Received About a Prior Reporting Period: When this occurs, the following rules also apply:

- (1) Officer is evaluated on his or her performance during the current rating period, *only*.
- (2) Reason for relief must be cited in the report.
- (3) If necessary, the new information will be referred to previous rating chain for submission of an addendum to the prior OER.

e. Minimum Time Requirements for Rating Officials: These minimum time requirements do not apply to RFC OERs.

4. Commander's Inquiries in Response to Adverse OERs:

a. Policy: Commanders *must* investigate alleged errors, injustices, and illegalities in OERs that have been brought to their attention either by the rated officer or any other person authorized access to the OER.

b. Procedure for appointing an IO:

(1) **Appointing Commander:** The commander at the time the OER was rendered and who is still in the command position, or a subsequent commander in the position, must conduct the inquiry *or cause it to be conducted* by an officer he or she designates. If the commander decides to appoint an officer to conduct the inquiry on his or her behalf, the appointment should be made in writing.

(2) **Appointment of Inquiry Officer (IO):** This IO must be a commander in the chain of command above the designated rating officials "*involved in the [rated officer's] allegations*" of error, injustice, or illegality. The appointment should be in writing, specifying the precise allegations to investigate (including appropriate witnesses to interview, and documents to review).

(3) **Method of Inquiry:** The appointment orders may specify that the IO investigate the allegations in any manner that sufficiently will resolve the allegations. While the provisions of AR 15-6 normally do not apply, the appointing commander may specify in the appointment orders that they will apply.

(4) **IO's Report:** The IO's findings and recommendations should be reported to the commander in any form that the commander desires. Normally, this will be in writing, containing supporting exhibits (*e.g.*, witness statements, etc.).

c. **Results and Further Disposition of OER:** Commanders should use AR 623-3, para 6-6, Table 6-1, as guides when dispensing with the results of the commander's inquiry and further processing the OER.

C. NCOERs:

1. Relief-for-Cause (RFC) NCOERs:

a. **Based on AR 15-6 Investigation:** If relief of an NCO is based on an informal AR 15-6 investigation, the "notice and comment" procedures in that regulation must be complied with prior to initiating or directing the NCO's relief. *This rule does not apply to relief following other types of inquiries (e.g., commander's inquiries) not conducted pursuant to AR 15-6.* In any event, this does not preclude the NCO's temporary suspension from duties pending the completion of the "notice and comment" procedures.

b. Specific Instructions in Completing RFC NCOERs:

(1) The rating official directing relief must explain the reason for relief in the appropriate narrative part of the NCOER.

(2) If an official other than the Rater or Senior Rater directs relief, the official directing relief must describe the reasons in a one-page enclosure to the NCOER.

(3) The Rater must enter the statement "The rated NCO has been notified of the reason for the relief" in part IV of the NCOER.

(4) Minimum Rater and Senior Rater qualification periods are 30 days. General Officers in the chain of command may waive this 30-day period in cases of misconduct.

(5) The date of relief determines the "THRU" date of the NCOER.

2. **Commander's Inquiries in Response to Adverse NCOERs:** Commanders *must* investigate allegations that a NCOER is illegal or unjust.

a. Procedure:

(1) **Appointing Commander:** The commander at the time the NCOER was rendered and who is still in the command position, or a subsequent commander in the position, normally conducts the inquiry *or causes it to be conducted* by an officer he or she designates. If the commander decides to appoint an officer to conduct the inquiry on his or her behalf, the appointment should be in writing.

(2) **Appointment of Inquiry Officer (IO):** The IO must be a commander (Major or above) in the chain of command above the designated rating officials “*involved in the [rated NCO’s] allegations*” of error, injustice, or illegality. The IO’s appointment should be in writing, specifying the precise allegations to investigate (including appropriate witnesses to interview, and documents to review).

(3) **Method of Inquiry:** The appointment orders may specify that the IO investigate the allegations in any manner that sufficiently will resolve the allegations. While the provisions of AR 15-6 normally do not apply, the appointing commander may specify in the appointment orders that they will apply.

(4) **IO’s**

Report: The IO should report his or her findings, conclusions, and recommendations in any written form that is acceptable for filing of the report in the NCO’s OMPF. The report, therefore, must include the commander’s signature and should be limited to one page. Supplemental documentation (*e.g.*, witness statements, etc.) will be attached as exhibits.

b. Processing of Commander’s Inquiries: Commanders must follow the guidance contained in AR 623-3, para 6-6, Table 6-1, in processing commander’s inquiry reports once they are completed.

Form 14-1

DEVELOPMENTAL COUNSELING FORM For use of this form, see FM 6-22; the proponent agency is TRADOC.		
DATA REQUIRED BY THE PRIVACY ACT OF 1974		
AUTHORITY:	5 USC 301, Departmental Regulations; 10 USC 3013, Secretary of the Army.	
PRINCIPAL PURPOSE:	To assist leaders in conducting and recording counseling data pertaining to subordinates.	
ROUTINE USES:	The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems or records notices also apply to this system.	
DISCLOSURE:	Disclosure is voluntary.	
PART I - ADMINISTRATIVE DATA		
Name (Last, First, MI)	Rank/Grade	Date of Counseling
Organization	Name and Title of Counselor	
PART II - BACKGROUND INFORMATION		
Purpose of Counseling: (Leader states the reason for the counseling, e.g. Performance/Professional or Event-Oriented counseling, and includes the leader's facts and observations prior to the counseling.)		
PART III - SUMMARY OF COUNSELING		
Complete this section during or immediately subsequent to counseling.		
Key Points of Discussion:		
OTHER INSTRUCTIONS		
This form will be destroyed upon: reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement. For separation requirements and notification of loss of benefits/consequences see local directives and AR 635-200.		

Plan of Action (Outlines actions that the subordinate will do after the counseling session to reach the agreed upon goal(s). The actions must be specific enough to modify or maintain the subordinate's behavior and include a specified time line for implementation and assessment (Part IV below)

Session Closing: (The leader summarizes the key points of the session and checks if the subordinate understands the plan of action. The subordinate agrees/disagrees and provides remarks if appropriate.)

Individual counseled: I agree disagree with the information above.
Individual counseled remarks:

Signature of Individual Counseled: _____ Date: _____

Leader Responsibilities: (Leader's responsibilities in implementing the plan of action.)

Signature of Counselor: _____ Date: _____

PART IV - ASSESSMENT OF THE PLAN OF ACTION

Assessment: (Did the plan of action achieve the desired results? This section is completed by both the leader and the individual counseled and provides useful information for follow-up counseling.)

Counselor: _____ Individual Counseled: _____ Date of Assessment: _____

Note: Both the counselor and the individual counseled should retain a record of the counseling.

Chapter Fifteen. Security Clearances – Suspension and Revocation

REFERENCES:

AR 380-67, Personnel Security Program, dtd 9 September 1988

A. Overview: When commanders learn of significant derogatory information that may warrant suspension or revocation of a soldier's access to classified information, they must comply with the procedures contained in AR 380-67, chap 8. Initial suspension may be "informal" (*e.g.*, taking away access to classified repositories) or formal (*e.g.*, compliance with the security regulation procedures for suspension). Commanders should coordinate suspension and revocation actions with their servicing S-2s.

B. Instances that may Prompt Suspension or Revocation of Security Clearances: These include, but are not limited to, incidents of criminal or dishonest conduct; unauthorized disclosure of classified information; and acts that indicate poor judgment, unreliability or untrustworthiness.

C. Procedures for Suspension: AR 380-67, chap 8, governs these procedures. In particular, commanders should ensure the following:

- 1. Removal of DA Form 873 From Soldier's Personnel File:** This form will be attached to DA Form 5248-R, and forwarded to the U.S. Army Central Clearance Facility.
- 2. Notify the Special Security Officer:** This is required if the soldier whose clearance has been suspended was indoctrinated for Sensitive Compartmented Information.
- 3. Ensure Suspension Is Documented in Soldier's SIDPERS.**

D. Procedures for Revocation: Chapter 8 of AR 380-67 governs these procedures, and requires providing the soldier due process before final action is taken to revoke his or her clearance. In particular, commanders should be aware of the following:

- 1. Written Statement of Reasons:** The soldier must receive a written statement of the reasons why the revocation is contemplated.
- 2. Opportunity to Respond:** The soldier must receive an opportunity to submit a written response regarding the proposed revocation.
- 3. Written Explanation in Response to Soldier's Rebuttal:** The soldier must receive a written response to his or her own response.

4. Opportunity to Appeal: The soldier must be afforded an opportunity to appeal to a higher authority any determination against him or her.

Chapter Sixteen. Bars to Reenlistment

REFERENCES:

NGB-ARH Policy Memorandum # 09-026, dtd 13 Aug 09

AR 601-280, Army Retention Program, dtd 4 October 2010

A. Overview:

1. Bars to Reenlistment (BAR) often serve a useful purpose as a “probationary period,” enabling a soldier to show signs of rehabilitation following acts of misconduct or substandard performance that led to the bar. *Bars are rehabilitative, not punitive, tools.* This section prescribes policies and procedures to deny reenlistment/immediate reenlistment extensions, and the future entrance into the California National Guard of substandard Soldiers whose immediate discharge under administrative procedures is not warranted.

2. Policies and procedures prescribed herein apply to the commander’s BAR. Soldiers may not be reenlisted extended without the recommendation of the unit commander. If a soldier is not recommended for continued service, a BAR will be initiated under the provisions of this chapter.

B. Standards and guidelines:

1. **Standards:** Only soldiers of high moral character, personal competence, and demonstrated adaptability to the requirements of the professional soldier’s moral code may be reenlisted. Soldiers who cannot or will not measure up to such standards, but whose discharge under proper administrative procedures is not now warranted, will have a BAR from further service under the provisions of chapter 8 of AR 601-280. Even though a BAR has been initiated, a soldier can still be administratively discharged if it is warranted. The BAR is a non-punitive, probationary device intended to serve notice that a soldier is not a candidate for reenlistment and may be discharged if the circumstances that led to the bar are not overcome.

2. Guidelines for use of a BAR:

a. BAR procedures will not be used instead of discharge action under AR 135-178.

b. A BAR will not be used instead of trial by courts-martial, nonjudicial punishment, or other administrative action.

c. Disciplinary and administrative actions that do not result in discharge do not prevent initiation or continuation of a BAR.

d. Honorable service for a number of years is considered in the evaluation of the soldier's service. However, it does not prohibit the initiation of a BAR if appropriate.

C. Special Rules:

1. Bars *will not* be initiated:

a. Solely because a soldier refuses to reenlist.

b. In lieu of courts-martial, Article 15s, or other adverse actions.

c. Against soldiers with an approved retirement .

d. To prevent a soldier's retirement by barring reenlistment once the soldier attains 18 years or more of active duty to preclude the soldier from attaining retirement eligibility.. (For soldiers who upon ETS, will have at least 18 years but less than 20 years of service, see paragraph E5c below.)

2. Bars *should not* be initiated:

a. **Against Soldiers Assigned to the Unit for Less than 90 Days:** If this occurs, the DA Form 4126-R (Commander's Certificate) must state why a bar is warranted.

b. **Against Soldiers During the Last 30 Days Before ETS:** If this occurs, the Commander's Certificate must explain why no action was taken at an earlier date.

D. Criteria: A soldier's unfitness or unsuitability may show up soon after entry into the service, or only become apparent after many years of service. In fact, a soldier performing in a substandard manner may have been permitted to remain in the California National Guard for a number of years. This should not stop a current commander from taking action under the provisions of this chapter. Commanders must evaluate the advisability and desirability of affording continued military service to soldiers of the following or similar categories:

1. Untrainable Soldiers: These soldiers will be identified as soon as possible with a view toward eliminating them from service. When discharge under administrative procedures is not warranted, action will be taken under this chapter to bar the soldier from further service with the California National Guard. These soldiers are often identified by failure to achieve individual weapons qualification; failure of the Army Physical

Fitness Test (APFT); obtaining low evaluation results from Army or National Guard education activities; failure to submit an approved family care plan; and failure to make satisfactory progress on Army Weight Control Program.

2. Unsuitable Soldiers: These soldiers will be identified early in their military service with a view toward elimination from the service. When administrative discharge is not warranted, action will be taken under this chapter to bar the soldier from further service with the California National Guard.

3. Substandard Soldiers: Soldiers against whom bars are initiated often have written documents that disclose the recurrence of one or a combination of the following. These documents should be maintained in the soldier's local file:

- a. Late for formations, details, or assigned duties.
- b. Unexcused absences and unsatisfactory participation.
- c. Loss of clothing or equipment.
- d. Substandard personal appearance.
- e. Substandard personal hygiene.
- f. Recurrent sickness on drill days without medical justification.
- g. Cannot follow orders; shirks; takes too much time; is recalcitrant.
- h. Cannot or will not train for a job; apathetic; disinterested; avoids training.
- i. Cannot adapt to military life; uncooperative; involved in frequent difficulties with fellow Soldiers.
- j. Failure to manage personal, marital, or family affairs. This includes failure to respond to duty requirements because of parenthood or custody of dependents (minor or adult) AR 600-20, paragraph 5-5.
- k. Causes trouble in civilian community.
- l. Involved in immoral activities.

- m. Personal behavior that brings discredit upon their unit and the California National Guard.
- n. Failure to achieve individual weapons qualification.
- o. Failure to pass the Army Physical Fitness Test.

E. Procedures for Initiating and Imposing Bars:

1. Initiating Commander: Any commander in a soldier's chain of command may prepare NGB Form 602-R (Bar to Reenlistment/Immediate Reenlistment or Extension Certificate), summarizing the basis for the action.

a. A BAR normally should NOT be initiated against a soldier assigned to a unit for less than 90 days. When a BAR is initiated during this period, the commander's certificate will contain an explanation of the timing of the action.

b. A BAR must be based on specific dates, places, times which can all be substantiated with backup documents. It should be substantiated by official remarks made at the time of each occurrence. All instances should be made a matter of record when a soldier performs unworthy acts.

c. Normally, a BAR will not be initiated against a Soldier during the last 90 days prior to ETS. However, some soldiers pending involuntary administrative separation may reach their ETS prior to the completion of separation action. Because they normally cannot be held past their ETS, it is in the State's best interest to process a BAR even though they are within 90 days prior to ETS.

2. Commander's Certificate: NGB Form 602-2 (Bar to Reenlistment/Immediate Reenlistment or Extension Certificate) will be prepared in original and two copies.

a. Total service will be computed as of the ETS, not the date the BAR was prepared.

3. Referral to Soldier: The commander will refer the BAR certificate to the soldier concerned for a statement on his or her behalf, if the soldier so desires. The soldier will be allowed a period of 30 days for the preparation of a statement and collection of any documents and/or pertinent materials. The soldier's unit commander may grant an extension to this period.

4. Forwarding to Higher Commander: The Commander's Certificate and the soldier's rebuttal, if submitted, must be forwarded to the

next higher commander in the normal chain, up to the proper approval authority.

5. Approval Authority: Final approval authority must be at least one approval level higher than the initiating commander. Upon receipt of the soldier's comment, or the soldier's refusal to comment, the certificate will be endorsed personally by each commander in the chain of command, and approved or disapproved by the appropriate authorities.

a. Soldiers with Less than 10 Years of Qualifying Service for Retired Pay at ETS: The approval/disapproval authority is the first commander, Lieutenant Colonel (O-5) or above, in the soldier's normal chain of command. No delegation of authority is authorized.

b. Soldiers with at Least 10 Years of Qualifying Service but Less than 18 Years of Qualifying Service for Retired Pay at ETS, those with More than 20 Years of Service at ETS, and those when Action is Taken to Extend the Soldier to Complete 20 Years of Service: The approval/disapproval authority is the first commander, Colonel (O-6) or above, in the soldier's normal chain of command. No delegation of authority is authorized.

c. Soldiers, who upon ETS, will have at Least 18 but Less than 20 Years of Qualifying Service, will be Allowed to Extend to the Point where they could Attain 20 Years: They may, after the extension is executed, be barred. The approval/disapproval authority for this bar is TAG. These Soldiers may be processed for separation before they attain 20 years of service but will not be separated before that point without approval of Chief, NGB.

6. Placement in Soldier's Local Unit File: Approved bars will be placed in the soldier's local unit file.

7. Review by Company Commander: An approved BAR will be reviewed by the appropriate unit commander every six months (for M-day Soldiers) or three months (for AGR Soldiers) after the date of approval, and 30 days before the Soldier's scheduled departure from the unit or discharge from the service.

a. If, upon review, the commander feels the BAR should remain in effect, the custodian of the soldier's personnel record will be notified and will enter on the soldier's DA Form 2-1, "Bar to reenlistment, immediate reenlistment or extension reviewed; not recommended for removal (date)." The unit commander will make the same remark on DA Form 1315 and will notify the soldier by providing a reproduced copy of NGB Form 602-R.

b. A recommendation to remove a BAR may be submitted at any time by the soldier's unit commander, if the soldier has proven worthy of retention in the California National Guard.

1. Recommendation to remove a BAR will be submitted in writing through the chain of command and will be endorsed personally by each commander.

2. Approval to remove a BAR may be granted by the same authority that approved the BAR originally or, if the soldier has moved to another jurisdiction, by a comparable commander in that jurisdiction.

3. The approved recommendation removing the BAR will be maintained in the appropriate unit file. NGB Form 602-R BAR will be removed and destroyed. The remark "Not recommended for further service" and an entry pertaining to "Bar to immediate reenlistment review; not recommended for removal (date)" will be deleted from DA Form 2-1, per AR 600-8-104 (Military Personnel Information Management/Records). The same remarks on the DA Form 1315 will be erased. The soldier concerned will be given a copy of the approved recommendation removing the BAR.

8. Mandatory Initiation of Separation: If at the time of the second six month (for M-Day) or three month (for AGR) review of a locally imposed BAR to reenlistment, the commander does not recommend that the BAR be removed, the commander will process the soldier for separation per NGR 600-200 and the appropriate chapter(s) of AR 135-178. The term processed for separation means that separation action will be initiated and processed through the chain of command to the separation authority for appropriate action. Compliance with AR 135-178, paragraph 1-12 is mandatory. The unit and intermediate commanders will recommend separation or retention and the characterization of service to be awarded.

a. Processing for separation will be initiated after the first review for soldiers who receive a locally imposed BAR to reenlistment after the second failure of the APFT. Soldiers who receive a locally imposed BAR after the first APFT failure will be processed for separation after the second review.

E. Processing Appeals to Bars to Reenlistment: When the BAR has been approved, the soldier's unit commander will use a counseling statement to inform the soldier of the right of appeal within 15 days. The appeal will be forwarded

through command channels, endorsed personally by each commander, and approved or disapproved within 30 days by the authorities shown below.

1. Appeals Authority:

a. Soldiers with less than ten years of qualifying service for retired pay at ETS, the appeal approval/disapproval authority is the first commander, COL or above, in the soldier's normal chain of command.

b. Soldiers with ten or more years of qualifying service and those with more than 20 years for retired pay at ETS, the approval/disapproval authority is TAG. Those with 18 or 19 years service will be extended to 20 years. (Appeal provisions: None)

F. Discharge with a BAR: *NGB Form 22 (Report of Separation and Record of Service) of otherwise qualified soldiers, who are discharged with a BAR in effect, will be annotated "Bar to Reenlistment or Extension (dated) in effect on the date of discharge" in the remarks section, block 18. Block 26, Reenlistment Eligibility, will be coded RE3.*

Form 16-1

ARMY NATIONAL GUARD BAR TO REENLISTMENT, IMMEDIATE REENLISTMENT OR EXTENSION (CERTIFICATE) <small>The proponent agency is NGB-ARH. The prescribing directive is NGR 600-200.</small>		
PRIVACY ACT STATEMENT 1. AUTHORITY: Title 5 USC Section 301 and Executive Order 9397. 2. PURPOSE: Used to serve notice that a Soldier is not a candidate for reenlistment, immediate reenlistment or extension. The original will be maintained in the Soldiers Official Military Personnel File or electronically filed in a DoD approved system. A copy will be maintained by the MILPO for state records. For organizational use only. 3. ROUTINE USES: None. 4. DISCLOSURE: Voluntary; However, if SSN is not provided you will not be accepted for this reenlistment option in the Army National Guard.		
Thru:		
To:		
From:		
SECTION I - COMMANDER'S RECOMMENDATION		
Under the provisions of NGR 600-200, I recommend the soldier named below be barred from reenlistment or extension in the Army National Guard for reasons indicated in items 1 through 4 as may be applicable. Prior to submission of this recommendation, the soldier was counseled by the undersigned about his or her undesirable traits, which are the basis for this action. The soldier has been counseled and advised of the adverse consequences that may result from this bar.		
Name: (Last, First, Middle)		SSN:
		Rank:
ETS:	Total active plus inactive service at ETS from PEBD: years months days	
1. Record of Court-Martial Convictions or Convictions Under State Military Code: (show offense, sentence, date, and any appeal action)		
2. Record of Non-Judicial Punishment or Punishment Under State Military Code: (show offense, sentence, date, and any appeal action)		
3. Record of Absent Without Leave (AWOL), Misconduct, Inefficiency, Unsatisfactory Participation and Performance: (show dates of counseling and		
4. Other Factual and Relevant Indicators of Untrainability or Unsuitability: (show dates of counseling and		
AUTHENTICATION		
Name, Grade, and Branch of Immediate Commander: (Or Commander initialing this recommendation)		Signature & Date:

SECTION II - SOLDIER'S REVIEW

(Initial each statement that applies)

- _____ 1. I have been furnished a copy of my Commander's Recommendation to bar me from further reenlistment and extension.
- _____ 2. I have been counseled and advised of the basis of this action.
- _____ 3. I DO DO NOT desire to submit a statement in my own behalf. If I wish, I may make separate statements and attach them as enclosures.

Name: (Last, First, Middle)

SSN:

Rank:

Signature:

SECTION III - BATTALION OR NEXT HIGHER COMMAND

Thru:

To:

From:

I have reviewed Sections I and II and recommend that:

The soldier be barred from reenlistment and extension.

The bar certificate is hereby DISAPPROVED.

The bar certificate is hereby APPROVED.

The unit commander will officially counsel the soldier in writing on the implications of this action and the soldier's right to appeal. After counseling, the soldier will be provided one copy, and the original will be maintained in the soldier's Official Military Personnel File or electronically filed in a DoD approved system.

Name, Grade, and Branch of Approving Official:

Signature & Date:

INSTRUCTIONS

1. If more space is needed per item, continue on a separate sheet and identify as an enclosure to NGB Form 602-R.
2. After completion of Section I by the unit commander, the recommended bar will be referred to the soldier for a statement in his or her own behalf and for the completion of Section II. The soldier will be allowed one month for the preparation of his or her statement and collection of any pertinent documents.

ENCLOSURES

Chapter Seventeen. **Reduction of Enlisted Soldiers for Inefficiency or Due to Civil Convictions**

REFERENCES:

AR 600-8-19, Enlisted Promotions and Reductions, dtd 30 April 2010

A. Overview: Enlisted soldiers may be reduced administratively, either for *inefficiency* or due to a *civil conviction*. In most cases, administrative reductions must be preceded by *reduction board proceedings*, in which the soldier receives an opportunity to rebut allegations against him or her. Reduction boards may recommend a soldier's reduction one grade, retention of the soldier in the current grade, or reassignment in the soldier's current grade.

B. Reduction Authorities: Commanders are authorized to reduce soldiers in the grades indicated below:

1. **E-4 and Below:** Company, troop, battery, and separate detachment commanders.
2. **E-5 & E-6:** Field grade CDRs of any organization authorized an LTC or higher grade CDR. For separate detachments or companies, the reduction authority will be the next higher headquarters within the chain of command. The higher headquarters must be authorized a CDR in the grade of LTC or higher.
3. **E-7 – E-9:** CDRs of organizations authorized a CDR in the grade of COL or higher. For separate detachments or companies, the reduction authority will be the next higher headquarters within the chain of command. The higher headquarter must be authorized a CDR in the grade of COL or higher.

C. Reduction Boards: Reduction boards are required in all cases (whether premised upon inefficiency or civilian conviction), unless administrative reduction involves soldiers in the grade of E-4 and below, or the soldier waives the board in writing. Reduction board policies and procedures are outlined in AR 600-8-19, paras 10-7 – 10-9. Commanders should note the following provisions, in particular:

1. **Soldier Must be Notified in Writing at Least 15 Days Prior to the Board.**
2. **Board Must Convene within 30 Duty Days After Soldier is Notified.**
3. **Board Must Consist of at Least Three Members, and Will Have Both Officers and Enlisted Voting Members.**
4. **Soldier May:**

- a. Appear in Person Before Board.
- b. Have Military or Civilian Counsel Present During Board.
- c. Submit Evidence and Witness Testimony on His or Her Behalf.
- d. Question any Witness Appearing Before the Board.

D. Reduction for Inefficiency: Inefficiency is a demonstration of characteristics that shows that the person cannot perform duties and responsibilities of the grade and MOS. Inefficiency may also include any act or conduct that clearly shows that the soldier lacks those abilities and qualities normally required and expected of an individual of that grade and experience. CDRs may consider misconduct, including conviction by civil court, as bearing on inefficiency. A soldier may be reduced under this authority for longstanding unpaid personal debts that he or she has not made a reasonable attempt to pay. Commanders should note, in particular, the following provisions:

- 1. **Soldier Must Have Served in Same Unit for 90 Days Prior to Being Reduced.**
- 2. **Improper Reasons to Reduce for Inefficiency:** Soldiers will not be reduced for inefficiency due to the following:
 - a. Actions for which they were Acquitted at Court-Martial.
 - b. In Lieu of Article 15 Proceedings.
 - c. Single Acts of Misconduct.
- 3. **Sufficient Documentation Must Support Reduction:** This includes, for instance, counseling statements, adverse evaluation reports, and other adverse documentation.
- 4. **Soldier Must Receive Notification and Chance to Comment:** The commander reducing the soldier must notify him or her in writing of the reason for the planned reduction. The soldier may submit written matters in rebuttal within a reasonable time period.

E. Reduction Due to Civilian Conviction: AR 600-8-19, para 10-4 & tbl 10-3, governs reduction of soldiers due to civil court convictions. Commanders should note the following provisions, in particular:

- 1. **Sentences to Death or Confinement for 1 Year:** Soldiers sentenced to confinement for one year or more which is not suspended, or to death, must be reduced to E-1. No administrative

board must be convened. *Note also that soldiers in this category should be separated from the Army UP AR 635-200, chap 14.*

2. **Sentences to Confinement for More than 30 Days, but Less than 1 Year:** Soldiers in the grade of E-5 or above will have their cases referred to a reduction board. Soldiers in the grade of E-4 and below will have their cases considered by their reduction authority; however, referral to a reduction board is not required.

F. Soldiers' Appeal of Reductions: Such appeals must be submitted in writing within 30 duty days of the date of reduction. Appeal Authorities are as follows:

1. **For Soldiers in Grades of E-6 and Below:** The next higher authority above the reduction authority.
2. **For Soldiers in Grades of E-7-E-9:** The first General Officer in the chain of command above the reduction authority

SECTION V

ADMINISTRATIVE SEPARATIONS

Chapter Eighteen. Separation of Enlisted Soldiers

REFERENCES:

AR 135-178, Enlisted Administrative Separations, dtd 27 April 2010

A. Overview: Separation of a soldier from the National Guard may be initiated either voluntarily by a soldier, or by his or her chain of command. Commanders should make reasonable efforts to rehabilitate soldiers who exhibit likelihood for early separation. However, when these efforts fail, administrative separation is a viable option.

B. Types of Discharge: Soldiers administratively separated from the National Guard will receive a discharge under (in the order of most to least favorable) Honorable, General, or Other Than Honorable (OTH) conditions. These types of discharges differ from the *punitive* discharges a soldier may receive only as a result of court-martial: *Bad-Conduct* or *Dishonorable*. Punitive discharges are not available through the chapter process. Nevertheless, an OTH discharge has detrimental consequences on a soldier's receipt of military benefits, such as educational and veterans' benefits.

C. General Procedures in All Chapter Actions: Commanders should anticipate having to fulfill, at a minimum, one or more of the following procedures when initiating separation against a soldier:

- 1. Counseling:** Before separation may initiated, Commanders must give soldiers at least one counseling session to inform them of their deficiencies. After the first counseling session is completed, it is generally within the commander's discretion to determine how many more (if any) counseling sessions are given before beginning a separation action. When determining how many counseling sessions to give, commanders should take into account factors such as: the soldier's age, attitude, number of years in the military, nature of the offenses warranting separation, and of course the soldier's improvement or lack of improvement since the first counseling session.

a. This "Magic Counseling," as it often is termed, places the soldier on notice that further acts of misconduct or substandard duty performance may result in the soldier's separation, unless he or she changes his or her behavior. It also informs soldier of the possible types of discharge he or she may receive, and the ramifications of each type of discharge.

Rehabilitative Transfer: Soldiers not in training status will be locally reassigned at least once, with a minimum of 3 months of duty in each unit. Reassignment should be between battalion-sized units or between brigade-sized or larger units when considered necessary by the local commander.

4. Procedures for Initiation: Once the above applicable prerequisites have been met, chapters are initiated (*e.g.*, the paperwork is prepared and forwarded to the soldier) either under a “Notification” or “Administrative Board” procedure.

a. Notification: This procedure is used in the majority of cases. Under this procedure, the soldier is entitled to written notification, an opportunity to consult with an attorney, copies of documents that will be considered by the separation authority, and an opportunity to submit written statements on his or her behalf for the separation authority to consider. *This procedure may not be used if the soldier has 6 or more years of total military service, or if an Other Than Honorable Discharge has been recommended; soldiers in these categories are entitled to have their cases heard by a Board.* Chapters under the “Notification” procedure typically take less than 30 days to complete.

b. Administrative Board: Chapters must be initiated under this procedure when *either* the soldier has **6 or more years** of total service, or when the soldier is recommended by his chain of command for an **Other Than Honorable Discharge**. A soldier notified under this procedure is entitled to present his or her case (with the aid of an attorney, if he or she desires) to a board comprised of not less than 3 soldiers senior in rank to him or her. Soldiers may waive their right to a board if they desire.

5. Processing Soldiers Through Medical Channels: Soldiers undergoing processing through medical channels (typically, through an MEB or PEB) will have their medical processing take precedence over their administrative separations. In the first instance, however, it is always a Commander’s decision whether to refer a soldier to an MEB based upon his or her ability or inability to perform the duties of his rank, grade, and MOS.

D. Separation Authority: The separation authority is The Adjutant General.

E. Grounds for Discharge: The following are the most common types of administrative separations that commanders may expect to initiate.

1. Unsatisfactory Performance: A soldier may be separated under this chapter when it is clearly established that the soldier will not develop sufficiently to participate satisfactorily in further training and/or become a

satisfactory soldier. Soldiers discharged under this chapter may receive an Honorable or General Discharge.

2. Minor Disciplinary Infractions or a Pattern of Misconduct:

Soldiers separated under these provisions may receive an Honorable, General, or Other than Honorable discharge. Soldiers may be separated under these provisions for:

a. A Pattern of Minor Disciplinary Infractions: Soldier must be formally counseled in writing, and, unless the SA waives it, transferred to another unit and provided an opportunity to rehabilitate themselves prior to the initiation of this chapter.

b. A Pattern of Discreditable Involvement with Civil or Military Authorities, or Conduct Prejudicial to Good Order and Discipline: Soldiers must be formally counseled in writing, and, unless the SA waives it, transferred to another unit and provided an opportunity to rehabilitate themselves prior to the initiation of this chapter.

3. Conviction by a Civilian Court: Soldiers may be separated under this provision for the commission of a serious offense, if the specific circumstances of the offense warrant separation, and a punitive discharge is warranted under the UCMJ for the same offense, or one closely related to it. Soldiers may receive an Honorable, General, or Other than Honorable Discharge when separated under this provision.

4. Abuse of Illegal Drugs: Soldiers who test positive on urinalysis tests must be “processed for separation.” (“Processing for separation” involves the initiation of the chapter paperwork and processing of it through the chain of command, to The Adjutant General for a decision whether to retain or separate the soldier.)

5. AWOL and Desertion: Soldiers returned to military control from a status of AWOL or desertion may be separated under this provision.

Form 18-1

DEVELOPMENTAL COUNSELING FORM For use of this form, see FM 6-22; the proponent agency is TRADOC.		
DATA REQUIRED BY THE PRIVACY ACT OF 1974		
AUTHORITY:	5 USC 301, Departmental Regulations; 10 USC 3013, Secretary of the Army.	
PRINCIPAL PURPOSE:	To assist leaders in conducting and recording counselling data pertaining to subordinates.	
ROUTINE USES:	The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems or records notices also apply to this system.	
DISCLOSURE:	Disclosure is voluntary.	
PART I - ADMINISTRATIVE DATA		
Name <i>(Last, First, MI)</i>	Rank/Grade	Date of Counseling
Organization	Name and Title of Counselor	
PART II - BACKGROUND INFORMATION		
Purpose of Counseling: <i>(Leader states the reason for the counselling, e.g. Performance/Professional or Event-Oriented counselling, and includes the leader's facts and observations prior to the counselling.)</i>		
PART III - SUMMARY OF COUNSELING		
Complete this section during or immediately subsequent to counselling.		
Key Points of Discussion:		
OTHER INSTRUCTIONS		
This form will be destroyed upon: reassignment (other than rehabilitative transfers); separation at ETS, or upon retirement. For separation requirements and notification of loss of benefits/consequences see local directives and AR 635-200.		

Plan of Action (Outlines actions that the subordinate will do after the counseling session to reach the agreed upon goal(s). The actions must be specific enough to modify or maintain the subordinate's behavior and include a specified time line for implementation and assessment (Part IV below)

Session Closing: (The leader summarizes the key points of the session and checks if the subordinate understands the plan of action. The subordinate agrees/disagrees and provides remarks if appropriate.)

Individual counseled: I agree disagree with the information above.
Individual counseled remarks:

Signature of Individual Counseled: _____ Date: _____

Leader Responsibilities: (Leader's responsibilities in implementing the plan of action.)

Signature of Counselor: _____ Date: _____

PART IV - ASSESSMENT OF THE PLAN OF ACTION

Assessment: (Did the plan of action achieve the desired results? This section is completed by both the leader and the individual counseled and provides useful information for follow-up counseling.)

Counselor: _____ Individual Counseled: _____ Date of Assessment: _____

Note: Both the counselor and the individual counseled should retain a record of the counseling.

Chapter Nineteen.

Separation of Officers, e.g., Withdrawal of Federal Recognition (WOFR)

REFERENCES:

NGR 635-101 dtd 15 Aug 1977

- A. **Separation Authority:** The Commanding General of 1st Army is the Separation Authority for a WOFR action. The Adjutant General makes a recommendation to 1st Army when TAG determines that there is a proper basis for separation of an officer.
 - B. **Initiation of a WOFR Action:** Action for withdrawal of Federal Recognition may be initiated by any commander with respect to an officer of his command or under his jurisdictional control, The Adjutant General, The Chief of the National Guard Bureau, or the Chief of Staff of the United States Army.
1. **Substandard performance of duties:** Existence of one of the following or similar conditions constitutes substandard performance of duty:
 - a. Downward trend in performance resulting in an unacceptable record of performance or consistent record of mediocre service.
 - b. Failure to exercise necessary leadership or command required of an officer of his grade.
 - c. Failure to meet standards for students in service schools due to disciplinary reasons, or academic, or leadership deficiencies.
 - d. Failure to discharge assignments in a manner to be expected of an officer of their grade.
 - e. Apathy, defective attitudes, or other character disorders including inability or unwillingness to expend effort.
 2. **Moral or Professional Dereliction:** Existence of one of the following or similar conditions constitutes moral or professional dereliction:
 - a. Unjustified failure to meet financial obligations
 - b. Mismanagement of personal affairs to the discredit of the California National Guard
 - c. Intentional misrepresentation or omission of facts in official statements or records

- d. Acts of intemperance or personal misconduct
- e. Conduct unbecoming of an officer
- f. Entry in military service of a foreign government

3. Failure to meet medical standards: An individual who has a medical condition(s) which prevents the soldiers from performing his or her duties must have his or her federal recognition withdrawn. However, an individual may not have his or her Federal Recognition withdrawn for conditions which were known at the time of the officer's commissioning and have not substantially changed since that time.

C. Notification of Elimination: The person initiating the action will, if at all possible, notify the officer of the pending action to withdraw their Federal Recognition, and that within 15 days of receiving the notification the officer must:

1. Show cause for retention to a board of officers convened to determine if the officer should be retained in the National Guard, or
2. Submit a resignation in lieu of withdrawal of Federal Recognition, or
3. Elect to retire to the Retired Service

Note: If the whereabouts of the officer are unknown, and he or she has not been located with reasonable efforts, or the officer refuses to respond or accept service of notification of withdrawal of Federal Recognition, the board may convene in the officer's absence.

D. Privileges of the Officer: If the officer can be found, the officer that is the subject of the board is entitled to the following privileges:

1. The officer that is the subject of the board may appear before the board at his or her own expense. If the officer cannot appear before the board because of incarceration or other restriction resulting from his or her own misconduct, the board will not be delayed.
2. The officer that is the subject of the board is to be given copies of the records from the board which is convened.
3. The officer that is the subject of the board is allowed to submit statements on his or her own behalf.
4. The officer that is the subject of the board is entitled to military defense counsel if he or she so elects.

5. The officer that is the subject of the board is entitled to have reasonable time to prepare his or her case (in no case less than thirty days from the date of notification).

E. Composition of the Board: The board will be composed of no less than four commissioned officers, an equal number being from the California National Guard.

1. When the capacity or general fitness of the officer is in question all voting members of the board must be senior to him or her.

2. If the physical fitness of the officer is in question, then at least one member of the board must be a medical officer. All voting members of the board (except the medical officer) must be senior to the officer that is the subject of the board.

3. In the case of female officers being the subject of the board, one member of the board must be a female officer of the same basic branch as the officer that is the subject of the board.

F. Board Recommendations: The board's recommendations must be warranted under the evidence presented. The board's recommendations are limited to retention or withdrawal of Federal Recognition.

G. Officer's Options When an officer is notified that he or she is being considered for withdrawal of Federal Recognition, he/she may submit a resignation before any final action in the board proceedings.

SECTION VI

Investigations

Chapter Twenty. Commanders' Inquiries

REFERENCES:

AR 15-6, Procedure for Investigating Officers and Boards of Officers, dtd 02 October 2006

A. Overview: Commanders' inquiries are quick and effective procedures that allow commanders both to determine whether misconduct has occurred and to gather additional facts. These inquiries may be as detailed as the commander desires, and can be conducted either formally or informally. They therefore normally may be completed quicker than those conducted under AR 15-6.

B. Investigating Officer: Commanders may either conduct the inquiry themselves, or task a subordinate to conduct it. The inquiry officer should be senior in rank to any person reasonably believed to have been involved in the suspected misconduct. In most cases, the inquiry officer should be appointed in writing.

C. Conduct of Investigation: The commander should identify the issues to be investigated. If he or she tasks a subordinate to conduct the inquiry, it is advisable to identify these issues in writing, including the names of any witnesses to be interviewed, and any documents or other evidence to be gathered.

1. Witness Interviews: The investigating officer should take care not to take statements from witnesses they believe may have committed a crime, without first reading rights warnings to them.

2. Report: The commander may require either a written or verbal report of the inquiry officer's findings. They also may require that the investigating officer provide his recommendations, based on those findings. Finally, the investigating officer may be required to provide copies of any witness statements and other evidence he collected during the course of the investigation.

D. Discovery of Serious Criminal Misconduct: Immediately upon the receipt of information that serious criminal misconduct may have occurred, the investigating officer and/or the commander initiating the investigation should contact their Command Judge Advocate for guidance. In serious cases, it may be necessary to seek the assistance of law enforcement authorities in more fully investigating the misconduct.

REFERENCES:

AR 15-6, Procedure for Investigating Officers and Boards of Officers, dtd 02 October 2006

A. Overview: AR 15-6 investigations are fact-finding tools for commanders. They may be formal or informal. In nearly all instances, informal AR 15-6 investigations are preferred because they may be completed relatively quickly. Information gathered during these investigations may be used to initiate adverse actions against soldiers deemed to have committed misconduct. These investigations also are helpful in determining systemic problems that need to be fixed. Investigating Officers (IOs) appointed to conduct AR 15-6 investigations should be thoroughly familiar with AR 15-6, and should rely on legal advice provided by their Command Judge Advocate or other legal advisor.

B. Difference between AR 15-6 Investigation and Commander's Inquiry: The primary difference between these two different fact-finding tools is the due process afforded to a soldier who is identified as having committed misconduct and the paperwork associated with completing the AR 15-6. Commanders normally can accomplish their fact-finding objective through the use of a commander's inquiry, without initiating a 15-6 investigation.

C. Use of Results of AR 15-6 Investigations: In most instances, there is no need to conduct a 15-6 investigation prior to initiating adverse action against a soldier. However, when adverse action *is* contemplated based on the investigation's results, the soldier normally must be afforded due process. This generally includes providing the soldier notification of the proposed action, a copy of the investigation and supporting evidence, and an opportunity to respond to the proposed action.

D. Appointing an AR 15-6 IO: Commanders, as well as principal staff officers or supervisors in the grade of O-4 and above, may appoint IOs. IOs must be senior in rank to any soldier whose conduct forms the basis of the investigation. It is usually advisable to appoint an IO in writing. Appointment orders must be signed by the appointing officer, and should include the following:

1. Scope of Investigation: The duties of the IO should include, at a minimum, the facts and circumstances to be investigated, specific personnel who should be interviewed, whether particular respondents (persons who are the subject of the investigation) are designated, and what evidence (including written statements, sketches, pictures, or recordings) must be obtained.

2. Suspense: The IO should be given a suspense for completing his or her findings and recommendations. The IO should be instructed to coordinate extensions directly with the appointing authority.

3. Findings: The IO should be tasked to answer specific questions that the appointing authority wants answered (*e.g.*, whether a soldier was negligent in his or her duties, the circumstances leading up to or causing a military vehicle accident, whether a soldier committed misconduct, etc.).

a. The IO does so in the form of written *findings*. The standard for making a finding normally is that *the finding is supported by a greater weight of evidence than supports a contrary conclusion*. This commonly is referred to as a “preponderance of the evidence” or “more likely than not” standard.

b. During the course of the investigation, the IO likely will discover other relevant evidence that may not be referenced in the appointment memorandum; he or she should, when necessary, include this information in the investigation’s findings, as well.

4. Recommendations: The IO should be tasked to make recommendations, based on his or her findings of fact. The IO will not know what these recommendations will be, until he or she completes the investigation (*e.g.*, that a soldier receive a reprimand, or that the unit’s dispatch procedures be overhauled, etc.).

5. Legal Advisor: The appointment memorandum should specify who the IO’s legal advisor will be during the investigation. Typically, it will be the Command Judge Advocate. The IO should contact the legal advisor as soon as he or she receives his appointment orders, to identify specific issues, implied tasks, and problems that the IO will encounter during the investigation.

E. Conduct of the Investigation: All findings of fact must be supported by evidence, usually in the form of written documents that will be included as exhibits to the investigation. Such exhibits should be numbered consecutively, and should contain, at a minimum:

1. Witness Statements: IOs should reduce witness statements to writing, whenever possible. This should be done on DA Form 2823 (sworn statement form). When telephonic testimony is authorized and/or necessary, the IO should reduce his or her conversation with the witness to a memorandum for record as soon as possible after completing the conversation.

2. Rights Warnings: If the IO suspects any potential witness of having committed a crime, he or she should immediately contact his legal advisor before interviewing the witness. In such cases, it will be necessary to issue the witness a rights warning, prior to taking his or her statement (*see* Chapter VII of this Guide).

3. **Other Evidence:** Other pertinent evidence may include:
 - a. Military Police and/or CID Reports.
 - b. Sketches, Diagrams, or Pictures Depicting the Scene or Results of the Incident.
 - c. Excerpts from Regulations Pertinent to the Subject of the Investigation.

F. Completion of the Investigation: When the IO has completed his or her investigation, he then will complete DA Form 1574 (Report of Proceedings by Investigating Officer or Board of Officers). General tips in filling this form out are as follows:

1. **Section I:** Include the appointing authority's name, rank, unit, and the date of the IO's appointment.
2. **Section II:** Indicate the place of investigation (*e.g.*, Camp Victory, Iraq) and other pertinent materials. In an informal investigation, there is no need to indicate members, respondents, counsel, etc.
3. **Section III:** Complete the appropriate blocks in Section III(A).
 - a. **Privacy Act Statements:** These normally are not required unless the investigation is into the actions of a particular respondent. IOs should consult with their legal advisor regarding whether these are required.
 - b. **Sections (B) & (C) Are Not Completed in Informal Investigations.**
4. **Section IV:** The IO should state in detail the facts and circumstances surrounding the incident investigated. Indicate, where appropriate, such information as names, ranks, units, dates, times, and locations that are important. The IO should reference exhibits included in the investigation, and should use a continuation sheet if more space is needed.
5. **Section V:** The IO should provide his or her recommendations to the appointing authority. All recommendations must be consistent with the findings, and should be based on the IO's understanding of rules, regulations, policies and customs of the service, combined with his concept of fairness to the Government and individuals.
6. **Exhibits:** The IO's final report should also include the following documents, listed as separate exhibits:

- a. Memorandum of Appointment.
- b. Witness Statements and other Written Exhibits.
- c. Explanation of any Unusual Delays, Difficulties, or Other Problems Encountered.
- d. Any Written Communications between the IO and Appointing Authority.

G. Legal Review: Once the IO has completed his or her investigation, it is advisable to provide it to his Command Judge Advocate for a preliminary legal review. This may avoid the need to later reopen the investigation, if the investigation is found to be legally insufficient once the appointing authority receives it.

H. Action by the Appointing Authority: Once the 15-6 investigation is completed, the appointing authority may act on the IO's recommendations, may disregard the IO's recommendations, or may return the report for additional investigation. The appointing authority may consider any relevant information, even if it was not considered by the IO.

Chapter Twenty Two. Line of Duty Investigations

REFERENCES:

AR 600-8-4, Line of Duty Policy, Procedures and Investigations, 4 September 2008

A. Overview: Line of Duty (LOD) investigations are the primary means of investigating the circumstances of a soldier's injury, disease or death. LOD investigations determine the soldier's duty status at the time of the incident, and characterize the soldier's conduct leading up to the injury. LOD investigations are either formal or informal, depending on the circumstances. This Chapter discusses common LOD issues that must be addressed in every investigation. Primary reliance should be on the LOD regulation cited above, however, when conducting and reviewing LOD investigations.

B. A soldier in the National Guard is entitled to hospital benefits, pensions and other compensation, similar to that of soldiers of the Active Army for injury, illness, or disease incurred in Line of Duty.

C. Formal vs. Informal LODs: Informal LODs are discussed in AR 600-8-4, Chapter 3, Section I. Formal LODs are discussed in AR 600-8-4, Chapter 3, Section II.

1. Informal LODs: The appointing authority for an informal LOD normally will be the commander of at least a battalion- or squadron-sized organization for California National Guard. The appointing authority normally will approve informal LOD findings. (See AR 600-8-4, s. 3-6)

2. Formal LODs: The appointing authority for an informal LOD normally will be the commander of at least a battalion- or squadron-sized organization for California National Guard. (See AR 600-8-4, s. 1-11) Formal LODs are *mandatory* in such cases as injury or death involving alcohol or drug abuse; self-inflicted injuries; suicide; injury or death while in AWOL status; and under suspicious circumstances or in cases apparently due to negligence or misconduct on the part of the injured soldier. (See AR 600-8-4, s. 2-3(c)(1-10). The reviewing authority will determine the completeness and accuracy of the investigation.

D. DA Form 2173 (Statement of Medical Examination and Duty Status): This form will be initiated by the medical authority attending to the subject soldier. AR 600-8-4, Chapter 3 indicates how to complete this form. The unit commander must complete Section II, showing the soldier's duty status and the facts of the incident. This form will be included as an exhibit in the final LOD report.

E. DD Form 261 (Report of Investigation): This form must be completed by the LOD Investigating Officer (IO). AR 600-8-4, Chapter indicates how to

complete this form. In Section 9(g) (Remarks) the IO should state the facts leading up to the injury. In completing this section, the IO should rely on the sworn statements and other facts discovered during the course of his or her investigation.

F. Evidence Collection: All findings of fact in a LOD investigation should be supported by evidentiary exhibits. Such exhibits may include, at a minimum, the following:

- 1. Informal LODs:**
 - a. DA Form 2173.**
 - b. Statement or written correspondence indicating that the soldier was warned of his/her right not to make a statement.**
 - c. Statements, police reports, medical documentation**
 - d. Copy of training schedules, annual training orders, and full time training orders, where applicable.**
- 2. DA Form 3881 (Rights Warning):** If the soldier is suspected or accused of any offense under the Uniform Code of Military Justice the soldier should be advised of his/her rights under UCMJ Art. 31 and the right to counsel.
- 3. Formal LODs:** In addition to the types of evidence indicated above (for informal LODs), the following should, where applicable, be included:
 - a. Autopsy Reports, Coroners' Inquests, and/or Toxicology and Pathology Studies.**
 - b. Incident Information:** This may include maps, photographs, and/or diagrams of the site and terrain where the accident or other incident occurred.

F. Special Requirements in Intoxication Incidents: Incidents involving death, injury, or disease where intoxication may have been a factor require that the following additional information be included:

- 1. Statements or Reports Regarding Subject's Level of Intoxication:**

Evidence as to the general appearance and behavior, clear and rational speech, coordination of muscular effort, and all other facts, observations, and opinions of others bearing on the question of actual impairment shall be made to determine the quantity and

nature of the intoxication agent used and the period of time over which used by the person.

2. **Sobriety Test Results:** Include these test results, when conducted.

G. Special Requirements in Suicide/Attempted Suicide Cases: Incidents involving suicide or attempted suicide require the IO to include the following additional evidence (See AR 600-8-4 s. 4-11:

1. **Subject's Background Evidence:** Evidence concerning the subject soldier's social background, actions, and moods immediately prior to the incident, and/or troubles that may have motivated the incident must be included. The deceased soldier's personal notes or diaries are valuable evidence.
2. **Pertinent Examination Results:** Pertinent results of examination or counseling by mental health professionals must be included.
3. **Psychological Autopsy Results:** These results are required in all cases of death by suicide.

H. Factual Findings: The LOD IO must make factual findings that are supported by the evidence he or she collects during the investigation. The IO must collect evidence in accordance to AR 600-8-4, s. 3-8(e.), indicating all facts leading up to the incident, as well as a description of the incident itself. The MFT commander must prepare section 1 of DA Form 2173; the unit commander must prepare section 2 of DA Form 2173.

1. **Standard of Evidence:** The standard for making a factual finding is that of "substantial evidence." This standard essentially means that the weight of evidence establishes a degree of certainty with which a reasonable person would agree. (See AR 600-8-4, s. 2-6)
2. **Evidence Considered:** The IO should consider all statements, observations, and other "hard" evidence he or she collects, plus reasonable inferences and conclusions that may be drawn from that evidence. The IO may, when necessary, evaluate and comment on a witness's demeanor, behavior, memory and potential biases when making his or her determinations. (See AR 600-8-4, s. 2-6(c.))
4. **Suicide and Attempted Suicide Cases:** The IO must determine whether the subject was mentally sound at the time of the incident. In determining this, the IO should rely on such evidence as the subject's social background, actions and moods prior to the suicide, and counseling records of mental health professionals. *In all cases, a mental health officer must review the evidence and render a written opinion as to whether the subject was mentally sound at the time of the incident.* Such a memorandum must be included in the IO's final report.

5. Cases Involving Death: In all cases involving death of the subject soldier, the IO will not express an opinion concerning the LOD status of the soldier. Procedures for Active Duty deaths are described in AR 600-8-4, s. 4-13.

I. Adverse Findings (Not in Line of Duty): If the IO anticipates that his or her final report will conclude that the injury was incurred “Not in the Line of Duty,” the IO must provide the subject *notice in writing* of the proposed adverse finding. The IO must include a *complete copy* of the final investigation, as well as copies of all supporting evidence. *The IO should not yet mark the LOD Finding in Items 10 and 11 of DD Form 261, as the subject soldier is entitled to provide a rebuttal statement.* The IO also must inform the soldier that he or she is not required to provide a rebuttal statement. (See AR 600-8-4, s. 3-8(f)(6))

K. Effects of Adverse Findings: A loss of benefits may result from an adverse LOD determination. However, this is entirely administrative, rather than punitive, in nature.

Form 21-1

STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS			
For use of this form, see AR 600-8-4, the proponent agency is DCS, G-1.			
THRU: <i>(Include ZIP Code)</i>	TO: <i>(Include ZIP Code)</i>	FROM: <i>(Include ZIP Code)</i>	
1. NAME OF INDIVIDUAL EXAMINED <i>(Last, First, and Middle Initial)</i>		2. SSN	3. GRADE
4. ORGANIZATION AND STATION		5. ACCIDENT INFORMATION	
		a. DATE	b. PLACE <i>(City and State)</i>
SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR			
6. INDIVIDUAL WAS <input type="checkbox"/> OUT PATIENT <input type="checkbox"/> ADMITTED <input type="checkbox"/> DEAD ON ARRIVAL		7. NAME OF HOSPITAL OR TREATMENT FACILITY <input type="checkbox"/> CIVILIAN <input type="checkbox"/> MILITARY	
8. HOUR AND DATE ADMITTED		9. HOUR AND DATE EXAMINED	
10. NATURE AND EXTENT OF <input type="checkbox"/> INJURY <input type="checkbox"/> DISEASE <input type="checkbox"/> RESULTING IN DEATH			
11. MEDICAL OPINION: a. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS <i>(Specify):</i> b. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND <i>(Attach Psychiatric evaluation if appropriate).</i> c. INJURY <input type="checkbox"/> IS <input type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE. d. INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN LINE OF DUTY. BASIS FOR OPINION:			
12. THE FOLLOWING DISABILITY MAY RESULT <input type="checkbox"/> TEMPORARY <input type="checkbox"/> PERMANENT PARTIAL <input type="checkbox"/> PERMANENT TOTAL		13. BLOOD ALCOHOL TEST MADE <input type="checkbox"/> YES <input type="checkbox"/> NO	14. NO. OF MG ALCOHOL/100 ML BLOOD
15. DETAILS OF ACCIDENT OR HISTORY OF DISEASE <i>(how, where, when)</i>			
16. DATE	17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR		18. SIGNATURE
SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER			
19. DUTY STATION <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY <input type="checkbox"/> ABSENT WITH AUTHORITY: <input type="checkbox"/> ON PASS <input type="checkbox"/> ON LEAVE		20. HOUR AND DATE OF ABSENCE a. FROM b. TO	
21. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY <i>(Explain in Item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance)</i> <input type="checkbox"/> YES <input type="checkbox"/> NO			
22. INDIVIDUAL WAS ON <input type="checkbox"/> ACTIVE DUTY <input type="checkbox"/> ACTIVE DUTY FOR TRAINING <input type="checkbox"/> INACTIVE DUTY TRAINING		23. HOUR AND DATE TRAINING a. BEGAN b. ENDED	
24. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING <input type="checkbox"/> DIRECTLY TO TRAINING <input type="checkbox"/> DIRECTLY FROM TRAINING			
25. MODE OF TRANSPORTATION	26. HOUR BEGINNING TRAVEL	27. DISTANCE INVOLVED	28. NORMAL TIME FOR TRAVEL
29. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY			
30. DETAILS OF ACCIDENT - REMARKS <i>(If additional space is needed, continue on reverse) (Attach inclosures as necessary)</i>			
31. FORMAL LINE OF DUTY INVESTIGATION REQUIRED <input type="checkbox"/> YES <input type="checkbox"/> NO		32. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY <i>(Not applicable on deaths)</i> <input type="checkbox"/> YES <input type="checkbox"/> NO	
33. DATE	34. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER		35. SIGNATURE

Form 22-2

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE <small>For use of this form, see AR 190-30; the proponent agency is ODCSOPS</small>			
DATA REQUIRED BY THE PRIVACY ACT			
AUTHORITY:		Title 10, United States Code, Section 3012(g)	
PRINCIPAL PURPOSE:		To provide commanders and law enforcement officials with means by which information may be accurately identified.	
ROUTINE USES:		Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.	
DISCLOSURE:		Disclosure of your Social Security Number is voluntary.	
1. LOCATION	2. DATE	3. TIME	4. FILE NO.
5. NAME <i>(Last, First, MI)</i>		8. ORGANIZATION OR ADDRESS	
6. SSN	7. GRADE/STATUS		
PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE			
Section A. Rights			
<p>The investigator whose name appears below told me that he/she is with the United States Army _____ and wanted to question me about the following offense(s) of which I am suspected/accused: _____</p> <p>Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:</p> <ol style="list-style-type: none"> 1. I do not have to answer any question or say anything. 2. Anything I say or do can be used as evidence against me in a criminal trial. 3. <i>For personnel subject to the UCMJ</i> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both. <p style="text-align: center;">- or -</p> <p><i>For civilians not subject to the UCMJ</i> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.</p> <ol style="list-style-type: none"> 4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below. 			
5. COMMENTS <i>(Continue on reverse side)</i>			
Section B. Waiver			
I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.			
WITNESSES <i>(If available)</i>		3. SIGNATURE OF INTERVIEWEE	
1a. NAME <i>(Type or Print)</i>		4. SIGNATURE OF INVESTIGATOR	
b. ORGANIZATION OR ADDRESS AND PHONE			
2a. NAME <i>(Type or Print)</i>		5. TYPED NAME OF INVESTIGATOR	
b. ORGANIZATION OR ADDRESS AND PHONE		6. ORGANIZATION OF INVESTIGATOR	
Section C. Non-waiver			
1. I do not want to give up my rights <input type="checkbox"/> I want a lawyer <input type="checkbox"/> I do not want to be questioned or say anything			
2. SIGNATURE OF INTERVIEWEE			
ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT <i>(DA FORM 2823)</i> SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED			

PART II - RIGHTS WARNING PROCEDURE

THE WARNING

1. **WARNING** - Inform the suspect/accused of:
 - a. Your official position.
 - b. Nature of offense(s).
 - c. The fact that he/she is a suspect/accused.
2. **RIGHTS** - Advise the suspect/accused of his/her rights as follows:

"Before I ask you any questions, you must understand your rights."

 - a. "You do not have to answer my questions or say anything."
 - b. "Anything you say or do can be used as evidence against you in a criminal trial."
 - c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer

can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

- or -

(For civilians not subject to the UCMJ) You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."

- d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"
 (If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Have you ever requested a lawyer after being read your rights?"
 (If the suspect/accused says "yes," find out when and where. If the request was recent (*i.e.*, fewer than 30 days ago), obtain legal advice whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)

"Do you want a lawyer at this time?"
 (If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" *(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)*

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.

2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.

WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS: If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")

COMMENTS *(Continued)*

Chapter Twenty Three. Financial Liability Investigations of Property Loss (FLIPL)

REFERENCES:

AR 735-5, Policies and Procedures for Property Accountability, dtd 28 Feb 2005

DA PAM 735-5, Survey Officer's Guide, dtd 9 April 2007

CA ARNG Pam 735-5W

A. Overview: FLIPL's document the circumstances surrounding the loss, damage to, or destruction of government property. They fix accountability for government equipment, document the proximate (or direct) cause of the loss, and assess financial liability in the event of losses due to negligence or willful misconduct.

B. Accountability and Responsibility: Accountability and responsibility are separate obligations, carrying with them specific duties. Financial liability may be assessed against any accountable or responsible person who, through negligence or willful misconduct, fails to perform his or her required duties, provided that this failure *proximately causes* the loss of government equipment.

1. Accountability: Accountability for equipment encompasses the person's obligation to maintain property records. Accountability rests with specific individuals, and may not be delegated. Accountable officers maintain formal records detailing such issues as quantities, values, balances, and property transactions.

2. Responsibility: Responsibility entails a person's obligation to ensure government property entrusted to his or her possession, command, or supervision is properly used and cared for.

C. Initiation of FLIPL's: FLIPL's must be initiated in those instances surrounding the loss of property described in AR 735-5, para 13-3 (Page 43). AR 735-5 reads, in part:

A financial liability investigation of property loss will be processed when:

1. Negligence or willful misconduct is suspected as the cause, and the individual does not admit liability and refuses to make voluntary reimbursement to the Government for the full value of the loss, less depreciation.

2. The property lost, damaged, or destroyed involves a change of accountable officer's inventory and the outgoing accountable officer made no voluntary reimbursement for the full amount of the loss to the Government.
3. The value of the admitted loss, damage, or destruction (LDD) exceeds the individual's monthly basic pay.
4. The value of the damages or shortages in occupied Government quarters (real property and furnishings combined or Government furnishings in non-Government quarters exceeds the individual's monthly basic pay.
5. The total handling loss of a specific bulk petroleum product exceeds the allowable loss for that product, and the dollar value of the total loss exceeds \$500.
6. The loss or destruction involves a controlled inventory item. Investigate controlled inventory items lost or destroyed per AR 15-6. However, do not use the AR 15-6 investigation as authority to adjust property records or to assess financial liability. Process a financial liability investigation of property loss to accomplish either of these actions. When using an AR 15-6 investigation, do not request a separate investigation by a financial liability officer.
7. The loss or destruction involves public funds or other negotiable instruments and the individual does not voluntarily reimburse the Army or National Guard for the loss.
8. Required by higher authority or other DA regulatory guidance.
9. Directed by an inventory adjustment report (IAR) approving authority.
10. The loss or damage involves a GSA vehicle, and the administrative actions under [AR 735-5, para 12-1c] have not been taken.
11. The loss resulted from a fire, theft or natural disaster.
12. The loss is a recoverable item with a recoverability code of "D," "F," "H" or "L").

D. Processing FLIPL's: Once a FLIPL is initiated (normally by the accountable officer) a survey officer will be appointed to conduct an investigation into the circumstances surrounding the loss of property. The survey officer conducts his investigation IAW applicable regulations and the DA Pamphlet referenced above.

E. Recommendation for Financial Liability: If the survey officer recommends an individual for financial liability (based on negligence or willful

misconduct), he or she must notify that soldier and provide him or her an opportunity to respond. If a response is submitted, the survey officer must consider this response and attach it to his or her report of investigation that is forwarded to the Approving Authority. The California National Guard will initiate and present financial liability investigations of property loss to the appointing authority or approving authority as appropriate not later than 45 calendar days after the date of discovering the discrepancy.

1. **Requirements.** There are three basic requirements for the finding of financial liability:
 - a. **Negligence or Willful Misconduct:** The soldier concerned must be found to have been negligent or committed willful misconduct.
 - b. **Proximate Cause:** Proximate cause is the cause, which, in a natural and continuous sequence, unbroken by a new cause, produces loss, damage or destruction, and without which, the loss, damage or destruction would not have occurred.
 - c. **Loss:** Loss is the dispossession of, damage to, or destruction of U.S. Government property under the control of the National Guard. Loss is also, a shortfall in accountability. Property is considered lost when it cannot be found, or accounted for, by the last responsible person in the audit trail.

F. Action by Approving Authority: Approving Authorities approve the survey officer's findings and recommendations, but are not bound by them. The approving authority's legal advisor should review the findings and recommendations, and opine regarding the evidence and propriety of the findings and recommendations. This review should not be undertaken until the soldier against whom financial liability is recommended has been provided an opportunity to respond.

It is important for commanders to note that the financial liability officer's findings and recommendations are administrative and not judicial; therefore, findings and recommendations are purely advisory and do not constitute a final determination or legal judgment. The recommendations are not binding upon the appointing authority or the approving authority. However, if the financial liability officer has conducted the investigation without prejudice or bias, has documented findings clearly and identified the supporting documentation, and has made recommendations that are reasonable and just, based upon the findings, those recommendations are more likely to be accepted by the appointing authority and approving authority.

SECTION VII

MILITARY PERSONNEL AND FAMILY LAW ISSUES

Chapter Twenty Four. Political Activities by Members of the Armed Forces

REFERENCES:

Manual for Courts-Martial, 2008 Edition

AR 600-20, Army Command Policy, dtd 27 April 2010

CAL ARNG PAM 600-1 dtd 1 November 1991

- A. Overview:** Generally, soldiers in the National Guard enjoy the same rights and responsibilities as other citizens. However, because they are soldiers, the manner in which they exercise their rights is limited in some cases. Under our democratic system, our military, as a group, must remain politically neutral and divorced from partisan politics. This is especially true when soldiers are in uniform.

Some general rules to remember:

- 1.** Soldiers have the right and duty as American citizens to vote and voice their opinions concerning political matters. However, soldiers must be very careful that their personal opinions and activities are not directly, or by implication represented as those of the National Guard.
- 2.** While soldiers and their dependents have the right to petition the president, the Congress, or other public officials, they may not publicly solicit or collect signatures on a petition when in uniform or in a foreign country. Soldiers may not circulate or sign a petition on a military post unless the petition has been authorized by the post commander.
- 3.** Soldiers may not distribute, on military facility, any written or printed materials that advocate the violent overthrow of the government or can be expected to entice disorder; adversely affect morale, good order, and discipline; or interfere with the accomplishment of the military mission.
- 4.** Soldiers may not participate in any demonstration or other activity within a military installation, that: (a) has not been approved by the commander, (b) could result in interference or prevention of orderly accomplishment of the mission of the installation, or (c) presents a

clear danger to loyalty, discipline, or morale, of armed forces personnel.

REFERENCES:

AR 600-20, Army Command Policy, dtd 27 April 2010

A. Overview: Commanders must enforce the National Guard's policy of providing equal opportunity and treatment for all soldiers without regard to race, color, religion, gender or national origin. The participation in extremist organizations and activities by National Guard personnel is inconsistent with the responsibilities of military service and National Guard policy. The above-cited references provide guidance on prohibited extremist activities. The following basic principles apply in all cases.

B. Extremist Organizations and Activities: Extremist organizations and activities are those that advocate racial, gender or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, gender, religion, or national origin; or advocate the use of (or actually use) force or violence or unlawful means to deprive individuals of their rights under the U.S. Constitution, or the laws of the United States or any State, by unlawful means.

C. Prohibited Activities: Soldiers are prohibited from engaging in the following non-inclusive types of activities in support of extremist organizations or activities:

1. Participating in Public Demonstrations or Activities.
2. Attending Meetings or Activities with the Knowledge that the Meeting or Activity Involves an Extremist Cause, When on Duty, When in Uniform, When in a Foreign Country (Whether on or Off Duty, or In or Out of Uniform), When it Constitutes a Breach of Law and Order, or When it is Likely to Result in Violence or When in Violation of Off-Limits Sanctions or Commanders' Orders.
3. Recruiting or Training Members (Including Encouraging Others to Join).
4. Fund-Raising Activities.

D. Command Responsibilities: In any case of apparent soldier involvement with, or in, extremist organizations or activities, commanders must take positive action to educate soldiers, putting them on notice of the potential adverse effects that participation in violation of National Guard policy may have upon good order and discipline. These actions include, but are not limited to:

1. **Educating Soldiers:** Commanders will advise soldiers that extremist organizations' goals are inconsistent with the National Guard's goals, beliefs, and values concerning equal opportunity.

2. Advising Soldiers: Commanders must advise soldiers that participation in extremist organizations or activities:

a. Will be taken into consideration when evaluating overall duty performance.

b. Will be taken into consideration when selections for positions of leadership and responsibility are made.

c. Will result, when appropriate, in removal of security clearances.

d. Will result, when appropriate, in reclassification actions or bars to reenlistment.

E. Command Authority and Options: Commanders have the inherent authority to prohibit military personnel from engaging, or participating, in any other activities that they deem will adversely affect good order and discipline or morale within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from barracks, to place areas or activities off-limits, or to order soldiers not to participate in those activities. Commanders' options for addressing a soldier's violation of prohibited activities include:

1. UCMJ Action (Pursuant to the California Military Veterans Code): Possible violations include:

a. Violation or Failure to Obey a Lawful General Order or Regulation (Article 92, UCMJ).

b. Riot or Breach of Peace (Article 116, UCMJ).

c. Provoking Speeches or Gestures (Article 117, UCMJ).

d. Conduct Prejudicial to Good Order and Discipline or Service Discrediting (Article 134, UCMJ: General Article).

2. Involuntary Separation: The basis for separation may be unsatisfactory performance, misconduct, or for conduct deemed prejudicial to good order and discipline or morale.

3. Reclassification Actions or Bars to Reenlistment.

4. Other Adverse Administrative or Disciplinary Action.

Chapter Twenty Six. **Fraternization and Improper Senior-Subordinate Relationships**

REFERENCES:

Manual for Courts-Martial, 2008 Edition

AR 600-20, Army Command Policy, dtd 27 April 2010

A. Overview: Recent revisions to the National Guard's policy regarding senior-subordinate relationships impose prohibitions on many personal and business relationships between officers and enlisted service members. The new policy continues to prohibit some relationships between soldiers of different ranks that the former policy also prohibited. The new policy does, however, permit many relationships in settings such as community-based organizations, church activities, sports events, and family and unit social functions. Finally, violations of the new policy (as opposed to the former policy) may be punishable under the UCMJ (Pursuant to the California Military and Veterans Code), as violations of a lawful general regulation.

B. Relationships Between Soldiers of Different Ranks: Relationships between soldiers of different ranks are prohibited if they –

1. Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command.
2. Cause actual or perceived partiality or unfairness.
3. Involve, or appear to involve, the improper use of rank or position for personal gain.
4. Are, or are perceived to be, exploitative or coercive in nature.
5. Create an actual or clearly predictable, adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission

C. Relationships between Officers and Enlisted: Certain personal relationships between officers and enlisted personnel are prohibited. Prohibited relationships include:

1. **Ongoing business relationships between officers and enlisted personnel.** This prohibition does not apply to landlord/tenant relationships or to one-time transactions such as the sale of an automobile or house, but does apply to borrowing or lending money, commercial solicitation, and any other type of on-going financial or

business relationship. In the case of California National Guard or United States Army Reserve personnel, this prohibition does not apply to relationships that exist due to their civilian occupation or employment.

2. Dating. Shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel. This prohibition does not apply to —

a. Marriages. When evidence of fraternization between an officer and enlisted member prior to their marriage exists, however, their marriage does not preclude appropriate command action based on the prior fraternization. Commanders have a wide range of responses available including counseling, reprimand, order to cease, reassignment, administrative action or adverse action. Commanders must carefully consider all of the facts and circumstances in reaching a disposition that is appropriate. Generally, the commander should take the minimum action necessary to ensure that the needs of good order and discipline are satisfied.

b. Changing Circumstances. Situations in which a relationship that complies with this policy would move into non-compliance due to a change in status of one of the members. (For instance, a case where two enlisted members are dating and one is subsequently commissioned or selected as a warrant officer.) In relationships where one of the enlisted members has entered into a program intended to result in a change in his or her status from enlisted to officer, the couple must terminate the relationship permanently or marry within either one year of the actual start date of the program, before the change in status occurs, or within one year of the publication date of AR 600-20 (April 2010) whichever occurs later.

c. Personal Relationships.

i. Personal relationships between members of the National Guard or Army Reserve, when the relationship primarily exists due to civilian acquaintanceships, unless the individuals are on active duty (other than annual training), on full-time National Guard duty (other than annual training), or serving as a dual status military technician.

ii. Personal relationships between members of the Regular Army and members of the National Guard or Army Reserve when the relationship primarily exists due to civilian association and the Reserve component member is not on active duty (other than annual training),

on full-time National Guard duty (other than annual training), or serving as a dual status military technician.

D. Business Relationships and Gambling: The new policy prohibits all business relationships between officers and enlisted service members, *except* for landlord-tenant relationships and one-time business transactions (such as the sale of a car). Furthermore, the policy prohibits the borrowing and lending of money, and commercial solicitations, between officers and enlisted personnel. Gambling between officers and enlisted personnel is strictly prohibited.

E. Team-Building Relationships: The new policy continues to permit social contacts between officers and enlisted members, or between soldiers of different ranks, in forums such as community organizations, church activities, sports events, family gatherings, and unit social functions.

F. Enforcement of Policy: The new policy continues to recognize that commanders are responsible for enforcing the terms and conditions of the policy. It also recognizes, however, that *all* military personnel share the responsibility for maintaining professional relationships.

1. Responsibility of All Soldiers: While the senior member in a relationship generally is in the best position to terminate or limit the relationship, the policy holds accountable *all* soldiers concerned, who violate the policy.

2. Commanders' Options: Commanders have a wide variety of options at their disposal in addressing violations of the policy. These options include, but are not limited necessarily to, the following:

- a. Counseling.
- b. Orders to Cease the Conduct Violative of the Policy.
- c. Verbal or Written Reprimands.
- e. Adverse Evaluation Reports.
- f. Non-judicial Punishment.
- g. Separation from the National Guard.
- h. Bar to Reenlistment.
- i. Denial of Promotion.
- j. Court-Martial.

3. UCMJ Violations (Pursuant the California Military and Veterans Code): Violations of the policy may be punished as violations of one or more of the following punitive articles under the UCMJ:

- a. Articles 90 & 92:** Disobedience of a Lawful Order or Regulation.
- b. Article 133:** Conduct Unbecoming an Officer.
- c. Article 134:** Fraternization.
- d. Article 134:** Adultery.

Chapter Twenty Seven. Domestic Violence Amendment to the Gun Control Act

REFERENCES

AR 600-20, Section 4-23, Army Command Policy, dtd 18 March 2008

A. Overview: The Lautenberg Amendment makes it a felony for any person convicted of a misdemeanor crime of domestic violence to ship, transport, possess, or receive firearms or ammunition.

B. General Provision and Definitions: The Amendment makes it a felony for any person who has been *convicted* of a misdemeanor crime of *domestic violence* to ship, transport, possess, or receive *firearms or ammunition*. Transfer or sale of firearms to persons with a qualifying conviction (as defined by the Amendment) also is a felony. For the purposes of this provision, the following definitions apply:

1. “Conviction”: This includes convictions either by a civilian court or by Special or General (but not Summary) Court-Martial. It does not include nonjudicial punishment or deferred civilian prosecutions.

2. “Domestic Violence”: This includes any crime involving the use, or attempted use, of physical force or threatened use of a deadly weapon, and in which the convicted offender was, at the time of the offense, any of the following:

- a. Current or Former Spouse, Parent or Guardian of the Victim.
- b. Person Who Had a Child in Common with the Victim.
- c. Person Who was Cohabiting or Did Cohabitate with the Victim as a Spouse, Parent or Guardian.

3. “Firearms and Ammunition”: This includes all National Guard-issue and privately-owned weapons, excluding Army-issue major weapons systems and crew-served weapons, such as tanks, missiles, and aircraft.

C. Command Responsibilities

1. Notify All Soldiers of the Amendment’s Provisions and Prohibitions:

Commanders may either accomplish this by verbally briefing their soldiers or by having their soldiers read the provisions and acknowledge that they understand them. If commanders verbally inform their soldiers of the provisions, it is recommended that they maintain a “sign-in” roster of all soldiers who received the briefing, for unit record-keeping purposes.

2. Check Soldiers' Local Unit Files for Evidence of a Qualifying Conviction.

3. Detail Soldiers Whom they Have Reason to Believe, or Know to Possess, Qualifying Convictions to Duties not Requiring the Soldier to Bear or Transfer Weapons or Ammunition. *DD Form 2760.* If a commander knows or has reasonable cause to believe that a soldier has a qualifying conviction, then that command should take all reasonable action to investigate. A commander may initiate the investigation by ordering the soldier to complete DD Form 2760. Soldiers will be notified that neither the information nor evidence gained by filling out the DD form 2760 may be used against them in any criminal prosecutions for a violation of 18 U.S.C. § 922, including prosecution under the UCMJ for conduct that occurred prior to the completion of DD Form 2760. Company and battery level commanders will collect completed DD Forms 2760 and file them in the soldiers local military personnel file IAW AR 600-8-104 and AR 25-400-2.

D. Effects of a Qualifying Conviction:

1. Nondeployable: Soldiers with qualifying convictions are nondeployable.

2. Restricted Positions: Soldiers with qualifying convictions may not hold leadership, supervisory or property accountability positions affording them access to firearms or ammunition.

3. Service Schools: Soldiers with qualifying convictions may not attend any service school in which instruction with individual weapons or ammunition is part of the curriculum.

4. Career Impact: Soldiers with qualifying convictions must be informed that their inability to complete service schools may impact adversely on their future promotion potential, as well as on their career length.

E. Bar to Reenlistment or Separation Action: A soldier with a qualifying conviction must either be barred to reenlist or separated via AR 135-178.

Chapter Twenty Eight. Tattoo Policy

REFERENCES:

AR 670-1, Wear and Appearance of Army Uniforms and Insignia, dtd 3 February 2005

A. Overview: The California National Guard follows the active Army's policies regarding Tattoos. Soldiers are required to wear their uniforms in a fashion that does not detract from overall military appearance. Tattooing in areas of the body that causes the tattoo to be exposed while in a class A uniform detracts from a soldierly appearance. NGB has issued supplemental guidance to the regulation in an attempt to clarify this policy, and has referenced both tattoos and brands.

B. Soldierly Appearance: The mere fact that a tattoo or brand is visible while a soldier is in a class A uniform does not, by itself, constitute a violation of that National Guard tattoo policy. However, examples of tattoos or brands that may violate DA policy include those that:

1. **Demonstrate alliance with an extremist organization.**
2. **Are indecent.** Examples include those that are grossly offensive to modesty, decency, or propriety and those that are vulgar, filthy, or disgusting in nature.
3. **Are unreasonably large or excessive in nature.**
4. **Are racist or sexist in nature.**

C. Command Responses to Violations of Tattoo Policy:

1. **Inspections:** Recruiting and retention managers (O-5 or above) will make initial entry determinations that tattoos or brands comply with this policy for National Guard soldiers. This Authority is not delegated further. Commanders may authorize the inspections of tattoos on soldiers' bodies. Any such inspections must be as non-intrusive as possible. Female leaders may inspect all areas on female soldiers' bodies that are not covered by the Army PT Uniform. Male leaders may inspect all areas on male soldiers' bodies that are not covered by the Army PT shorts. *Commanders should coordinate with their Group Judge Advocates prior to conducting such inspections.*
2. **Actions Upon Discovery of a Violative Tattoo:** *Commanders should not order soldiers to have tattoos or brands removed.* Commanders

encountering soldiers who refuse to have a tattoo or brand removed should follow the following guidance:

- a. Ensure the Soldier Understands the Policy.
- b. Ensure the Soldier Has the Opportunity to Seek Medical Advice Regarding Removal of the Tattoo or Brand.
- c. Counsel the Soldier in Writing that He or She is not in Compliance with National Guard Policy, and that His Decision not to Remove the Tattoo or Brand Could Result in Adverse Administrative Action, to Include Discharge from the National Guard.

D. Tattoo Removal: The Army Medical Command and its subordinate commands are prepared to assist in removing tattoos when the soldier *requests removal*, and he or she is *command-referred*.

1. **Exceptions:** The National Guard may elect not to provide tattoo removal services to soldiers who, after 31 December 1998 (the date of the NGB Message References above), voluntarily apply tattoos or brands that violate DA policy.
2. **Procedures:** NGB estimates that tattoo removal will require five to eight treatment sessions, with four to six weeks between sessions. Consequently, complete tattoo removal may take several months.

Chapter Twenty Nine. Body Piercing Policy

REFERENCES:

**AR 670-1, Wear and Appearance of Army Uniforms and Insignia, dtd
3 Feb 2005**

A. Overview: NGB requires soldiers to uphold a certain military appearance on and off duty. Both the wear of piercings and earrings while in uniform detracts from a soldierly appearance.

B. NGB Policy – Soldierly Appearance:

1. **Body piercing.** When on any California National Guard installation or other places under California National Guard control, soldiers may not attach, affix, or display objects, articles, jewelry, or ornamentation to or through the skin while they are in uniform, in civilian clothes on duty, or in civilian clothes off duty (this includes earrings for male soldiers). The only exception is for female soldiers, who are authorized to wear prescribed earrings with the service, dress, and mess uniforms. (Commanders should note that the term “skin” is not confined to external skin, but includes the tongue, lips, inside the mouth, and other surfaces of the body not readily visible).
2. **Earrings** Earrings may be screw-on, clip-on, or post-type earrings, in gold, silver, white pearl, or diamond. The earrings will not exceed 6 mm or 1/4 inch in diameter, and they must be unadorned and spherical. When worn, the earrings will fit snugly against the ear. Females may wear earrings only as a matched pair, with only one earring per ear lobe. When females are off duty, there are no restrictions on the wear of earrings
3. **Ankle Bracelets and Necklaces** - Ankle bracelets, necklaces (other than those described in para 1–7b of Army Regulation 670-1), faddish (trendy) devices, medallions, amulets, and personal talismans or icons are not authorized for wear in any military uniform, or in civilian clothes on duty.

C. Actions Upon Discovery of a Policy Violation: Commanders may order the soldier to remove any such object placed through the skin on his/her body. Commanders encountering soldiers who refuse to have the object removed should follow the following guidance:

- a. Ensure that the Soldier Understands the Policy.
- b. Counsel the Soldier in Writing that He or She is not in Compliance with California National Guard Policy, and that His or

Her Decision not to Remove the Piercing Could Result in Adverse Administrative Action, to Include Discharge from the California National Guard.

Chapter Thirty.

Conscientious Objection

REFERENCES:

DoD Directive 1300.6, Conscientious Objectors, dtd 5 May 2007

AR 600-43, Conscientious Objection, dtd 21 August 2006

A. Overview: Any soldier with a firm, fixed, and sincere objection to participation in any form of war, or to the bearing of arms because of religious training or belief, may apply for separation from the California National Guard as a conscientious objector. Applicants must establish by clear and convincing evidence that the objection is sincere and based on beliefs that either did not exist or did not become fixed until after entry into the service. Applicants must consent to interviews and to an investigation into their status. NGB makes the final decision on many applications.

B. Classes of Conscientious Objectors: There are two classes of conscientious objectors, as detailed below.

1. Class 1-A-0: A member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a non-combatant status.

2. Class 1-0: A member who, by reason of conscientious objection, sincerely objects to participation in military service of any kind in war in any form.

C. Procedures for Processing Applications: AR 600-43 governs the procedures for processing conscientious objection claims. In particular, commanders should be aware of the provisions detailed below.

1. A Military Chaplain and Psychiatrist Must Interview Applicants.

2. The Special Court-Martial Convening Authority (Normally, the Soldier's Battalion Commander) Must Appoint an Officer to Investigate the Claim.

3. The Record of Investigation will be Forwarded to the General Court-Martial Convening Authority (GCMCA) and his or her Staff Judge Advocate for Review.

4. Soldiers May Withdraw their Application at Any Time Prior to Final Action on the Case.

5. Approval Authorities: Authority to approve applications for noncombatant conscientious objector status (1-A-0) is delegated to the commander exercising GCMCA over the applicant and the proper level of command listed below for the Reserve Component. The Department of the Army Conscientious Objector Review Board will make the final determination on all applications requesting discharge (1-0) and those requesting noncombatant status (1-A-0) that are not approved by the command level listed below—.

a. Applications submitted by personnel in the Army National Guard (ARNG) on active duty or active duty for training (ADT) will be forwarded through normal command channels to the Active Army commander having GCMCA for recommendations with supporting reasons (1-0 and disapproval of 1-A-0), or determination and action on approved applications (1-A-0).

b. Applications submitted by California National Guard personnel who are not on active duty or ADT will be forwarded through normal command channels to the State Adjutant General for:

i. Recommendations with supporting reasons (1-0 and disapproval of 1-A-0), or

ii. Determination and action on approved applications (1-A-0).

iii. Applications submitted by USAR unit personnel, and those non-unit personnel under the jurisdiction of an oversea area commander who are not on active duty or ADT, will be forwarded through normal command channels to the numbered Armies in the continental United States (CONUSA) or oversea area commander, as applicable, for recommendations with supporting reasons (1-0 and disapproval of 1-A-0) or determination and action on approved applications (1-A-0).

6. Use and Assignment of Applicants: Applicants pending final action on their cases must be retained in their unit and assigned duties providing minimum practicable conflict with their asserted beliefs. They remain subject to all military orders and discipline, and regulations to include those on training.

D. Administrative Separation of Conscientious Objectors: Soldiers separated from the California National Guard for conscientious objection are entitled to receive either an Honorable or General Discharge.

Chapter Thirty One.

Family Support Inquiries

REFERENCES:

**AR 608-99, Family Support, Child Custody, and Paternity, dtd
29 October 2003**

Cal ARNGR 600-14, dtd 21 Nov 1990

NGR 600-12, dtd, 8 January 1986

A. Overview: The National Guard has an interest in the welfare of both soldiers and their family members. This is recognized by numerous laws and military programs authorizing government family housing, living and travel allowances, medical care and legal services, child care and youth development services, child and spouse abuse prevention services, and morale, welfare and recreation services. Although the traditional National Guard soldier is not full-time, pursuant to AR 608-99, these regulations apply to any National Guard soldier who is on active duty for at least thirty days.

B. NGB Guidance: Soldiers are required to manage their personal affairs in a manner that does not bring discredit upon themselves or the California National Guard. This responsibility includes:

1. Maintaining reasonable contact with family members. This ensures that their financial needs and welfare do not become official matters of concern for the Army.
2. Conducting themselves in an honorable manner with regard to parental commitments and responsibilities.
3. Providing adequate financial support to their family members.
4. Complying with all court orders.

C. Command Response: Leaders at all levels may receive a complaint by a family member that support is not being provided by the soldier. Complaints may be in the form of a telephone call, letter, facsimile, or other such communication. All such complaints must be brought to the Commander's attention for a written response within 14 days. If a final response is not completed, an interim response must be sent within the mandated 14 day requirement. Any inquiry alleging a repeated or continuing violation of the support requirement will be referred to the battalion commander for appropriate action.

D. National Guard Family Program: The National Guard recognizes the importance that family plays in its soldiers' lives and combat readiness. The National Guard has instituted a "family program regulation" which is intended to help commanders institute family programs which will increase unit cohesiveness and combat readiness.

Members of the California National Guard are expected to support and participate in the family Program. Members will:

1. Keep their commanders informed of their family status.
2. Keep the appropriate mobilization documents and required emergency data in their unit files.
3. Support newly assigned members of the unit as requested by their commander.
4. Forward information and messages to their families in support of the National Guard Family Program.
5. Keep their families informed of key personal information, benefits, and programs, etc.

Chapter Thirty Two.

Family Readiness Groups

REFERENCES:

The Army Family Readiness Group: Leader's Handbook

- A. Overview:** A Family Readiness Group (FRG) is an organization created to create a climate of mutual support within the unit. FRG goals include supporting the military mission through provision of support, outreach, and information to family members.
- B. Taxes:** FSG's must comply with all Federal, State, and local tax laws, including state excise taxes. FSG's must seek private counsel or contact proper tax officials to ensure compliance with all tax laws.
- C. Raffles, Lotteries & Games of Chance:** Raffles and lotteries are subject to state law and local installation policy. Contact your CJA for details.
- D. Money Accountability:**
1. Money raised by FSG's must be guarded carefully. Only one person (custodian) is responsible for maintaining, accounting for, and documenting spending of the fund. This does not mean that only one signature is required to spend money, however. Custodians of FSG money are liable to the FSG if they lose it. The custodian should open a non-interest-bearing checking account (interest-bearing accounts may be liable for local, State, or Federal taxes, and responsible to file tax returns). Although FSG's may qualify for exemption from Federal income tax, pursuant to section 501 of the Internal Revenue Code, the savings to be achieved may not equal the time and effort required to obtain an exemption.
 2. The custodian will annually inform the command about the fund existence and purpose, and provide a financial report. Detailed records should be maintained on how money is raised and how it is spent. The FRG membership should make spending decisions. The FSG membership should determine the amount of money the FRG leadership may spend without consulting the entire membership. Commanders must review FRG financial records annually in accordance with local installation policy.
- E. How FRG's May Spend Money:**
1. FRG's may spend money in such a manner that the broad goals of the FRG are supported, i.e. social events, supplies, child care, dayrooms, newsletters, etc.
 2. FRG funds should be used for activities that support the entire group rather than for specific individuals. Thus, inviting third party visitors for the

purpose of sales, such as a Tupperware or Longaberger representative does not support the entire group or the broad goals of an FRG.

3. The use of funds should not duplicate what other agencies provide (i.e., establishing a loan fund or emergency food locker when other agencies such as Army Community Service, Army Emergency Relief, American Red Cross, etc., already have programs established).

4. Finally, FRG monies may not be spent in a way that appears improper or contrary to California National Guard interests.

F. Authorized Support: Below are the types of support authorized to FRGs.

1. **Official mail:** The requirements are that it must be for an official, mission-related purpose and be approved by the commander. Official mail cannot be used to support private organization activities, fund raisers, or commercial ventures

2. **FRG Newsletters:** Newsletters can be printed with appropriated funds (APFs) provided information is considered official and approved by the commander.

3. **Use of Government Facilities:** FRG volunteers may use government facilities to include dedicated office space, desks, equipment, supplies, and telephones needed to accomplish their assigned duties.

4. **Use of military vehicles:** Requirements for the use of military vehicles are outlined in AR 58-1, Management, Acquisition, and Use of Administrative Vehicles. Government vehicles may also be used when several criteria are met, as provided for in DA Pam 608-47, paragraph 3-6(a)(4).

Chapter Thirty Three. Mental Health Evaluations

REFERENCES:

DoD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, dtd 24 November 2003

NGB Message, Subject: Mental Health Evaluations (Clarification), dtd 8 March 1996

- A. Overview:** A soldier has certain rights when referred for a mental health evaluation, and additional rights when admitted to a treatment facility for an emergency or involuntary mental health evaluation. The procedures outlined in DoD Directive 6490.1 are designed to ensure Commanders are prohibited from using the mental health system as a means of “reprisal” or to control “whistleblowers.”
- B. Non-emergency referral:** First, a commander must contact an authorized mental health professional and make an appointment at least two (2) business days later. Next, the commander must provide written notice of the referral to the soldier. A two page form is located at the end of this chapter to complete the written notice for a *non-emergency* referral. (Form 33-1) Strict adherence to the form will ensure compliance with the directive’s referral requirements. For emergency or involuntary referrals that result in admitting a soldier to a treatment facility, refer to the requirements listed below.
- D. Emergency referral:**
- 1. Requirements:** Emergency or involuntary referrals are not subject to the two-day notice requirement of the DoD Directive. When *admitting* a soldier to a treatment facility for an emergency or involuntary mental health evaluation, the following requirements apply:
 - a.** Reasonable efforts shall be made, as soon after admission as the member’s condition permits, to inform the member of the reasons for the evaluation, the nature and consequences of the evaluation and any treatment, and the member’s rights;
 - b.** The member shall have the right to contact, as soon after admission as the member’s condition permits, a friend, relative, attorney, or IG;
 - c.** The member shall be evaluated by the attending psychiatrist or a physician within 2 business days after admittance to determine if continued hospitalization and treatment is justified or if the member should be released from the facility;

Form 33-1

Notice of Referral for Non-Emergency Mental Evaluation

FROM: Cdr, _____ FOR: _____
[Printed rank & name of Cdr] [Printed rank & name of Soldier]

1. You are hereby notified, under the provisions of the Department of Defense Directive 6490.1, that you are being referred for a mental health evaluation. I have determined that a mental health evaluation is necessary because of the following behaviors and/or verbal expressions: _____

_____.

2. Your evaluation is scheduled for _____ at _____ at _____.

[Date] [Time] [Location][Note: Minimum (2) business days notice]

3. I have previously consulted with the following health professional(s) before making the referral:

[Only a psychiatrist, clinical psychologist, doctorate in clinical social work, or a psychiatric clinical nurse specialist. If consultation is not possible state why in a separate memorandum at the end of this notice.]

4. Based on this referral, you have the following rights:
- a. Upon your request, an attorney who is a member of the Armed Forces or employed by the Department of Defense and who is designated to provide advice under the Directive shall advise you of the ways in which you may seek redress.
 - b. If you submit to an IG an allegation that you were referred for a mental health evaluation in violation of the Directive or implementing Directives, the IG, DoD, shall conduct or oversee an investigation into the allegation.
 - c. You have the right to also be evaluated by a mental health professional of your own choosing if reasonably available. Any such evaluation, including an evaluation by a mental health professional who is not an employee of the Department of Defense, shall be conducted within a reasonable period of time after you are referred for evaluation and shall be at your own expense.
 - d. No person may restrict you in communicating with an IG, attorney, Member of Congress, or others about your referral for a mental health evaluation. This provision does not apply to a communication which is unlawful.

- e. In situations other than emergencies, you shall have at least two (2) business days before a scheduled mental health evaluation to meet with an attorney, IG chaplain, or other appropriate party. If a commanding officer believes your condition requires that a mental health evaluation occur sooner, the commanding officer shall state the reasons in writing as part of the request for consultation.
 - f. If you are aboard a naval vessel or in circumstances related to your military duties that make compliance with any of the procedures required in the Directive impractical (any procedure outlined on page 1 or 2 of this notice), the commanding officer seeking the referral shall prepare a memorandum stating the reasons for the inability to comply with such procedures and give you a copy.
5. The following are the positions and telephone numbers of authorities, including information on contacting a legal assistance attorney or IG who can assist you if you wish to question the referral:

ATTORNEY: Legal Assistance Attorney, Legal Assistance Office, Bldg. _____,
 _____, Telephone _____

IG: Inspector General, Bldg. _____, _____,
 Telephone _____.

I HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THIS NOTICE OF REFERRAL FOR A MENTAL HEALTH EVALUATION WHICH OUTLINES MY RIGHTS UNDER DEPARTMENT OF DEFENSE DIRECTIVE 6490.1.

[Date]

[Soldier's signature]

[Soldier's printed/typed name]

Commander completes this portion if soldier refuses to sign or accept receipt of the form:

I hereby certify that on the date listed above I presented this form to the soldier identified above and the soldier refused to (sign the form) (accept receipt of the form). Circle all that apply.

_____ [Commander's signature]

_____ [Commander's rank & name—printed]

Commander completes this portion if not able to consult with a mental health professional before referral:

I hereby certify that I was unable to consult with a mental health professional before making the referral for the following reasons:

10 Point Checklist for Properly Referring Soldiers for Mental Health Evaluations

1. Are you referring a member for a mental health evaluation as a reprisal for making or preparing a lawful communication to a Member of Congress, any appropriate authority in the chain of command of the member, an IG, or a member of a DoD audit, inspection, investigation or law enforcement organization? (Violators are subject to punishment under UCMJ or regulations governing civilian disciplinary or adverse actions.)
2. Is this an emergency or involuntary mental health evaluation referral? If so, the (2) business day notice does not apply. Rather the commander should escort the soldier to mental health immediately and, if admitted to a treatment facility, ensure the soldier is advised of additional rights. These rights are listed separately in the attached form.
3. Does the purpose for the non-emergency mental health evaluation fall into a category in which the DOD Directive does not apply? If so, prepare TAMC Form 108 and contact the front desk personnel at Division Mental Health Services, Community Mental Health, Department of Psychology, or Department of Psychiatry for scheduling an evaluation.
4. Read the attached example for written notice of referral as outlined in a two (2) page “Notice of Referral for Non-emergency Mental Health Evaluation.”
5. Consult with a mental health provider at Division Mental Health Service, Community Mental Health, Department of Psychology, or Department of Psychiatry at least two days before referring a soldier for a mental health evaluation?
6. You must provide the soldier the opportunity to meet with an attorney, IG, chaplain, or other appropriate person during these two business days. If you believe the condition requires a mental health evaluation sooner, you must state the reasons in writing as part of the request for consultation.
7. Administer the two page “Notice of Referral for Non-Emergency Mental Health Evaluation” to the soldier, properly reading and completing the form. Provide a copy of documentation for the soldier.
8. Follow these requirements regarding your soldier’s rights upon receiving notice of referral:
 - a. Upon the soldier’s request, an attorney who is a member of the Armed Forces or employed by the Department of Defense and who is designated to provide advice under the Directive must be provided to advise the soldier of the ways in which he or she may seek redress.

- b. The soldier has the right to also be evaluated by a mental health professional of his or her choosing if reasonably available. Any such evaluation, including an evaluation by a mental health professional who is not an employee of the Department of Defense, shall be conducted within a reasonable period of time after referral for evaluation and shall be at the soldier's own expense.
 - c. No person may restrict the soldier in communicating with an IG, attorney, Member of Congress, or others about referral for a mental health evaluation. This provision does not apply to an unlawful communication. (Violators are subject to punishment under the UCMJ or regulations governing civilian disciplinary or adverse action.)
9. Are the rules impractical? If the soldier is in circumstances related to the soldier's military duties that make compliance with any of the procedures required in the Directive impractical, you must prepare a memorandum stating the reasons for the inability to comply with such procedures and give the soldier a copy.
10. Contact your local command judge advocate.

SECTION VIII

ETHICS ISSUES

Chapter Thirty Four. Ethics Counselor Fundamentals

REFERENCES:

DOD 5500.7-R, Joint Ethics Regulation (JER), 29 November 2007

A. Basic Obligations of Public Service.

1. Public Service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
2. Employees shall not hold financial interest that conflict with the conscientious performance of duty.
3. Employees shall not engage in financial transaction using nonpublic Government information or allow the improper use of such information to further any private interest.
4. An employee shall not, except as [provided for by regulation], solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interest may be substantially affected by the performance or nonperformance of the employee's duties.
5. Employees shall put forth honest effort in the performance of their duties.
6. Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.
7. Employees shall not use public office for private gain.
8. Employees shall act impartially and not give preferential treatment to any private organization or individual.
9. Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.
10. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment that conflict with official Government duties and responsibilities.

- 11.** Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.
- 12.** Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.
- 13.** Employees shall adhere to all laws and regulations that provide equal opportunity for all American regardless of race, color, religion, sex, national origin, age, or handicap.
- 14.** Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant factors.

Chapter Thirty Five.

Support to Non-Federal Entities

REFERENCES:

DoD 5500.7-R, Joint Ethics Regulation (JER), 29 November 2007

A. Basic Ethics Principles Regarding Official Support to Non-Federal Entities (NFEs):

1. Use Government Property Only for Authorized Purposes:

a. The Government's performance of services for most NFEs is an improper use of funds.

i. This applies even if the Government is compensated or reimbursed.

ii. Federal law entitles some NFEs to particular types of support (*e.g.*, CFC, Red Cross, Boy Scouts, Girl Scouts).

b. Official Communications Channels may be Used to Notify DoD Personnel of NFE-Sponsored Events of Common Interest.

c. Logistical Support and DoD Speakers May be Provided to NFE-Sponsored Events (*Other than Fundraisers*) if the Support:

i. Does not interfere with official duties;

ii. Serves official interests;

iii. Is appropriate for DoD involvement;

iv. Benefits DoD or the local community;

v. Does not offer preferential treatment;

vi. Is incidental to the event, or the event's admission fee does not exceed the event's cost; **and**

vii. Does not violate federal law or regulations.

2. The California National Guard may not Endorse or Otherwise Sanction NFEs, Even if Otherwise Permissible Support is Provided:

- a. NFE fundraisers may not be supported through the use of DoD personnel's official positions or titles.
- b. Receiving or presenting awards, giving other-than-official speeches, and serving in honorary positions at NFE fundraising events in an official capacity is prohibited.
- c. DoD personnel may not be the "star attraction" at NFE fundraisers.

3. No NFE may Receive Preferential Treatment.

B. Management of NFEs in an Official Capacity:

1. Management in an Official Capacity is Limited to "Designated" Organizations Only:

- a. Army Emergency Relief.
- b. Air Force Aid Society.
- c. Navy-Marine Corps Relief Society.
- d. Coast Guard Mutual Assistance.
- e. Entities regulating and supporting service academy athletics programs.
- f. Entities regulating international athletic competitions.
- g. Entities accrediting service academies and other DoD schools.

2. DoD Personnel Serving in a "Management" Position may not Participate in the NFE's Internal Management or Day-to-Day Operations.

3. No Compensation is Permitted.

C. Personal Participation in NFEs:

1. Management may be in a Personal Capacity, Only

- a. Generally, DoD personnel may not even serve in a *personal* capacity, if the position was offered *because of the DoD employee's official position*.

- b.** General Officers generally may not accept compensation for their service in their personal capacities as officers or members of NFE boards.
- 2.** Personnel Personally Participating in NFEs may not Take *Official Action* on Matters Involving those NFEs.
- 3.** Generally, Government Resources and Time may not be Used in Support of Personal Participation in NFEs.
- 4.** Personnel Serving in a Personal Capacity may not Solicit Funds from their Subordinates.
- 5.** Personnel Serving in a Personal Capacity may not Use their Official Titles or Positions in Endorsements of the NFE.

Chapter Thirty Six. Travel and Travel-Related Gifts

REFERENCES:

DoD 5500.7-R, Joint Ethics Regulation (JER), 29 November 2007

Joint Federal Travel Regulation

Joint Travel Regulation

A. Acceptance of Commercial Travel Expenses for Official Travel from Non-Federal Sources:

1. General Rule: When private organizations offer to DoD personnel a gift of travel expenses for use during official travel, the personnel's Travel Approval Authority must determine, *in advance of the travel and in writing*, that there is no conflict of interest in accepting the gift. In making this determination, the Approval Authority must consider the following criteria:

- a.** Whether the Payment is for Attendance at a Meeting or Similar Function.
- b.** Whether Payment is for Travel that is Related to Official Duties.
- c.** Whether Travel is Primarily for the Government's, Rather than the Non-Federal Organization's, Benefit.
- d.** Whether the Non-Federal Source is Disqualified on Conflict of Interest Grounds, after Examining the Following Factors:
 - (I)** Identity of the Source.
 - (II)** Nature and Purpose of the Meeting or Function.
 - (III)** Identity of Other Expected Participants.
 - (IV)** Nature and Sensitivity of Matters Pending within the Agency that may Affect the Non-Federal Source's Interests.
 - (V)** Significance of the Traveler's Role in any Pending Agency Matters.
 - (VI)** Monetary Value and Character of the Travel Benefits.

2. Cash Payments Not Permitted: Any authorized payment of travel expenses must be in-kind, or by check payable to the Department of the Army. Payment is only permissible for travel, subsistence, and related expenses.

3. First-Class Travel Payments Not Permitted: Only coach or premium-class (*e.g.*, business class) travel is permitted when paid for by a non-federal source. Only the Secretary of the Army may grant exceptions to this rule. Upgrades using *personally-accumulated* frequent flyer upgrade points are permissible.

4. Reporting Requirements: Payments, or the receipt of gifts in excess, of \$250 from a non-federal organization must be reported to NGB. The traveler must submit his or her report, after completing travel, through the Travel Approval Authority and the Group Judge Advocate, who serves as the Group's Ethics Counselor.

B. Incidental Commercial Travel Benefits Deriving from Official Travel:

1. Frequent Traveler Benefits: Frequent traveler benefits earned on *official travel* belong to the federal government. They may be used on subsequent official travel. They often may be used to upgrade seat assignments to premium-class on later official travel, when the Joint Travel Regulation authorizes an upgrade. They may not be used, however, to upgrade to first-class.

2. On-the-Spot Upgrades: Personnel traveling in an official duty status may accept on-the-spot seat upgrades, if the upgrades are generally available to the public, to all military members, or to all federal employees.

3. Benefits Received from Being "Bumped" from a Flight:

a. Involuntary Bumps: Benefits received from being involuntarily "bumped" from a flight while on official duty belong to the government.

b. Voluntary Relinquishment: Benefits received from voluntarily relinquishing a seat while on official travel belong to the traveler, and may be used for personal travel. However, such relinquishment cannot interfere with the unit's mission, and the government should not incur additional costs due to voluntary relinquishment of the seat.

C. Invitational Travel Orders (ITOs):

1. Authorized Cases: ITOs may be issued to qualified personnel (including civilian personnel), in such cases as those listed below.

- a. **Lectures, Instructions, or Demonstrations:** Where an individual is requested to lecture, instruct, or provide a demonstration at activities connected with a DoD program.
- b. **Conferences on Official DoD Matters:** Where an individual will confer, either singly or as part of a group, on official DoD matters with DoD officials, and thus perform a direct service to the DoD.
- c. **Sponsorship in Official Ceremony Directly Related to DoD Interests.**
- d. **Dependents Who Travel with Sponsors to Attend Unquestionably Official Functions, in which the Dependent Actually Participates in an Official Capacity.** “Actual participation” means participation *beyond mere attendance*, in which there is a substantive spouse agenda that requires active participation.
- e. **Travel is Deemed to be in the National Interest.**

2. **Unauthorized Uses of ITOs:** Generally, ITOs may not be issued to employees of the federal government or to members of the Uniformed Services (excluding retirees).

3. **ITOs for Award Ceremonies:** Reimbursement for travel and transportation normally is permitted in order to allow one individual to attend a DoD employee’s major award ceremony, provided that the ITO has been authorized, and the attendee chosen by the award recipient to attend the event is closely related by blood or affinity.

D. Motor Vehicle Transportation.

1. Home-to-Work Transportation.

- a. Within certain limited exceptions prescribed by statute, home to work transportation is not transportation for official purposes, and is prohibited. Such transportation is a personal responsibility.
- b. The law provides that an individual who willfully violates the home-to-work transportation rules may be suspended without pay for a minimum of 30 days, and when circumstances warrant, for a longer period. Military personnel who willfully use or authorize the use of government vehicles for other than official purposes can also be disciplined under the UCMJ or other administrative procedures as appropriate.

2. Official After-Hours Functions.

- a. Transportation to official after-hours functions will be treated as an exception to policy for which prior approval is required. All transportation to after-hours functions will begin and end at the individual's normal place of duty.
- b. Official motor vehicle transportation requirements do not include: transportation to private social functions; personal errands or side trips for unofficial purposes; transportation of dependents or visitors without an accompany official; or in support of non-DoD activities unless specifically approved under the provisions of Army Regulations.

3. The use of California National Guard motor vehicles is restricted to official purposes only.

- a. Military and civilian personnel of the DA may use DA motor vehicles when attending official ceremonies (e.g., changes of command, parades, promotions, retirements, unit activations/deactivations, field demonstrations, funerals, or other similar events) when attendance is in their official capacity. For purposes of these functions, the most senior military and civilian DA official, as well as those DA officials who are actively participating, are attending in their official capacity. Mere attendance at an event does not justify the use of government vehicles except in those rare occasions where the event achieves a significant public affairs objective to justify the official use of group transportation (e.g., buses).
- b. California National Guard motor vehicle transportation is not authorized for officials attending such ceremonies or events only in a personal capacity. All DA officials attending simply as invited guests are deemed traveling in their personal capacity. This includes attendance based solely on friendship, family ties, or prior professional relationship with the honoree.
- c. Commanders or their principal staff officers will determine whether attendance at such ceremonies or events is in an official or personal capacity. When official travel is authorized for general attendance the mode of travel provided will normally be via mass transportation rather than via individual vehicles.

Chapter Thirty Seven. Gifts in the Workplace

REFERENCES:

DoD 5500.7-R, Joint Ethics Regulation (JER), 29 November 2007

A. Overview: A DoD employee may not solicit or accept gifts from *prohibited sources* or that are given because of the employee's *official position*. Foreign gifts may be accepted in limited circumstances, depending on the nature and value of the gifts. DoD employees, with some exceptions, may not solicit contributions for gifts for superiors, or accept gifts from lower-paid employees.

B. Gifts from Outside Sources: DoD employees may not solicit or accept gifts from *prohibited sources* or that are given because of the employee's *official position*.

1. **“Prohibited Sources”:** Prohibited sources include any person or entity:
 - a. Seeking official action by the DoD employee's agency.
 - b. Doing or seeking to do business with the employee's agency.
 - c. Regulated by the employee's agency.
 - d. Substantially affected by the employee's official duties.
 - e. Comprised of members, a majority of whom fit into one or more of the above categories.
2. **“Official Position”:** The test for “official position” is whether the gift would have been solicited, offered, or given had the DoD employee not held the status, authority or duties associated with his Federal position.
3. **“Gifts”:** Gifts include almost anything of monetary value, but not the following:
 - a. Coffee, donuts, and similar modest items of food and refreshments when offered *other than as part of a meal*.
 - b. Greeting cards and items with little intrinsic value, such as most plaques, certificates, and trophies that are intended solely for presentation.
 - c. Rewards and prizes in contests open to the public.

- d. Commercial discounts available to the general public, or to all government or military personnel.
- e. Commercial loans, and pensions and similar benefits.
- f. Anything paid for by the government, secured by the government under contract, or accepted by the government in accordance with federal law.
- g. Anything for which the DoD employee pays market value.

4. Exceptions to the Gift Rule: Common exceptions to the gift prohibition exist in the following, non-inclusive cases:

- a. **Unsolicited Gifts with Market Value of \$20 or Less *Per Source, Per Occasion*, Provided that the Total Value of All Gifts Received from a Single Source During the Year does not Exceed \$50.**
- b. **Gifts Based on an Outside (*e.g.*, Family or Personal) Relationship.**
- c. **Meals, Refreshments, and Entertainment in Foreign Areas.**
- d. **Discounts Offered to Groups in which Membership is not Related to Government Employment.**

5. Command Responses to Offers of Gifts: Generally, the following three-step inquiry will determine whether or not a gift properly may be accepted. Commanders should consult their Group Judge Advocates in all cases, however.

- a. **Is the Item a “Gift”?:** Consider whether the item qualifies as a “gift,” as described in subparagraph B3, above.
- b. **If the Item is a Gift, Does an Exception Apply?:** Consider whether the gift properly falls into one of the gift exceptions, the most common of which are described in subparagraph B4, above.
- c. **Would Using the Exception Undermine Government Integrity?:** If an exception to the gift prohibition *does* apply, consider whether acceptance would undermine Government integrity by creating the appearance that influence is sought.

C. Foreign Gifts: Generally, no DoD employee may request or otherwise encourage the offer of a gift from a foreign government. DoD employees may

otherwise accept a table favor, memento, remembrance, token bestowed at an official function, or gift of “minimal value.”

1. “Foreign Government”: A “foreign government,” for purposes of this rule, includes any unit of a foreign governmental authority, including any foreign national, state, local or municipal government or its agent or representative.

2. “Gifts of Minimal Value”: “Minimal value” is defined as a retail value in the United States at the time of acceptance not exceeding \$260. When gifts exceeding this value are offered, the following general guidelines should be followed:

a. When possible, refuse the gift. If it appears that refusal of the gift may offend or embarrass the donor or could affect adversely the foreign relations of the United States, the donor must be advised that federal law and DoD policy prohibit acceptance.

b. If such a gift cannot be refused, it may be accepted on behalf of the United States. The gift then must be reported and deposited with the Commander, PERSCOM, ATTN: TAPC-PDO-IP, Alexandria, VA 22332-0474 within 60 days.

3. Multiple Foreign Gifts: The values of gifts given by different officials of the same foreign government during the same presentation must be aggregated. When more than one gift is included in a single presentation, the DoD employee may retain only those gifts with an aggregate value that does not exceed the value a gift of “minimal value.” The remainder must be disposed of in accordance with the guidance contained in subparagraph B2, above. Gifts presented by foreign officials at separate presentations, even if presented on the same day or from the same official, are separate gifts, and their value need not be aggregated.

D. Gifts Between Employees: Employees may not give a gift or solicit a contribution for a gift for a superior (*e.g.*, a supervisor or person in the supervisory chain); or accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship. Exceptions to this rule apply as follows:

1. Unsolicited Gifts Given On Occasional Bases: This includes minor contributions of food or drink that will be consumed at the office or during meals at someone’s home. It also includes infrequent gifts with a value of less than \$10 on appropriate occasions, such as Christmas or birthdays.

2. Special Infrequent Occasions: Subordinates may give or donate toward gifts to a superior on special occasions, such as marriages, PCS, or retirement. Under no circumstances, however, may employees solicit more

than \$10 from another employee for a “group gift” to a superior. Collection of such donations should be undertaken by someone junior in the unit.

SECTION IX

Fiscal Claims and Legal Issues

Chapter Thirty Eight. Commanders' Coins

REFERENCES:

AR 37-47, Representation Funds of the Secretary of the Army, dtd 12 March 2004

AR 600-8-22, Military Awards, dtd 11 December 2006

A. Overview: NGB increasingly has scrutinized the purchase and presentation of commanders' coins. Commanders must recognize fiscal rules that affect their purchase and distribution. Coins may be purchased, depending on circumstances, using appropriated funds, non-appropriated funds (NAFs), or private funds.

B. Purchase with Appropriated Funds: Appropriated funds will be used to purchase the items to be awarded. MACOM commanders, State adjutants general, and principal NGB officials may authorize their subordinate award authorities to use appropriated funds as required. To avoid waste of California National Guard resources, award items procured in bulk will not include the presenting official's name unless the official is the Secretary of the Army; the Chief of Staff, Army; or the Sergeant Major of the Army. Items may be procured in bulk that contain the official's title and/or the organization's name. This limitation does not prohibit the specific inscribing or engraving of an award individually selected for presentation.

C. Purchase with NAFs: Commanders may present coins purchased with NAFs only to award soldiers and DoD civilians for excellence in athletic or nonathletic competitions, proficiency in recreational programs, or unusual accomplishment in supporting special events.

D. Private Funds: Commanders wishing to present coins to soldiers or DA civilians for any reason, including such occasions as farewells, may purchase them with their own private funds. Commanders should keep receipts for all such purchases.

Chapter Thirty Nine. Article 139 Claims

REFERENCES:

Manual for Courts-Martial, 2008 Edition

AR 27-20, Claims, dtd 16 December 2005

DA PAM 27-162, Claims Procedures, dtd 1 April 1998

A. Overview: Article 139, UCMJ, provides an administrative mechanism for assessing and paying restitution to the victims of certain types of criminal offenses committed by military personnel subject to the UCMJ (See California Military and Veterans Code). Claims initiated and processed UP Article 139, UCMJ, permit individuals, corporations, non profits, and governments to file claims against soldiers who *willfully take or destroy personal property*. Soldiers are not the only persons who may file Article 139 claims; any person whose property was taken or destroyed *by a soldier* may file such a claim, subject to certain limitations.

1. **Willful damage.** Willful Damage falls into two categories. The first category involves damage caused intentionally without justification. Such damage is essentially the result of vandalism. The second category involves riotous, violent, or disorderly acts, acts of depredation or acts showing a reckless and wanton disregard for the property rights of others. Only damage that is “incidental to violence against the person or the outgrowth of a breach of the peace” falls within the meaning of “willful damage.”
2. **Wrongful Taking.** A wrongful taking is essentially a theft. That is, an unauthorized taking or withholding of property with the intent to deprive the owner of either temporary or permanent possession.

B. Limitations on Types of Article 139 Claims: Article 139 claims may not be processed for the following non-inclusive types of loss or destruction:

1. Breach of Contract.
2. Property Damaged through Negligence.
3. Personal Injury or Death.
4. Actions or Omissions of Military Personnel Acting within the Scope of their Employment.

C. Limitations on Financial Amounts of Article 139 Claims: Limitations on the amount of money that may be paid to a claimant depend on the level of authority at which the claim is handled. Special Courts-Martial Convening Authorities (SPCMCAs) (normally, Brigade Commanders) may approve claims that do not exceed \$5,000 on a single claim. General Courts-Martial Convening

Authorities (GCMCAs) may approve claims that do not exceed \$10,000 on a single claim.

D. Processing Article 139 Claims: AR 27-20, chap 9 governs the procedures for initiating and processing Article 139 claims. In particular, commanders should be aware of the following provisions.

- 1. Suspense for Filing:** Claimants must file claims within 90 days from the date of the incident causing the loss or destruction of property.
- 2. Place for Filing:** Claimants should file claims with their servicing installation's Claims Office. Installation claims offices traditionally are co-located with respective installation's Office of the Staff Judge Advocate. They may do so either verbally or in writing.
- 3. Forwarding of Claim:** Claims that are properly filed will be forwarded to the suspected soldier's SPCMCA. If the SPCMCA determines the claim is cognizable, he will assign, within four working days of receiving the claim, an Investigating Officer (IO) to examine the allegations and surrounding facts and circumstances.
- 4. Investigation:** The IO's investigation must comply with AR 27-20, chap 9. In particular, he or she must take the following steps:
 - a. Notify the Soldier:** The IO must notify the soldier against whom a claim is filed, and if the soldier wishes to make voluntary restitution, the IO may (with the SPCMCA's approval) delay the proceedings until the end of the next pay period.
 - b. Continue the Investigation:** If the soldier refuses to make full restitution or cannot do so, the IO will determine whether the claim is *cognizable* (proper UP AR 27-20) and *meritorious* (supported by the evidence). The IO likely will have to obtain written statements and other supporting paperwork, diagrams, and/or pictures during his or her investigation.
 - c. Determination of Meritorious Claim:** If the IO determines that a soldier should be held financially liable, he or she must submit written findings and recommendations to the SPCMCA. The assessment must be reviewed for legal sufficiency; normally, the servicing Group Judge Advocate will perform this legal review.
 - d. Notification to Liable Soldier:** Soldiers against whom financial liability has been assessed must be notified of the determination and of their right to seek reconsideration. A copy of the IO's findings and recommendations must be enclosed with the notice. Unless the approval authority determines that substantial injustice will result, action to recoup money from the liable soldier

must be suspended for 10 working days, in order to afford him or her an opportunity to respond to the assessment of liability.

5. Disposition of Meritorious Claims: If the investigation into the Article 139 claim ultimately determines that a soldier is financially liable for the loss or destruction of personal property, an amount equal to the assessed amount of loss or destruction will be taken directly from the soldier's military pay and awarded to the claimant. Alternatively, the soldier may choose to make voluntary and full restitution to the claimant at any stage during the claim process. If this occurs, the approval authority may terminate the Article 139 proceedings without findings.

E. Related Administrative and UCMJ Actions: Commanders may determine, in appropriate circumstances, that a soldier's actions resulting in the loss or damage of private property warrant adverse administrative or UCMJ action. Commanders are advised, however, that findings of liability under Article 139 are separate and distinct from findings that may result during other adverse actions. Each type of action requires independent findings.

OPERATIONAL LAW ISSUES

Chapter Forty. Freedom of Information Act/Privacy Act

I. The Freedom of Information Act (FOIA).

REFERENCES:

Freedom of Information Act, 5 U.S.C. § 552, as amended.

Department of the Army Regulation 25-55, The Department of the Army Freedom of Information Act Program, dtd 1 November 1997

A. Overview of FOIA:

1. Disclosure is the rule, not the exception.
2. The status and purpose of the requester are irrelevant in determining release.

B. Scope of FOIA.

Applies to “agency records.” Records include almost anything capable of being reproduced – books, papers, computer data, photographs, videotapes, etc.

C. Exemptions. Exemptions permit withholding.

1. Classified records.
2. Internal personnel rules and practices.
3. Other Federal withholding statutes.
4. Trade secrets and commercial or financial information.
5. Certain agency memoranda and internal agency communications.
6. Personal privacy protection.
7. Records of information compiled for law enforcement purposes.

D. How does the California National Guard process FOIA requests?

1. The request must be proper.

- a. It must request and reasonably describe a record;
 - b. Be in writing (this includes conventional, paper requests, e-mail messages, and fax transmissions);
 - c. Express a willingness to pay or request a waiver of fees; and
 - d. Be directed to the proper custodian.
2. **Acting on a proper request.**
- a. Custodian may usually grant the request.
 - b. Custodian cannot deny the request.
 - c. 20 working days time limit.

II. The Privacy Act.

REFERENCES:

The Privacy Act of 1974, 5 U.S.C. §552a, as amended.

Department of Defense Directive 5400.11, Department of Defense Privacy Program, dtd 8 May 2007

Department of the Army Regulation 340-21, The Army Privacy Program, dtd 5 July 1985

Department of the Army Pamphlet 25-51, The Army Privacy Program – System Notices and Exemption Rules, dtd 21 September 1988

- A. Overview of the Privacy Act.**
1. Presume people have access and the opportunity to amend factual matters in their own files.
 2. Presumes no access by other third parties.
- B. Scope of the Privacy Act:** Applies to “systems of records.” A “system of records” is a group of records under the control of an agency, from which information about an individual is retrieved by the name of the individual or some other identifying particular.
- C. Collection and Maintenance of Personal Information.**

1. Only collect information relevant and necessary to accomplish an agency purpose.
2. Collect directly from the individual himself.

D. Access and Amendment Rights: Ten exemptions allow the agency to deny the individual access to and amendment of his or her own record (two general exemptions, focus on the agency maintaining the record; six specific exemptions, focus on the type of record; and other exemptions deal with information compiled in anticipation of civil litigation).

E. Processing requests for access and amendment.

1. Custodian may grant the request.
2. Custodian cannot deny the request, but must forward the request to the Refusal Authority (higher up in the technical chain).

F. General Rule – Release to Third Parties. Privacy act information is generally not disclosed to third parties, unless the individual consents to its release, or an exception applies.

1. Exceptions permit agencies to disclose information from records without the prior consent of the individual.
 - a. Disclosure occurs within the agency on a need to know basis. For the National Guard, this includes all of DoD.
 - b. Disclosure is required under FOIA.
 - c. Routine use.
 - d. Law enforcement use.
 - e. Court order.

G. Penalties for Improper Release to Third Parties. Criminal penalties exist for any intentional or willful disclosure of information to a third party not otherwise authorized access to the Privacy Act information. Civil penalties also exist for any wrongful release of such information.

SECTION X

Chapter Forty-One

Mobilization Legal Guide

I. INTRODUCTION

The information in this Guide is designed to help you and your family put your legal affairs in order and anticipate, and avoid, personal legal problems resulting from deployment. It also contains sample letters and notices you can use to ensure that your rights under the law are protected. It covers such matters as:

1. **Legal Protections and Benefits** that exist for you and your family, including relief from financial obligations; right to terminate leases and other contracts; protection against eviction, repossession, foreclosure and shutoff of utilities; and deferment of payments for servicemembers deployed to Iraq or Afghanistan.
2. **Employment Protections**, including your rights to reinstatement in your job upon your return from service, with accrued seniority and benefits.
3. **Estate Planning**, including your will, life insurance, and the disposition of property owned in joint tenancy.
4. **Medical Planning**, including a “living will” and/or advance healthcare directive/medical power of attorney, and, if appropriate, a power of attorney that will allow someone to make medical decisions for your children in your absence.
5. **Powers of Attorney**, for property, financial affairs, and other matters.
6. **Housing Issues**, including the impact of your deployment on any leases or rental agreements; where your family will live during deployment; and what protections exist against eviction and shutoff of utilities.
7. **Childcare Issues, including** preparation of a Family Care Plan and use of a power of attorney for childcare.
8. **Insurance Issues**, including cancellation and reinstatement of health insurance policies, protection against cancellation of life insurance policies, SGLI and designation of beneficiaries.

JAG ASSISTANCE

You will have an opportunity (if you have not already done so) to meet with a Judge Advocate General (JAG) attorney and have legal documents (such as a will or power of attorney) prepared and to discuss any specific legal issues you may be confronting.

Some of the things to think about (and, where appropriate, discuss with your spouse or family members) before you meet with a JAG include:

- Deciding whether you want to have *a will* drawn up for you; how you want to dispose of your property; and whom you want to appoint as your executor.
- Deciding whether or not you need a *living will* or *advance healthcare directive*. These documents can authorize the person you

designate to make decisions regarding your medical care in the event you become incapacitated and cannot make those decisions yourself.

- Deciding whether or not you should give a *power of attorney* to a friend or family member. This allows the person you choose to sign documents and take a range of actions (that you can specify) on your behalf, including financial, tax and other matters.
- If you have minor children, whether you want to give a *childcare power of attorney* to a family member, friend and/or child care provider to authorize these individuals to make certain decisions (including medical decisions) and take action on behalf of your children in your absence.
- Providing *notice to your employer, creditors, landlord, utility company and others* regarding your deployment in order to trigger certain legal rights that exist for you and your family.

II. LEGAL PROTECTIONS AND BENEFITS: THE SERVICEMEMBERS CIVIL RELIEF ACT AND CALIFORNIA LAW

Significant legal benefits and protections exist for you and your family under the Servicemembers Civil Relief Act (SCRA, 50 U.S.C. App. §§ 501 *et seq.*) and California State Law (*Military and Veterans Code*, §§ 389 *et seq.*). These laws cover a broad range of matters, including reduction of interest rates, termination of residential or automobile leases and cell phone contracts, protection from eviction and shutoff of utilities, rights to maintain or reinstate life or health insurance, deferral of payments and taxes, and certain protections in court and administrative proceedings.

A. Application of the Law

Active Federal or State Service. The SCRA protects National Guard members called to active federal service under Title 10 or 32 of the United States Code. California state law provides similar (and in some cases greater) protections to National Guard members called to active federal service *or* ordered into full-time active state service by the Governor (for example, as with the Hurricane Katrina relief efforts). In most cases, the protections apply during the entire period of active duty and for between 30 days and 1 year after its termination.

Period of Military Service. In virtually all cases, for purposes of the law, you are considered to be on active duty from the *date you receive your orders to report for military service* rather than the date you actually report for duty. (50 U.S.C. App. §516(a)). While this adds important protections, you should be mindful that most contracts, leases, debts, other obligations for which you receive protection under the law must have been entered into *before* your military service, meaning that if you sign a contract after you receive your orders, but before you report for duty, you will not be protected for that obligation under the law.

Spouses and Dependents. Many of the benefits of the law are available to your spouse and dependents, including protection from eviction or foreclosure of property and shutoff of utilities, the right to terminate leases and cell phone contracts, and deferral of payment of income taxes. A “dependent” for purposes of the law means your children and any other person for whom you provided more than one-half of their support of the 180-day period before applying for protection under the law. (50 U.S.C. App. § 511(4)).

“Materially Affected.” To receive protection under some parts of the law, you must be prepared to show that military service has materially affected your ability to comply with the legal or financial obligation involved (such as paying a debt or appearing in court). In general, this means

that your military service must have made it more difficult or financially burdensome to perform the obligation.

B. Reduction of Interest Rate on Pre-Service Debt

Under the law, interest rates on credit cards, installment contracts, mortgages, or other debts or obligations incurred before you were called to active duty (except federally insured student loans) are limited to *six percent* during your period of active service. This includes debts owed by you individually or jointly with your spouse. (It makes no difference which of you actually incurred the debt – e.g., for an auto loan for your spouse’s car – as long as you are both liable for repayment of the debt). However, the obligation or debt *must have been incurred before your call to active duty*. Any interest above the 6% amount is forgiven.

1. Definition of “Interest.”

For purposes of the law, the definition of “interest” includes not only standard interest charges but also *service charges, renewal charges, transaction fees* or any other charges in connection with the debt or obligation. It also applies to “pre-calculated” or “pre-computed” interest, i.e. interest that is built into the amount of the debt rather than being charged separately from the principal.

2. Obtaining the Interest Rate Reduction.

To obtain the reduction, you must provide:

1. *each creditor* (e.g., your bank or credit card company, auto loan company, home loan company, etc.)
2. *written notice* of your call to active service and a copy of your military orders,
3. *no later than 180 days after your release from active duty*. (A sample letter is attached at the end of this Guide.) **It is strongly recommended that you send out notice immediately upon being activated to secure this important right.**

Automatic Reduction. As long as you provide notice within the 180-day period, the creditor must *retroactively* reduce all interest charges to 6% for the period of your active service. In the case of a mortgage, trust deed, or other security in the nature of a mortgage, this reduction in interest charges continues for one year after the end of your period of active service. The interest cap is automatic if you provide the proper notice. You do not have to prove to the creditor that your military service materially affected your ability to pay the interest charges under the contract. (However, as discussed below, a creditor may apply to a court for relief from the 6% cap if it believes your ability to pay was not materially affected).

3. Creditor Relief If No “Material Effect.”

If the creditor believes that your ability to pay the interest rate at the level above 6% was not materially affected by your military service, it can apply to a court for relief from the interest rate reduction. A court may grant this request if it finds you were not materially affected (as, for example, where your employer made up the difference between your military pay and your prior salary). However, the burden is on the creditor to go to court and make this showing.

C. Termination of Residential or Automobile Leases

If you are leasing or renting property or a vehicle, the law allows you to terminate that lease upon your call to military service under the circumstances described below. The lease must have been signed before your call to duty. (Sample notices of termination are attached).

1. Home or Business Property Lease.

You may terminate a lease for premises *occupied by you or your legal dependents* and used as a dwelling or for professional, business, agriculture or similar purposes as long as your period of military service is at least 90 days. Upon termination of the lease, the landlord must prorate any unpaid rent and refund any rent paid for the period after the effective date of the termination. The landlord may not withhold the refund of your security deposit for early termination of the lease (but may withhold any portion necessary to pay for repairs or damages).

To terminate the lease, you must provide written notice of termination and a copy of your military orders.

Termination is effective:

- for a **month-to-month lease**, on the earlier of (i) the last day of the month following the month in which notice is given, or (ii) 45 days;
- for **all other leases**, on the last day of the month following the month in which notice is given.

2. Motor Vehicle Lease.

You may terminate any lease of a motor vehicle used by you or your dependents for personal or business transportation provided the lease is for a period of more than 180 days. If you decide to terminate the lease, the lessor must allow you to make payment of amounts due at the time of termination in equal installments over a period of time at least equal to the period of your active duty service. No early termination fees or charges may be collected.

To terminate the lease, you must provide written notice of termination and a copy of your military orders and must return the vehicle.

Termination is effective on the date of delivery of the notice and the vehicle.

Example: SSG Able is leasing an automobile for personal use at the time he receives orders for a one-year deployment. There are 18 months left on the lease, and SSG Able has a \$585 payment due at the time he receives his orders. If SSG Able returns the vehicle with a notice of termination and a copy of his orders, the lessor must terminate the lease and cannot charge any early termination fees. It must also allow SSG Able to repay the \$585 he owes over a one-year period.

D. Termination of Cell Phone Contracts

The law allows you and your *spouse and legal dependents* to terminate any cell phone contract entered into on or after January 1, 2006.

Note: Even though the law does not apply to cell phone contracts entered prior to January 1, 2006, you should consider providing the notice anyway since many cell phone providers will now allow servicemembers to cancel without penalty upon deployment as a matter of company policy.

To take advantage of this law, you must provide notice to the cell phone company, with a copy of your military orders. This notice **must be sent via certified mail, return receipt requested**. (A sample form is attached.)

E. Protection from Eviction

The law provides certain protections for you, your spouse or your legal dependents against eviction from a residential dwelling (house or apartment) during the period of your military service.

The landlord must apply for and obtain a specific court order of eviction, and cannot rely on a 3-day notice or any provision of the lease or rental agreement. If the court issues the requested eviction order, it must **stay** (i.e. postpone) the effective date of the order until 30 days after the end of your military service unless it concludes that your ability to comply with the terms of the rental agreement was not materially affected by your military service.

To obtain the protection of this stay, you or your representative must apply to the court for the stay. (A sample form is attached.) The court may require partial payment of rent as a condition to issuing the stay.

Note that your obligation to pay rent is not forgiven as a result of your military service. Although you have protection against eviction for nonpayment of rent, you and your spouse (if a party to the rental agreement) will remain responsible for any unpaid rent.

F. Protection from Shutoff of Utilities

You may apply for and receive protection against shutoff of utility services (water, electrical, gas, sewer and garbage) to your household for a period of 180 days. (The service provider may, but is not required to, grant additional extensions after the 180-day period). The **account must be in your name or the name of your spouse**.

To obtain this protection, you must give the service provider a written notice, enclosing a copy of your military orders, certifying that:

- You are requesting shutoff protection because of a reduction in household income as a result of a member of the household being called to active duty in the military:
- During the shutoff protection period, the household will be occupied by one or more of your legal dependents. (A sample form is attached).

Unpaid Rates and Charges. Although your household is protected against shutoff of utilities for non-payment, it does not forgive the amounts due (unless these are waived by the service provider). You (or the account holder) remain responsible for payment of those amounts. However, the service provider ***must establish a repayment plan*** allowing payment of any past due amounts over a reasonable period not to exceed one year after the end of active duty. ***Additionally, the service provider may not charge you any late payment fees or interest during the period of active service.***

G. Protection from Foreclosure or Repossession

The law provides protections for you and your legal dependents against termination of contracts for purchase or lease of real or personal property (such as a home or car) and foreclosure or repossession of the property.

The protection of the law is automatic if the contract is entered into by you or your dependent and payment of a deposit or at least one installment is made before your call to active duty.

The law applies to all contracts (including mortgages and deeds of trust agreements) for the ***purchase or lease*** of:

- **“Personal property”** including vehicles, furniture, appliances, recreational equipment and the like;
- **“Real property,”** including any home, condominium, building or land.

Such a contract cannot be terminated by the creditor for non-payment or breach, nor may the property be repossessed or foreclosed upon without a court order. This means that a creditor may not rely on provisions in the contract that would otherwise allow it to cancel the agreement and seize the automobile or other personal property or to recover the home or land through “non-judicial” foreclosure. The law extends protection against non-judicial foreclosure to nine months after the end of your period of active service.

As a condition to refusing or staying an order terminating such a contract, the court may require whole or partial repayment of amounts due under the contract. The court may also grant the order to terminate the contract if it finds that your ability to comply with its terms was not materially affected by your military service.

H. Life and Health Insurance Protection

Your call to active duty entitles you automatically to life insurance coverage under the Servicemembers Group Life Insurance (SGLI) program (discussed below in Section IV). You are also entitled, upon return from active duty, to reinstatement of any employer- provided, health insurance coverage if you return to your former job. The law also makes you eligible for the following insurance benefits.

1. Life Insurance.

The law allows you to apply for **protection against cancellation** of a qualifying life insurance policy and deferment (i.e. postponement) of premiums and other payments that would otherwise be due during the period of your military service and two years thereafter. The amount of the policy may not exceed the maximum SGLI benefit (currently \$400,000).

To obtain this protection, you must send written notice to the insurer with a copy to the Secretary of Veterans Affairs. (A sample notice is attached). Upon receipt, the insurer must provide certain information about the policy to the Secretary of Veterans Affairs, which is used to determine whether the policy is eligible for protection.

Benefits of the Law. If the Secretary determines that the policy qualifies, the insurer may not cancel the policy for nonpayment of premiums at any time after the application is received by the Secretary. This protection remains in effect for the period of your military service and for two years thereafter. You have up to that two-year period to pay any unpaid premiums.

Premium Payments Federally Guaranteed: *If the policy qualifies, payment of the premiums is guaranteed by the United States, but you remain responsible for any unpaid premiums and the government may later recover from you any premiums paid on your behalf.*

2. Health Insurance

The law also gives you the right to **reinstatement** of any health insurance policy covering you and/or your dependents that was in effect at the start of your military service and that you terminated during the period of your service. (*This does not apply to employer-provided health insurance programs, which are covered by USERRA, discussed below under Section III.*)

To obtain this protection, you must send written notice to the insurer electing to reinstate the health insurance *within 180 days after the end of your military service*. (A sample notice is attached).

Benefits of the Law. Upon receipt of the notice from you, the insurer must reinstate the health insurance policy without any waiting period and without any exclusions of pre-existing medical conditions (i.e. conditions that existed as of the date of reinstatement).

Exceptions:

- The limitation on **pre-existing medical conditions** does not include conditions that arose out of or were aggravated by your military service. However, the insurer must obtain a determination by the Secretary of Veterans Affairs that the condition met these criteria before it can exclude it.
- If you are eligible to participate in an **employer-offered health insurance program**, you are not entitled to the protections of this law.

I. Income Taxes

1. Combat Zone Exclusion and Extension

If you are deployed to a “**combat zone**” or “**qualified hazardous duty zone,**” as defined below, or you are providing **direct support** for operations in those areas for which you receive hostile fire/imminent danger pay, (i) you can **exclude** certain pay from your income, and (ii) most deadlines regarding filing and payment of taxes are extended.

Combat Zones include:

- **Persian Gulf Area** (Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates);
- **Afghanistan;**
- **Kosovo** (former Yugoslavia).

Qualified Hazardous Duty Zones include three parts of former Yugoslavia:

- **Bosnia/ Herzegovina**
- **Croatia**
- **Macedonia.**

2. Income Tax Exclusion

If you serve in any of these zones, as an *enlisted person* or as a *warrant officer*, **all of your military pay** – including hostile fire or imminent danger pay -- **is excluded from gross income.**

For *commissioned officers*, the monthly exclusion is capped at the highest enlisted pay, plus any hostile fire or imminent danger pay received.

3. Income Tax Extension

If you serve in any of the above zones, virtually all deadlines relating to income tax are extended (including filing your return, paying taxes, establishing an IRA and applying for refunds). This extension covers you, your spouse (even if filing separately) and your dependents. During the extension period, assessment and collection deadlines are extended and there are no penalties imposed. No back taxes can be collected.

Extension Period. The extension is for the period of your service *plus* 180 days, *plus* the period remaining to take the action when you were deployed. Thus, for example, if your one-year deployment began on January 31, 2006, and ended on January 30, 2007, you would have until mid-October 2007 to file your 2005 income tax return.

J. Schools and Colleges

If you are granted an academic leave of absence for military service, and within one year after your release from military service, you so request, the school must do either of the following:

- Refund the tuition (provided you withdrew prior to the date established by the school for withdrawal without academic penalty); or
- Give you a credit against future tuition. (Note: There is no requirement that you have withdrawn prior to the date set for withdrawal without academic penalty to get this credit).

Additionally, upon request made within one year of your release from military service, the school must restore you to the educational status you had attained prior to being called to military service without loss of academic credits earned, scholarships or grants awarded, or tuition or fees paid (provided the appropriate credit is requested as specified above).

K. Court and Administrative Proceedings

If you are involved in a judicial or administrative proceeding before or during your military service, the law gives you the right to obtain a *stay of proceedings* and provides you with certain *protections against defaults* or other adverse decisions or actions if you can show that your ability to participate in the proceedings is materially affected by your military service (as, for example, by an overseas deployment). The other party to the proceeding may also request a stay. Statutes of limitation are also suspended during your military service.

These legal protections apply to any matter in *state or federal court* or before *any administrative agency or board* (such as the Workers' Compensation Appeals Board, Unemployment Insurance Appeals Board, Department of Motor Vehicles, etc.) (*As used below, "court" includes any administrative agency*).

1. Stay of Legal Proceedings

At any time during or within 90 days after your military service, you may request a stay of any legal proceeding if your military service materially affects your ability to participate in the proceeding.

To obtain a stay, you must send the court a letter stating (1) why your military service materially affects your ability to participate in the proceedings; (2) the date you will be able to appear; and (3) a letter from your commanding officer stating that your military duties prevent your appearance and that leave will not be authorized for an appearance.

The court must stay the proceedings if you provide the above information (unless it determines that your ability to appear is not materially affected). The stay may be for the entire period of your military service plus three months. The court may impose conditions on the stay (such as making partial payments if the case involves a debt or obligation).

2. Protection Against Defaults Judgments or Orders.

Prerequisites to Entering Judgment. Before entering a judgment against you, the court must require the other party to provide an affidavit under penalty of perjury stating whether or not you are in military service (or that the party cannot determine whether or not you are). *If the court determines you are in military service*, the court

- (1) may not enter judgment until after it appoints an attorney to protect your interests; and
- (2) must grant a stay of the judgment (for a minimum of 90 days) if it determines you may have a valid defense that cannot be presented in your absence.

If the court cannot determine whether or not you are in military service, it may require the other party to post a bond to protect you from any adverse impact of entering a judgment against you.

3. Stays of Judgments or Orders.

The court may also stay the effect of any judgment and order entered against you if you show that your ability to comply is materially affected by your military service. The court may also vacate (i.e. cancel) or stay any order of garnishment or attachment of your money or property. You must apply for this relief during or within 60 days after the end of your military service.

4. Tolling of Statutes of Limitation.

During your military service, all statutes of limitation (i.e. the deadline to file a lawsuit) are “tolled” – i.e., suspended. This law applies to actions *by or against you* and includes all administrative proceedings.

L. Child Custody, Support and Arrearages.

The California legislature has recently adopted a variety of statutory provisions that deal with child custody, visitation, support and arrearage matters:

1. Custody and Visitation

Newly-enacted Family Code section 3047 declares that a servicemember’s failure to comply with custody or visitation orders as a result of military service/deployment outside of California is not “by itself” sufficient grounds to modify a custody or visitation order. Family courts retain the ability to act in the best interests of children; however, the new legislation provides you with a strong argument in favor of stepping back into the previously existing custody/visitation arrangement without fear that the deployment will automatically undo what existed.

2. Child Support

By way of amendments to Family Code section 3651, you may now serve and file a “**Notice of Activation of Military Service and Request to Modify Support Order**” (Form FL-398).

This notice requires the court to hold a hearing prior to the servicemember’s deployment or to essentially stay the hearing during deployment. You then have up to 90 days after return from deployment to have the hearing and reduce the child support “retroactively” to the later of the date of service of the paperwork or the date of deployment. *If you fail to make the request within that time, you may lose the right to an adjustment.*

If you filed Form FL-398, but were unable to have the hearing to reduce child support prior to deployment, you should be able to get the court to grant you a credit for the amount you overpaid during deployment. The court may either grant you a credit against future child support payments or order the person receiving support payments to pay you back over a reasonable time period.

Keep in mind that because the “time share” with your child or children will essentially go down to “0%” during your deployment, you most likely will not be entitled to a reduction in support even if your income (while activated) was reduced.

In addition to the modification procedures contained in the Notice of Activation of Military Service and Deployment and Request to Modify a Support Order, you may be eligible for a modification based on a change in income due to military activation. To request a modification of support for reasons other than out-of- state deployment, see Form FL-391 Information Sheet— Simplified Way to Change Child, Spousal, or Family Support, for the forms to use and instructions (available on the California Court Website: www.courtinfo.ca.gov/forms/documents).

3. Assistance from Local Child Support Agency

Newly-enacted Family Code section 17440 requires the Department of Child Support Services to develop its own form so that a local child support agency can file a motion to reduce child support on behalf of the servicemember even if the servicemember is not present. The local child support agency is required to file the motion on behalf of the servicemember within five days of a servicemember providing a properly completed form.

If you would like the local child support agency to assist you, you may fill out a **Notice of Deployment** and submit it to the local child support agency. The agency will prepare a request for modification, and you will not need to appear if you are already deployed. The agency must attach the Notice of Deployment to form FL-398 to show the court that you have authorized the agency to act on your behalf. (You can obtain a Notice of Deployment from any local child support agency.)

4. Arrearages

Family Code section 17560 now allows a local child support agency to compromise “arrearages” that accrued due to your deployment if you can show that you would have

paid less child support if a timely motion to reduce child support had been made. This provision is completely retroactive, which means that it applies to deployment periods prior to the effective date of the legislation (January 1, 2006). An offer of compromise “shall be deemed” in the best interests of the state for resolution purposes if you can show that the deployment would have reduced your child support payments, but you were simply unable to have a court hearing before the deployment.

M. General Relief from Financial Obligations

The law allows you to obtain relief from a court from any debt, obligation, liability, tax or assessment on the ground that your military service materially affected your ability to comply with it.

To obtain this relief, you must apply to the court during your military service or within 180 days after the end of your service.

The court may grant the following relief if it finds your ability to pay is materially affected by military service.

1. Real Estate Contracts.

The court may stay payments due under any real estate contract, mortgage or deed of trust (e.g. for your home or business property) for a period up to *the remaining life of the contract plus the period of your military service*. However, you will be required to pay the balance (principal and interest) due and unpaid as of the date of termination of military service (or the date of your application) in equal installments over the life of the stay at the rate of interest prescribed in the contract. No other charges, fines or penalties may be assessed for the delay in payment.

Example: MSG Delta has a 30-year mortgage on his home, on which he has been paying for 10 years. His monthly payment of principal and interest is \$2,200 (a 5½% annual interest rate). Upon his one-year deployment, he applies to the court for relief from the mortgage payment on the ground that his military pay is substantially lower than his civilian income. The court may order that the enforcement of the real estate contract is stayed, and that the amount that would have been due during his deployment (\$26,400 [12 x \$2,200]) may be paid in equal installments over 21 years (the 20-year balance of the mortgage plus the one-year deployment) at 5½ % interest.

2. All Other Contracts and Obligations

The court may stay the enforcement of any other debt, obligation, liability, tax or assessment (including, for example, Mello-Roos taxes or assessments on your home for bonds) for the period of your military service. You will be required to pay the balance due and unpaid at the date of termination of military service (or the date of your application) in equal installments over the period of the stay at the rate of interest set forth in the contract or other obligation. No other charges, fines or penalties may be assessed for the delay in payment.

Example: 1LT Victor has a contract to purchase an automobile with a three-year loan at a 5% interest rate. The monthly payment is \$550. One year after buying the car, he is deployed for 18 months. Unable to make the payments because of a reduction in his income, he applies to the court for relief. The court may order that the contract is stayed for the period of his military service and the amount due at the end of his deployment (\$9,900 [18 x \$550]) shall be paid over the 18 months following the end of his military service at 5% interest.

3. Additional Options

State and federal laws may give you a range of additional options, including bankruptcy, if you are having a hard time meeting your financial obligations. If you are considering bankruptcy, please consult with JAG or a civilian attorney. Be aware that recent changes to the bankruptcy laws exempt service members from certain means testing requirements under Chapter 7.

N. Deferral of Payments for Iraq or Afghanistan Deployments

A recent California law (California Military and Veterans Code §§ 800-11), effective January 1, 2006, gives you an additional benefit if you are called to active duty as part of the Afghanistan or Iraq conflicts.

In addition to any other benefits provided by law (such as reduction of interest rates to 6%), the law allows you to *defer* (i.e. delay without interest or penalty) payment on certain debts and obligations for as long as 180 days. The new law applies only to obligations you incurred before you were called to active duty.

1. Deferrable Obligations

The types of debts and obligations that can be deferred include:

- Credit card payments.
- Retail installment contracts (for example, for furniture, appliances or household goods).
- Revolving charge accounts (for example, with a department store).
- Mortgages or deed of trust payments for your primary residence.
- Up to two automobile loans.
- Auto leases (and the company must also extend the term of the lease by the period of the deferral).
- Property taxes and assessments on your primary residence.

2. Period of Deferral

You may defer payments on any of the above obligations for the *lesser of* 180 days or the period of active duty plus 60 days.

3. Required Notice

To take advantage of this benefit, you must send each company to which you want to defer payments:

- (1) A letter signed by you, *under penalty of perjury*, requesting a deferral of the financial obligation. Note that deferral is only of amounts due *after this notice*. (A form of this notice is attached.)
- (2) ***If asked, you must provide proof that your employer does not provide you continuing income***, which, together with your military pay, exceeds 90 percent of the amount you earned before the call to active duty. Your employer must provide this information on request within 5 days. (If your employer *does* provide you with such continuing income, you are not eligible for deferral of payments.)

4. No Interest or Penalties.

During the period of deferral, no interest may be *charged or accumulated* on the obligation and there can be no penalties assessed. In other words, the interest you would otherwise have been paying during the deferral period cannot be accumulated and added to the amount you owe, and no additional interest can be assessed as a result of the deferral. No adverse credit report may be made, and the deferral cannot be the basis for denying or revoking credit. Additionally, the property subject to the deferred obligation cannot be repossessed or foreclosed on.

III. SERVICEMEMBER'S JOB EMPLOYMENT AND REEMPLOYMENT RIGHTS

Critical Tasks:

1. ***Give written notice*** of your deployment to your employer as early as possible. Send the notice by certified mail. Keep a copy of the letter and the certified mail receipt. A sample notice letter is included at the end of this Guide.
2. ***Return to your job on time***. The number of days you have to return to your job depends on the length of your military duty. If you are away from your job on military duty for more than 180 days you must return to your job within 90 days.
3. ***Get help immediately*** if you are discriminated against because of military or veteran status, if you are denied reemployment, or if any of your other rights under USERRA are violated.

You have the right to be free from discrimination in employment because of your military service. You also have the right to return to your job after performing military duty. These rights are guaranteed by a federal law called the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) and by similar provisions of California law.

A. Discrimination in Hiring and Employment

It is illegal for any employer or a prospective employer to discriminate against you because of your membership in the National Guard. You may not be discriminated against in hiring, promotion, reemployment, termination or benefits or in any other way connected with your job. Get help immediately (see “Getting Help” below) if you are the target of discrimination.

B. Reemployment – Getting Your Job Back After Deployment:

You have a right to return to your job after your release from military duty if you satisfy six conditions:

- 1. You have a job before going on military duty.** Your job is covered by the reemployment rights provisions in USERRA unless the job (a) is only for a brief, non-recurrent period and (b) there is no reasonable expectation that your job will continue indefinitely or for a significant period of time. Generally, permanent full time, part time, hiring hall, or seasonally recurring jobs are covered by USERRA, even if you are on probation or on strike when you go on military leave. A short term temporary job may not be covered. Both government and private sector jobs are covered by USERRA. Get help if you have questions regarding whether your job is covered by USERRA.
- 2. You give your employer notice that you are leaving.** Give your employer notice that you are leaving to perform military duty as early as possible. The notice can be oral or written. However, the best way to protect your rights is to give notice in writing. (A sample notice is attached.) Send the notice to your employer via certified mail, return receipt requested. Keep a copy of the notice and the receipt so that you can prove that you gave notice. See a JAG immediately if it was impossible for you to give notice to your employer before a deployment.
- 3. You are away from your job for less than five years of military service.** This five-year limit is cumulative for each employer. Some types of duty including drills, AT and ADSW do not count toward the five year limit.
- 4. Your military service is honorable.**
- 5. You return to your job on time after being released from military duty.** The law requires you to return to your job or to request reinstatement within a set period after you are released from military duty. If you are performing military duty for less than 31 days you must return to your job on the next regularly scheduled work day that starts at least eight hours after the end of your military duty. If you are performing military duty for more than 31 days but less than 180 days you must

apply for reinstatement within 14 days. If you are performing military duty for more than 180 days you must apply for reinstatement within 90 days. You may have additional time to return to your job if you are recovering from a service-connected disability.

6. **You provide documentation of your eligibility for reemployment on request when you return.** Generally, this means that your employer can ask you for a copy of your orders when you return. Get help if your employer makes an unreasonable request for documentation or if you are denied reemployment.

If you satisfy these conditions you will generally have a right to:

1. **Prompt reinstatement to a job with the seniority, status, and pay rate that you would have if you had remained employed during the period of your deployment.** This is known as the “escalator” rule. Special rules apply to promotions that require the successful completion of an exam or a probationary period. Get help immediately if you are denied reinstatement or if you are not given the seniority, status, and pay that you would have had if you had remained employed during the period of your deployment.
2. **Retraining to enable you to perform your job and reasonable accommodation for any service-connected disability.** Get help if you are denied retraining or if you have a service connected disability that may interfere with your job.
3. **Protection against retaliation.** You cannot be fired because of your military status or for asserting your rights under USERRA. In addition, you are protected from being discharged without cause for one year if your military duty lasted more than 180 days. You are protected from being discharged without cause for six months if your military duty lasted between 31 and 180 days. Get help if you are retaliated against or if you are fired without cause after returning from military duty.
4. **Service credit in any retirement plan.** You are entitled to service credit in your employer’s retirement plan for your period of military service. Your employer may require you to pay the employee contribution to the plan for the period of military service.
5. **A right to use vacation time.** If you have unused vacation credits with your civilian employer when you leave for military duty, then you have the right to use all or some of those vacation credits during your period of military duty. However, your employer cannot require you to do so. You generally do not have the right to earn additional vacation credits from your civilian employer during the time you are away to perform military duty.
6. **A right to continue your health insurance during your military duty at your expense.** If your deployment is for 30 days or less you can be required to pay the usual employee share of the health insurance cost. If your deployment is for longer than 30 days you can be required to pay 102% of the full cost (the employee share plus the employer share) of

the health insurance premium. Note that TRICARE may not cover you or your family for periods of duty lasting less 30 days or less.

7. **Immediate reinstatement of health insurance when you return.** The employer may not impose a waiting period or exclude preexisting conditions that are not service-related.
8. **Any other benefits that you employer offers to other employees who take similar leaves of absence.**

There are some exceptions to these rights. Get help if you have questions or if you are denied any of your rights.

C. Choosing When to Start Your Military Leave

The law permits you to leave your employment a reasonable period of time before starting your military duty. At a minimum, you may take enough time off before starting your military duty to travel safely to your duty station and to arrive fit for duty. For longer periods of military duty, such as a deployment in support of OIF or OEF, you have the right to take a reasonable period of time to put your personal affairs in order and to prepare for deployment.

D. Additional Rights

You may be entitled to other protections or benefits if your employer provides them voluntarily or if they are mandated by a contract or collective bargaining agreement. Federal, state or local government employees may have other protections or benefits under federal, state or local laws. For example, certain employees of the State of California who are called to active duty in support of the Global War on Terrorism are entitled to receive the difference between their state pay and military pay for up to one year. (Government Code § 19775.18).

E. Getting Help

Get help early if you have any questions or problems regarding employment or reemployment. For assistance with employment and reemployment issues call Employer Support of the Guard and Reserve (ESGR) at (800) 336-4590. If ESGR is unable to resolve the problem, contact the U.S. Department of Labor (“DOL”) at (866) 487-2365. DOL can refer your case to the Department of Justice for prosecution, or you may hire a private attorney. You may also speak with a JAG if you have questions regarding employment or reemployment issues.

F. Other Laws Apply to State Active Duty

This discussion applies to duty under Title 10 and Title 32. State law protects your job if you are called to state active duty by order of the Governor. You should speak with a JAG if you have questions regarding employment or reemployment issues during state active duty.

IV. SERVICEMEMBER'S GROUP LIFE INSURANCE (SGLI)

SGLI is a program of low-cost group life insurance for servicemembers. SGLI coverage is available in \$50,000 amounts up to a maximum of \$400,000 (as of September 1, 2005).

- 1. Automatic Coverage.** Upon deployment, National Guard members automatically get SGLI life insurance coverage at the maximum amount (\$400,000) as of the effective date of their orders, for a monthly charge (deducted from military pay). You have the right to retain any other private or government life insurance (although you may not have more than a total of \$400,000 in combined SGLI and VGLI coverage).

Soldiers who want to refuse or reduce the \$400,000 coverage must do so on Form SGLV 8286: Servicemembers' Group Life Insurance Election and Certificate (which is the same form for designating beneficiaries, discussed below). More information on the coverage and cost of SGLI is available on the Department of Veterans Affairs website: <http://www.insurance.va.gov/sgliSite/SGLI/SGLI.htm>.

- 2. Designating Beneficiaries.** If you have SGLI coverage, you can choose your beneficiaries (i.e., the persons to whom the insurance will be paid) on Form SGLV 8286.
 - Your first choice is listed as the "primary" beneficiary on the form.
 - You can also list "contingent beneficiaries" (those who would receive the proceeds if the primary beneficiary is no longer living at the time of payment).
 - You can also designate several primary beneficiaries and contingent beneficiaries. If you do, you should specify (in fractions or percentages) the share to be paid to each; otherwise, they will share equally in the proceeds.
 - You can change the beneficiaries at any time by submitting a new Form SGLV 8286. The change becomes effective when the form is received by the Office of SGLI. Note that a named beneficiary will **NOT** be changed automatically by any event occurring after you complete the form (e.g. marriage, divorce, birth of children, etc.). Also, your beneficiary *cannot be changed, and is not affected, by any other documents* such as a divorce decree or will. (For further information on beneficiary designations, see AR 600-8-1, paragraph 11-29).
- 3. Designating a Custodian for Children.** Because a child under the age of 18 (a "minor") cannot legally receive or hold property, you must designate a person (a "custodian") who can receive and manage the SGLI proceeds until the child's 18th birthday. If you want to name a custodian, you should first contact the person and confirm that they are willing to do this. The following language may

be used on the form SGLV 8286 when designating a custodian for minor children:

“[NAME OF CUSTODIAN], as custodian for my child(ren), [NAME OF CHILD(REN)], pursuant to the UGMA/UTMA”.

If no custodian is designated on the SGLV form, a court will need to appoint a guardian of the minor to receive the SGLI proceeds on behalf of the minor. Such court process helps protect the minor’s funds from theft, fraud, waste, and other such acts. However, it imposes additional time and expense, and the SGLI proceeds can be significantly reduced by the payment of court costs, attorneys’ fees and expenses incurred by the guardian. Thus, it is well worth designating a custodian to avoid this process. Further guidance on designation of a custodian is available in AR 600-8-1 paragraph 11-30.

- 4. **Converting Coverage.** SGLI may be converted upon release from active duty, active duty for training (ADT), initial active duty for training (IDT), or upon separation from the Ready Reserve, to VGLI or to a commercial life insurance policy effective at the end of the 120-day SGLI extension period.

V. LIVING WILL AND ADVANCE HEALTH CARE DIRECTIVE

As an adult in the United States, you have the legal right to consent to or refuse medical treatment. You also have the right to give this power to another person under special circumstances (as when you are unconscious or otherwise incapacitated). Making your wishes known about the treatment you want when you are unable to communicate – or giving another the power to make specific medical decisions under those circumstances -- can be very helpful to medical personnel and to your family.

A. Advance Health Care Directive (AHCD).

You can accomplish both things – empowering another to make medical decisions and stating your wishes regarding treatment – in a single document called an “*Advance Health Care Directive*” (also sometimes known as a “Medical Power of Attorney”).

The portion of the Advance Health Care Directive that states your own wishes regarding medical treatment (as distinct from giving another person the right to make medical decisions) is usually referred to as a “Living Will” (discussed below).

An AHCD can also contain a written statement indicating your decision about organ and tissue donation.

You can also express a desire to die at home rather than in a hospital or nursing home.

B. Health Care Agent

In the AHCD, you can designate a person to make decisions concerning your medical treatment if you are unable to do so. This person should know your desires concerning medical treatment so they can act on your behalf. If no arrangements are made for medical directives and you become incapacitated, the court may appoint a guardian for you.

Important: Signing an AHCD that gives someone power to make medical decisions for you, or states your desires regarding medical treatment, *is only effective if you are unable to make those decisions yourself.* It does not take away your right to decide on treatment if you are able to do so.

C. Living Will.

In the AHCD, you can give medical providers specific instructions about withholding life sustaining procedures, artificial nourishment, and other ways of keeping you alive that you may not wish to have implemented. (A standard clause, however, directs that treatment for alleviation of pain or discomfort must be provided at all times.) You can specifically instruct the medical providers that you do not want your life prolonged and to withhold or withdraw life-sustaining procedures in the event that at some future time, you:

- (1) *are terminally ill*, i.e., have an incurable and irreversible condition that is likely to result in your death within a relatively short time without the administration of life-sustaining treatment;
- (2) *are in a persistive state of unconsciousness*, i.e., become unconscious and, to a reasonable degree of medical certainty, will not regain consciousness; or
- (3) *the likely risks and burdens of treatment would outweigh the expected benefits.*

"*Life sustaining procedure*" generally refers to any medical procedure or intervention that would serve only to prolong the dying process.

"*Terminally ill*" usually means an incurable or irreversible condition with no possibility of recovery, as agreed upon by two doctors in writing.

An AHCD can be destroyed *any time you change your mind*. You can do this by telling someone, revoking it in writing, or by destroying the document. Let your doctor, family and anyone who has a copy of it know that you've destroyed it.

D. Advantages.

There are multiple advantages to having an AHCD, including the "living will" portion. They include:

1. Difficult decisions about future care are provided for while you are competent, alert and healthy.

2. You can authorize a specific person who knows your desires regarding medical care to make decisions on your behalf.
3. If you become terminally ill or are in a persistent vegetative state, your directions allow you to die under circumstances *you* have chosen. It makes your wishes clear and removes the burden of decisions having to be made by grieving loved ones when you are dying.
4. The AHCD can reduce medical expenses.
5. The AHCD states your desires regarding organ donation at your death and your desire to die at home rather than in a health care facility.

VI. POWERS OF ATTORNEY

A. Powers of Attorney.

A Power of Attorney is a legal document that allows a person you designate (your agent or “attorney in fact”) to act on your behalf when you are unavailable. Upon deployment, you may not be able to manage your own affairs and you may need to appoint someone else to act for you. There are two primary types of powers of attorney –

- **General:** The individual you name can act in *all matters*. A general power of attorney gives your representative the authority to conduct any transaction on your behalf. The benefit to a general power of attorney is that your representative can use the power of attorney to handle any unforeseen issues that may arise during deployment. *The danger of a general power of attorney is that you are legally bound by any decisions this person may make, including using your credit, and buying or selling property in your name.* With proper planning, a general power of attorney is *almost never necessary*, and JAG recommends that you use a special or limited power of attorney instead.
- **Limited/Special:** A limited or special power of attorney grants your agent the right to act on your behalf only for specific matters. For example, the limited power of attorney form can be drafted to give your agent (usually a family member or fiancée) specific authority to manage household expenses and deal with insurance, taxes and other listed matters in their absence. You can specify on the form of limited power of attorney exactly what powers you wish to give your agent.

B. Effect and Limitations of Powers of Attorney.

Executing a power of attorney *does not mean that you can no longer make decisions*; it just means that your agent can act for you also. Additionally, your agent must follow your directions. However, you are bound by any decisions or actions your agent takes on your behalf as long as the other party is relying in good faith on the power of attorney, *even if those actions are contrary to your directions*. You are simply sharing your power with someone else. If you are concerned or dissatisfied with your agent’s conduct, you should promptly revoke the power of attorney (see below).

C. Selecting an Agent.

The person you designate as your agent assumes certain duties and responsibilities on your behalf. Although your agent is supposed to make decisions in your best interest and to use your money and property only for your benefit, he or she has great freedom to do as he or she pleases. Therefore, it is essential to choose someone you trust when you sign a power of attorney. You should also choose someone who will be readily available to perform tasks on your behalf. Avoid selecting anyone who may relocate during your deployment (or a soldier who may be deployed).

D. Duration of Power of Attorney.

Most powers of attorney have a beginning and an ending date. Many servicemembers set the length of their power of attorney based on when they are due to return from deployment (allowing some leeway for an extension of the deployment). In general, a power of attorney should be effective for no more than the period necessary to accomplish its basic purpose (usually not more than two years in the case of standard deployments).

E. Revocation of a Power of Attorney.

If during the period of the power of attorney you no longer want your agent to be able to act on your behalf, you may revoke the power of attorney. You do this by notifying your agent of the revocation and retrieving and destroying the original (and any copies). You should also notify, in writing, any individual or organization who may still be relying on the power of attorney that it has been revoked.

If you are concerned that your agent may be using or misusing your power of attorney despite your revocation, you should also contact your credit card companies and credit reporting agencies (Equifax 800-525-6285, TransUnion 800-680-7289 and Experian 800-680-7289) to cancel any further use of credit accounts and filing either a "Fraud Alert" or a "Security Freeze," either of which will make it difficult for the obtain any further extension of credit on your behalf.

VII. ESTATE PLANNING

A. Wills

A will is a document that states how you want your property distributed upon your death and can contain provisions expressing your desires concerning care of your children, funeral arrangements and other matters. Your will must be in writing and must be generally be signed by you and at least two witnesses. These requirements must be carefully observed, and it is strongly advised that you have your will prepared by a JAG or other attorney.

1. **Appointment of Executor.** In your will, you may designate the person you want to have oversee the management and distribution of your property. (If you do not appoint an executor, the court must appoint someone to carry out that function). In general, you should choose someone familiar with your property and affairs and whom you trust to manage your estate and carry out your wishes.

2. **Community vs. Separate Property.** California is a “community property state,” which generally means that all money, real estate and other property you or your spouse acquire during marriage belongs to both spouses equally, no matter who earns more or who actually purchased the property. Therefore, you can only give away in your will (1) your half of the community property; and (2) any separate property you own, e.g. property you acquired before marriage or obtained by gift or inheritance.

If you do not have a will, your property will be distributed according to law (called “intestate succession”), as follows: All community property goes to your spouse. Your separate property also goes to your spouse if you have no children. If you are married and have children, your separate property is divided between your spouse and children. If you have only children (or grandchildren), the estate is divided among them. If you have no spouse, children, or grandchildren, the estate is distributed to your parents, brothers and sisters, grandparents, aunts and uncles, cousins or other members of your family. If you have no living relatives, your property goes to the State.

3. **Wills v. Trusts.** A trust is another tool used in estate planning that can be created as part of a will or as a separate document. A trust is a legal document that appoints a trustee to manage your property and gives detailed instructions on how the property will be managed and distributed. A “living trust” may be established during your lifetime (and you may act as your own trustee), or may be established by your will after your death. Trusts are generally more complicated and time-consuming to create than a will. You will need to have a civilian estate planning attorney assist you if you are interested in establishing a living trust as the JAG section will not be able to assist you in preparing this very involved document.
4. **“Living Wills.”** *A will only takes effect after you die.* A “living will” (which, as discussed above, is often part of an advance directive) is a document in which you *specify your desires regarding your health care while you are still living.* A will, on the other hand, has no legal effect on your health care – including whether medical treatment is given or withheld.
5. **Probate.** Having a living will does not avoid “probate” (the court proceeding in which your estate is settled), but can significantly reduce the cost of probate and the burden to your friends and family.
6. **Maintaining Your Will.** After your will has been signed and witnessed, you should give a copy to the person you appointed as executor. If you keep your will in your possession, you should store it in a safe, fireproof container. Your executor should be informed of where your will is kept at all times so that the probate of your estate may proceed smoothly in the event of your death.

Note: It is generally not a good idea to place a will in a safe deposit box because the bank will usually require a court order to open a safe deposit box in the event of the owner’s death.

7. **Changing or Revoking Your Will.** You can change or cancel your will at any time as long as you are of sound mind. Major life events such as marriage, divorce, death of a family member, or a new baby are good reasons to consider

changing your will. You may revoke your old will simply by destroying it, or by writing a new will. If you only want to make minor changes, you may create a '**codicil**,' a document that is attached to your will. The same legal formalities are required for creating a codicil as a will, and therefore it is wise to consult an attorney about the changes you would like to make. ***Do not erase any part of your will or attempt to insert changes.***

B. Property Not Distributed By Will.

A substantial amount of property and money does not get distributed by your will (or go through the probate process at all, whether or not you have a will). This includes:

Joint accounts. Assets you have in these accounts (bank accounts, stock and bond accounts, etc.) generally do not go through your will but are automatically transferred to the person with whom you hold the account upon your death.

Real Estate. Your home or other real property is often owned jointly with a spouse or family member. Title to the property is usually held either in joint tenancy or, for spouses, as community property with rights of survivorship. The interest of any party to such joint ownership passes automatically to the other parties upon death.

Retirement Accounts. Distributions from retirement accounts (including pension plans, IRAs, annuities, 401ks, etc.) are to the beneficiaries you have designated in your plan documents.

Life insurance proceeds.(including SGLI). Are distributed to the beneficiaries listed on the designation documents.

Beneficiary Designations Control. Your beneficiary designations in the documents relating to your life insurance, retirement account, or joint account are controlling as to who gets the benefit **regardless of what your will says.**

VIII. FAMILY CARE PLAN

All military members ***married to military members*** or who are ***single parents with minor children*** are required to have a Family Care Plan. This is a working plan that outlines how your children and other dependents will be cared for during any period of separation— whether for short-term absences of 30 days or less (such as for temporary duty or annual training) or for long-term absences of 31 days or more (such as for deployments or extended temporary duty assignments).

If you are single, you should also make a plan to address matters such as personal property (referred to as a ***Personal Care Plan.***) Although JAGs generally do not prepare Family Care Plans, we are available to advise soldiers on legal issues relating to these documents.

A. Purpose

A Family Care Plan helps provide guidance for caregivers during deployment and includes information about how you want specific matters conducted in your absence.

Included in the plan are copies of legal documents (e.g. guardianship papers and powers of attorney), instructions for care, and contact information for people involved in the plan. It also addresses healthcare, logistical (housing, food, and transportation), educational, financial, and religious arrangements for the care of your children.

It is important that the Family Care Plan be kept current and that your family and/or caregiver have all the information and documentation needed in your absence. You should also secure a copy in a safety deposit box and in a fire-safe box at home.

B. Preparing Your Family Care Plan.

Your Family Care Plan should include the following family members:

- **Minor children** – The plan should include domestic care, educational needs and family activities such as sports and after-school activities. You must also include a Family Member Care Certification of Childcare Plan and designate a guardian.
- **Special needs family members** – It is important to include direction regarding family members with special needs under the care of your household. (For assistance in addressing dependent children with special needs, contact your Family Program Coordinator or visit: <http://www.efmconnections.org>).

C. Required Documents.

A Family Care Plan includes the following forms and documents:

- Family Care Plan (DA Form 5305-R)
- Family Care Counseling Checklist (DA Form 5304-R)
- Power of Attorney or equivalent (DA Form 5841-R)
- Certificate of Acceptance as Guardian or Escort (DA Form 5840-R)
- Application for Uniformed Services Identification Card DEERS Enrollment (DD Form 1172)
- Authorization to Start, Stop, or Change an Allotment for Active Duty (DD Form 2558),
- Letter of Instruction to Guardian/Escort

D. Power of Attorney for Childcare.

An important part of your Family Care Plan is the is the power of attorney by which you give another person the legal authorization to care for your dependent children and to make important decisions regarding the children (including decisions about medical care and schooling) on your behalf.

Form. You may use either DA Form 5841-R or a power of attorney form prepared by JAG.

Guardian Designation. You can appoint more than one person to act as guardian, but you must specify whether they must act jointly or may act individually.

You should use the utmost care in designating a guardian for family members. Guardians should be persons who will be immediately available in the event of an emergency and will be able to exercise their responsibilities for extended periods of time, if necessary.

The guardian should not be a soldier who may be deployed or mobilized.

Chapter Forty-Two**SERVICEMEMBER'S SUPPORT
REFERENCE PHONE LIST**

American Red Cross	800-843-2949 559-455-1000 x 115 888-494-3559
California Fair Employment & Housing Department	800-233-3212
Chaplain	559-449-2490
Department of Labor	800-473-2356
Employer Support of the Guard and Reserves (ESGR)	800-336-4590
Operation Ready Families Program Coordinators	800-449-9662 916-854-3252 559-222-7278
JFHQ ESGR	916-854-3829
JFHQ JAG	916-854-3505
40 th ID JAG	562-795-2689
Servicemembers Opportunity Colleges (SOC)	800-368-5622
Sexual Assault Response Coordinator	916-869-0787
Trial Defense Services	916-854-3496
U.S. Department of Housing & Urban Development	800-669-9777
Veterans Crisis Center	559-486-1284 800-611-6262

Chapter Forty-Three

USEFUL WEBSITES

A. Comprehensive Guard Site

http://www.guardfamily.org/index.cfm?fuseaction=B0603_A.list#B0603_anchor_A_01

B. Legal Services related to deployment:

<http://www.jagcnet.army.mil/legal>

DoD Directive 1350.4 Legal Assistance Matters <http://www/dtic.mil/whs/directives/>

C. DEERS Procedures

DoDI 1341.2 Defense Enrollment Eligibility Report System (DEERS) Procedures

<http://www.dtic.mil/whs/directives/>

D. Family Care Links

DoDI 1342.19 Family Care Plans <http://www.dtic.mil/whs/directives/>

DoDI 1342-22 Family Centers <http://www.dtic.mil/whs/directives/>

DoDI 1342.23 Family Readiness in the National Guard and Reserve Components

<http://www.dtic.mil/whs/directives/>

Family Support Center Program <http://afpubs.hq.af.mil/pubfiles/af/36/afi36-3009/afi36-3009.pdf>

Army Regulation 600-20

DA Pam 608-47 [A Guide to Establishing Family Support Groups](#)

E. Family Support Groups

<http://www.usapa.army.mil/>

Useful web sites and links to the publications web sites for the services:

<http://www.dtic.mil/whs/directives/links.html>

Chapter Forty-Four

STATUTORY REFERENCES

<u>Protection or Benefit</u>	<u>Servicemembers Civil Relief Act</u>	<u>California State Law</u>
Termination of Agreements		
Termination of Home or Business Property Lease	50 U.S.C. App. § 535(a)(1)	CMVC § 409
Termination of Motor Vehicle Lease	50 U.S.C. App. § 535(a)(2)	N/A
Termination of Cell Phone Contracts	N/A	CMVC § 823
Legal Protections		
Protection from Shutoff of Utilities	N/A	CMVC § 827
Protection from Eviction	50 U.S.C. App. §§ 531	CMVC § 406
Protection from Foreclosure or Repossession	50 U.S.C. App. § 532-33	CMVC §§ 407-08
Insurance Benefits		
Life Insurance	50 U.S.C. App. §§ 541-49	N/A
Health Insurance	50 U.S.C. App. § 594	CMVC § 409.4
Court and Administrative Proceedings		
Stay of Legal Proceedings	50 U.S.C. App. § 522	CMVC § 403
Protection Against Defaults	50 U.S.C. App. § 521	CMVC § 402
Stays of Judgments or Orders	50 U.S.C. App. § 524	CMVC § 403(c)
Tolling of Statutes of Limitation	50 U.S.C. App. § 526	CMVC § 404
Child Custody and Support		
Child Custody and Visitation	N/A	Family Code § 3047
Child Support	N/A	Family Code § 3651

Assistance from Local Child Support Agency	N/A	Family Code § 17440
Child Support Arrearages	N/A	Family Code § 17560

Relief from Financial Obligations

Reduction to 6% of Interest Rate on Pre-Service Debt	50 U.S.C. App. § 527	CMVC § 405
General Relief from Financial Obligations and Taxes	50 U.S.C. App. § 591	CMVC § 409.3
Relief from Obligations under Real Estate Contracts	50 U.S.C. App. § 591(b)(1)	CMVC § 409.3(a)(1)
Relief from Other Contracts or Obligations	50 U.S.C. App. § 591(b)(2)	CMVC § 409.3(a)(2)
Deferral of Payments for Iraq or Afghanistan Deployments	N/A	CMVC §§ 800-05
Employment and Reemployment Rights	38 U.S.C. §§ 4301 <i>et seq.</i>	CMVC §§ 394 <i>et seq.</i>

SECTION XI

USEFUL LEGAL RESOURCES

Chapter Forty Two. Publications and References

The following references may be useful to the commander or new officer who is confronted with a problem in a specific area (*e.g.*, FLIPL, Line of Duty Investigation, etc.).

Abbreviations	AR 310-50
Absentee and Deserter Apprehension	AR 190-9
Alcohol and Drug Problems	AR 600-85
Apprehension, Restraint, Release, and Release to Civil Authorities	AR 190-9
Armed Forces Disciplinary Control Boards And Off Installation Military Enforcement	AR 190-24
Army Command Policy and Procedures	AR 600-20
Army Community Service	AR 608-1
Army Emergency Relief	AR 930-4
Army Terms, Dictionary of	AR 310-25
Article 15, UCMJ	AR 27-10
Assignments/Transfers (Enlisted)	AR 614-200
Assignments/Transfers (Officer)	AR 614-100
Awards	AR 600-8-22
AWOL	AR 630-10
Bars to Reenlistment	AR 601-280
Casualty Assistance	AR 600-8-1
Change of Name, SSN, Etc.	AR 600-8-104
Check Cashing	AR 210-60 AR 37-104-3
Child Custody	AR 608-99 NGR 600-12
Claims	AR 27-20
Clothing, Issued, and Sale of Personal Items	AR 700-84
Code of Conduct Training	AR 350-30
Command And Administration of Military Installations	AR 210-10
Commercial Solicitation	AR 210-7
Commissaries	DoDD 1330.17-R AR 30-19
Correctional Custody	AR 190-34
Correction of Military Records	AR 15-85
Crime Prevention	Physical Security Update
Dropped From Rolls (DFR)	AR 630-10
Drunk Driving	AR 190-5

Duty Roster	AR 220-45
Eliminations (Enlisted)	AR 635-200
Eliminations (Officers)	AR 600-8-24
Enlisted Personnel Separations	AR 635-200
Equal Opportunity	AR 600-20
Evaluation Report (Enlisted)	AR 623-205
Evaluation Report (Officer)	AR 623-105
Extremist Organizations	AR 600-20
Family Advocacy	AR 608-18
Family Care Plan	AR 600-20
Family Housing	AR 210-50
Family Support	AR 608-99
Family Support Groups	DA PAM 608-47 AR 210-1
Suspension of Favorable Personnel Actions (Flags)	AR 600-8-2
Freedom of Information Act (FOIA)	AR 25-55
Fund Raising	AR 600-29
Financial Liability Property Loss (FLIPL) Officer's Guide	AR 735-5 DA PAM 735-5
ID Card and Privileges	AR 600-8-14
Indebtedness	AR 600-15 AR 37-104-4
Inspector General	AR 20-1
Inventory Management Investigations	AR 710-2
Law of Land Warfare	AR 27-10
Leave	AR 600-8-10
Legal Assistance	AR 27-3
Legal Guide for Commanders	AR 27-1
Legal Guide for Soldiers	AR 27-14
Letter (Memorandum) of Reprimand	AR 600-37
Line of Duty Investigations	AR 600-8-1
Mail, Unit Operations	AR 600-8-3
MARKS System	AR 25-400-2
Military Justice	AR 27-10
Military Police Investigations	AR 190-30
Military Whistle Blower Protection	DoDD 7050.6
Morale, Welfare, & Recreation (MWR)	AR 215-1 AR 215-2
Motor Vehicles (Registration)	AR 190-5
Official Military Personnel File	AR 600-8-104
Overseas Service	AR 614-30
Passes	AR 600-8-10
Paternity	AR 608-99
Permissive TDY	AR 600-8-10
Physical Evaluation for Retention, Retirement or Separation	AR 635-40
Physical Fitness Program	AR 21-20

Physical Performance Evaluation System	AR 600-60
Physical Security	AR 190-11
	AR 190-13
Political Activities	AR 600-20
Pregnancy Counseling (Enlisted)	AR 635-200
Pregnancy Counseling (Officer)	AR 635-100
Privacy Act Program	AR 340-21
Private Organizations	AR 210-1
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Promotions (Enlisted)	AR 600-8-19
Promotions (Officers)	AR 600-8-29
Quarters & Commercial Activity	AR 210-50
Qualitative Management Program (QMP) (Enlisted)	AR 601-280
Reductions (Enlisted)	AR 600-8-19
Reenlistment Program	AR 601-280
Relief for Cause	AR 600-20
Religious Practices (Accommodation)	AR 600-20
Reports of Survey	AR 735-5
Representation Funds of the Secretary Of the Army	AR 37-47
Retirement, Voluntary (Enlisted)	AR 635-200
	AR 600-8-7
Retirement (Officer)	AR 600-8-24
	AR 600-8-7
Salutes	AR 600-25
Security Clearance (Suspension/Revocation)	AR 380-67
Separation, Processing Personnel for	AR 635-10
Separations (Enlisted)	AR 635-200
Separations (Officer)	AR 600-8-24
Serious Incident Report (SIR)	AR 190-40
SF Tab Revocation	AR 600-8-22
Traffic Regulation	AR 190-5
Unfavorable Information	AR 600-37
Uniform Wear and Appearance	AR 670-1
Unit Funds	AR 210-1
Weight Control Program	AR 600-9