THE AIR FORCE
LAW REVIEW

VOL. 47 1999

CONTENTS

ARTICLES

Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?

CAPTAIN KRISTINE D. KUENZLI[*]

The Uniformed Services Former Spouses' Protection Act[1] (USFSPA) and its amendments provide a number of benefits for former spouses of military members. The USFSPA was enacted, partly, to recognize the important role the military spouse plays in the military family.[2] Although the Air Force legal assistance charter does not allow Air Force attorneys to represent members or their spouses in actual divorce proceedings,[3] a working knowledge of the benefits available is necessary in order to provide adequate legal guidance before the matter goes to court.[4] Many members and spouses do not become aware of the benefits available to them upon the dissolution of their marriage until they are in the middle of divorce proceedings.[5] Furthermore, the numerous provisions of the USFSPA and the time

---

[*] *Captain Kuenzli (B.A., University of California at Davis; J.D., Gonzaga University School of Law) is an Assistant Staff Judge Advocate at Scott Air Force Base, Illinois. She is a member of the Washington State Bar.*

[1] Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified at 10 U.S.C. §§ 1408, 1447-50, 1072, 1076, 1086 (1994 & Supp. IV 1998)).

[2] The legislative history states,

> [t]he committee received extensive testimony from the uniformed services and public witnesses on the contributions and sacrifices made by the military spouse throughout the service member's career . . . The concept of the military family and its importance to military life is widespread and publicized. Military spouses are still expected to fulfill an important role in the social life and welfare of the military community.

S. REP. NO. 97-502, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1601. *See also* Nancy Scannell, *"We Also Served:" The Lot of Former Military Wives; Divorce*, WASH. POST, Dec. 18, 1980, at Md. 1.

[3] Air Force Instruction 51-504, Legal Assistance, Notary and Preventive Law Programs ¶ 1.2 (May 1, 1996). Air Force practitioners are permitted to and often do provide legal assistance to military members and their spouses who are considering divorce.

[4] There are numerous articles providing guidance to the practitioner on the USFSPA. *See, e.g.*, Meredith Cohen, *Representing the Military Spouse*, FLA. BAR J., June 1987, at 117.

[5] *See* David Evans, *A Divorce in the Military Can Really Hurt*, SAN ANTONIO EXPRESS NEWS, Oct. 5, 1996, at B7; Reg Jones, *Former Spouses Need to Be Benefit Savvy*, FED. TIMES, July 26, 1999, at 17.

requirements for direct payments to former spouses confuse many military members.[6]

Although the USFSPA was initially enacted in 1982 to rectify what Congress considered an inequity propounded by the Supreme Court's decision in *McCarty v. McCarty*,[7] Congress has frequently amended the USFSPA to provide further protections for the former spouse. In addition, state courts have interpreted various provisions of the USFSPA in such a way as to protect the former spouse's interests. Whether the time has now come for Congress to afford further protection for the military retiree is up for debate. In fact, Congress is currently considering legislation that would attempt to amend the USFSPA to protect retirees' interests in their retirement pay. This article will discuss the history of the USFSPA; its current provisions; the relationship between the USFSPA, disability benefits, the Survivor Benefit Plan, the Dual Compensation Act, and pay incentives; the special provisions for domestic abuse cases; and finally, the proposed legislation affecting the USFSPA.[8]

I. HISTORY

A. Marital Property Law

An understanding of the impact of *McCarty v. McCarty*[9] and the USFSPA requires a basic understanding of marital property law. The United States contains eight community property states and forty-two common-law states.[10] Both of these systems classify property acquired during marriage differently, and therefore, have a great impact on the distribution of assets at divorce.

---

[6] *See* discussion *infra* Part IX.

[7] 453 U.S. 210 (1981). For a discussion of the facts and holding in *McCarty*, see *infra* Part I.B.

[8] Although not specifically addressed in this article, state law can drastically affect the way in which the USFSPA is applied in divorce proceedings. *See* Lieutenant Colonel Block, *Former Spouses' Protection Act Update*, ARMY LAW., July 1996, at 21 (analyzing state laws concerning the application of the USFSPA). However, since the publication of Lieutenant Colonel Block's article there have been a few state law changes, such as in North Carolina. Previously, North Carolina had a vesting requirement for distribution of marital property. George v. George, 444 S.E.2d 449 (N.C. 1994) (holding that since retirement pay was not vested at time of divorce, it was not marital property subject to distribution). In June 1997, the North Carolina legislature enacted a new law that did away with the vesting requirement for division of pensions. H.B. 535, 1997 Legis. Sess., S.L. 212 (N.C. 1997) (codified at N.C. GEN. STAT. § 50-20(b)(1) (1999)). The statute specifically includes military retirement benefits that are classified under the USFSPA as marital property and are subject to division, and applies to all petitions for equitable distribution filed on or after October 1, 1997. *Id.*

[9] 453 U.S. 210.

[10] The eight community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1, 56 (2d ed. 1971).

The eight community property states use the Spanish system of marital property known as the ganancial system.[11] In the ganancial system, all property owned by each spouse prior to marriage or acquired by each spouse separately by gift during marriage is classified as separate property, and all other property acquired during marriage is community property.[12] Under this system, each member contributes to the community of marriage by "equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution."[13] As a result, all income earned during marriage by both members is classified as community property. Furthermore, retirement benefits, considered deferred income, are also considered community property in this system.[14] As such, military retirement benefits, even unvested benefits,[15] are community property assets subject to distribution upon divorce.[16]

Common-law states[17] use an English-derived system of distribution of marital assets.[18] These jurisdictions consider all property owned before marriage, as well as all property acquired during marriage by gift, inheritance, or personal earning, to be owned by each member.[19] Retirement benefits, whether vested or unvested, are owned by the earning member.[20] Historically, upon divorce, this system of distribution resulted in inequities for the wife who had no earnings and little property. To counteract these inequities, most common-law states grant alimony in divorces that have unequal marital assets.[21] In addition, most common-law states divide property equally upon divorce, either by judicial or statutory mandate.[22] However, the property

---

[11] *See id.* at 55. Ganancial property is a type of community property enjoyed by husband and wife, where the property is divisible between them equally upon dissolution of marriage. BLACK'S LAW DICTIONARY 679 (6th ed. 1990). Ganancias is defined in Spanish law as to gain or profit. *Id.*

[12] DEFUNIAK & VAUGHN, *supra* note 10, at 234.

[13] *Id.* at 2-3.

[14] *See id.* at 148.

[15] *See id.* at 149.

[16] *See id.* at 150.

[17] The remaining forty-two states are common-law jurisdictions. For list of community property jurisdictions, see DEFUNIAK & VAUGHN, *supra* note 10, at 56.

[18] Early American laws were derived from the theory that "in marriage the husband and wife were merged into one and, in effect, the husband was that one." *Id.* at 4. Since the husband was the head of the household, all of the wife's property owned prior to marriage became the husband's upon marriage, as did all of her personal earnings and earnings from her property acquired during marriage. *Id.* at 4-5. As a result of these common law inequities, almost all states passed married women's property acts. 2H CLARK, LAW OF DOMESTIC RELATIONS 503 n.4 (2d ed. 1988). These statutes allowed the wife to retain and control her own property. *Id.* at 504.

[19] 2H CLARK, *supra* note 18, at 183.

[20] *See id.*

[21] *See id.* at 220-21.

[22] *See id.* at 176-77.

subject to division is limited in most states.[23] Retirement benefits can be distributed in these jurisdictions, depending largely upon whether they are vested or unvested.[24]

B. The Court's Decision in *McCarty v. McCarty*

In *McCarty v. McCarty*,[25] the Supreme Court found for the sixth time[26] that certain state community property laws are preempted by federal law. The issue in *McCarty* was whether California courts were preempted by federal statutes from dividing nondisability retirement benefits upon divorce.[27] Colonel Richard John McCarty and his wife, Patricia, were married in 1957.[28] Colonel McCarty was an Army medical officer who entered the service in 1959.[29] Colonel and Mrs. McCarty separated and filed for divorce in 1976.[30] In the divorce proceedings, the superior court ruled that Colonel McCarty's military retired pay was distributable as quasi-community property.[31] Colonel McCarty unsuccessfully appealed this decision and ultimately petitioned the United States Supreme Court for certiorari. The Supreme Court granted certiorari in 1981.

Colonel McCarty raised two arguments in his appeal. First, he argued that military retired pay was not subject to division as marital property because it was not the same as civilian "retired pay."[32] To support this argument, Colonel McCarty cited federal cases to establish that military retired pay

---

[23] *See id.* at 184. Some states limit the type of property that is subject to division, precluding property obtained prior to marriage by one spouse only or retirement benefits that have yet to vest. *Id.*

[24] *See id.*

[25] 453 U.S. 210 (1981).

[26] There were five previous preemption cases. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); McCune v. Essig, 199 U.S. 382 (1905).

[27] Some courts have determined, largely due to the wording of a separation agreement or final judgment, that an award of a portion of military retirement pay is actually an award of maintenance, instead of a division of property. *See, e.g.*, Thomas v. Abel, 688 N.E.2d 197, 199 (Ind. Ct. App. 1997) (holding that a separation agreement which provided that "after the Husband attains the age of sixty years he shall pay to the Wife as support and maintenance an amount equal to one-third (1/3) of his monthly pension . . . as a retired Army National Guard officer . . . these payments shall continue until the death of the wife or the Husband, whichever occurs first" was an award of maintenance rather than a distribution of property). The *Thomas* court looked at the following factors to make its determination: 1) a specific designation as maintenance, 2) provisions for termination of payments upon the death of either the wife or husband, and 3) the installments are to be made from future income. *Id.* at 199-200 (citing Coster v. Coster, 452 N.E.2d 397 (Ind. Ct. App. 1983)).

[28] McCarty, 453 U.S. at 216.

[29] *See id.*

[30] *See id.*

[31] *See id.* at 218.

[32] *Id.* at 221.

actually is reduced current pay for continued service in the armed forces at a reduced level.[33] Under this theory military retirement benefits, unlike civilian retirement, are not considered assets earned during employment with payment deferred until retirement. Rather, by remaining on the retired list, military retirees continue to serve in a reduced capacity subject to recall.[34] Consequently, their military retired pay is a monthly payment in return for their reduced service.[35] The Court did not, however, adopt this theory. Instead, the Court focused on Colonel McCarty's second argument.[36]

Colonel McCarty's second argument rested on the concept of preemption. Colonel McCarty argued that a conflict existed between the terms of the federal retirement statutes and the community property right asserted by his former spouse.[37] He argued further that the consequences of that community property right sufficiently injured the objectives of the federal program, such that the court should not recognize the community property right.[38] He asserted that military retirement benefits constituted an important part of Congress's goal of meeting the personnel management needs of the active military forces.[39] Together with other benefits and personnel management policies, the military retirement system was designed to serve as an inducement for enlistment and reenlistment, to create an orderly career path, and to ensure a "youthful and vigorous" military force.[40] Colonel McCarty's position, therefore, was that allowing state courts to divide retired pay would frustrate Congress's goals in these areas.[41] The Court agreed.

---

[33] *See id.* The current pay theory is supported by various rules concerning military retirement pay. *See generally* Lieutenant Colonel Jeffrey S. Guilford, *Exploring the Labyrinth: Current Issues Under the Uniformed Services Former Spouses Protection Act*, 132 MIL. L. REV. 43 (1991). First, in order to avoid being subject to involuntary recall to active duty, the retired member must resign. However, resigning in this fashion also terminates the military retirement benefits. Second, recalled retirees receive full pay and allowances, but not active duty pay for the time they are serving. Instead, they only receive their retired pay. Third, military pensions do not vest like civilian pensions. They cannot be assigned, have no cash value, and are subject to reduction by Congress at any time. Fourth, military retirees continue to be subject to the Uniform Code of Military Justice. As a result, a postretirement court-martial conviction can result in reduction or even termination of military retirement benefits. 10 U.S.C. § 802(4) (1994 & Supp. IV 1998). *See also*, McCarty, 453 U.S. at 223 n.16 (referencing Hooper v. United States, 326 F.2d 982, 987, *cert. denied*, 377 U.S. 977 (1964)).

[34] 10 U.S.C. § 688. Recent events in Southwest Asia and the Balkans demonstrate that this is not merely a possibility.

[35] The reduced service argument stems from a comparison of the service rendered by military retirees and those who are on active duty. *See* Guilford, *supra* note 33, at 44.

[36] McCarty, 453 U.S. at 223.

[37] *See id.*

[38] *See id.* at 232.

[39] *See id.* at 232-33.

[40] *Id.* at 234.

[41] *See id.* at 235.

The Court found that distributing military retired pay as community property brought state courts into direct conflict with the intent of the federal military retirement plan and "threaten[ed] grave harm to 'clear and substantial' federal interests."[42] The Court applied a two-step analysis to the preemption issue, following its analysis in *Hisquierdo v. Hisquierdo*.[43] First, the Court determined that Congress intended to grant retired service members a "personal entitlement" to the benefits. [44] Pursuant to this analysis, the Court concluded that dividing this entitlement in conformity with state community property provisions conflicted with federal military retirement statutes.[45] Second, the Court considered whether the "application of community property principles to military retired pay threatened grave harm to 'clear and substantial' federal interests."[46] The Court found that Congress intended to provide for retired service members and that dividing retirement benefits upon divorce would frustrate this congressional intent and disrupt military personnel management.[47] Justice Blackmun, writing for the majority, noted, "We very recently have re-emphasized that in no area has the Court accorded Congress more deference than in the conduct and control of military affairs."[48] He did suggest, however, that "Congress may very well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone."[49] Concluding that this case satisfied both steps of the preemption test, the Court held that military members' retirement benefits were not subject to division upon divorce as community property assets.[50]

The Court's decision in *McCarty* drew strong criticism from the American Bar Association,[51] as well as from legal[52] and journalistic[53]

---

[42] *Id*. at 232.

[43] 439 U.S. 572 (1979). Then-Justice Rehnquist, writing for the dissent in *McCarty*, opined that *Hisquierdo* limited Supreme Court intervention into the field of family law to areas in which "Congress had 'positively required by direct enactment' that state law be preempted." McCarty, 453 U.S. at 236 (Rehnquist, J., dissenting). Rehnquist argued that no such requirement existed concerning the division of military retirement pay as though it was community property. *Id.* at 236-37 (Rehnquist, J., dissenting).

[44] McCarty, 453 U.S. at 224 (citing S. REP. NO. 1480, at 6 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3294, 3298).

[45] *See id.* at 223.

[46] *Id.* at 232 (citing United States v. Yazell, 382 U.S. 341, 352 (1966) (establishing the clear and substantial federal interests test)).

[47] *See id.* at 233-35.

[48] *Id.* at 236.

[49] *See id.* at 235-36.

[50] *Id.* at 236.

[51] *See* 128 CONG. REC. 18314-315 (1982) (letter from Robert D. Evans, Director, American Bar Association). Mr. Evans states, "The Court has materially and adversely affected the practice of family law in the United States. More specifically, this decision has cast a shadow over untold thousands of final divorce decrees in this country." *Id.*

commentators. Criticism of the *McCarty* decision focused primarily on the Court's extension and application of the federal preemption test.[54] In addition, critics focused on the inequitable treatment afforded to military spouses versus nonmilitary spouses.[55] Although the majority of the *McCarty* court recognized that it had damaged the interests of military spouses, it suggested that the problem was better resolved by legislation.[56]

C. The Uniformed Services Former Spouses Protection Act

Less than five months after the Court ruled in *McCarty*, Senator Roger Jepsen of Iowa introduced the Uniformed Services Former Spouses Protection Act.[57] Before the Senate Manpower and Personnel Subcommittee, Committee on Armed Forces, Senator Jepsen testified that his bill was a direct response to the Supreme Court decision in *McCarty*.[58] Acting with alarming speed, less than fifteen months after the *McCarty* decision, Congress passed the USFSPA.[59]

---

[52] *See* Leonard Bierman & John Hershberger, *Federal Preemption of State Family Property Law: The Marriage of McCarty and Ridgway*, 14 PAC. L.J. 27 (1982); Anne Moss, *Women's Pension Reform: Congress Inches Toward Equity*, 19 U. MICH. J.L. REFORM 165 (1985); Note, *McCarty v. McCarty: A Former Spouse's Claim to a Service Member's Military Retired Pay is Shot Down*, 13 LOY. U. CHI. L.J. 555 (1982); Note, *McCarty v. McCarty, the Battle Over Military Nondisability Retirement Benefits*, 34 BAYLOR L. REV. 335 (1982); Note, *Military Retirement Pay Not Subject to Division as Community Property Upon Divorce: McCarty v. McCarty*, 19 HOUS. L. REV. 591 (1982); Note, *Federal Law Preempts State Treatment of Military Retirement Benefits as Community Property: McCarty v. McCarty*, 13 TEX. TECH. L. REV. 212 (1982).

[53] Fred Barbash, *Justices Rebuff Divorcee on Pension*, WASH. POST, June 27, 1981, at A4; *Military Wives Fight Pension Cutoff*, MS., Feb. 1982, at 17; Jane Bryant Quinn, *A Housewife's Lot*, NEWSWEEK, Sept. 14, 1981, at 25.

[54] As then-Justice Rehnquist stated in his dissent, the majority disregarded the preemption standard that the Court had applied and had carefully confirmed in *Hisquierdo*. *See supra* note 43 and accompanying text.

[55] *See, e.g.*, Louise Raggio & Kenneth Raggio, *McCarty v. McCarty: The Moving Target of Federal Pre-emption Threatening All Non-Employee Spouses*, 13 ST. MARY'S L.J. 505 (1982); Comment, *The Uniformed Services Former Spouses Protection Act: A Partial Return of Power*, 11 W. ST. U. L. REV. 71 (1983).

[56] McCarty, 453 U.S. at 235-36. The Court recognized "that the plight of an ex-spouse of a retired service member is often a serious one . . . . Nonetheless, Congress may well decide . . . that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone." *Id.*

[57] The Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, § 1002(a), 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408 (1994 & Supp. IV 1998)).

[58] S. REP. NO. 97-502, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1596.

[59] Some critics contend that Congress acted a little too quickly in enacting the USFSPA. *See, e.g.*, Comment, *The Uniformed Services Former Spouses Protection Act: A Partial Return of Power*, 11 W. ST. U. L. REV. 71 (1983).

The USFSPA effectively voided the *McCarty* decision, restoring state marital property law and substantially revising the federal system for directing military disposable retired and retainer pay.[60] Senator Jepsen's act became law on February 1, 1983, applied retroactively to the date of the *McCarty* decision.[61] Although Congress intended, through the passage of the USFSPA, to negate the effect of *McCarty*,[62] the USFSPA did not require the reversal of state court final judgments. Instead, the USFSPA allows state courts to reconsider judgments in light of their marital property and procedural laws, disregarding the decision in *McCarty*.[63]

Criticism of any legislative reversal of *McCarty* began early in the legislative discussions on the USFSPA. Primarily, this criticism came from groups representing retired military personnel. These groups supported the Court's ruling in *McCarty*, insisting that retirement pay was earned and, therefore, belonged to the service member.[64] Of course, the primary reason retired military personnel have so vigorously criticized the USFSPA is their emotional and financial attachment to their military retirement pay.[65] In addition, in many divorces, the military retirement pay is the most significant marital asset.[66] Despite the criticism by retirees, Army, Navy, Air Force, and Marine Corps representatives testified "in support of an equitable solution to the problems created by the *McCarty* decision."[67] Yet, they did not go so far as to advocate legislative codification of the *McCarty* decision. These representatives testified, instead, that a legislative reversal of *McCarty* would

---

[60] 10 U.S.C. § 1408(a)(4) (1994).
[61] *See id.* § 1408(c)(1).
[62] *See* S. REP. NO. 97-502, at 1, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1596. *See generally* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) (discussing the constitutionality of retroactive legislation).
[63] Representative Patricia Schroeder, one of the sponsors of the USFSPA, noted that although "state law may allow reopening for changed circumstances . . . there is nothing in the bill to require it." 128 CONG. REC. at 18317 (1982) (statement of Rep. Schroeder).
[64] S. REP. NO. 97-502, at 50, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1633. "Military retired or retainer pay is an integral part of the military compensation system. Many, if not most, career decisions are made based on individual's perceptions of the stability, reliability, and integrity of the retirement system." *Id.* Most of these groups suggested a ten-year minimum for the duration of the marriage in order for distribution of retirement pay to the former spouse. *See* S. REP. NO. 97-502, at 43, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1626-28 (statement of Sen. Denton).
[65] *See* FLORENCE W. KASLOW & RICHARD I. RIDENOUR, THE MILITARY FAMILY 217-25 (1984); K.C. JACOBSEN, RETIRING FROM MILITARY SERVICE 222-23 (1990).
[66] *See* Block, *supra* note 8, at 21 & n.4 (discussing the relative value of military and civilian pensions).
[67] S. REP. NO. 97-502, at 7, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1601-02.

have an adverse effect on recruiting and retention and create military personnel assignment problems.[68]

Lieutenant General Andrew P. Iosue, Deputy Chief of Staff for Manpower and Personnel of the Air Force, testified before the Senate that "state court records are filled with numerous examples that highlight the impracticability of allowing state courts total discretion in retired pay property divisions."[69] Lieutenant General Iosue cited several cases upon which he based his concerns.[70] One California decision referenced by Lieutenant General Iosue made it possible for the former spouse to determine when his or her share of the retired pay should begin regardless of whether or not the member is retired.[71] He cited another California decision that required a military member who refused to retire and begin receiving retired pay, to provide the former spouse an amount equal to what she would have received as her property had he retired.[72] Lieutenant General Iosue also referred to an Idaho case in which the court first consulted actuarial tables to determine what the gross amount of the former spouse's annuity would be if the retiree lived a normal life expectancy and then included this figure as a lump sum distribution.[73] Finally, he cited a Montana case where the court stated that in the event the wife predeceased her husband, his military retired pay should

---

[68] Although these representatives testified to this effect at the hearings prior to the passage of the USFSPA, it is interesting to note that these representatives did not produce anything to substantiate their concerns in this respect.

> The committee notes that until June 26, 1981, a number of State courts traditionally recognized that military retired pay could be dealt with as marital property and divided between the parties . . . . To that end, the committee requested the Department of Defense to furnish objective data, the results of statistically sound surveys, or any other pertinent information which indicated that prior to the *McCarty* decision military personnel management needs were adversely affected by application of State property laws and precedents to military retired pay. The committee also requested similar information on the potential for future management problems if S. 1814 were enacted into law. The Department of Defense has not submitted any satisfactory empirical evidence . . . to show that . . . recruiting, retention and personnel assignment were adversely affect by application of State property laws to military retired pay.

S. REP. NO. 97-502, at 7, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1602.

[69] *Id.* at 52-57, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1635-40.

[70] *See id.* at 55, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1638.

[71] *See id.* at 55, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1638 (citing *In re* Marriage of Luciana, 104 Cal. App. 3d 956, 165 Cal. Rptr. 93 (Cal. Ct. App. 1980)).

[72] *See id.* at 56, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1639 (citing Gilmore v. Gilmore, 113 Cal. App. 3d 319, 169 Cal. Rptr. 811 (1981)).

[73] *See id.* at 56, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1639 (citing Ramsey v. Ramsey, 535 P.2d 53 (Idaho 1975)).

pass to her estate.[74] Lieutenant General Iosue emphasized that while this was only a small sample of the cases dealing with military retired pay, they demonstrated perfectly the consequences of allowing state courts unconstrained authority to divide military retirement pay.

Department of Defense officials who also testified before Congress asserted that there was a need to protect against the possibility of forum shopping by spouses or members.[75] In this context, forum shopping meant a search for a state with the "most advantageous law and procedures in which to commence a divorce proceeding."[76] These officials expressed concern that forum shopping would allow a state with which a spouse or member had little contact to exercise jurisdiction. Opposition to this position was powerful. Witnesses testifying on behalf of the American Bar Association Family Law Section pointed out that the Soldiers' and Sailors' Civil Relief Act[77] already afforded some procedural protections against forum shopping.[78] Further, the Senate itself emphasized that state conflict of law rules protected against such forum shopping abuse.[79]

As it made clear in its report, the Senate intended to give state courts with jurisdiction over domestic relations great latitude in dealing with retired pay.[80] The Senate, however, concluded, "it is imperative that the control of uniformed service personnel remain with the federal government."[81] Consequently, Congress did not completely reverse the *McCarty* decision. Instead, Congress placed a number of limitations on state court's authority to distribute retirement pay. Despite these limitations, discussed in the next section, the USFSPA provided a powerful tool for former spouses in obtaining a portion of the military member's retired pay.

II. CONGRESSIONAL LIMITATIONS ON STATE COURT AUTHORITY

Congress's intent, to reverse the effect of the *McCarty* decision by enacting the USFSPA, was largely fulfilled.[82] However, in an effort to strike a

---

[74] *See id.* at 56, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1639 (citing Miller v. Miller, 609 P.2d 1185 (Mont. 1979)).
[75] *See id.* at 8-9, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1603-04.
[76] *Id.*
[77] 50 U.S.C. app. § 501 (1994 & Supp. IV 1998).
[78] S. REP. NO. 97-502, at 9, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1604.
[79] *See id.*
[80] *See id.* at 17, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1612.
[81] *Id.*
[82] H.R. CONF. REP. NO. 97-749, at 165 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1569, 1570.

balance between the federal government's control over the benefits extended to military members and the call to provide a remedy to former spouses, Congress placed a number of limitations on the ability of state courts to divide retired pay. State court authority was limited in that they could deal only with disposable retired pay;[83] a spouse's right to retirement pay could not be transferred;[84] courts would have no equitable power to order members to apply for retirement or to retire;[85] and courts could not attempt to avoid the *McCarty* holding unless they had jurisdiction over the member apart from any military assignment.[86]

A. Division of Disposable Retired Pay

One limitation Congress placed on state court authority is that the USFSPA does not empower state courts to divide the gross retired pay of the service member.[87] Instead, the USFSPA only gives state courts the authority to distribute disposable retired pay according to state law.[88] This provision is, in fact, the cornerstone of the USFSPA and it provides that:

> The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981.

S. REP. NO. 97-502, at 16, *reprinted in* 1982 U.S.C.C.A.N. 1569, 1611.

[83] 10 U.S.C. § 1408(a)(4), (c)(1) (1994 & Supp. IV 1998).

[84] *See id.* § 1408(c)(2).

[85] *See id.* § 1408(c)(3).

[86] *See id.* § 1408(c)(4).

[87] *See* Brown v. Harms, 863 F. Supp. 278 (E. D. Va. 1994) (holding that the USFSPA allows courts to apply state divorce laws to military pensions, but does not expressly or by implication grant the court power to adjudicate any cause nor does it provide substantive rules for treatment of military pensions in divorce or domestic relations contexts).

[88] Although the USFSPA allows courts to distribute retirement pay as marital property during a dissolution proceeding, it does not determine the amount that is properly distributable to the former spouse. There are a number of different ways in which states calculate the amount of retirement pay to be distributed to the former spouse. *See generally* Captain Mark E. Henderson, *Dividing Military Retirement Pay and Disability Pay: A More Equitable Approach*, 134 MIL. L. REV. 87 (1991). For example, in Colorado there are three recognized methods of distributing retirement pay: net present value, deferred distribution, and reserve jurisdiction. TJAGSA Practice Note, *Colorado Reinforces the "Time Rule" Formula for Division of Military Pensions*, ARMY LAW., Aug. 1998, at 27.

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.[89]

Central to the operation of the USFSPA are the definitions of *disposable retired* or *retainer pay* and *spouse*. Subsection 1408(a)(6) defines a spouse or former spouse as "the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member."[90] Subsection 1408(a)(4) defines disposable retired pay or retainer pay as total monthly income less certain debts owed to the government, forfeitures because of a court-martial, and any amount waived to receive disability pay or to provide an annuity.[91] Under this definition the amount withheld for federal, state, and local income taxes is considered part of disposable retired pay.

However, this broad, inclusive definition of disposable retired pay was not part of the original legislation, but was instead a product of Congress's decision to change the definition to address a conflict between the state courts and the Supreme Court. As originally calculated, disposable retired pay included gross nondisability retired pay minus certain deductions, such as federal, state, and local income tax withholdings; federal employment taxes; life insurance; survivor benefit plan premiums in some cases; statutory offsets required by the retiree's receipt of federal civil service employment benefits;

---

[89] 10 U.S.C. § 1408(c)(1).
[90] *Id.* § 1408(a)(6).
[91] *See id.* § 1408(a)(4). The entire provisions reads as follows:

> Total monthly retired or retainer pay to which a member is entitled less amounts which:
> (A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
> (C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
> (D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

Id.

and statutory offsets required by the retiree's receipt of disability benefits from the Department of Veterans' Affairs.[92] Under the original provision in the USFSPA, state courts were permitted to treat a military member's *disposable retired pay* as property solely of the member or as property of the member and his spouse in accordance with state law.[93] However, problems arose when courts attempted to reconcile the adjusted amount contemplated by the USFSPA with the gross retired pay usually required by state statutes. In many instances, as a result of the tax break to the member, the former spouse received less than what state statutes seemed to require.[94] As a result, the majority of states ignored this definition and held that they had the authority to award a share of gross retired pay to the former spouse.[95] The Supreme Court responded to this application of the USFSPA's definitions in *Mansell v.*

---

[92] 10 U.S.C. § 1408(a)(4) (1988), *amended by* the National Defense Authorization Act for 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1569, 1569-70 (1990) (codified as amended at 10 U.S.C. § 1408(c)(1) (1994)).

[93] 10 U.S.C. § 1408(c)(1) (1988) (emphasis added).

[94] Guilford, *supra* note 33 at 47. The author provided an example to illustrate how this definition could harm the former spouse.

> Consider a retiree entitled to $2000 per month, with a former spouse who has been awarded 50 percent of the retired pay. Under the law of many states, each would receive $1000. In the simplest case under the Act as originally formulated, however, the disposable retired pay would be $2000, minus federal income tax withholding. The military finance centers would calculate and report tax withholding as if all the income were taxable to the member. This rule applied because, under federal law, the money is current income for current services, rather than an asset to be divided. Assuming the retiree is in the 15 percent tax bracket and has a second job (and attributing the personal and standard deductions to income from the second job), the disposable pay would be $1700. Each spouse would get one-half this amount, or $850. The retiree actually pays taxes on only $1150, while the former spouse would pay taxes on the remaining $850. Thus, the retiree receives $850 each month, plus a tax refund at the end of the year equal to 15 percent times $850 times 12 months, or $1530. This works out to a monthly total of $977.50 (pay plus prorated refund). In the meantime, the former spouse pays taxes (15 percent) on $850, leaving a net of $722.50 per month. These numbers simplify the tax calculations, but they do illustrate a key problem with the "disposable retired pay" construct. The retiree's "half" is $977.50 per month, while the former spouse's "half" is only $722.50.

Guilford, *supra* note 33, at 47 n.13.

[95] *See, e.g.*, Martin v. Martin, 373 S.E.2d 706 (S.C. 1988); Grier v. Grier, 731 S.W.2d 936 (Tex. 1987); White v. White, 734 P.2d 1283 (N.M. Ct. App. 1987); Casas v. Thompson, 720 P.2d 921 (Cal. 1986); Lewis v. Lewis, 350 S.E.2d 587 (N.C. Ct. App. 1986); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984); Bullock v. Bullock, 354 N.W.2d 904 (N.D. 1984); Butcher v. Butcher, 357 S.E.2d 226 (W.Va. 1987).

Mansell.[96] Although the *Mansell* case dealt with a different aspect of the division of military retirement pay,[97] the Court had to determine whether to strictly interpret the term disposable retired pay.[98] Striking down the approach taken by a majority of state courts, the Supreme Court held that Congress only empowered state courts to divide, not define, disposable retired pay. [99] In so doing, the Court effectively overruled state court decisions to ignore the definition in the USFSPA and award a share of gross retired pay to the former spouse. Congress responded to this conflict between the state courts and the Supreme Court's holding in *Mansell*, by enacting an amendment to the USFSPA. [100] This amendment recalculated disposable retired pay to eliminate tax withholdings from the definition.[101] Thereafter, state courts were no longer required to deduct the amount withheld for tax purposes when calculating the amount to be divided between the member and the former spouse. By allowing state courts to begin with a larger amount to be divided, Congress reinforced the state court's desire to provide former spouses with more monetary benefits.

In a related effort to provide further monetary benefits to the former spouse, courts have also interpreted the USFSPA to allow the courts to treat military disposable retired pay as income for family support purposes, specifically, alimony or child support.[102] Since the USFSPA allows states to treat military retirement pay as they do civilian retirement pay,[103] military retirement pay can be subject to division between the spouses as property *and* as income in determining any support obligation. Classifying military retirement pay as both property and income was discussed in two fairly recent state divorce cases.[104] In both cases, a percentage of the military retirement pay was awarded to the former spouse as marital property.[105] In addition, the

---

[96] 490 U.S. 581 (1989). For a discussion of the facts of *Mansell*, see *infra* notes 164-77 and accompanying text.

[97] The *Mansell* Court addressed whether state courts could divide retirement pay waived by the retiree in order to receive disability benefits. *Id.* at 594-95.

[98] *See id.* at 588-92.

[99] *See id.* at 589.

[100] National Defense Authorization Act for 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1569, 1569-70 (1990) (amending 10 U.S.C. § 1408(a)(4) (1988)).

[101] The amendment also limited the types of deductible indebtedness payments to the government. Only indebtedness arising from overpayments of retired pay is deductible. *Id.* This prevents a retiree from using retired pay deductions for tax indebtedness to offset a portion of a former spouse's share of retired pay. It also eliminates the deductibility of court-martial fines.

[102] *See* TJAGSA Practice Note *Military Retirement Pay – Property or Income?*, ARMY LAW., June 1997, at 42.

[103] *See* Cook v. Cook, 560 N.W.2d 246, 249-50 (Wis. 1997).

[104] *See In re* Klomps, 676 N.E.2d 686 (Ill. App. Ct. 1997); Cook, 560 N.W.2d at 246.

[105] In *Klomps*, the court awarded Mrs. Klomps 35 percent of disposable retired pay after eighteen years of marriage. Klomps, 676 N.E.2d at 687. In *Cook*, the court awarded Mrs.

courts classified the portion of the military retirement pay received by the retiree as income for purposes of determining the child support obligation of the retiree.[106] Therefore, these courts classified the military retirement pay as both marital property subject to division and as income to the retiree for determination of child support payments. In effect, the same military retirement pay is used to satisfy two separate obligations in the divorce proceeding.

B. Transferability of Retired Pay

An additional restriction Congress placed upon the division of retired pay concerned the transferability of retired pay. During the divorce process, property is generally classified as marital or nonmarital property or as community or separate property. At the conclusion of the divorce proceeding, each party is then left with their own separate property with all of the attributes of sole ownership. However, the USFSPA places limits on the ability of the former spouse to exercise all rights of ownership.[107] Section 1408(c)(2) provides that "this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse."[108] The legislative history provides an insight into congressional intent for this section.

> It is recognized that this limitation is contrary to certain concepts of property laws, especially the concepts of community property laws. That is, it is recognized that when a division of property is made pursuant to a divorce proceeding in a state having community property laws, each spouse usually becomes the sole owner of his or her portion of the community property so that the spouse can sell, assign, transfer, or otherwise dispose of that property without limitation. The spouse or former spouse should have no greater interest in the retired or retainer pay of a member than the member has. And a member has no right to transfer his retired or retainer pay on death. Nor can the member sell, assign, transfer, or otherwise dispose of the member's right to receive retired pay.[109]

Section 1408(c)(2) recognizes that military retirement payments are not like regular property divided during divorce proceedings. A member of the military cannot transfer retired pay on death or sell, assign, transfer, or

---

Cook 50 percent of disposable retired pay after twelve years of marriage. Cook, 560 N.W.2d at 248.

[106] Klomps, 676 N.E.2d at 690; Cook, 560 N.W.2d at 254.

[107] *See* TJAGSA Practice Notes, *When is Property Not Really Property?*, ARMY LAW., Sept. 1995, at 28.

[108] 10 U.S.C. § 1408(c)(2) (1994).

[109] S. REP. NO. 97-502, at 16, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1611.

otherwise dispose of retired pay.[110] For that very reason, section 1408(c)(2) provides,

> that a spouse or former spouse does not have any transferable right, title or interest in the member's retired or retainer pay. However, there is no limit on a spouse's or former spouse's right to deal with a portion of a member's retired or retainer pay after the spouse or former spouse receives that pay.[111]

Thus, the former spouse, like the military member, is precluded from transferring any award of retired pay.

C. Forced Application for Retirement

Another major limitation Congress placed upon the division of retired pay is in the state court's power to force members to apply for retirement or to retire. Since members of the armed forces often remain in service after they become eligible for retirement, the receipt of retirement pay, distributable in a divorce proceeding, is often postponed. The decision to defer retirement affects the former spouses in two ways: it increases the amount of retired pay, and it delays receipt of the retired pay. The courts that have examined deferred receipt of retired pay have generally found the spouse to be disadvantaged unfairly by the delay.[112] With respect to military retirement benefits, the former spouse usually maximizes lifetime retired pay income if the member retires immediately upon eligibility.[113] In order to prevent courts from forcing members into retirement in order to distribute retirement pay, Congress included section 1408(c)(3), which provides that "this section does not

---

[110] 10 U.S.C. § 1408(c)(2). *See also* Department of Defense Financial Management Regulation, *Military Pay Policy and Procedures - Retired Pay*, vol. 7B, ch. 29 (Sept. 1999) [hereinafter DoD Financial Management Regulation].

[111] S. REP. NO. 97-502, at 16-17, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1611-12.

[112] *See, e.g.*, *In re* Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Cal. Ct. App. 1980) (member of the armed forces); Koelsch v. Koelsch, 713 P.2d 1234 (Ariz. 1986) (policeman); *In re* Gillmore, 629 P.2d 1 (Cal. 1981) (civilian pension); Wallace v. Wallace, 677 P.2d 966 (Haw. Ct. App. 1984) (Public Health Service employee); Gemma v. Gemma, 778 P.2d 429 (Nev. 1989) (policeman). *But see* Morlan v. Morlan, 720 P.2d 497, 498 (Alaska 1986) (holding that instead of ordering the employee to retire in order to protect the former spouse's interest in a union pension, the trial court should have given the employed spouse the option of continuing working and paying the spouse her share of the pension benefits he would have received); Mattox v. Mattox, 734 P.2d 259 (N.M. Ct. App. 1987) (affirming the use of the employee's retirement eligibility date, as opposed to a later projected retirement date, in calculating the current value of the pension).

[113] The time value of money is one of the key reasons that the value of the spouse's interest in the retired pay benefit shrinks. That is, $500 per month, with payments beginning immediately, may be worth more than a $600 benefit that will not start for five or ten years. The increased monthly income in the future may not adequately compensate for the lost use of the lesser amount over a period of years.

authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section."[114]

Although the USFSPA prevents courts from forcing members into retirement, it does not address when distribution from retired pay can or should begin. California courts have contemplated whether a member should be entitled to unilaterally make the decision to retire, which has such severe consequences for the former spouse.[115] These courts allow the former spouse to decide whether to receive payment when the member is eligible for retirement or to postpone receipt until a later date, up to the time the member actually retires.[116] Therefore, the former spouse can seek to maximize the value of his or her interest based on the health of the parties, the nature of the employed spouse's retirement plan, the employed spouse's prospects for promotion, and other factors. The practicalities of an election by a former spouse to receive payment upon eligibility of retirement in the military may, however, be difficult. California courts require the military member who remains on active duty past retirement eligibility to pay the former spouse out of his current income.[117]

D. Jurisdictional Provisions

With the USFSPA, Congress also limited a state court's authority to divide military retirement pay[118] by imposing certain jurisdictional requirements.

> A court may not treat the disposable retired or retainer pay of a member [as marital or community property] unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the

---

[114] 10 U.S.C. § 1408(c)(3) (1994 & Supp. IV 1998).

[115] *See In re* Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (member of the armed forces); *In re* Gillmore, 629 P.2d 1 (civilian pension).

[116] *See* Luciano, 104 Cal. App. 3d at 960-61, 164 Cal. Rptr. at 95-96; Gillmore, 629 P.2d at 6. Alternatively, in Arizona one court held that the former spouse must begin receiving his or her share when the employed spouse becomes retirement eligible—without an opportunity to elect a different time to begin receiving the benefit. Koelsch, 713 P.2d at 1238-44.

[117] *See* Luciano, 104 Cal. App. 3d at 960-61, 164 Cal. Rptr. at 95-96; Gillmore, 629 P.2d at 6.

[118] Before placing within the Act the limitations on jurisdiction, Congress heard arguments of officials from the Department of Defense. These witnesses argued strongly for retention of the separate property concept of retired military pay. They further contended there was a need to prevent the possibility of forum shopping by the spouses. *See* S. REP. NO. 97-502, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1601-04.

> territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court. [119]

When Congress enacted the USFSPA, it limited the subject matter jurisdiction of state courts over military retirement pay to those instances in which personal jurisdiction existed over the military member other than by virtue of military assignment.[120] These jurisdictional provisions are more restrictive than the minimum contacts test which will subject an out-of-state defendant to the jurisdiction of the forum state.[121] This provision has raised two primary issues in case law regarding jurisdiction.

The first question focused on what was required for the court to find that the member had "consented" to the court's jurisdiction. The majority of jurisdictions have concluded that a general appearance is tantamount to consent to the court's jurisdiction for all purposes, including division of the military pension.[122] Since no requirement exists for the member to specifically consent to the court's authority to divide the military retirement pay, this reading of the statute seems appropriate. After all, the USFSPA only requires

---

[119] 10 U.S.C. § 1408(c)(4) (1994). The USFSPA defines the term *court* to include:

> (A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; (B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and (C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

Id. at § 1408(a)(1).

[120] *See id.* § 1408(c)(4). These limits apparently reflect a concern that military pensioners could be substantially disadvantaged by forum-shopping spouses who otherwise might seek to divide these property interests in a state never having had substantial contact with the military pension and whose courts are not easily accessible because of distance. *See generally* S. REP. NO. 97-502, at 8-9, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1603-04.

[121] Southern v. Glenn, 677 S.W.2d 576, 583 (Tex. 1984). The minimum contacts test provides that an out-of-state defendant is subject to the jurisdiction of the court provided, (1) the nonresident defendant must purposely do some act or consummate some transaction in the forum state; (2) the cause of action between plaintiff and defendant must arise out of that transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice under the due process clause of the Fourteenth Amendment, bearing in mind the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded by the respective parties, and the basic equities of the situation. *Id.* at 582 (referencing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Kulko v. California Superior Court, 436 U.S. 84 (1978)).

[122] *See, e.g.*, Lewis v. Lewis, 695 F. Supp. 1089 (Nev. 1988); *In re* Marriage of Jacobson, 161 Cal. App. 3d 465, 207 Cal. Rptr. 512 (Cal. Ct. App. 1984); Seeley v. Seeley, 690 S.W.2d 626 (Tex. Ct. App. 1985); *In re* Marriage of Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988).

consent to the jurisdiction of the court, not consent to the court's authority to divide the pension.[123] One court noted as much when it stated,

> had Congress intended specific consent to be a requirement, it would have been a simple matter to draft the statute to do so. By drafting it as Congress did, the statute curtails "forum shopping" by the nonmilitary spouse . . . but does not give an absolute "veto power" to the military spouse.[124]

The second jurisdictional issue is whether a court has continuing jurisdiction over the divorce proceeding in order to divide military retirement after the completion of the divorce. Although the majority of jurisdictions hold that the courts do retain jurisdiction, continuing jurisdiction only applies to subsequent proceedings in the original case.[125] Most states permit former spouses to return to court for partition of assets that were not disposed of in the original divorce proceedings.

In 1991, Congress amended section 1408(c)(1) of the USFSPA to prohibit retroactive division of military retired pay after *McCarty* in divorce decrees issued before *McCarty*.[126] The USFSPA, therefore, prohibits partition actions for omitted military pension benefits if the underlying divorce decree is dated prior to June 25, 1981, and if the decree does not divide the pension or reserve jurisdiction to do so.[127] This 1991 amendment was intended to ebb the tide of state court cases in which pre-*McCarty* decrees that neither divided the military retirement nor reserved jurisdiction to do so were reopened for that purpose.[128]

---

[123] *See, e.g.*, Kildea, 420 N.W.2d at 393-94.

[124] *Id.*

[125] *See, e.g.*, Tarvin v. Tarvin, 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (1986). *See also* Carmody v. Secretary of the Navy, 886 F.2d 678, 681 (4th Cir. 1989) (holding that an order dividing military retired pay that resulted from a new partition action, unrelated to the original divorce decree, does not qualify as a court order for purposes of seeking direct payment of the spousal share).

[126] Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (1990) (codified at 10 U.S.C. § 1408(c)(1) (1994)). In spite of this provision in the USFSPA, some courts have held that a retiree's waiver of retired pay in order to receive VA benefits justifies reopening a property division. Torwich v. Torwich, 660 A.2d 1214 (N.J. App. Div. 1995); Clausen v. Clausen, 831 P.2d 1257 (Alaska 1992).

[127] 10 U.S.C. § 1408(c)(1).

[128] H.R. CONF. REP. NO. 101-923, at 609 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3110, 3166 (stating that if a court issued a final decree before *McCarty* and did not treat retired pay as the property of both spouses, it may not subsequent to *McCarty*, modify the decree to do so). A related Code of Federal Regulations provision states in pertinent part that:

> A modification on or after June 26, 1981, of a court order that originally awarded a division of retired pay as property before June 26, 1981, may be honored for subsequent court-ordered changes made for clarification, such as the interpretation of a computation formula in the original court order. For court orders issued before June 26, 1981, subsequent amendments after

Although Congress has amended the jurisdictional requirements of the USFSPA to provide more guidance for the courts, new questions regarding jurisdiction still arise. For example, in *Delrie v. Harris*,[129] a federal district court addressed for the first time two specific issues surrounding partition actions: whether 10 U.S.C. § 1408(c)(4) imposed a heightened personal jurisdictional requirement on the court,[130] and what the interpretation of the prohibition on partitions contained in 10 U.S.C. § 1408(c)(1) might be.[131] Roberta and Harry Harris married in May of 1943 and divorced in Louisiana in September 1963.[132] Mr. Harris entered the military in 1943 and was married to Ms. Delrie[133] during approximately nineteen years of his military career.[134] Ms. Delrie petitioned for a partition of military retirement benefits thirty-three years later. No court-ordered, ratified, or approved property settlement

---

> that date to provide for a division of retired pay as property are unenforceable under this part.

32 C.F.R. § 63.6(c)(7) (1999).

[129] 962 F. Supp. 931 (W.D. La. 1997).

[130] *See id.* at 934. Section 1408(c)(4) states:

> A court may not treat the disposable retirement pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court; (B) his domicile in the territorial jurisdiction of the court; or (C) his consent to the jurisdiction of the court.

10 U.S.C. § 1408(c)(4).

[131] Delrie, 962 F. Supp. at 935. Section 1408(c)(1) states:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after 25 June 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

10 U.S.C. § 1408(c)(1).

[132] Delrie, 962 F. Supp. at 932.

[133] Mrs. Harris changed her last name to Delrie after the divorce.

[134] Delrie, 962 F. Supp. at 932.

incident to the divorce decree existed. In addition, the parties' community property settlement did not partition the military retirement benefits.[135]

With respect to the first issue, Mr. Harris contended that the USFSPA established a heightened requirement for personal jurisdiction.[136] He asserted that personal jurisdiction was lacking unless he resided in, was domiciled in, or consented to suit in Louisiana.[137] The court, however, ruled that section 1408(c)(4) does not constitute a heightened requirement for personal jurisdiction, but, rather, is a substantive requirement.[138] Therefore, the court found that the Louisiana court had jurisdiction over the issue at the time of the divorce and that by appearing and defending in one action, a defendant consented to jurisdiction over suits incidental to that action.[139]

The second issue the court addressed was an interpretation of the prohibition on partitions contained in section 1408(c)(1).[140] Ms. Delrie argued that the parenthetical phrase "(including a court ordered, ratified, or approved property settlement incident to such decree)"[141] limited the words divorce, dissolution, annulment, or legal separation so that the prohibition on partition was not effective unless a divorce included such a court ordered, ratified, or approved property settlement.[142] Mr. Harris maintained that the parenthetical phrase expanded or illustrated the preceding list to include property settlements incident to such decrees, but did not limit the preceding list.[143] The court found that the plain language of the statute supported the interpretation propounded by Mr. Harris.[144] The court found that by enacting section 1408(c)(1) of the USFSPA, Congress acted to prevent relitigation of divorces concluded prior to 1981.[145] Therefore, the court determined that Ms. Delrie had a right to the retirement benefits initially, but failed to act on that

---

[135] *See id.* at 933.
[136] *See id.* at 934.
[137] *See id.* At the time of the petition for partition of military retirement benefits, Mr. Harris resided in Oklahoma.
[138] *See id.*
[139] *See id.* Were the rule otherwise, a party to a marital dissolution proceeding could attempt to divest the court of the power to modify its own judgment by moving out of the forum and purporting to withdraw a previous consent to jurisdiction. For example, in a case where a judgment was entered, where neither party filed a timely notice of appeal, and where one party committed fraud in obtaining the judgment, a later motion to modify or vacate the judgment brought on the ground of fraud might be opposed on the theory that the court was without personal jurisdiction to consider the motion if the fraudulent party had the foresight to leave the forum after the judgment became final.
[140] *See id.* at 934-35.
[141] 10 U.S.C. § 1408(c)(1).
[142] Delrie, 962 F. Supp. at 935.
[143] *See id.*
[144] Louisiana state courts are split on this issue, as the *Delrie* court noted when it cited *Meche v. Meche*, 635 So. 2d 614 (La. Ct. App. 1994). In *Meche*, a Louisiana circuit court of appeals adopted the same interpretation of the statute as argued by Mrs. Delrie. *Id.* at 616.
[145] Delrie, 962 F. Supp. at 935.

right before it was terminated by the passage of the USFSPA.[146] As such, Ms. Delrie was unable to petition for a partition of military retirement benefits thirty-three years after the initial decree.

III. DIVISIBILITY OF DISABILITY PAY

One particularly controversial provision of the USFSPA is that requiring the nondivisibility of disability benefits received by the military retiree. Disability retirement pay may be awarded to a member when he is so disabled that he cannot perform his duties.[147] Once it has been determined that the member has a qualifying amount of service, he may be placed on the disability retired list and begin receiving disability retired pay.[148] In addition, a member may collect disability retirement pay when he has a permanent disability of at least 30 percent that renders him unfit to perform assigned duties and the member has either served at least eight years on active duty or was disabled while performing active duty.[149]

Receiving military disability retirement pay instead of retirement pay can benefit the service member greatly, regardless of whether a divorce is involved. First of all, disability retirement pay is nontaxable to the member.[150] Therefore, the service member can increase his after-tax income by receiving

---

[146] *See id.*

[147] 10 U.S.C. § 1212 (1994); *see also* R. ROBERTS, THE VETERANS GUIDE TO BENEFITS 129-64 (1989).

[148] 10 U.S.C. § 1221. The formulas for computing the amount of disability retired pay are contained in 10 U.S.C. § 1212. Basically, the retiree multiplies his years of service by twice his monthly base pay computed at various times depending on whether the retiree was placed on the temporary disability retired list, separated in lieu of being placed on the list, or failed to be promoted because of his placement on the list. *Id.* § 1212.

[149] 10 U.S.C. § 1201(b) (1994 & Supp. IV 1998). The entire provision provides the following requirements for eligibility:

> Determinations referred to in subsection (a) are determinations by the Secretary that-- (1) based upon accepted medical principles, the disability is of a permanent nature and stable; (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and (3) either-- (A) the member has at least 20 years of service computed under section 1208 of this title; or (B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination; and either-- (i) the member has at least eight years of service computed under section 1208 of this title; (ii) the disability is the proximate result of performing active duty; (iii) the disability was incurred in line of duty in time of war or national emergency; or (iv) the disability was incurred in line of duty after September 14, 1978.

Id.

[150] 38 U.S.C. § 5301 (1994 & Supp. IV 1998).

disability retirement pay rather than normal retirement pay, which is fully taxable. In addition, disability retirement pay is protected from certain creditors,[151] thereby further insulating the pay received by the member.

As a result of the military retiree's ability to receive disability pay in lieu of retirement pay, the military disability retired pay system poses serious consequences for a former spouse. Initially, the USFSPA excluded *all* disability retired pay from the definition of *disposable retired pay*.[152] Consequently, under the initial provisions of the USFSPA, no portion of a disability pension could be awarded to the former spouse. Although courts liberally applied the definition of disposable retired pay,[153] this exclusion of disability pay could result in a hardship for the former spouse.[154] Once again, in an attempt to provide more protection for the former spouse, Congress amended the USFSPA in 1986.[155] This amendment eliminated the total exclusion of disability retired pay from the divisibility provision and specifically defined a portion of disability pensions as disposable retired pay.[156]

Disabled military retirees can collect benefits from another source, the Department of Veterans' Affairs (VA).[157] Since a prohibition exists against the concurrent payment of retired pay and VA compensation, in order to receive disability pay, the member must waive his retired pay to the extent of his VA disability compensation entitlement.[158] The purpose of the waiver

---

[151] *See id.*

[152] Pub. L. No. 97-252, § 1002, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. § 1408(a)(4) (1994)).

[153] *See supra* note 95 and accompanying text.

[154] Some courts used this prohibition to award other marital assets to the former spouse. *See, e.g.*, Clauson v. Clauson, 831 P.2d 1257, 1258 (Alaska 1992) (holding that USFSPA does not preclude courts from considering military disability benefits received in lieu of waived retirement pay when making equitable division of marital assets).

[155] Pub. L. No. 99-661, § 644(a), 100 Stat. 3816, 3887 (1986) (codified as amended at 10 U.S.C. § 1408(a)(4) (1994)).

[156] Congress deleted a portion of the introductory paragraph in 10 U.S.C.S. § 1408(a)(4), which read "(other than the retired pay of a member retired for disability under chapter 61 of this title)." 10 U.S.C. § 1408(a)(4) (1982), *amended by* 10 U.S.C. § 1408(a)(4) (Supp. IV 1987). Thus, prior to this amendment, section 1408(a)(4) read as follows: "the term 'disposable retired pay' means the total monthly retired pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which . . . ." *Id.* However, Congress retained the exception for disability pay delineated further in the definition of disposable retired pay, which uses the percentage of disability to determine the amount considered as disposable retired pay. *See* 10 U.S.C. § 1408(a)(4)(C) (1994). It was a previous form of this exception contained in section 1408(a)(4)(C) that the Supreme Court relied upon in the *Mansell* decision. Mansell v. Mansell, 490 U.S. 581, 589 (1989).

[157] 38 U.S.C. § 1110 (1994).

[158] *See id.* § 5304. *See also* TJAGSA Practice Notes, *Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, ARMY LAW., Feb. 1998, at 31 [hereinafter TJAGSA Practice Notes, *Former Spouses' Protection Act*].

provision is to permit a retiree to receive retired pay and veterans' benefits, not to exceed the full rate of retired pay, without terminating the status that affords the right to either benefit. Since retirement pay is taxable and VA disability compensation is not,[159] the member has an incentive, regardless of whether there has been a divorce, to receive VA disability payments rather than military retirement pay.

Although the USFSPA specified that the amount of retirement pay waived in order to receive disability benefits could not be divided by the court, some controversy still existed among various jurisdictions.[160] The Supreme Court settled this controversy in *Mansell v. Mansell*,[161] by holding that the USFSPA does not grant state courts the power to treat military retirement pay waived by the retiree in order to receive veteran's disability benefits as property divisible upon divorce.[162] The court found that, in light of section 1408(a)(4)(B)'s limiting language as to such waived pay, the Act's plain and precise language established that section 1408(c)(1) granted state courts the authority to treat only disposable retired pay, not total retired pay, as community property.[163]

Major Mansell and his wife divorced after twenty-three years of marriage. At the time of the divorce, Major Mansell received both Air Force retirement pay and disability pay.[164] Major and Mrs. Mansell entered into a property settlement agreement, which the trial court enforced, that included a provision that Major Mansell pay Mrs. Mansell 50 percent of his total retirement pay, including that portion he waived to receive disability pay.[165] Major Mansell challenged the enforcement of the property settlement agreement, attacking the court's treatment of military retirement pay waived to receive disability benefits as community property.[166] Disposable pay, as defined by the USFSPA, excluded any retired pay waived to receive VA benefits.[167]

After unsuccessful challenges in the California state courts, Major Mansell sought and was granted review by the United States Supreme Court. The Court characterized the *Mansell* issue as a question of the statutory

---

[159] 38 U.S.C. § 5301 (1994 & Supp. IV 1998).

[160] *See, e.g., In re* Daniels, 186 Cal. App. 3d 1084, 1089, 231 Cal. Rptr. 169, 171 (Cal. Ct. App. 1986) (court ruled that they could divide the waived retired pay when a military retiree elected to receive VA payments); Casas v. Thompson, 720 P.2d 921, 923 (Cal. 1986) (holding that Congress had not intended the Act's disposable retired pay language to limit the application of state law in divisions of military retired pay).

[161] 490 U.S. 581 (1989).

[162] *See id.* at 594-95.

[163] *See id.* at 592.

[164] *See id.* at 585 (Major Mansell had executed a waiver of a portion of his retirement pay in order to receive disability pay).

[165] *See id.* at 585-86.

[166] *See id.* at 586-87.

[167] 10 U.S.C. § 1408(a)(4)(B).

interpretation of section 1408(c)(1).[168] The Court found that the USFSPA "affirmatively grants state courts the power to divide military retired pay, yet

[168] Mansell, 490 U.S. at 588. For the full text of the provision, see *supra* note 89 and accompanying text. The Court focused on the portion of this section dealing with the term *disposable retired pay*. Disposable retired pay is defined in 10 U.S.C. § 1408(a)(4). When the Court decided *Mansell,* this section read as follows:

> "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which -- (A) are owed by that member to the United States; (B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38; (C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he is entitled. (D) are withheld under section 3402(i) of the Internal Revenue Code of 1986 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding; (E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or (F) are deducted because of an election under chapter 73 of this title [10 U.S.C. §§ 1431-1452] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

10 U.S.C. § 1408(a)(4) (1982 & Supp. IV 1987) (amended by 10 U.S.C. § 1408(a)(4) (1988 & Supp. II 1990). After Congress amended section 1408(a)(4) in 1990, the section read:

> "Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which -- (A) are owed by that member to the United States for previous over-payments of retired pay and for recoupments required by law resulting from entitlement to retired pay; (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38; (C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or (D) are deducted because of an election under chapter 73 of this title [10 U.S.C. §§ 1431-1452] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

its language is both precise and limited."[169] The Court further concluded that "under [the Act's] plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted authority to treat total retired pay as community property."[170]

The Court found that since the USFSPA's plain and precise language did not support Mrs. Mansell's position that she was entitled to a portion of Mr. Mansell's disability retirement pay, she could prevail only by providing clear evidence that a literal interpretation of the USFSPA's language would thwart the Act's "obvious purposes."[171] Mrs. Mansell argued that the purposes of the USFSPA were to preclude federal preemption and protect former spouses.[172] The Court found, however, that congressional reports and the language of the statute itself provided inconsistent guidance as to the USFSPA's general purpose.[173] The Court determined that since the legislative history, read as a whole, indicated that Congress intended to both create new benefits for former spouses and to place on state courts limits designed to protected military retirees, it was impossible to identify any "obvious purposes" that would be hindered by a literal reading. [174] Like the *McCarty* Court, the *Mansell* Court concluded that:

> reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.[175]

Justice O'Connor, writing in dissent, argued that under the majority's interpretation of the USFSPA, the former spouses' economic security, which Congress intended to protect, was severely undermined by allowing unilateral decisions of their ex-spouses to waive retirement pay in lieu of disability benefits.[176] Justice O'Connor found it inconceivable that Congress intended the broad, remedial purposes of the statute to be thwarted in this manner.[177] As a result of the inequities identified by Justice O'Connor, some courts have

---

National Defense Authorization Act for 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1568-70 (1990) (codified at 10 U.S.C. § 1408(a)(4) (1994)).

[169] Mansell, 490 U.S. at 588.

[170] *Id.* at 589.

[171] *See id.* at 592.

[172] *See id.* at 592-93.

[173] *See id.* at 594.

[174] *See id.*

[175] *Id*.

[176] *See id.* at 603 (O'Connor, J., dissenting).

[177] *See id.* (O'Connor, J., dissenting).

taken equitable action to compensate the former spouse when such a reduction in disposable military retirement pay occurs.

In *Abernethy v. Fishkin*,[178] the Florida Supreme Court addressed the problem of a military spouse waiving retirement pay to receive disability benefits. In *Abernethy*, the parties, pursuant to their divorce, executed a separation agreement that awarded the former spouse (Fishkin) 25 percent of any retirement pay received by the member (Abernethy).[179] The subsequent judgment entered by the court prohibited Abernethy from pursuing any course of action which would defeat Fishkin's right to receive her allotted portion of Abernethy's "full net disposable retired or retainer pay" and required Abernethy to indemnify Fishkin for any breach.[180] Several months after the final judgment, Abernethy elected to voluntarily separate from the Air Force and receive benefits under the then newly enacted Voluntary Separation Incentive (VSI)[181] program.[182] As with retirement pay, a service member who receives VSI payments must waive a portion of those payments if he accepts VA disability payments.[183] Fishkin sought enforcement of the divorce decree.[184]

The trial court granted enforcement of the judgment and awarded Fishkin 25 percent of the annual VSI payments.[185] Thereafter, Abernethy waived portions of his VSI benefits in order to receive disability benefits.[186] Once again, Fishkin sought enforcement of the trial court judgment, asking for 25 percent of the amount Abernethy received as either VSI benefits or VA disability benefits.[187] The Supreme Court of Florida found that at the time of the final judgment, Abernethy was still on active duty and was not yet eligible to receive veteran's disability benefits.[188] Consequently, the court concluded that including Abernethy's VA disability benefits in calculating the amount of retirement pay awarded to Fishkin was not improper.[189] In addition, the court found that the final judgment contained an indemnification clause, which indicated the parties' intent to maintain level monthly payments pursuant to

---

[178] 699 So. 2d 235 (Fla. 1997).
[179] *See id.* at 237.
[180] *Id.*
[181] 10 U.S.C. § 1175 (1994). VSI is a temporary program to provide a financial incentive for service members to leave the service earlier than their scheduled end of term of service to assist with the downsizing of the military. *See infra* notes 232-37 and accompanying text.
[182] *See* Abernethy, 699 So. 2d at 237. Florida treats VSI and SSB payments as retirement pay. *Id.* at 237 n.5. Therefore, the court found that the VSI benefits were the functional equivalent of military retirement and were thus covered by the USFSPA *Id.*
[183] 10 U.S.C. § 1175(e)(4).
[184] *See* Abernethy, 699 So. 2d at 237.
[185] *See id.*
[186] *See id.* at 238.
[187] *See id.*
[188] *See id.*
[189] *See id.* at 240.

their separation agreement.[190] The court found that the indemnification clause did not require the indemnification funds come from disability benefits.[191] Instead, Abernethy could pay Fishkin with any other available asset.[192] Therefore, the court concluded that Fishkin could be awarded a portion of Abernethy's disability pay since the final judgment did not specifically delineate a division of disability pay.[193]

IV. DIRECT PAYMENTS TO FORMER SPOUSES

Under the USFSPA, former spouses of retired service members became eligible to receive direct payments of a portion of their former spouse's military retired pay to satisfy a court-ordered division of property. The USFSPA authorizes direct payments from military retired pay for child support, alimony, and division of property pursuant to a court order.[194] This provision allows a former spouse to receive payments directly from DFAS, without the necessity of resorting to periodic garnishment proceedings.[195] A *court order* is defined as a "final decree of divorce, dissolution, annulment, or legal separation issued by a court,"[196] and includes a court ordered, ratified, or approved property settlement incident to such a decree.[197] Additionally, the term includes a final decree that modifies the terms of a previously issued court order.[198] In 1997, Congress once again amended the USFSPA to assist the former spouse in obtaining a share of military retirement pay. The 1997 Fiscal Year Defense Authorization Act included an amendment that affected the service of process on Defense Finance Accounting Service (DFAS), allowing service by facsimile, electronic transmission, or regular mail.[199] Since certified mail return receipt requested was required previously, the change should ease the process for requests for direct payment.

---

[190] *See id.* at 237.
[191] *See id.* at 240.
[192] *See id.*
[193] *See id.*
[194] 10 U.S.C. § 1408(d)(1) (1994 & Supp. IV 1998).
[195] Guidelines used by the respective services to implement these direct payments are found in DoD Financial Management Regulation, *supra* note 110, vol. 7B, ch. 29. Garnishment procedures are found in DoD Financial Management Regulation, *supra* note 110, vol. 7B, ch. 27.
[196] 10 U.S.C. § 1408(a)(2).
[197] *See id.*
[198] *See id.*
[199] Department of Defense Authorization Act for 1997, Pub. L. No. 104-201, § 636, 110 Stat. 2503 (1997). *See also* TJAGSA Practice Note, *National Defense Authorization Act for Fiscal Year 1997 Affects Aspects of Uniformed Services Former Spouses' Protection Act*, ARMY LAW., Dec. 1996, at 20 [hereinafter TJAGSA Practice Note, *National Defense Authorization Act*].

Although this direct payment provision does inure greatly to the benefit of the former spouse, the USFSPA does place a few limitations on such a direct payment.[200] In order to be enforceable, the court order must describe the payments to the former spouse in "dollars or as a percentage of disposable retired pay."[201] With respect to service of the court order, the USFSPA provides that service must be on "an appropriate agent of the secretary . . . or, if no agent has been designated, upon the secretary."[202] After effective service of a valid court order, "the Secretary shall make payments (subject to the limitations of this section) . . . to the spouse or former spouse . . . in the amount of disposable retired pay specifically provided for in the court order." [203]

An additional limitation Congress enumerated in the USFSPA is that DFAS is permitted to make direct payment only if the former spouse was married to the service member "for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay."[204] The complete section provides:

> If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.[205]

Therefore, the USFSPA provides that when the member and spouse have been married for less than ten years while the member was in credible service, a court may order division of the retired pay, but the spouse cannot get direct payment from DFAS.

The third limitation placed on the enforcement of court orders is that the amount paid directly to a former spouse cannot exceed 50 percent of the member's disposable retired pay.[206] If a retired member's pay is also

---

[200] 10 U.S.C. § 1408(d).

[201] *Id.* § 1408(a)(2)(C). Direct payments in most instances may not exceed fifty percent of the member's disposable retirement pay.

[202] *Id.* § 1408(b)(1)(A).

[203] *Id.* § 1408(d)(1).

[204] *Id.* § 1408(d)(2). *See also infra* note 320 (discussion of confusion this 10/10 rule has produced for eligibility of benefits).

[205] 10 U.S.C. § 1408(d)(2).

[206] *See id.* § 1408(e)(1). State courts are split on whether this limitation also limits state court authority in making awards of military retirement pay. *Compare* Beesley v. Beesley, 758 P.2d 695 (Idaho 1988), *and* Bullock v. Bullock, 354 N.W.2d 904 (N.D. 1984), *and* Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984), *with In re* Marriage of Smith, 669 P.2d 448 (Wash. 1983). The bankruptcy court deciding *In re MacMeeken*, 117 B.R. 642 (D. Kansas

garnished pursuant to the Social Security Act,[207] the 50 percent limit on direct payments is increased to 65 percent of disposable retired pay for all court orders and garnishments paid under direct payment and garnishments.[208] Generally, direct payments terminate upon the earliest of three events: the terms of the court order are satisfied, the death of the retired member, or the death of the former spouse.[209]

Finally, the USFSPA provides a few limitations on direct payments that are in effect prohibitions on DFAS or the Secretary of the respective service. If a court order distributes an amount or percentage in excess of the maximum, the Secretary concerned is instructed to only pay the maximum amount authorized under the USFSPA. Under this scenario, as long as the Secretary pays the maximum amount authorized, the court order to the Secretary will be deemed fully satisfied.[210] Under section 1408(c)(1), if a court order became final before June 26, 1981, payments under section 1408(d) can only be made if the original order divided retirement pay or reserved jurisdiction to do so.[211] In 1997, Congress amended section 1408(d) by adding section 1408(d)(7)(A), which prohibits the DFAS from accepting or complying with an out-of-state modification of an existing court order to pay benefits to a former spouse pursuant to the USFSPA.[212] Consequently, DFAS can only comply with such a court order when the out-of-state court has jurisdiction over both the military member and the former spouse as specified in section 1408(c)(4).[213]

V. SURVIVOR BENEFIT PLAN

1990), provided a thorough legislative analysis and concluded that section 1408 did not preclude a court from awarding more that 50 percent of retirement pay to the former spouse.

[207] 42 U.S.C. § 659 (1994 & Supp. IV 1998). This statute provides for the processing of garnishment orders for child support and/or alimony from any payment to individuals from the United States. *Id*. § 659(a).

[208] 10 U.S.C. § 1408(e)(4)(B).

[209] *See id.* § 1408(d)(4).

[210] *See id.* § 1408(e)(5).

[211] *See id.* § 1408(c)(1). The CFR for this provision states in pertinent part that:

> A modification on or after June 26, 1981, of a court order that originally awarded a division of retired pay as property before June 26, 1981, may be honored for subsequent court-ordered changes made for clarification, such as the interpretation of a computation formula in the original court order. For court orders issued before June 26, 1981, subsequent amendments after that date to provide for a division of retired pay as property are unenforceable under this part.

32 C.F.R. § 63.6(c)(7) (1999).

[212] Pub. L. No. 101-510, §§ 555(a)–(d), (f), (g), 104 Stat. 1569, 1570 (1990) (codified at 10 U.S.C. § 1408(d)(7)(A) (1994 & Supp. IV 1998)).

[213] *See id.*

The Survivor Benefit Plan (SBP) was established by Congress in 1972 as an income maintenance program for dependents of deceased members of the uniformed services. [214] The SBP allows retired members of the armed forces (both active duty and Reserve components) to provide continued income for designated beneficiaries after the retiree's death through the use of an annuity.[215] Although SBP participation is voluntary,[216] in most cases a married member on active duty must have their current spouse's written consent to decline participation in the program. [217] Additionally, even though the member must elect whether or not to participate in the SBP before retirement, that decision is usually irrevocable.[218]

The annuity's cost is governed by the beneficiary category and the level of participation.[219] The monthly premiums are automatically deducted from military retired pay and SBP premiums are paid with before-tax dollars. The annuity for a spouse or former spouse is 55 percent of the selected base amount.[220] This annuity payment decreases when the beneficiary reaches age sixty-two.[221] If the beneficiary remarries before age fifty-five, annuity payments cease.[222] However, if that marriage terminates for any reason, payments are revived.[223] As originally codified, the SBP provided no authority for coverage of a former spouse and upon divorce, a retiree's former spouse lost coverage. The SBP originally provided a monthly annuity to be paid to "(1) the eligible widow or widower; (2) the surviving dependent children; or (3) the natural person designated (with an insurable interest in the

---

[214] Pub. L. No. 92-425, 86 Stat. 706 (1972) (codified at 10 U.S.C. §§ 1447-1455 (1988)).

[215] *See* 10 U.S.C. §§ 1447-1455 (1994 & Supp. IV 1998). Guidelines used by the respective services to implement the SBP are found in DoD Financial Management Regulation, *supra* note 110, vol. 7B, chs. 42-52. Air Force guidelines are found in Air Force Instruction 36-3006, Survivor Benefit Plan (SBP) and Supplemental Survivor Benefit Plan (SSBP) (July 1, 1996) [hereinafter AFI 36-3006].

[216] Although participation is voluntary, there are a number of compelling reasons, such as government subsidization of the coverage and tax-free premiums, why a member would enroll in the SBP. *See* Lew Tolleson, *Think Twice Before Bailing Out of SBP*, THE RETIRED OFFICER MAG. (May 1998).

[217] 10 U.S.C. § 1448(a).

[218] *See id.*

[219] The cost is determined by looking to the level of retired pay, or base amount, which the member chooses, upon which the Defense Finance and Accounting Service computes monthly premium and annuity amounts. The maximum base amount allowed is full retired pay; the minimum is $300. The SBP base amount must be full retired pay when SSBP is elected. When DFAS computes the monthly premium they also look to the type of beneficiary and the age of the member. *See* AFI 36-3006, *supra* note 215, atch. 3.

[220] 10 U.S.C. § 1451(a)(1).

[221] *See id.*

[222] *See id.* § 1450(b)(2).

[223] *See id.* § 1450(b)(3).

member)."[224] No provision existed to provide annuity coverage for a former spouse, unless the former spouse was designated a natural person.[225]

The USFSPA amended the SBP to allow a member to make a voluntary election to provide an annuity for "a former spouse" at the time the member became eligible to participate in the SBP.[226] In 1983, the SBP was amended again by the Department of Defense Authorization Act.[227] This amendment allowed the member to designate his former spouse as the SBP beneficiary, provided he elected into the SBP by designating his then current and now former spouse when he became eligible and later divorced that same spouse.[228]

Although these amendments allowed a member to designate a former spouse as a beneficiary, no provision required the member to make such a voluntary election. Therefore, any agreements between the member and the former spouse could not be enforced absent an additional court proceeding by the former spouse. Congress responded to this perceived inequity and further amended the SBP statute to provide for "deemed" elections.[229] This amendment provides that if the retiree agrees to make an election for a former spouse under the terms of a divorce decree but subsequently fails or refuses to do so, it will be considered an election.[230] Although a former spouse of an

---

[224] *See* 10 U.S.C. § 1450 (Supp. II 1972), *amended by* 10 U.S.C. § 1450 (1994 & Supp. IV 1998).

[225] *See generally* S. REP. NO. 97-502, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1599.

[226] Pub. L. No. 97-252, tit. X, § 1003(b), 96 Stat. 718, 735 (1982) (codified at 10 U.S.C. § 1448(b)(2) (1994 & Supp. IV 1998)).

[227] Pub. L. No. 98-94, tit. IX, pt. D, § 941(a)(1), (2), (c)(2), 97 Stat. 653 (1983) (codified at 10 U.S.C. § 1450(b) (1994 & Supp. IV 1998)).

[228] This amendment was enacted to relieve the restriction imposed by the USFSPA where a member could only elect to provide an annuity for a former spouse if he had a former spouse at the time he became eligible to participate in the benefit plan. *See* S. REP. NO. 98-174, at 255 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1145, 1152.

> The primary purpose of these technical amendments is to clarify the authority of individuals electing to participate in the Plan before the effective date of the Uniformed Services Former Spouses' Protection Act to designate their former spouses as Plan beneficiaries. For example, the amendments made it clear that a member who elected into the Plan by designating his spouse in 1975 and divorced that spouse in 1980 could now elect to designate his former spouse as a beneficiary under the Plan. He would have to make that election within one year after enactment of this Act.

Id. Guidelines used by the respective services to implement elections are found in DoD Financial Management Regulation, *supra* note 110, vol. 7B, ch. 43.

[229] Pub. L. No. 104-201, § 634, 110 Stat. 2561 (1996) (codified at 10 U.S.C. § 1450(f)(3) (Supp. IV 1998)).

[230] 10 U.S.C. § 1450(f)(3)(A). Under section 1450(f)(3)(A), the basic requirement for a deemed election is a court-approved agreement between the parties providing that the member or retiree will designate the former spouse as the SBP beneficiary. Alternatively, the automatic election will be made if a court simply orders the member or retiree to make the

SBP participant is not entitled to an annuity simply as the result of having been married to the participant at the time the member became eligible for and elected to participate in the benefit plan, when there is a subsequent divorce, the former spouse may still be entitled to an annuity.[231]

VI. SEPARATION INCENTIVES

In an effort to facilitate the military drawdown, Congress passed legislation in 1991 providing incentive payments to members who voluntarily left the service prior to attaining retirement eligibility.[232] Congress passed two

---

designation, whether or not an agreement exists between the parties. Such an order may be incident to the divorce decree, or it may be issued at a later date. *Id. Court-approved* is a broad term. It includes an agreement that has been incorporated, adopted, ratified, or approved in a court order. *Id.* § 1447. It also includes an agreement that simply has been filed with a court pursuant to state law. *Id.*

[231] *See* 10 U.S.C. § 1448(b). As amended, this section provides:

> (3)(A) A person–
> (i) who is a participant in the Plan and is providing coverage for a spouse . . . and (ii) who has a former spouse who was not that person's former spouse when he became eligible to participate in the Plan, may . . . elect to provide an annuity to that former spouse. Any such election terminates any previous coverage under the Plan and must be written, signed by the person, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment.
> (B) An election under this paragraph may not be revoked except in accordance with section 1450(f) of this title and is effective as of the first day of the first calendar month following the month in which it is received by the Secretary concerned.
> (4) A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) shall, at the time of making the election, provide the Secretary concerned with a written statement (in a form to be prescribed by that Secretary and signed by such person and the former spouse) setting forth whether the election is being made pursuant to a written agreement previously entered into voluntarily by such person as a part of or incident to a proceeding of divorce, dissolution, or annulment and (if so) whether such voluntary written agreement has been incorporated in, or ratified or approved by a court order.

Id. The importance of ensuring that a Survivor Benefit Plan provision is included in the final judgment entered by the court cannot be overemphasized. If a former spouse fails to ensure that a court order exists which requires the member to make an election for the former spouse or fails to send a copy of this court order to DFAS, the former spouse can lose his or her benefits under the SBP. *See generally*, TJAGSA Practice Notes, *Drafting a Separation Agreement? Don't Forget the Survivor Benefit Plan!*, ARMY LAW., Dec. 1995, at 71-72.

[232] H.R. CONF. REP. NO. 102-311, at 555-56 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1042, 1112-13. *See also* Elzie v. Aspin, 841 F. Supp. 439, 440 (D.D.C. 1993) (explaining that the SSB and VSI programs were designed to reduce the size of the armed forces in keeping with a perceived diminished threat to the United States' interests posed by the new world order).

separate plans: a lump-sum payment called the Special Separation Benefit[233] (SSB) or an annual payment called the Voluntary Separation Incentive[234] (VSI). A service member who elected to leave active duty prior to retirement eligibility could choose to receive a series of annual payments referred to as a voluntary separation incentive or a lump-sum special separation benefit.[235] These early separation incentive programs were designed to induce members of the armed forces to leave the military voluntarily rather than run the risk of being involuntarily separated due to reductions in the size of the military.[236] Under SSB and VSI, qualifying service members receive benefits based on their salary and years of service at the time of separation.[237] The service member's affirmative request and application to participate are required to receive either of these benefits.

The majority of states hold that SSB and VSI payments are divisible upon divorce.[238] In *Marsh v. Wallace*,[239] the court held that since SSB

---

[233] 10 U.S.C. § 1174 (1994 & Supp. IV 1998). The SSB program entitles a service member with over six years but less then twenty years active duty service to a one-time lump-sum payment determined by 10 percent of the product of years of service and twelve times the monthly basic pay at the time of release from active duty. *See id.* § 1174(d)(1).

[234] 10 U.S.C. § 1175. The VSI is an annual payment to the service member with over six years but less then twenty years active duty service based on 2.5 percent of the monthly basic pay that was received at the time of transfer to the reserve component multiplied by twelve and multiplied again by the number of years of service. The service member receives the annuity for twice the number of years of service. *See id.*

[235] *See* 10 U.S.C. §§ 1174a(b), (e)(3), 1175(c).

[236] H.R. CONF. REP. NO. 102-311, at 555-57 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1042, 1111-13.

[237] 10 U.S.C. §§ 1174a(b), 1175(e)(1).

[238] *See generally* Marsh v. Wallace, 924 S.W.2d 423 (Tex. App. 1996); Kelson v. Kelson, 675 So. 2d 1370 (Fla. 1996) (finding VSI benefits to be the "functional equivalent of . . . retired pay" and therefore their division is not precluded by federal law); *In re* Marriage of Heupel, 936 P.2d 561 (Colo. 1997) (if VSI or SSB benefits were intended to compensate for lost future income, they would not be subject to recoupment from retired pay); In re Babutta, 66 Cal. App. 4th 784, 78 Cal. Rptr. 281 (Cal. Ct. App. 1998) (SSB and VSI benefits are analogous to retired pay and are compensation for services already rendered); Fisher v. Fisher, 462 S.E.2d 303 (S.C. Ct. App. 1995) (rejecting the husband's argument that the court lacked subject matter jurisdiction to modify the original property division when the husband elected to receive VSI benefits in lieu of retired pay because the retired pay provisions of the parties' separation agreement applied); *In re* Crawford, 884 P.2d 210 (Ariz. Ct. App. 1994) (whether SSB payment represents retirement proceeds or a payment in lieu of retirement benefits, some portion of it is attributable to retirement funds); Blair v. Blair, 894 P.2d 958 (Mont. 1995) (election of special separation benefits is an election of early retirement); Kulscar v. Kulscar, 896 P.2d 1206 (Okla. 1995) (dissolution decree awarding wife a portion of husband's military retirement benefits and predating enactment of SSB program enforced against husband's special separation benefits); and *In re* Marriage of McElroy, 905 P.2d 1016 (Colo. Ct. App. 1995) (marital settlement agreement providing for division of husband's "gross military retirement/pension benefits" and predating enactment of SSB program enforced against husband's special separation benefits).

[239] 924 S.W. 2d 423, 427 (Tex. App. 1996).

payments are compensation for lost retirement pay earned in the past that the member voluntarily gives up receiving in the future, SSB payments are subject to division upon divorce.[240] In *Marsh*, the divorce decree awarded Wallace (the spouse) 29 percent of Marsh's (the member) "retirement pay."[241] At the time of the divorce, Marsh was not eligible to receive retirement pay.[242] Three years after the divorce, Marsh left active duty and received a lump sum SSB payment.[243] Pursuant to the SSB program, this payment was based on his rank, base pay, and years of service.[244] Wallace petitioned the trial court for enforcement of the divorce decree, alleging that the SSB payment was retirement pay as described in the divorce decree.[245] The trial court concluded that SSB was retirement pay and awarded Wallace a portion of Marsh's net SSB payment.[246]

Upholding the trial court decision, the appellate court found that although SSB payments were designed to "assist separating personnel *and their families*,"[247] they were different from involuntary severance payments because they were only made when a member voluntarily elected to separate from active duty.[248] In holding that SSB payments were divisible upon divorce, the *Marsh* court addressed the nature of SSB payments, concluding that SSB payments resembled a "buy-out of the services member's investment in military retirement."[249] As such, the court determined that SSB payments were really a lump sum settlement designed to encourage a member's voluntary early separation from service.[250] The court also addressed the provisions in the SSB program that provided that if a member separated voluntarily, later reenlisted, and subsequently retired, the amount of retirement is reduced by the amount of the SSB payment received.[251] Thus, the member can wait to receive regular retirement benefits or separate now and receive an SSB payment, but not both.[252] Therefore, the court found that by voluntarily electing to separate from active duty, the member "voluntarily forfeits the opportunity to earn and receive future retirement benefits that otherwise would

---

[240] *See id.* at 427.
[241] *See id.* at 424.
[242] *See id.*
[243] *See id.*
[244] *See* 10 U.S.C. § 1174a(b)(2).
[245] Marsh, 924 S.W.2d at 424.
[246] *See id.* at 424–25.
[247] *Id.* at 426 (emphasis in original).
[248] *Id.* (citing H.R. REP. NO. 101-665, at 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 2962).
[249] *Id.*
[250] *See id.*
[251] *See id.*
[252] *See id.*

become due upon successful completion of the required service."[253] Because Marsh elected to receive an SSB payment in lieu of the opportunity to receive future retirement benefits, the SSB payment he received was subject to division as retirement pay pursuant to the property division.[254]

In *Kelson v. Kelson*,[255] the Florida Supreme Court came to a similar conclusion regarding VSI payments. When the Kelsons divorced, the final judgment of the trial court incorporated a provision of the couple's property settlement, which awarded Mrs. Kelson a portion of her husband's retired/retainer pay.[256] At the time of the divorce, Mr. Kelson had not retired from active duty.[257] Two years later, he elected to leave active duty and receive VSI benefits.[258] Mrs. Kelson filed a motion in the trial court to enforce the final judgment, arguing that her husband's VSI benefits were the functional equivalent of the retired pay she was entitled to receive under the parties' agreement.[259] The trial court "reluctantly" held that VSI benefits were not retired/retainer pay under the settlement agreement.[260]

The Florida Supreme Court examined the provisions of the VSI/SSB statutes and focused on the fact that the VSI/SSB benefits were calculated based on years of service and rate of pay similar to retirement pay.[261] In addition, the court also looked at the statute's provisions requiring recoupment of incentive pay from retirement benefits when a service member who has received SSB/VSI subsequently reenlists and qualifies for retirement.[262] Therefore, the court held that since, as a practical matter, VSI payments were

---

[253] *Id.* The analysis used by the court in *Marsh*, that SSB payments are basically an advance on retirement, was also used by the Montana Supreme Court in *Blair v. Blair*, 894 P.2d 958, (Mont. 1995):

> Like retirement, [the husband's] eligibility for the SSB program was based on the number of years he served in active duty. As with retirement pay, [his] separation pay was calculated according to the number of years he was in active service. [He] could have remained on active duty for five more years and received retirement pay. Instead, he chose voluntary separation from the military and received his compensation at an earlier date. For the reasons we have stated, we characterize separation pay received under the Special Separation Benefits program, as an election for early retirement.

Blair, 894 P.2d at 961-62.
[254] Marsh, 924 S.W.2d at 426-27.
[255] 675 So. 2d 1370 (Fla. 1996).
[256] *See id.*
[257] *See id.*
[258] *See id.* at 1371.
[259] *See id.*
[260] *See id.* at 1370.
[261] *See id.* at 1372.
[262] *See id.*

the functional equivalent of the retired pay in which Mrs. Kelson had an interest under the settlement agreement, she was entitled to a portion of the benefits in conformity with the settlement agreement.[263]

In *Horner v. Horner*,[264] Pennsylvania joined a minority[265] of states by ruling that SSB payments are neither marital property nor retirement benefits and, therefore, not divisible.[266] The Horners divorced after 12 years of marriage.[267] Pursuant to their divorce, the court awarded Mrs. Horner a percentage of her husband's military retirement pay.[268] Four years later, after he failed to make the next higher rank, he enrolled in the SSB program.[269] Upon learning of this, Mrs. Horner petitioned the court to enforce the divorce decree and award her a percentage of the SSB payment.[270] The Pennsylvania Supreme Court upheld the lower court's decision and agreed with its analysis that Mr. Horner's SSB payment was neither marital property nor retirement pay and, therefore, was not divisible.[271] Similar to other jurisdictions, Pennsylvania defined marital property as property that is acquired during the marriage.[272] The court decided that since the SSB program did not exist at the time of the Horner's divorce, Mr. Horner did not acquire any interest in the SSB during the marriage and did not even anticipate it as a military benefit.[273] The court held that only if her husband reached retirement in the reserve component would Mrs. Horner be entitled to receive her percentage of that retirement pay as awarded in the divorce decree.[274]

In addition to the court's analysis in *Horner*, the legislative history of VSI payments may provide support for the position that VSI/SSB payments should not be considered marital property subject to division. The legislative history of the Act creating the VSI program "reveals that Congress enacted the legislation 'because of [its] concern over the effect of strength reductions on [service members] and their families.'"[275] Moreover, Congress noted that the program "would give a 'fair choice to personnel who would otherwise have no

---

[263] *See id.*
[264] No. 97-26, 1997 Pa. LEXIS 2835 (Dec. 23, 1997).
[265] *See* McClure v. McClure, 647 N.E.2d 832 (Ohio Ct. App. 1994) (holding VSI payments are separate property of the service member).
[266] Horner, 1997 Pa. LEXIS 2835, at *1.
[267] *See id.* at *1.
[268] *See id.* at *2.
[269] *See id.* at *3-4.
[270] *See id.* at *4.
[271] *See id.* at *5-10.
[272] *See id.* at *5 (citing 23 PA. CONS. STAT. § 3501(a)(6) (1997)). Pennsylvania defines marital property as "all property acquired by either party during the marriage, including the increase in value, prior to the date of final separation." *Id.*
[273] *See id.* at *6.
[274] *See id.* at *11.
[275] McClure, 647 N.E.2d at 841 (citing H.R. REP. NO. 102-311, at 556 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1042, 1112).

option but to face selection for involuntary separation, and to risk being separated at a point not of their own choosing.'"[276] Therefore, after considering the congressional intent behind the VSI program, perhaps courts should characterize VSI payments as more closely analogous to severance benefits than retirement benefits.[277]

VII. DUAL COMPENSATION ACT

Military retirees often begin a second federal civil service career after their military service is concluded. The Dual Compensation Act (DCA) required retired regular officers in the federal civil service to forego a percentage of their military retired pay as a condition of federal employment.[278] Until October 1999, when Congress passed the National Defense Authorization Act for 2000 (FY2000 Authorization Act), this had a significant effect on a former spouse entitled to receive a share of military retired pay.[279] The impact of the DCA on military retirees and their former spouses was radically changed by the passage of the FY2000 Authorization Act.[280] The Act contains a provision that repeals the Dual Compensation Statute.[281] This effectively allows a military retiree to collect their retirement concurrently with collection of a federal salary.[282]

This provision was not originally included in the FY2000 Authorization Act, but was added later as a result of an amendment sponsored by Senator Michael D. Crapo.[283] As a result, there is little legislative history as to the intent of this provision of the Act. Although there is no mention in the legislative history of the USFSPA or its effects on military retirees, the passage of this provision seems to contradict the military retirees' argument that military retirement is reduced current pay, rather than an asset earned during employment with payment deferred until retirement.[284] Instead, this provision would seem to classify military retirement as a reward for prior service, while characterizing a salary from the federal government as compensation for current service. In addition, the repeal of the DCA is silent as to whether there will be a grandfather clause for members that have

---

[276] *Id.* at 841.
[277] *See generally In re* Marriage of Kuzmiak, 176 Cal. App. 3d 1152, 222 Cal. Rptr. 644 (Cal. Ct. App. 1986) (discussing treatment of involuntary separation pay as separate property).
[278] 5 U.S.C. § 5532(b) (1994).
[279] *See generally* TJAGSA Practice Notes, *Former Spouses' Protection Act*, *supra* note 158, at 133.
[280] *See* National Defense Authorization Act for 2000, S. 1059, 106th Cong., 1st Sess. § 651 (1999). The act was signed by the President on October 5, 1999.
[281] *See id.*
[282] *See* H. REP. NO. 106-301, 106th Cong., 1st Sess. (1999).
[283] 145 CONG. REC. S6384 (daily ed. May 27, 1999).
[284] *See supra* notes 32-35 and accompanying text.

executed waivers prior to FY2000. As a result, a historical perspective on the DCA and its effect on the distribution of retired pay is necessary.

Prior to the passage of the FY2000 Authorization Act, the USFSPA definition of disposable military retirement pay excluded portions of retirement waived to collect salary received subject to the DCA.[285] The USFSPA required a retiree to voluntarily waive a portion of longevity retirement in order to receive salary subject to the limits of the DCA.[286] If the member executed such a waiver, the former military spouse lost her interest in retirement benefits once the military member retired or separated from the service and then took a federal job.[287] Although the years of military service counted toward the thirty years required for federal retirement, once the employee retired from federal civil service, no "military retired pay" existed.[288] Therefore, this waiver often drastically affected the amount of disposable retirement pay available for division under a divorce decree.

In order to alleviate the effect of this waiver on the former spouse, many courts continued to award a portion of gross rather than disposable retirement pay. In *Gaddis v. Gaddis*,[289] the Arizona Court of Appeals ruled that the former spouse was entitled to the original award of military retirement pay, despite the waiver filed by the member to collect a federal salary covered by the DCA.[290] The trial court awarded Mrs. Gaddis 50 percent of Mr. Gaddis's disposable military retirement pay.[291] This resulted in Mrs. Gaddis receiving approximately $750 per month.[292] When Mr. Gaddis took a civil service job, the filing of his waiver reduced Mrs. Gaddis's monthly portion of disposable retirement pay by 50%.[293] After Mrs. Gaddis filed a petition for an order to show cause, the trial court ordered Mr. Gaddis to continue paying the original $750.[294] Noting that the original community property award established an enforceable property interest,[295] the court concluded that it was not dividing his civil service salary, since he was not receiving this income at the time of the divorce.[296] The court also felt that Mr. Gaddis's deliberate

---

[285] 5 U.S.C. § 5532(b). This legislation applies only to federal employees in the civil service who were officers in the armed forces. If an officer secures federal employment after military service, section 5532(b) requires the employee to waive a portion of his military longevity retirement in order to receive his federal salary. *See id.*

[286] 10 U.S.C. § 1408(a)(4)(B) (1994). *See also* TJAGSA Practice Notes, *Former Spouses' Protection Act, supra* note 158, at 31.

[287] *See* 5 U.S.C. § 5532(b).

[288] *See* 5 U.S.C. § 8332 (1994 & Supp. IV 1998).

[289] 957 P.2d 1010 (Ariz. App. 1997).

[290] *See id.* at 1013.

[291] *See id.* at 1010.

[292] *See id.*

[293] *See id.*

[294] *See id.*

[295] *See id.* at 1012.

[296] *See id.* at 1013.

subversion of the decree's award was fundamentally unfair to his former spouse.[297] As a result, the court held that Mr. Gaddis's federal employment altered the calculation of disposable income, but did not alter Mrs. Gaddis's community property interest in the retirement plan at the time of the decree.[298]

The impact of the DCA on disposable retired pay was further exemplified in *Knoop v. Knoop*.[299] In *Knoop*, a former spouse was awarded 36.5 percent of her husband's military retirement pay.[300] Once the member retired, the former spouse received about $800 per month as her share of military retired pay.[301] Several months later, the retiree accepted a federal civil service job with the Army.[302] Under the DCA, the member was required to waive a portion of his military retired pay as a condition of accepting the new position.[303] Using these deductions and calculating the 36.5 percent share to his former spouse, the member then reduced his property division payments to his former spouse.[304] This resulted in a reduction of almost $300 per month, reducing her share to just over $500 per month. The former spouse filed suit challenging this reduction.[305]

The disagreement centered on the scope of disposable retired pay. The retiree's decision to reduce payments to his former spouse was based on the assumption that references to retirement pay found in the parties' property division referred to disposable retired pay as it is defined by the USFSPA.[306] Disposable retired pay equals total monthly retired pay to which a member is entitled minus deductions, including amounts required by law to be waived to receive certain compensation under the Dual Compensation Act.[307] The former spouse insisted that her share of the retirement pay was "36.5 percent of retirement pay remaining after deduction of federal withholding."[308] The retiree responded that the former spouse was only entitled to 36.5 percent of his *disposable* retired pay remaining after the deduction for federal withholding.[309] The North Dakota Supreme Court rejected the retiree's

---

[297] *See id.*
[298] *See id.* at 1014.
[299] 542 N.W.2d 114 (N.D. 1996).
[300] *See id.* at 116.
[301] *See id.* The payments were made directly by the retiree to the former spouse. The amended judgment required the member to make necessary arrangements so that the former spouse was paid by allotment. *See id.*
[302] *See id.*
[303] *See id.* The actual reduction associated with his Dual Compensation Act waiver was from $2465 to $1620 per month. *See id.*
[304] *See id.*
[305] Knoop, 542 N.W.2d at 116.
[306] *See id.* at 116. *See also* 10 U.S.C. § 1408(a)(4). For the USFSPA definition of disposable retired pay, see *supra* note 89 and accompanying text.
[307] 10 U.S.C. § 1408(a)(4)(B).
[308] Knoop, 542 N.W.2d at 116.
[309] *See id.*

argument that the USFSPA and *Mansell* required retirement pay, as used in the amended judgment, to be construed as disposable retired pay.[310] The court held that the trial court had jurisdiction to treat the member's disposable retired pay as marital property subject to division and could award up to 50 percent to the former spouse.[311] The court concluded that since the underlying order only awarded 36.5 percent of gross retired pay minus federal withholdings, enforcement would not cause payments to the former spouse in excess of the 50 percent limits provided in the USFSPA.

In an effort to rectify the harm that DCA waivers had upon a former spouse, in 1997 Congress amended the Civil Service Retirement Act[312] and the Federal Employees Retirement Act.[313] These amendments required an employee to authorize the Office of Personnel Management to deduct some of his retirement pay for the former spouse as a prerequisite to using the years of military service towards federal retirement.[314] This essentially allowed a former spouse to collect her awarded portion of military retirement pay, regardless of whether the member subsequently took a federal government position. The amount deducted equals the amount the former spouse would have received had the member not taken the federal job.[315] Once again, Congress attempted to further protect former spouses and their interest in military retirement pay. With the passage of the FY2000 Authorization Act, Congress has effectively eliminated any concern regarding the DCA for former spouses and military members. The question now remains how the courts and ultimately Congress will deal with divorce decrees and judgments that have already incorporated the provisions of the DCA into the division of property.

VIII. DOMESTIC ABUSE CASES

Most of the amendments to the USFSPA inure to the benefit of the former spouse of a member who retires from active duty pursuant to a regular retirement program. However, Congress has recognized that there are other spouses and former spouses who deserve to receive benefits from the member, regardless of whether the member actually retired. In this vein, Congress felt compelled to address the plight of victims of spouse and child abuse and the hardship imposed on them by discharge of the member resulting from the abuse. As a result, Congress amended the USFSPA in 1993 to provide for

---

[310] *See id.* at 117.
[311] *See id.*
[312] Pub. L. No. 104-201, div. A, tit. VI, § 637(a), 110 Stat. 2580 (1996) (codified at 5 U.S.C. § 8332 (1994 & Supp. IV 1998)). *See generally* TJAGSA Practice Note, *National Defense Authorization Act*, *supra* note 200, at 20.
[313] Pub. L. No. 104-201, div. A, tit. VI, § 637(b), 110 Stat. 2580 (1996) (codified at 5 U.S.C. § 8411 (1994 & Supp. IV 1998)).
[314] *See* 5 U.S.C. §§ 8332, 8411.
[315] *See id.*

spouses or former spouses[316] who are unable to collect their portion of retirement pay and other benefits because the service member receives a punitive discharge imposed as a result of domestic abuse.[317] Basically, these provisions were enacted to allow the spouse or former spouse, who is a victim of or the parent of a victim of domestic abuse, to collect retired pay and maintain entitlements to other benefits, such as medical benefits, as if the member retired without engaging in misconduct. [318]

The provisions require that a court order be executed awarding a portion of retired pay, the member be eligible for retirement by years of service but lose the right to retire due to misconduct involving dependent abuse, and that the person having the court order be either the victim or the parent of the victim of the abuse.[319] Although the USFSPA specifically provides for these victims, it also requires that the spouse be otherwise entitled to the pay and benefits (i.e., the spouse must be awarded a portion of retirement pay pursuant to a divorce and be either a "20/20/20" or "20/20/15" spouse to receive the other benefits).[320] These benefits terminate upon remarriage. Unlike the benefits normally awarded to 20/20/20 and 20/20/15 spouses, however, divorce, annulment, or death of the subsequent spouse can revive these

---

[316] Oddly, there is no requirement that the spouse divorce the member who has committed the domestic abuse in order to receive payments and be entitled to benefits under this provision.

[317] Pub. L. No. 103-160, § 554, 101 Stat. 1663-67 (1993) (codified at 10 U.S.C. § 1408(h) (1994 & Supp. IV 1998)).

[318] The statute provides that the spouse or former spouse must be "the victim of the abuse and married to the member or former member at the time of that abuse; or a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse." 10 U.S.C. § 1408(h)(2)(B). A *dependent child* is:

> an unmarried legitimate child, including an adopted child or a stepchild of the member or former member, who (A) is under 18 years of age; (B) is incapable of self-support because of a mental or physical incapacity that existed before become 18 years of age and is dependent on the member or former member for over one-half of the child's support; or (C) is enrolled in an full-time course of study in an institution of higher education . . . is under 23 years of age and is dependent on the member or former member for over one-half of the child's support.

Id. § 1408(h)(11).

[319] *See id.* § 1408(h).

[320] *See id.* § 1408(h)(9). *See infra* notes 322-234 and accompanying text. Many members assume that there is a third category, the 10/10 spouse. This is a misapplication of the requirements for direct payment of military retired benefits from DFAS to the former spouse. *See supra* notes 194-199 and accompanying text. The 10/10 spouse is not, by virtue of being married to a military member for 10 years during which there was 10 years of creditable service, entitled to any heightened benefits from the respective service. This misconception is reinforced by civilian publications, which frequently indicate that a former spouse must be married to a military member for 10 years in order to receive a portion of their retirement. *See, e.g.*, DANIEL SITARZ, DIVORCE YOURSELF, 64 (1991).

benefits.[321] As a result of the universally recognized need to protect these spouses and former spouses, these provisions have not generated substantial controversy or criticism by the courts.

IX. ADDITIONAL BENEFITS TO FORMER SPOUSES

Under the USFSPA, additional nonmonetary benefits may also extend to former spouses.[322] Although the extension of these benefits to former spouses has not elicited the same controversy as the division of military retired pay,[323] the benefits constitute important tangible benefits to the former spouse.[324] The level of these benefits can be classified by determining the years of creditable service by the member,[325] the years of marriage, and the overlap between the two. This produces two main categories of entitled former spouses: the 20/20/20 spouse and the 20/20/15 spouse.

The 20/20/20 spouse qualifies for benefits because there was twenty years of creditable service by the member, twenty years of marriage, and twenty years of overlap between the marriage and the creditable service. The former spouse is entitled to commissary and Post Exchange/Base Exchange (PX/BX) privileges as long as the former spouse is unremarried.[326] In addition, the 20/20/20 spouse qualifies for full military health care benefits as long as

---

[321] 10 U.S.C. § 1408(h)(7). The payments resume as of the first day of the month the marriage is terminated and continue in an amount that would have been paid if the continuity of the payments had not been interrupted by marriage. *Id.*

[322] Logistically, these nonmonetary benefits are given to the former spouse by issuing the former spouse and other eligible dependents an identification card. *See* Air Force Instruction 36-3026, Identification Cards for Members of the Uniformed Services, their Family Members and Other Eligible Personnel (Oct. 1, 1998) [hereinafter AFI 36-3026]. The basic eligibility criteria are outlined in AFI 36-3026 ¶ 2.7. The verification procedures used to confirm eligibility are outlined in AFI 36-3026 ¶ 2.8.

[323] The lack of interest in anything but military retirement pay is largely due to the fact that these other benefits do not cost the military retiree any direct payments. These benefits are funded from the service coffers and do not impact the benefits extended to the retiree. However, if these benefits are threatened in the future, this could become a point of contention with retirees and former spouses. *See* Bill Kaczor, *Military Still Promising Retiree Medical Benefits*, SEATTLE TIMES, Nov. 11, 1997, at C2; Bradley Graham, *Budget Ignores Military's Top Enemy: Lagging Pensions*, SEATTLE TIMES, Oct. 20, 1998, at A5.

[324] Edwin Schilling, *Benefits of Former Spouses of Military Personnel*, WASH. ST. B. NEWS, May 1990, at 11.

[325] 5 U.S.C. § 8332 (1994). *Creditable service* is defined as "the date of original employment to the date of separation on which title to annuity is based in the civilian service of the Government . . . credit may not be allowed for a period of separation from the service in excess of 3 calendar days." *Id.* § 8332(b).

[326] 10 U.S.C. § 1062 (1994). According to the statute "[a]n unremarried former spouse . . . is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services." *Id.* Unremarried really means unmarried for purposes of providing commissary and BX/PX privileges, and termination of a subsequent marriage does not revive the entitlement to benefits. *Id.*

the former spouse is unremarried.[327] These benefits include the full military health care program, including CHAMPUS/Tricare coverage (up to age sixty-two) and in-patient and outpatient care at military treatment facilities.[328] Termination of a subsequent marriage by divorce or death does not revive health care benefits, but an annulment does. Also, the former spouse's enrollment in an employer-sponsored health insurance plan cancels military health care benefits.[329] For both commissary and PX/BX privileges and for health care benefits, the date of the divorce is irrelevant, as long as the 20/20/20 rule is satisfied.

As originally enacted, the USFSPA only provided medical, commissary and exchange privileges to 20/20/20 spouses. In an effort to further expand coverage for former spouses, Congress amended the USFSPA in 1985 to provide for certain benefits for the 20/20/15 spouse.[330] The 20/20/15 spouse qualifies for benefits because there were at least twenty years of creditable service by the member, twenty years of marriage, and fifteen years of overlap between the marriage and the creditable service. To qualify for any benefits, the former spouse must remain unremarried.[331] The 20/20/15 spouse is

---

[327] *See id.* § 1076. The definition of dependent is found in section 1072, which provides as follows:

> The term dependent with respect to a member or former member of a uniformed service, means . . .
> . . . .
> (F) the unremarried former spouse of a member or former member who (i) on the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member for a period of at least 20 years during which period the member or former member performed at least 20 years of service which is creditable in determining that member's or former member's eligibility for retired or retainer pay, or equivalent pay, and (ii) does not have medical coverage under an employer-sponsored health plan;
> (G) a person who (i) is the unremarried former spouse of a member or former member who performed at least 20 years of service which is creditable in determining the member or former member's eligibility for retired or retainer pay, or equivalent pay, and on the date of the final decree of divorce, dissolution, or annulment before April 1, 1985, at least 15 of which, but less than 20 of which, were during the period the member or former member performed service creditable in determining the member or former member's eligibility for retired or retainer pay, and (ii) does not have medical coverage under an employer-sponsored health plan.

Id. § 1072(2)(F), (G) (1994 & Supp. IV 1998).
[328] *See id.* §§ 1408, 1072, 1076, 1086.
[329] *See id.* § 1072(2)(F), (G).
[330] Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, § 641, 98 Stat. 256 (1984) (codified at 10 U.S.C. § 1072(2)(G) (1994 & Supp. IV 1998)).
[331] *See id.* § 645(a)(3), 98 Stat. 256 (codified at 10 U.S.C. § 1072(2)(G)).

entitled to full military medical benefits, like a 20/20/20 spouse, if the divorce occurred before April 1, 1985.[332] Otherwise, the former spouses is entitled to transitional health care benefits, provided the spouse is unremarried and is not covered by an employer-sponsored health insurance plan. These transitional benefits include full medical coverage for one year after the divorce, with the possibility of limited coverage for an additional year.[333] To qualify for a second year of limited coverage, the former spouse must enroll in the Department of Defense Continued Health Care Benefit Program.[334] The 20/20/15 spouse is not entitled to any commissary or PX/BX privileges.

The Department of Defense Continued Health Care Benefit Program is available for any member or dependent who loses entitlement to military health care.[335] This includes former spouses, members who do not retire but leave the service, and their dependents. Basically, this program is designed to provide transitional care until alternative coverage can be obtained.[336] As long as the individual enrolls within sixty days of losing CHAMPUS benefits, his eligibility is guaranteed.[337] In terms of benefits provided, the program provides temporary health care coverage similar to the benefits offered by CHAMPUS. The primary difference in this program is that the individual must pay a premium in order to receive benefits.[338]

It is interesting to note that because the creditable service requirement exists in order for former spouses to receive most nonmonetary benefits, the enactment of VSI and SSB can effect the ability of a former spouse to receive these nonmonetary benefits. Although the majority of courts hold that VSI and SSB are divisible, by the very function of these programs, a military member can preclude his former spouse from receiving nonmonetary benefits. Since these programs encourage a member to separate from the service before he reaches retirement eligibility, the member will never have twenty years of credible service in order for the spouse to qualify as a 20/20/20 or 20/20/15 spouse.[339] Therefore, the former spouse of a military member who elects an "early out" under one of these programs is severely disadvantaged in receiving benefits as compared to a similarly situated former spouse of a military member who retired under normal circumstances. Although the American Bar

---

[332] *See id.*

[333] Pub. L. No. 100-456, tit. VI, § 651, 102 Stat. 1990 (1988) (codified at 10 U.S.C. § 1078a (1994 & Supp. IV 1998)).

[334] 10 U.S.C. § 1078a(b).

[335] *See id.*

[336] *See id.* § 1078a(g) (stating former spouses and others who no longer qualify as dependents qualify for thirty-six months of coverage).

[337] *See id.* § 1078a(d).

[338] *See id.* § 1078a(f). Additionally, section 1086 provides for a schedule of payments by the patient for some outpatient services. *See* 10 U.S.C. § 1086 (1994 & Supp. IV 1998).

[339] *See* Marshal Willick, *ABA Response to the National Defense Authorization Act for 1998 § 643* (April 13, 1999) (transcript available on the Internet at http://www.abanet.org/family/military/nda98.html) [hereinafter Willick, *ABA Response*].

Association has called for measures to rectify these inequities,[340] Congress has not yet responded.

X. PROPOSED LEGISLATION

Although most of the amendments to the USFSPA have benefited the former spouse, that tide seems ripe for change. There has been growing criticism of the USFSPA and its effect on military retirees.[341] In response to such criticism, in January of 1999, Representative Bob Stump introduced to the House of Representatives the Uniformed Former Spouses Equity Act of 1999 (the Equity Act).[342] As described by Representative Stump, the purpose of the Equity Act is to "restore a small measure of balance to the way military retired pay is handled during a divorce."[343] The Equity Act is comprised of four main sections.

The first section requires termination of payments to a former spouse upon remarriage.[344] The entire provision reads as follows:

> (a) IN GENERAL- Section 1408(c) of title 10, United States Code, is amended by adding at the end the following new paragraph:
> (5) Payment from the monthly disposable retired pay of a member to a former spouse of the member pursuant to this section shall terminate upon the remarriage of that former spouse, except to the extent that the amount of such payment includes an amount other than an amount resulting from the treatment by the court under paragraph (1) of disposable retired pay of the member as property of the member or property of the member and his spouse. Any such termination shall be effective as of the last day of the month in which the remarriage occurs.
> (b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to marriages terminated by court orders issued before, on, or after the date of the enactment of this Act. In the case of such a court order issued before the date of the enactment of this Act, such amendment shall apply only with respect to amounts of a member's retired pay that are payable for months beginning more than 180 days after the date of the enactment of this Act.[345]

Once the former spouse remarries, she would no longer be entitled to a portion of the retirement pay. The Equity Act would terminate these benefits on the

---

[340] *See id.*
[341] *See* Statement of Patrick J. Kusiak, Before the House Committee on Veterans' Affairs Regarding Garnishment of Veterans' Benefits for Child Support and Other Court-Order Family Obligations (Aug. 5, 1998) (transcript available on the Internet at http://www.troa.org/legislative/FSPA/Hearing.asp).
[342] Uniformed Services Former Spouses Equity Act of 1999, H.R. 72, 106th Cong. (1999).
[343] 145 CONG. REC. E49 (daily ed. Jan. 7, 1999) (statement of Senator Bob Stump).
[344] H.R. 72.
[345] *Id.*

last day of the month in which the remarriage occurs.[346] This provision of the Equity Act has logical appeal. One rationale for permitting retirement pay to be divided as marital property was to provide support for a former spouse in those few states that did not authorize alimony. Therefore, where remarriage extinguishes the obligation for alimony in most circumstances, remarriage should also terminate the payment of retirement pay to the former spouse. However, this assumes that military retirement benefits do not have the status of property. Currently, the central provision of the USFSPA focuses on the characterization of military retirement pay as property subject to division according to state law.[347] This amendment would essentially eliminate the status of military retirement benefits as property. The ramifications of this recharacterization on existing divorce decrees would be great. If courts were to allow reopening of existing decrees pursuant to this amendment, the retroactive effects of this amendment would be burdensome, to say the least. The flood of cases that occurred after the initial passage of the USFSPA to reopen decrees entered before *McCarty* would pale in comparison.[348]

This provision of the Equity Act also implicates another rationale supporting the division of military retirement pay, which is to provide for the spouse that has no other means of support. In many divorces, military retirement is the only significant asset of the marriage for distribution. In those situations, when the former spouse remarries, there is a presumption that she now has additional means of support such that the military retired pay is no longer needed. This rationale assumes that the former spouse that is unmarried has a greater financial need for the retired pay income. However, in dividing property upon divorce, courts are generally not concerned solely with financial need, but rather an equitable distribution of the assets. Therefore, in some situations a former spouse can still be entitled to a portion of the retirement pay, even without a great financial need. This amendment would preclude these former spouses from collecting property to which they are entitled, simply because they got remarried, not as a result of a change in economic circumstances. In addition, there is a concern that this provision of the Equity Act would put a chill on remarriage by former spouses.[349] The loss of their portion of military retirement pay would be a disincentive to former spouses to get remarried. This would contravene the long-standing public policy in promoting marriages and the family unit.[350]

The second provision of the Equity Act provides that when there is a divorce prior to the retirement of the member, the disposable retired pay of the

---

[346] *See id.*
[347] 10 U.S.C. § 1408(c)(1) (1994).
[348] *See supra* note 128 and accompanying text.
[349] *See* Willick, *ABA Response*, *supra* note 339.
[350] *See id.*

member, for the purposes of determining the amount of monthly payment to the spouse, is determined at the time of divorce.[351] The full provision reads:

> (a) IN GENERAL- Section 1408(c) of title 10, United States Code, as amended by section 2, is further amended by adding at the end the following new paragraph:
> (6) In the case of a member as to whom a final decree of divorce, dissolution, annulment, or legal separation is issued before the date on which the member begins to receive retired pay, the disposable retired pay of the member that a court may treat in the manner described in paragraph (1) shall be computed based on the pay grade, and the length of service of the member while married, that are creditable toward entitlement to basic pay and to retired pay as of the date of the final decree. Amounts so calculated shall be increased by the cumulative percentage of increases in retired pay between the date of the final decree and the effective date of the member's retirement.
> (b) IMPLEMENTATION- With respect to payments to a former spouse from a member's disposable retired pay pursuant to court orders issued before the date of the enactment of this Act, the Secretary shall--
> (1) within 90 days of such date, recompute the amounts of those payments in accordance with paragraph (5) of section 1408(c) of title 10, United States Code, as added by subsection (a); and
> (2) within 180 days of such date, adjust the amount of disposable retired pay payable to that former spouse accordingly.
> (c) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after June 25, 1981.[352]

The Equity Act provides that the computation, based on pay grade and length of service while married, is made on the date of the final decree without regard to the time served in the military after the divorce.[353] This provision attempts to rectify the situation whereby a member still on active duty is divorced and the court awards a portion of the disposable retired pay to the former spouse. In this situation, increases in retired pay as a result of service or promotions after divorce are used, to the detriment of the military member, in the computation of disposable retired pay. The concern is that as a result, former spouses are awarded a portion of the retirement pay that is properly attributable to the hard work and dedication of the member after the marriage has ended. In addition, awarding any amount to the former spouse that is properly attributable to the efforts of the member contravenes the notions of community property, where traditionally the community's interest in marital property ends when the community ends.

Under the Equity Act, determining the divisible amount at the time of the divorce decree ultimately reduces the amount of retired pay distributed to

---

[351] H.R. 72.
[352] *Id.*
[353] *See id.* This provision does allow for incremental increases in retired pay to the former spouse as the retirement pay increase. *Id.*

the former spouse. The genesis of this issue is the member's decision not to retire. By remaining on active duty, the member delays the payment of retirement pay. However, the member also increases the amount of retirement pay ultimately distributed. Therefore, the delay incurred by waiting to receive retirement pay is offset by the increased amount of pay at retirement. A decision to defer retirement affects the former spouse by delaying receipt of the retired pay but increasing the amount of retired pay payable to the former spouse. Under the current provisions of the USFSPA, the former spouse shares in the increase as a result of delaying the payment of the retirement pay. By contrast, under the proposed provision of the Equity Act, where the amount distributed to the former spouse is determined at the time of the decree, the former spouse does not share in the increase in retirement pay. Although the member would receive increased compensation as a tradeoff for the delay, the former spouse would not receive any additional compensation. Therefore, this provision would effectively result in the former spouse receiving a smaller portion of the retirement benefits upon retirement, while also continuing to have a delay in payment. The military member is able, therefore, to make a unilateral decision as to when to retire that has profound effects on the former spouse. Under this proposed provision, any delay in retirement works to the benefit of the military member and to the detriment of the former spouse. If this provision is enacted, courts may respond by adopting the reasoning of some California courts and allow the former spouse to elect to receive payment from the member when the member is eligible for retirement rather than at actual retirement.[354]

In addition, this provision of the Equity Act would not reward the former spouse for her contributions to the foundation years of the member's military career. Although the member retires at a higher rank than at divorce, the ranks accrued during the marriage are just as important as the ranks accrued later in the career.[355] Essentially, in order to advance in rank, the member must perform at the lower ranks. Since the former spouse supported the member in his quest to achieve higher rank, the former spouse should be entitled to benefit from the rewards of that support.

The third provision of the Equity Act requires a former spouse to obtain a court order for their portion of retirement pay within two years of the date of the final decree of divorce, dissolution, annulment, or legal separation, or six months after the enactment of the Equity Act.[356] This provision provides:

> (a) IN GENERAL- Subsection (c)(4) of section 1408 of title 10, United States Code, is amended to read as follows:

---

[354] *See supra* notes 115-17 and accompanying text.
[355] *See* Willick, *ABA Response*, *supra* note 339.
[356] H.R. 72.

> (4) A court may not after the date of the enactment of the Uniformed Services Former Spouses Equity Act of 1999 treat the disposable retired pay of a member in the manner described in paragraph (1) unless--
> (A) the court has jurisdiction over the member by reason of (i) the member's residence, other than because of military assignment, in the territorial jurisdiction of the court, (ii) the member's domicile in the territorial jurisdiction of the court, or (iii) the member's consent to the jurisdiction of the court; and
> (B) the member's spouse or former spouse obtains a court order for apportionment of the retired pay of the member not later than (i) two years after the date of final decree of divorce, dissolution, annulment, or legal separation, including a court ordered, ratified, or approved property settlement incident to such a decree, or (ii) the end of the six-month period beginning on the date of the enactment of the Uniformed Services Former Spouses Equity Act of 1999, whichever is later.
> (b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to final decrees of divorce, dissolution, annulment, or legal separation issued on or after June 25, 1981.[357]

This provision attempts to preclude courts from reopening long settled divorce decrees to divide previously undivided military retired pay. Although the USFSPA was amended to prohibit retroactive division of military retired pay in decrees issued before *McCarty*, it does allow courts to revisit this division if they retained the jurisdiction to do so.[358] Once the six month grace period for implementation of the Equity Act has passed, this provision would explicitly preclude a court from looking at the retired pay issue, except in the initial proceeding, or within two years of the decree. As a result, a former spouse, who at the time of dissolution was not awarded a portion of the retirement pay, would be unable to petition the court for division of the retired pay at a later date. This would provide greater finality to divorce proceedings regarding military retirement pay. Although this greater finality would inure to the benefit of the military member, there is some question as to whether it would be advantageous for the former spouse. In those situations where the division of property at the time of dissolution does not include a division of the retirement benefits, but rather reserves jurisdiction to do so, this allows the court greater flexibility for providing for the former spouse. If a change in financial circumstances occurs, either as a result of the actions by the former spouse or the military member, under this provision the court would be unable to revisit the issue of a division of the military retirement.

The fourth provision of the Equity Act prohibits courts from treating, as retired pay, amounts that have been waived in order to receive veterans disability compensation.[359] The full text of this provision is as follows:

---

[357] *Id*.
[358] 10 U.S.C. § 1408(c)(1).
[359] H.R. 72.

> (a) IN GENERAL- Subsection (e)(4) of section 1408 of title 10, United States Code, is amended by adding at the end the following new subparagraph:
> (C) Notwithstanding any other provision of law, a court may not treat as part of the disposable retired pay of a member under this section or as part of amounts to be paid pursuant to legal processes under section 459 of the Social Security Act (42 U.S.C. 659) amounts which are deducted from the retired pay of such member as a result of a waiver of retired pay required by law in order to receive compensation under title 38.
> (b) AMENDMENTS TO SOCIAL SECURITY ACT- Section 459(h) of the Social Security Act (42 U.S.C. 659(h)) is amended--
> (1) in paragraph (1)(A)(ii)--
> (A) by inserting 'or' at the end of subclause (III);
> (B) by striking out 'or' at the end of subclause (IV) and inserting in lieu thereof 'and'; and
> (C) by striking out subclause (V); and
> (2) in paragraph (2)--
> (A) by redesignating subparagraphs (E) and (F) as subparagraphs (F) and (G), respectively; and
> (B) by inserting after subparagraph (D) the following new subparagraph:
> (E) are paid by the Secretary of Veterans Affairs as compensation for a service-connected disability under title 38, United States Code, when military retired pay has been waived in order to receive such compensation.
> (c) EFFECTIVE DATE- The amendments made by subsections (a) and (b) shall apply to court orders and legal processes issued on or after June 25, 1981. In the case of a court order or legal process issued before the date of the enactment of this Act, such amendments shall apply only with respect to retired pay payable for months beginning on or after the date of the enactment of this Act.[360]

This provision seeks to prevent courts from circumventing the prohibition on division of disability pay found in *Mansell* by awarding a comparable amount of alimony. Some courts have attempted to provide the same amount of compensation to the former spouse as was initially required before the member executed a disability waiver.[361] These courts have protected the former spouse's interest in the amount awarded in the separation agreement or final judgment and not looked to the source of the funds. Some courts have recharacterized these benefits as alimony.[362] Other courts, such as that deciding *Abernethy*, have looked to safeguard clauses and indemnification clauses to provide benefits.[363] This amendment would, to the benefit of the

---

[360] *Id.*

[361] *See supra* notes 178-93 and accompanying text.

[362] *See, e.g., In re* Marriage of McGhee, 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Cal. Ct. App. 1982).

[363] Abernethy v. Fishkin, 699 So. 2d 235, 237 (Fla. 1997). *Accord In re* Strassner, 895 S.W.2d 614 (Mo. Ct. App. 1995) (court could use an indemnification clause to prohibit husband from reducing his retirement pay paid to his former spouse below a certain percentage); Owen v. Owen, 419 S.E.2d 267 (Va. Ct. App. 1992) (settlement agreement's guarantee/indemnification clause requiring the retiree to pay the same amount of support to the

military member, stop courts from using this back door approach to dividing disability benefits.

XII. CONCLUSION

The many amendments to the USFSPA, as well as the various interpretations by the courts, have led to a reaffirmation of the former spouse's interest in military retirement pay. However, criticism of the USFSPA and its effects on military retirees continues to grow. The critics call for an overhaul of the USFSPA to restore an evenhanded approach in divorces involving members and retirees. This criticism seems to have found a refuge in Congress in the Equity Act. In an effort to assess the Department of Defense's perspective on the effects of the Equity Act, Congress requested that the Department of Defense provide comment.[364] The Department of Defense responded to this request, indicating that it was premature to comment until the previously required review of the USFSPA was completed.[365] Although Congress will not likely move forward with the Equity Act until the Department of Defense reports its findings, support for the Equity Act is growing.[366]

Until such time as the Equity Act is implemented, the legal assistance attorney must have a working knowledge of the current provisions of the USFSPA. If the provisions of the Equity Act are implemented, the legal assistance attorney must be prepared to adequately advise members, retirees, and spouses on its effect on existing divorce decrees and prospective divorce actions.

---

spouse despite the retiree beginning to collect VA disability pay held not to violate *Mansell*); Dexter v. Dexter, 661 A.2d 171 (Md. Ct. App. 1995) (when parties enter into an agreement that one spouse will receive a percentage of pension benefits, the pensioned party may not hinder the ability of the party's spouse to receive the payments she has bargained for, by voluntarily rejecting, waiving, or terminating the pension benefits); McHugh v. McHugh, 861 P.2d 113 (Idaho Ct. App. 1993) (parties mutual agreement for husband to pay wife a certain sum of money was enforceable even when an increased percentage of retirement pay was awarded to former spouse to compensate for reduction because of disability waiver).

[364] *See Thomas, Legislative Information on the Internet, Bill Status and Summary for the 106th Congress* (visited Nov. 15, 1999) <http://thomas.loc.gov/home/thomas.html>.

[365] *See id.* This review was required by the National Defense Authorization Act of 1998, Pub. L. No. 105-85, § 643, 111 Stat. 1799 (1997). This review encompassed other laws affecting federal civil service retirement and current civil practices regarding division of retirement pay or pensions and was required in order to assess whether the USFSPA should be amended. H. R. CONF. REP. NO. 105-340, at 759 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2251, 2545. Rick Maze, *Ex Spouse Debate Renewed*, ARMY TIMES, Jan. 23, 1995, at 20 (reporting Rep. Robert K. Dorman's promise to review the Uniformed Services Former Spouses' Protection Act).

[366] As of November 15, 1999, there were fifty-three cosponsors to the bill, with the latest two cosponsors joining in late October. *Thomas, Legislative Information on the Internet, Bill Status and Summary for the 106th Congress* (last visited Nov. 15, 1999) <http://thomas.loc.gov/home/thomas.html>.

The Uniformed Services Employment and Reemployment Rights Act of 1994

LIEUTENANT COLONEL H. CRAIG MANSON*

An indelible piece of American iconography is the image of the colonial-era farmer laying down his hoe to take up arms in defense of liberty, then returning to his fields when freedom had been secured. But this image is more than a hazy bit of folklore or exaggerated civil mythology. It is, in fact, emblematic of the way Americans have fought virtually every major conflict that threatened their homeland. Noncareer volunteers and conscripts, along with on-call reservists, have been essential to the security of America for over 350 years.

The concept of citizen-soldier or citizen-airman is alive and well in twenty-first century America. The United States has relied on an all-volunteer force for more than twenty-five years. In the last decade, as the Cold War ended, reliance on the reserve components to perform "real world" missions has increased. Total Force integration is such a reality that the Air Force cannot do without its Air Reserve Components. That integration will be key to the air expeditionary force concept currently being implemented in the Air Force.[1]

The Air National Guard, for example, has 100 percent of the Air Force's fighter-interceptor capability, 44 percent of the tactical airlift forces, 43 percent of the air refueling capability, 28 percent of the rescue assets, and more than two-thirds of the combat communications resources.[2] The Air Force Reserve Command has three numbered air forces with thirty-five flying wings and approximately 74,250 personnel.[3]

The current state of national defense policy has resulted in a smaller force tasked by a tempo of operations probably greater than that during most of the Cold War. So once again, the proverbial farmer is leaving his field to take up the cause of liberty. But, what if there was no field for him to return to?

---

*Lieutenant Colonel Manson (B.S., United States Air Force Academy; J.D. with great distinction, University of the Pacific, McGeorge School of Law) is the Staff Judge Advocate, Headquarters California Air National Guard, Sacramento, California. As a civilian, he is a Judge of the Superior Court of California for the County of Sacramento and Adjunct Professor of Employment Law at McGeorge School of Law. He is a member of the California State Bar.

[1] Honorable Charles L. Cragin, Acting Assistant Secretary of Defense for Reserve Affairs, Speech to Air National Guard Commanders Conference (Nov. 18, 1998).

[2] *USAF Almanac,* AIR FORCE MAGAZINE, May 1997, at 114.

[3] *Id.* at 112; Strom Thurman National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 411, 112 Stat. 1920, 1997 (1998) (authorizing end strength of Air Force Reserve).

Would he be as eager to go, especially (to mix metaphors), if the wolf is on somebody else's doorstep?

Increased utilization of reserve components necessarily affects businesses and communities almost as an additional tax. Thus, conflicts between service member/employees and their employers are inevitable. It becomes essential to have a mechanism to resolve these conflicts. This article describes the background and essential provisions of reemployment rights legislation which is the mechanism for resolving employer/employee conflicts over absences for military duties. It is imperative to the success of our current modes of operation that legal assistance attorneys, both on active duty and in the reserve components, be prepared to give accurate advice on reemployment rights.

I. THE HISTORY OF REEMPLOYMENT LEGISLATION

Reemployment legislation has existed continuously for nearly sixty years. The legislation has served to support different aspects of national defense policy over the years. In an unusually prescient legislative action, Congress first enacted reemployment rights for returning service members just before the outbreak of World War II. As the clouds of war gathered, Congress foresaw the need to train and induct a substantial number of civilians into the small standing military establishment. If no war occurred, these individuals would return to their usual livelihoods after training. If war did indeed break out, they would nonetheless go back to their jobs at the conclusion of their service. The new reemployment provisions, designed to facilitate the return of the service member to their civilian jobs, were part of the Selective Training and Service Act of 1940.[4] The key substantive provisions of that early legislation remain virtually unchanged today.

After the war, in 1948, Congress reenacted the employment protection legislation as part of the Military Selective Service Act.[5] This time, the purpose was to support the conscription-based force management policies that existed for the first twenty-five years of the Cold War.[6] The typical draftee served two or three years and then returned to civilian life. Without legal protection against employment discrimination, the draft may have become even more unpopular with "Middle America" a lot sooner than it eventually did.

---

[4] Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 885 (1940) (formerly codified at 50 U.S.C. app. § 308, *repealed by* Pub. L. No. 759, § 17, 88th Cong., 2d Sess., 62 Stat. 625 (1948)).

[5] Pub. L. No. 759, §9, 88th Cong., 2d Sess., 62 Stat. 614 (1948) (formerly codified at 50 U.S.C. app. § 459; *repealed by* Pub. L. No. 93-508, § 405, 88 Stat. 1600 (1974)).

[6] *See generally* S. Rep. No. 1286, 88th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S.C.C.S. 1989, 2011 (1948).

Congress next passed reemployment legislation at the end of the Vietnam conflict.[7] Large numbers of service members were being separated as involvement in Southeast Asia came to an end. Additionally, the draft had ended and the nation was transitioning to a peacetime all-volunteer force. Employment protection was important in luring the potential one-term volunteer (to replace the draftee) and to induce separating members to continue to serve in the reserve forces.[8]

Between major reenactments, Congress amended the reemployment legislation numerous times in bills that concerned veterans' affairs or military personnel policy or fiscal authorizations. Although there was never a formal name to the reemployment provisions, prior to 1994 this legislation was popularly known as the Veterans' Reemployment Rights (VRR) law.[9] A more formal name was used for the present reemployment rights legislation, the Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA),[10] and it passage reflected yet another shift in national defense

---

[7] Vietnam Era Veterans Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1594 (1974) (formerly codified at 38 U.S.C. §§ 2021-2027 (1976), *redesignated* 38 U.S.C. §§ 4301-4307 (1992)) [hereinafter Vietnam Veterans Readjustment Act]. Tracking the numbering of the sections of Title 38, United States Code, which comprise the present Uniformed Services Employment and Re-employment Rights Act (USERRA) and the last "pre-USERRA" veterans reemployment legislation (the 1974 Act cited in this footnote) can be a bit confusing. As indicated in this footnote, the Vietnam-era reemployment legislation was codified originally in sections 2021 through 2027 of Title 38. For some reason not now clear, these sections were codified in Chapter 43 of Title 38, following Chapter 19 and preceding Chapter 21. In 1992, sections 2021 through 2027 were redesignated as sections 4301 through 4307 and transferred to a new Chapter 43 of Title 38 in proper numerical sequence. *See* Pub. L. No. 102-568, § 506(a), 106 Stat. 4340 (1992). The present statute, USERRA, was enacted in 1994 and codified in Chapter 43 of Title 38 as sections 4301 through 4333. *See* Pub. L. No. 103-353, § 2(a), 108 Stat. 3150 (1994). This new legislation provided for a sixty-day transition period. Any reemployments "initiated" during the sixty-day transition period remain subject to the 1974 legislation in the prior sections 4301 through 4307. *See* Pub. L. No. 103-353, § 8, 108 Stat. 3175 (1994). It is conceivable that even as of this writing (late 1999) or later, a legal assistance attorney could be confronted with an issue arising out of that transition period. Reference to the prior sections 4301 through 4307 would then be necessary.

[8] *See generally* S. Rep. No. 93-907, at 110 (1974).

[9] The reemployment legislation was never an "Act" with its own special title. Some courts, commentators, and practitioners found it convenient to refer to the legislation in its various pre-1994 forms as the Veterans' Reemployment Rights Act or VRRA. *See, e.g.*, Gummo v. Village of Depew, New York, 75 F.3d 98 (2d Cir. 1996); Newport v. Ford Motor Co., 91 F.3d 1164 (8th Cir. 1996); Beattie v. Trump Shuttle, 758 F. Supp. 30 (D.D.C. 1991); Kevin G. Martin, *Employment Law*, 46 SYRACUSE L. REV. 499, 507 (1995); Margery Sinder Freidman & Mark A. Trank, *Reservists' Rights to Re-employment and Benefits*, 14 L.A. LAW., Mar. 1991, at 30; Judith Bernstein Gaeta, *Kolkhorst v. Tilghman: An Employee's Right to Military Leave Under the Veterans' Re-employments Rights Act*, 41 CATH. U. L. REV. 259 (1991); Penni P. Bradshaw & Richard E. Fay, *"When Johnny Comes Marching Home Again": The Veterans' Re-employment Rights Act and Employer Obligations to Military Reservists*, 15 AM. J. TRIAL ADVOC. 79 (1991). This usage is perfectly acceptable.

[10] 38 U.S.C. §§ 4301-4333 (1998).

policy on this issue. The Cold War had ended and another drawdown of active duty forces had begun. The nation would place greater reliance on its reserve forces. These reserve forces would look different from the reserve forces of the Cold War era. During the Cold War, the reserve components were, for the most part, forces in reserve as part of a planned redundancy with active duty forces.[11] After the fall of the Berlin Wall,[12] greater emphasis was placed on reserve component roles and missions as part of, but not as an adjunct to, the "Total Force."[13] Indeed, as one military official put it, the reserve components have a "full-time commitment to America and to America's military."[14] Additionally, the United States, in this post-Cold War era, faces different security threats and different geographic positioning in that not nearly as many military personnel are forward-based in foreign countries. The consequence of these facts is that both active and reserve components are called on to deploy for varying and, often, unpredictable lengths of time. This places significant strain on active duty and reserve members and on their families. Moreover, for the reserve component members, there is the added pressure of maintaining their civilian employment.

The Gulf War was the first post-Cold War opportunity to test America's new defense posture and, consequently, the first significant chance to see its effects on the personnel. Over 250,000 members of reserve components served on active duty during the Gulf War.[15] This brought the war home to "Main Street America" like no other military involvement since Vietnam.

II. THE UNIFORMED SERVICE EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT

USERRA was enacted with congressional mindfulness of the new realities of military policy and strategy in the post-Cold War era. Congress explicitly declared that the purpose of the statute is "to encourage noncareer

---

[11] Charles L. Cragin, *The Demise of the Weekend Warrior*, BANGOR DAILY NEWS, May 27, 1999 <http://raweb.osd.mil/news/articles/bangornews.htm>.

[12] The Berlin Wall was torn down by East and West Germans on November 9, 1989. The actual demise of the Wall is used as a metaphor for the eventual collapse of the Soviet empire, which occurred during the period 1989 to 1991.

[13] Memorandum from Honorable William S. Cohen, Secretary of Defense, *Integration of the Reserve and Active Components* (Sep. 11, 1997).

[14] Honorable Charles L. Cragin, Acting Assistant Secretary of Defense for Reserve Affairs, Remarks at the Reserve Officers Association National Convention (June 24, 1999) [hereinafter Cragin ROA Speech].

[15] Honorable Deborah R. Lee, Assistant Secretary of Defense for Reserve Affairs, Remarks at TELECON XV Convention (Oct. 27, 1995).

service . . . by eliminating or minimizing the disadvantages to civilian careers and employment [and to] minimize the disruption to the lives of people serving in the uniformed services as well to their fellow employees, their employers, and their communities."[16] Congress also sought to prohibit discrimination against individuals because of their service in the military.[17] To insure success in this regard, Congress borrowed several concepts from other federal employment discrimination statutes with which most employers are familiar. USERRA also represents a simplification of the original veterans' reemployment legislation that, over the years, had become less comprehensible as various amendments were added. To that end, the Secretary of Defense has promulgated regulations that interpret certain provisions of USERRA.[18] In an effort to achieve its goals, Congress separated the statute into three major elements: (1) a prohibition on employment discrimination against service members, former service members, or prospective service members; (2) reemployment rights for persons absent from employment because of military service; and (3) preservation of benefits for persons absent from employment because of military service.

A. Who is Covered by USERRA?

Every employer in the United States, including the federal and state governments, is subject to USERRA by the express terms of the statute.[19] Coverage in this regard is so extensive that, unlike certain other federal employment statutes, USERRA has no exception for small businesses.[20]

The application of this legislation to employees is quite clear. An employee or an applicant for employment[21] may claim protection under USERRA if the employee "is a member of, applies to be a member of,

---

[16] 38 U.S.C. § 4301 (a)(1)-(2)(1998).
[17] *See id.* § 4301(a)(3).
[18] *See* 32 C.F.R. pt. 104.1 (1998).
[19] *See* 38 U.S.C. § 4303(4). *See also* H.R. Rep. No. 103-65, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2454 (1994) (term *employer* broadly construed; every employer in United States is covered). As to state governments, however, see discussion *infra* notes 174-186 and accompanying text.
[20] *See* Cole v. Swint, 961 F.2d 58 (5th Cir. 1992) (holding employer with two employees not exempt from 1974 VRRA). *See also* H.R. Rep. No. 103-65, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2454 (1994). By comparative example, Title VII of the Civil Rights Act of 1964 applies only to entities with fifteen or more employees. *See* 42 U.S.C. § 2000e (1998). Other statutes with similar small business exemptions include the Americans with Disabilities Act, 42 U.S.C. § 12111(5) (fifteen or more employees), the Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (1998) (twenty or more employees), and the Family and Medical Leave Act, 29 U.S.C. § 2611(4) (fifty or more employees).
[21] The statute does not explicitly refer to applicants for employment. However, since the statute does explicitly prohibit discrimination as to, among other things, initial employment, applicants are covered. *See* 38 U.S.C. § 4311.

performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service."[22] Additionally, however, if the employee has been separated from the service, that separation must not have been as a result of a punitive discharge or a discharge under other than honorable conditions.[23]

B. Employment Discrimination Against Service Members, Former Service Members, and Prospective Service Members

USERRA provides that an employee or applicant for employment cannot be denied employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of having served in the military.[24] This antidiscrimination provision, section 4311, applies to former active duty members, as well as members and former members of the Guard and Reserve.[25] It also applies to persons who are not military members or former military members, but who have applied for appointment or enlistment in the military.[26] Finally, by its plain language, section 4311 bars employment discrimination against active duty members who seek off-duty employment.[27] Unlike the reemployment rights provision, the antidiscrimination provision covers employees who hold or seek temporary positions with civilian employers.[28] Given the broad application of this legislation, it is not surprising that USERRA is not limited to merely one type of discrimination. To the contrary, USERRA's protections preclude all forms of discrimination common in today's workplace.

---

[22] *Id.* § 4311(a).

[23] *See id.* § 4304. The 1974 law required "satisfactory completion of military service." Vietnam Veterans Readjustment Act, *supra* note 7. The 1974 statute excluded from its coverage a person who received a discharge under other than honorable conditions. Brotherhood of Railway Clerks v. Railway Express Agency, Inc., 238 F.2d 181 (6th Cir. 1956). The wording of the present section 4304 of USSERA would seem to extend coverage to persons with uncharacterized "entry level" separations. *See generally* Air Force Instruction 36-3208, Administrative Separation of Airmen ¶ 1.19.1 (Oct. 14, 1994) [hereinafter AFI 36-3208]; Air Force Instruction 36-3209, Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members ¶ A2.3.2 (Feb. 1, 1998) [hereinafter AFI 36-2909]. The present statute excludes coverage for members dropped from the rolls. 38 U.S.C. § 4304(4). *See generally* AFI 36-3208 ¶ 1.19.3; AFI 36-3209 ¶ A2.3.1. Unanswered by the statute is whether a person "released from the custody and control" of the military by reason of a void enlistment is entitled to coverage by USERRA. *See generally* AFI 36-3208 ¶ 1.19.2; AFI 36-3209 ¶ A2.3.3. Since the statute is to be broadly construed, it would seem that persons released for void enlistments (as opposed to fraudulent enlistments) should be entitled to coverage.

[24] *See id.* § 4311(a).

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] *See* 38 U.S.C. § 4311(c)(2).

A person suffers one type of unlawful discrimination under USERRA if the person's military membership or prospective military membership is "a motivating factor" in an adverse employment action,[29] unless the employer can prove that the adverse action would have been taken even in the absence of the military membership.[30] The motivating factor standard is a concept taken from Title VII mixed motive jurisprudence.[31] Though no cases have yet been decided concerning the motivating factor language under USERRA, the courts will likely apply Title VII case law to this provision. Under Title VII, the employer must show by a preponderance of evidence that the adverse action would have been taken even absent the impermissible motive.[32] To the extent and employer is unable to make such a showing, the employee would probably prevail on this theory of discrimination.

Another aspect of the anti-discrimination provision is the retaliation or whistleblower clause. An employer is prohibited from taking adverse action against a person for exercising rights under USERRA or testifying, assisting, or participating in any proceeding or investigation under USERRA.[33] Like other provisions, this is new to veterans' employment law and has been copied from other federal employment statutes.[34] This provision protects employees who may not themselves have any affiliation with the military, but who may have complained or assisted another employee with that person's USERRA issues.[35]

Although not specifically addressed in the statute, "military status harassment" is another conceivable form of discrimination arguably covered under USERRA. Indeed, the Merit Systems Protection Board (MSPB), which adjudicates cases involving federal employees under USERRA,[36] has made this determination. In *Petersen v. Department of Interior*,[37] the Board

---

[29] The term *adverse employment action* is not particularly a term of art, nor is it used or defined in the statute. It is used here to mean any action unfavorable to the employee or applicant for employment.

[30] 38 U.S.C. § 4311(b).

[31] *See* 42 U.S.C. § 2000e-2(m) (1998); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The legislative history of USERRA indicates an intent to disapprove dicta in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), which some lower federal courts took to mean that military affiliation must have been shown to be the sole factor in discrimination under the previous reemployment rights statute. H.R. Rep. No. 103-65, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457 (1994). *See also* Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988).

[32] Price Waterhouse, 490 U.S. at 252-253.

[33] 38 U.S.C. § 4311(c)(2).

[34] *Compare* 38 U.S.C. § 4311(c)(1) *with* 42 U.S.C. § 2000e-3(a) (antiretaliation provision of Title VII of the Civil Rights Act of 1964), *and* 42 U.S.C. § 12203(a) (prohibition against retaliation under Americans with Disabilities Act), *and* 29 U.S.C. § 623(d) (1998) (antiretaliation provision of Age Discrimination in Employment Act).

[35] *See* 140 Cong. Rec. H9136 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2493, 2494 (1994) (Joint Explanatory Statement on H.R. 995).

[36] *See* 38 U.S.C. § 4324.

[37] 71 M.S.P.R. 227 (M.S.P.B. 1996).

considered the complaint of a park ranger who alleged that the National Park Service had engaged in harassment against him because of his past military service. A central issue was whether the Board had jurisdiction of a claim of harassment. An administrative law judge held that freedom from harassment is not a "benefit of employment" within the meaning of USERRA and therefore the Board had no jurisdiction over the complaint.[38] Returning the matter to the administrative law judge, the Board stated that Congress intended the statute to be construed broadly.[39] The Board examined cases construing other federal anti-discrimination statutes and found harassment to be encompassed within the ambit of discrimination under those statutes.[40] The Board borrowed the Title VII formulation of harassment: that is, to state a claim, the harassment must be "sufficiently pervasive to alter the conditions of employment and create an abusive working environment."[41] Thus, the Board concluded that Congress, in prohibiting discrimination against service members and former service members under USERRA, intended for the statute to cover harassment claims.[42]

C. Reemployment Rights Under USERRA

A person who is absent from his or her civilian employment because of military service is generally entitled to be reemployed by his or her employer.[43] The reemployment rights provisions apply to individuals who leave employment to enter extended active duty in a Regular component of the armed forces, to Reserve and Guard members who perform active duty, active duty for training, and inactive duty training, and persons assigned to full-time National Guard duty.[44] Air Reserve Technicians[45] and National Guard

[38] *Id.* at 231.
[39] *See id*. at 236.
[40] *See id*. at 237. *See also* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (finding sexual harassment actionable as sex discrimination under Title VII).
[41] Petersen, 71 M.S.P.R. at 239. *See also* Meritor Savings Bank, 477 U.S. 57.
[42] Petersen, 71 M.S.P.R. at 239.
[43] *See* 38 U.S.C. §§ 4301(a)(2), 4312 (1998).
[44] Full-time National Guard duty refers duty in the National Guard called "Active/Guard Reserve" (AGR) duty. AGR duty is active duty (for Reserve members) performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard. It lasts for a period of 180 consecutive days or more and is for the purpose of organizing, administering, recruiting, instructing, or training the reserve components. *See* 10 U.S.C. § 101(d)(6)(A) (1998). *See also* Air National Guard Instruction 36-101, The Active Guard/Reserve Program (Dec. 29, 1993). Many AGR members serve entire careers in that status. There are about 992 AGR members in the Air Force Reserve and about 10,931 in the Air National Guard. *See* Strom Thurman National Defense Authorization Act for Fiscal Year 1999, Pub. L. 105-261, § 412, 112 Stat. 1920, 1997 (1998) (authorizing end strength of reserves on active duty for support of reserve components). AGR duty performed in the Air National Guard "shall be considered active duty in Federal service as a Reserve of the Air Force." 10 U.S.C. § 12602(b)(2).

technicians[46] are also covered.[47]

Notwithstanding that provision, National Guard AGRs perform duty under Title 32, United States Code, and are subject to state military control unless called to active duty under Title 10, United States Code. Title 32 is the portion of federal law that pertains to the National Guard and its members when not in Federal (Title 10) service. National Guard members on Title 32 status are under the control of the commander-in-chief of their state militia (the Governor of the State) and are not subject to the Uniform Code of Military Justice. *See* Perpich v. Department of Defense, 496 U.S. 334 (1990). Title 10 is the portion of federal law that generally governs the organization and training of the armed forces. *See* 10 U.S.C. § 802. National Guard members may be called or ordered to federal active duty under Title 10 under a variety of circumstances beyond the scope of this article. *See* 10 U.S.C. §§ 331-335, 12301-12304, 12311, 12406. National Guard members serving in Title 10 status are subject to the UCMJ. *See generally Perpich*, 496 U.S. 334, for an excellent discussion of the various roles in which members of the National Guard serve. AGRs are a distinct personnel category from military technicians and state active duty National Guard personnel.

[45] Air Reserve Technicians (ARTs) serve in the Air Force Reserve and are statutorily known as *military technicians*. *See* 10 U.S.C. §§ 10216, 10217; Air Force Instruction 36-108, Air Reserve Technician Program (July 26, 1994). These personnel are federal civilian employees who perform certain full-time functions with Air Force Reserve units. Most are "dual-status" technicians; that is, they are required to be military members of the Reserve organizations in which they are employed. ARTs wear military uniforms while engaged in their duties and observe military customs and courtesies. A termination of their military status (through administrative discharge, court-martial, medical discharge, or retirement) requires termination of their civilian employment. There are about 9,761 ARTs. *See* Strom Thurman National Defense Authorization Act § 413, 112 Stat. at 1998 (authorizing end strength of military technicians in Air Force Reserve). A very few technicians (perhaps less than 3 percent) are "non-dual status"; that is, they are not military members of their units. However, Congress has ensured that the non-dual status technician soon will be a thing of the past. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 513, 110 Stat. 186, 306 (1995) (stating that no more non-dual status technicians are to be hired six months after effective date of legislation). Without looking at personnel records, it is impossible to distinguish ARTs from active duty personnel or other reserve members on duty.

[46] National Guard technicians are a personnel category similar to ARTs, although the history of the National Guard Technician program is very different from that of the ART program. Like ARTs, National Guard technicians are federal civilian employees employed in National Guard units. Most are dual-status technicians required to be military members of the units in which they are employed. *See* 32 U.S.C. § 709 (1998). They are required to wear military uniforms and observe military customs and courtesies in the course of their duties. Termination of their military status requires termination of their civilian employment. Unlike ARTs, however, National Guard technicians are "nominal federal employees for a very limited purpose" and are subject to "the military authority of the states." American Federation of Government Employees v. Federal Labor Relations Authority, 730 F.2d 1534, 1537-38 (D.C. Cir. 1984). There are about 22,408 National Guard technicians in the Air National Guard. *See* Strom Thurman National Defense Authorization Act § 413, 112 Stat. at 1998 (authorizing end strength of military technicians in Air National Guard).

[47] Of course, the civilian employer of ARTs and National Guard technicians is the federal government. ARTS and National Guard technicians generally must take leave from their *civilian* positions to perform *military* duty (frequently, but not always, in the exact same position). Under USERRA, they have the right to return to their civilian positions after a period of military duty. Presumably, such individuals have little need for the protections of USERRA. However, there are various scenarios in which potential conflicts may arise. For

The statute does, however, place some responsibility on the service member/employee to preserve reemployment rights. The employee must have given advance notice of the military service to the employer.[48] This notice need not be writing; indeed, no particular form of notice is specified by the statute.[49] An appropriate officer of the employee's military service may also give the notice.[50] The term *appropriate officer* includes commissioned officers, warrant officers, and non-commissioned officers.[51] Notice is not required if precluded by military necessity or if impossible or unreasonable under the circumstances.[52] *Military necessity* means that a mission, operation, or exercise is classified, or may be compromised or otherwise adversely affected if made public.[53] Notice is *impossible* or *unreasonable* when the employer or employer's representative is unavailable to receive notice, or the employee has been given forty-eight hours or less notice from competent military authority.[54] The Assistant Secretary of Defense for Reserve Affairs may also determine that other circumstances make or made notice impossible or unreasonable.[55]

An employee who has been absent for military service must report back for work or submit an application for reemployment at the conclusion of the military service.[56] The rules concerning reporting back or applying for reemployment vary depending on the length of the absence. A person whose absence was less than thirty-one days must report back to work at the beginning of the first regularly scheduled work period.[57] Further, the member must report back on the first full calendar day after the completion of military

---

example, an ART might apply for a position on extended active duty (EAD) not related to the military or technician duties he usually performs. The person is entitled to be reemployed in his ART position, if all other applicable criteria are met, upon his return from EAD. *See* 38 U.S.C. § 4312.

[48] *See id*. § 4312(a)(1).

[49] *See id*. The legal assistance attorney will, of course, want to advise clients that written notice specifying the commencement and anticipated length of service is preferable.

[50] *See id.*

[51] 32 C.F.R. § 104.3 (1999). The Department of Defense regulation refers to *service officials* who are "authorized by the Secretary [of the military department] concerned [to] provide advance notice to a civilian employer" of pending military duty. *Id.* The service secretaries are required to designate officials authorized to give advance notice to civilian employers. *See* 32 C.F.R. § 104.6(k). It does not appear that (as of November 1999) the Secretary of the Air Force has specifically authorized any particular officers or class of officers to give notice. It seems reasonable that a commander, first sergeant, or other supervisor is authorized by virtue of position to give such notice to the employer. Indeed, anyone who is empowered to notify the service member/employee should suffice to give notice to the employer.

[52] 38 U.S.C § 4312(b).

[53] 32 C.F.R. § 104.3.

[54] *Id.*

[55] *See id.*

[56] *See* 38 U.S.C § 4312(a)(3).

[57] *Id.* § 4312(e)(1)(A)(i).

duty *plus* eight hours after a period for safe transportation from the duty location to the employee's residence.[58]

The rule most often will apply to Reserve and Guard members participating in inactive duty training, unit training assemblies, annual training, or brief periods of active duty for other purposes. Typically, the member will simply show up at work on the next scheduled shift after the duty. If, however, the member arrives home from military duty less than eight hours before the next scheduled shift, the member need not report at that next scheduled shift, but may wait until the subsequent shift to report. As a practical matter and in the interest of good relations with one's employer, a member would do well not to split hairs about this timing. The legal assistance attorney would do well to advise a client to report as soon as he is reasonably able to work (i.e., safely and competently) after a short absence for duty, notwithstanding the availability of an eight-hour rest period. If reporting after the eight hour period after returning home is impossible or unreasonable through no fault of the employee, the employee may report without penalty as soon as possible after the eight hour period.[59]

A person who has been absent for examination or testing prior to entering the military service is subject to the short absence rules discussed above, regardless of the length of the absence.[60] Examples would include individuals who are taking physical examinations for entry into a service academy or persons taking tests like the Armed Forces Vocational Aptitude Battery.

A person who is absent for more than thirty days but less than 181 days must submit an application for reemployment to the employer within fourteen days of the end of the military duty.[61] If, through no fault of the employee, submission of the application within fourteen days is impossible or unreasonable, the application must be submitted on the next full calendar day when submission becomes possible.[62] As a practical matter, many employees absent for this medium term will simply report to work at some reasonable or agreed upon time after their return from duty. Again, the practical advice to a client should be to report back as soon as reasonable possible. Discussion with the employer in advance is the best course for the service member/employee.

---

[58] *See id*.
[59] *See id*. § 4312(e)(1)(A)(ii).
[60] *See id*. § 4312(e)(1)(B).
[61] *See id*. § 4312(e)(1)(C).
[62] *See id*. The terms *impossible* and *unreasonable* are not defined in the statute. The DOD regulation, however, defines these terms together as "the unavailability of an employer or employer representative to whom notification can be given, an order by competent military authority to report for uniformed service within forty-eight hours of notification, or other circumstances that the Office of the Assistant Secretary of Defense for Reserve Affairs may determine are impossible or unreasonable . . . ." 32 C.F.R. § 104.3.

Only a few employers, and only with respect to certain types of jobs, likely will require a member to actually submit an application for reemployment after relatively brief periods of military duty. But, the nature of the application for reemployment is within the discretion of the employer, subject of course to the requirement that the employer not discriminate against the returning employee on the basis of military service.[63]

In the current state of international security affairs, Guard and Reserve members are absent more frequently than before for deployments that fit in this intermediate range. Many Guard and Reserve members may be away for these types of deployments several times a year. This fact may be difficult to accept for those employers who adhere to the obsolete notion that Guard and Reserve members are "weekend warriors" who go to "summer camp."[64] As a result, more employment conflicts are likely with respect to frequent and lengthy deployments.

A member who is absent for more than 180 days for military duty must submit an application for reemployment within ninety days of the end of the military duty.[65] Such long-term absences typically may include basic military training followed by technical training, in-residence professional military training, or mobilization in a significant contingency. However, it could include an Active Guard/Reserve (AGR) tour.[66] It might also include the situation where a person without prior military affiliation decides to enlist or seek an appointment in a Regular component and to return after a term of service.[67]

An employee who is hospitalized for or convalescing from an injury or illness suffered during military duty may report back or apply for reemployment (depending on the length of the original military absence) at the end of the period of hospitalization or convalescence.[68] However, that period

---

[63] *See* 38 U.S.C. 4312(e)(3). This means, for example, that if the employer has a regular application process for all employees returning from leaves of absence, the requirements for returning military members should not be more burdensome than that regular process.

[64] That view of service in the Reserve and Guard "fails to adequately characterize the contributions and sacrifices made by today's Reservists and Guardsmen and women." Cragin ROA Speech, *supra* note 14. Mr. Cragin described "a significant and profound paradigm shift" with respect to the employment of the Reserve and Guard. *Id.* He told the audience of Reserve and Guard officers, "You are no longer the force of last resort. You're not weekend warriors anymore—you're Total Force warriors! What you do is not part-time—you have a full-time commitment to America and to America's military." *Id.* As for the term weekend warrior, Mr. Cragin said, "I am working hard to get people to stop using [it]." *Id.*

[65] *See* 38 U.S.C. § 4312(e)(1)(D).

[66] For an explanation of this term, see *supra* note 44. So-called traditional Reserve and Guard members (that is, those who are not AGRs or technicians) may apply for AGR tours of duty.

[67] *See* 38 U.S.C. § 4312(a) ("Any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter.").

[68] *See id*. § 4312(e)(2)(A).

cannot exceed two years for the purposes of USERRA.[69] If the hospitalization or convalescence is, in fact, more than two years, the period may be extended by the minimum time necessary to accommodate circumstances that were beyond the employee's control but which made it impossible or unreasonable to report or apply within the usual statutory period.[70]

It is not clear in the statute when the two-year period is to commence. Does it commence at the end of the military service or does it commence at the end of the period in which the employee otherwise would be required to report or apply? The fact is that most Guard and Reserve members injured on active duty[71] are retained on active duty for some period of convalescence. The answer to the question becomes more significant, however, if the member is injured while performing inactive duty training or when Guard members are injured in Title 32 status.[72]

Failing to follow the statutory process for reemployment does not mean that the service member automatically loses the right to reemployment.[73] However, the member may be subject to the "established policy and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."[74] In other words, a member who fails to report back at the time required in the statute may be disciplined for missing work in the same manner that a nonmilitary affiliated employee could be. Indeed, a failure to comply with the statute could result in a loss of a job if the employer's established policy, applied in a nondiscriminatory fashion, mandated such a sanction.[75]

Employees who are absent on military duty for more than thirty days may be required by their employers to provide documentation that their application for reemployment was timely.[76] This apparently requires some form of documentation to show when their period of duty ended. The employer may also require evidence that the employee was separated under

---

[69] *See id.*

[70] *See id.* § 4312(e)(2)(B).

[71] For Guard members, *active duty* in this context means only active duty under the provisions of Title 10, United States Code, and not active duty performed under Title 32, United States Code.

[72] For a definition of the meaning of Title 32 status (and Title 10 status), see *supra* note 44.

[73] *See* 38 U.S.C. § 4312(e)(3).

[74] *Id.*

[75] *See id.* Suppose, for example, that an employer had a rule that an employee absent for five consecutive days is deemed to have resigned. That rule could be applied to a service member who, after a military tour of thirty-five days, failed to submit an application for reemployment until nineteen days after his return from duty.

[76] *See* 38 U.S.C. § 4312(f)(1)(A). The secretaries of the military departments are required to establish procedures to provide this documentation. 32 C.F.R. § 104.6(l). It does not appear that as of this writing (November 1999) that the Secretary of the Air Force has established any particular procedure.

honorable conditions,[77] if there is a separation involved. While many employers who have received advance notice of an absence for military duty will not require documentation, a returning service member/employee should always be prepared to provide it.

A person's voluntary entry onto military duty, as opposed to being involuntarily ordered to duty, generally does not affect the person's right to be re-employed. There is, however, an important limitation that may affect a member's decisions with respect to volunteering for certain duty. The reemployment provisions of the statute do not apply if the cumulative length of an absence for duty and all previous absences for military duty from positions with the same employer exceed five years.[78] There are several exclusions from the five-year limitation. Any service beyond five years necessary to complete an initial military service obligation is excluded from the five-year limitation.[79] Perhaps most significant for Guard and Reserve members is that inactive duty training and annual training are excluded from the five-year limitation.[80] However, full-time National Guard duty in the AGR program is subject to the five-year limitation.[81] Also excluded from the five-year

---

[77] *See* 38 U.S.C. § 4312(f)(1)(C). *See also* 38 U.S.C. § 4304 (person's entitlements under USERRA terminate if separated under conditions less than honorable). See the discussion *supra* note 23, concerning characterization of discharge.

[78] *See* 38 U.S.C. § 4312(a)(2).

[79] *See id*. § 4312(c)(1).

[80] *See id*. § 4312(c)(3).

[81] *See id.* The decision of the United States Supreme Court in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), no doubt influenced the drafting of section 4312 to bring AGR tours within the five year limitation. In *King*, the Court was called upon to construe a now-repealed provision of the former Veterans Re-employment Rights Act (VRRA). Petitioner King, a member of the Alabama Army National Guard, was employed by a hospital when he applied for and was selected to be the Command Sergeant Major at the Alabama Army National Guard headquarters. The position was a three-year AGR tour. King advised his employer of the tour and applied for a leave of absence in July 1987. King, 502 U.S. at 216-217. King reported for duty at the Army Guard headquarters in mid-August 1987. Some weeks later, the hospital notified King that his request for a three year leave of absence was "unreasonable" and therefore denied the request. *Id*. at 217. Thereafter, the hospital sued King in federal court, seeking a declaratory judgment to the effect that an employer was not required to re-employ a service member/employee whose absence was unreasonably long. At the time, there was a split among the circuits as to that issue. The Fifth Circuit Court of Appeals had held that the law only protected reasonable requests for military leaves. Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981). The Eleventh Circuit Court of Appeals, which had been carved from the old Fifth Circuit and which included Alabama, was bound to follow *Lee.* *See* Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir 1987). The Third Circuit Court of Appeals had also imputed reasonableness into the reemployment rights statute. Eidukonis v. Southeastern Pennsylvania Transportation Authority, 873 F.2d 688 (3rd Cir. 1989). Conversely, the Fourth Circuit Court of Appeals had found no requirement of reasonableness in the statute. Kolkhorst v. Tilghman, 897 F.2d 1282, 1286 (4th Cir. 1990) (stating that reasonableness is not the issue). The Supreme Court held that former section 2024(d) placed no limits on the length of an AGR tour after which the service member/employee could

limitation is any duty performed when the member is involuntarily ordered to or retained on active duty;[82] ordered to or retained on active duty during a war or national emergency declared by Congress or the President;[83] ordered to active duty in support of an operational mission for which personnel have been involuntarily called to active duty;[84] ordered to active duty in support of a "critical mission" or "critical requirement", as determined by the Service Secretary;[85] or called into federal service as a member of the National Guard to suppress an insurrection or rebellion, repel an invasion, or execute the laws of the United States.[86]

USERRA provides an employer with three affirmative defenses in an action to enforce a service member/employee's reemployment rights: they include, changed circumstances, undue hardship, and the temporary nature of the prior employment.[87] An employer has the burden of proof as to these defenses, and if the employer is successful, the service member employee will be unable to return to that job.[88] The defense of changed circumstances requires that the employer show that reemployment has become impossible or unreasonable.[89] The defense of undue hardship applies in the special

---

enforce his reemployment rights. King, 502 U.S. at 222. The decision was unanimous, though Justice Thomas had been confirmed just prior to oral argument and did not participate in the matter.

[82] *See* 38 U.S.C. § 4312(c)(4)(A); *see also* 10 U.S.C. §§ 672(a), 672 (g), 673, 673b, 673c, 688 (1998).

[83] *See* 38 U.S.C. § 4312(c)(4)(B).

[84] *See id.* § 4312(c)(4)(C); *see also* 10 U.S.C. § 673b (1998).

[85] 38 U.S.C. § 4312(c)(4)(D). A *critical mission* is "[a]n operational mission that requires the skills or resources available" in the Reserve or Guard. 32 C.F.R. § 104.3. A *critical requirement* is (1)

> [a] requirement in which the incumbent possesses unique knowledge, extensive experience, and specialty skill training to successfully fulfill the duties or responsibilities in support of the mission, operation or exercise, [or (2)] a requirement in which the incumbent must gain the necessary experience to qualify for key senior leadership positions within his or her Reserve component.

Id.

[86] *See* 38 U.S.C. § 4312(c)(4)(E); *see also* 10 U.S.C. §§ 331-335, 12406 (1998). It should be noted that the section 4312(c)(4)(E) of USERRA originally cited sections 3500 and 8500 of Title 10. Sections 3500 and 8500 were repealed and replaced by section 12406 of Title 10 eight days before USERRA became law. See Pub. L. No. 103-337, div. A, tit. XVI, § 1662(f)(1), 108 Stat. 2994 (1998). Note that this refers to federal use of the National Guard as the militia for federal purposes. This is distinct from s*tate* use of the National Guard for state emergencies or law enforcement. State military duty is completed excluded from coverage under USERRA.

[87] *See* 38 U.S.C. § 4312(d)(1).

[88] *See id.* § 4312(d)(2).

[89] *See id.* § 4312(d)(1)(A).

situations where the employee incurred or aggravated a disability while on military duty[90] or where two or more individuals may have reemployment rights to the same position and one has incurred or aggravated a disability while on military duty.[91] The defense concerning the temporary nature of the prior employment requires the employer to show that the position the employee left was for a "brief, nonrecurrent period and there [was] no reasonable expectation that such employment [would] continue indefinitely or for a significant period."[92]

D. Nature and Extent of Reemployment Rights Under USERRA

USERRA requires that a returning service member who is entitled to the protections of the statute "shall be promptly re-employed in a position of employment . . .."[93] But the nature and extent of reemployment rights remains, as has been the case for more than half a century, a fertile ground for conflict and, ultimately, litigation between employers and returning service members. However, the basic principles of the law have been the same through the various iterations of the statutory enactment. In the first case concerning veterans' reemployment rights decided by the United States Supreme Court after World War II, *Fishgold v. Sullivan Drydock & Repair Corp.*,[94] Justice Douglas, writing for the Court, observed:

> The [Selective Training and Service Act of 1940] was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind. . . . Thus, he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.[95]

The *Fishgold* "escalator" became an enduring metaphor for the scheme Congress had established. It remains apt under USERRA. The statute distinguishes between those employees absent for less than ninety-one days

---

[90] *See id*. § 4312(d)(1)(B); 38 U.S.C. § 4313(a)(3)-(4) (1998).
[91] *See* 38 U.S.C. § 4312(d)(1)(B); 38 U.S.C. § 4313(b)(2)(B) (1998). For a comprehensive discussion of this defense, see *infra* notes 118-123 and accompanying text.
[92] 38 U.S.C. § 4312(d)(1)(C).
[93] *Id*. § 4313.
[94] 328 U.S. 275 (1946).
[95] *Id*. at 284-85 (discussing the reemployment provisions of the Selective Training and Service Act). *See* Selective Training and Service Act, Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 885 (formerly codified at 50 U.S.C. app. § 308, *repealed*, Pub. L. No. 759, § 17, 88th Cong., 2d Sess., 62 Stat. 625 (1948)).

and those absent for more than ninety-one days, but in both situations, the escalator principle is applicable.

Those service members returning after an absence of less than ninety-one days must be reinstated to "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform."[96] This might be the same position the person left, but the statute is not so narrow. Depending the employer's personnel policies, the position to which the returning person may have rights may be a position with a different title, different responsibilities and different pay, if that's where the person would have landed had he or she not been absent for military duty.[97] Thus, for example, if the employee was scheduled to be promoted while absent and would have been promoted but for the absence, the person is entitled to the promotion upon return as long as they qualified for the new position. The escalator principle dictates that result. Likewise, if the person was scheduled to be rotated laterally while absent and would have but for the absence, then upon return, the person may be placed in the new lateral position if otherwise qualified. The escalator did not go up, but the moving walkway advanced. The principle is the same. Of course, escalators sometimes move in retrograde. If the employee would have been demoted but for the military absence, the employee may be returned to the lesser position.[98]

There is a considerable amount of case law concerning the escalator principle in the context of promotions, accrued benefits, and seniority.[99] The Supreme Court has said, in essence, that longevity is the engine of the escalator.[100] Thus, the escalator moves for the returning service member to the point where it is reasonably certain the member would have ended up if the member had been continuously employed.[101]

> Thus, on application for re-employment, a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other

---

[96] 38 U.S.C. § 4313(a)(1)(A).

[97] *See, e.g.*, Smith v. Inudstrial Emp. & Dist. Ass'n, 546 F.2d 314 (9th Cir. 1974).

[98] There seem to be no cases in which a returning service member was legitimately demoted; however, this outcome is the clear implication of the escalator principle.

[99] Foster v. Dravo Corp., 420 U.S. 92 (1975); Accardi v. Pennsylvania R.R. Co., 383 U.S. 225 (1966); Brooks v. Missouri Pacific. R.R. Co., 376 U.S. 182 (1964); Waltermyer v. Aluminum Co. of America, 804 F.2d 821 (3rd Cir. 1986); Aiello v. Detroit Free Press, Inc. 570 F.2d 145 (6th Cir. 1978); Austin v. Sears, Roebuck & Co., 504 F.2d 1033 (9th Cir. 1974).

[100] *See* Fishgold, 328 U.S. 275.

[101] Alabama Power Co. v. Davis, 431 U.S. 581, 589 (1977) (concluding seniority to which returning veteran is entitled is that which it is reasonably certain he would have had if continuously employed).

> form of automatic progression, but on the exercise of discretion on the part of the employer.[102]

Additionally, if the right to a promotion or benefit was, at the time the employee left for military, subject to some "significant contingency," then USERRA does not require that the returning employee be given that promotion or benefit.[103]

If the person is not qualified to perform the duties of the position in which he or she would have been employed (even if it was the same position the person occupied before they left), then the employer must make reasonable efforts to qualify the person for the new position.[104] This means that the employer must provide retraining or upgrade training if the skills or technology are different when the person returns from military duty. If those qualification efforts fail, then the employee must be returned to the position held on the date the military service commenced.[105]

A service member returning from a military absence of more than ninety days also generally must be reemployed in "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service . . . the duties of which the person is qualified to perform."[106] However, the employer may satisfy the obligation by placing the employee in "a position of like seniority, status and pay."[107] The escalator/moving walkway principle applies in this situation as well. Again, if the person is not qualified to perform the duties of the position in which he or she would have been employed (even if it was the same position the person occupied before they left), then the employer must make reasonable efforts to qualify the person for the new position.[108] If those efforts fail, then the employee must be returned to the position held on the date the military service commenced, or "a position of like seniority, status and pay."[109]

Not infrequently, an employee returns to a civilian job having incurred or aggravated a disability in the course of military duty. In that case,

---

[102] McKinney v. Missouri-Kansas-Texas R.R. Co., 357 U.S. 265, 272 (1958).
[103] Alabama Power Co., 431 U.S. at 589.
[104] *See* 38 U.S.C. § 4313(a)(1)(B).
[105] *See id.* § 4313(a)(2)(B).
[106] *Id.* § 4313(a)(2)(A).
[107] *Id.*
[108] *See id.* § 4313(a)(2)(B).
[109] *Id.* Prior versions of the veterans' reemployment law used the phrase "position of like seniority, status, and pay," resulting in a considerable amount of case law construing the phrase in the context of the escalator principle. *See* Smith v. Industrial Emp. & Dist. Ass'n, 546 F.2d 314 (9th Cir. 1977) (seniority to be broadly construed); Boone v. Ft. Worth & Denver Ry. Co., 223 F.2d 766 (5th Cir. 1955) (same position, different hours approved); Meehan v. National Supply Co., 160 F.2d 346 (10th Cir. 1947) (title of position not controlling).

provisions of both USERRA and the Americans with Disabilities Act (ADA)[110] apply. The ADA prohibits discrimination against a "qualified individual with a disability"[111] who is capable of performing the "essential functions" of a job with or without "reasonable accommodation."[112] A person has a disability if the person has a physical or mental impairment that substantially limits one or more major life activities.[113] A person without such an impairment is entitled to the protections of the ADA if the person has a record of such impairment or is regarded as having such an impairment.[114]

USERRA is compatible with the ADA. If an employee returns from military duty having incurred or aggravated a disability during that duty, the employer is obligated to make "reasonable efforts" to accommodate that disability in reemploying the person as described above.[115] If, after such reasonable efforts, the person remains unqualified for the position to which he or she otherwise would be entitled under the statute, then the person is entitled to "any other position which is equivalent in seniority, status, or pay" which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer.[116] If for some reason the person cannot be employed in the equivalent position, then the person must be offered "a position which is the nearest approximation . . . in terms of seniority, status, and pay consistent with" the person's circumstances.[117]

---

[110] 42 U.S.C. § 12101-12213 (1998).
[111] *Id*. § 12111(8).
[112] *Id*. § 12111(9).
[113] *See id*. § 12102(2)(A).
[114] *See id*. § 12102(2)(B)&(C).
[115] 38 U.S.C. § 4313(a)(3).
[116] *Id*. § 4313(a)(3)(A).
[117] *Id*. § 4313(a)(3)(B). An example may be helpful to explicate the nature and extent of reemployment rights. Suppose Jones is employed as a telephone maintenance team member by Mega Telephone Corp. (MTC). He is also a pararescue crewmember with the 129th Rescue Wing (ANG). Staff Sergeant Jones volunteers for a 179-day deployment to Europe in support of a NATO operation. During the operation, Staff Sergeant Jones injures his back while successfully recovering a downed F-117A pilot under hostile fire. At the conclusion of the deployment, Jones returns to work at MTC, but not before he and the other members of his aircrew receive the Air Medal. Consider the following scenarios:

1. A few weeks after Jones left for overseas, his maintenance team supervisor was shifted to another position. Under MTC's established personnel policies, Jones would have been selected to fill the supervisor's position had he not been absent. Under section 4313 of USERRA, he must be reemployed in the supervisor's job, if he is qualified for it.

2. Since Jones was absent, MTC assigned another employee as supervisor of Jones' maintenance team. That person has held the position for five months and MTC does not want to reassign him. MTC offers Jones a position as supervisor of a different maintenance team whose work is performed about thirty to sixty miles away from Jones's home. His prior job took him only fifteen to thirty miles from home. MTC has satisfied its USERRA obligations.

3. After his return home, Jones' doctor tells him that due to his back injury, he can no longer climb telephone poles. Team supervisors are required to climb telephone poles. MTC offers Jones a position as the maintenance team scheduler. The incumbent of this

E. Employer's "Undue Hardship" Defense When Service Member Returns Unqualified or With a Disability

The employer generally must make reasonable efforts to accommodate the disability or to qualify the employee for the relevant position, if a service member/employee returns from military duty with a disability or is otherwise unqualified for the job the employee left or the one he is entitled to upon return.[118] However, an employer is not required to reemploy a person or to accommodate or qualify the person if doing so would impose an "undue hardship" on the employer.[119] This is a concept borrowed from federal disability law.[120] USERRA defines *undue hardship* in the same manner as the ADA defines the concept: that is, "actions requiring significant difficulty or expense."[121] Both statutes list as factors to be considered when determining undue hardship, the nature and cost of the action required, the overall financial resources of the facility involved and those of the entire business, and the type of operations of the employer.[122] The employer has the burden of proving undue hardship under both statutes.[123]

---

position schedules all teams in the region and holds the same grade and is paid the same as a team supervisor. MTC has satisfied its USERRA obligations.

4. The maintenance team scheduler is required to have knowledge of the company's computer systems. Jones fails the computer training course to which MTC has sent him. MTC then offers Jones a position as a maintenance instructor, training maintenance team members. This position is one grade lower than the scheduler position. Has MTC satisfied its USERRA obligations to Jones?

This scenario raises several issues. The first is whether MTC has made "reasonable efforts" to qualify Jones in the job of scheduler. The second issue is whether the job Jones has been offered is "the nearest approximation" to the job to which he would have been entitled had he qualified. If for some reason Jones is not qualified for the supervisor job or, for a reason other than disability, not qualified for his previous job, then MTC legally could offer him any other position of lesser status and pay for which he is qualified. *See* 38 U.S.C. § 4313(a)(4).

[118] *See supra* notes 106-117 and accompanying text.

[119] 38 U.S.C. § 4312(d)(1)(B).

[120] *See* 42 U.S.C. § 12112(b)(5)(A) (1998) (unlawful discrimination under Americans with Disabilities Act includes failure to make reasonable accommodation unless undue hardship shown).

[121] *Compare* 38 U.S.C. § 4303(15) *with* 42 U.S.C. § 12111(10).

[122] *See* 38 U.S.C. § 4303(15); 42 U.S.C. § 12111(10).

[123] *See* 38 U.S.C. § 4312(d)(2) (1998); 42 U.S.C. § 12112(b)(5)(A).

F. Scheduling of Military Leave[124]

Legal assistance attorneys are frequently asked questions that involve issues of scheduling an employee's military leave with regular shifts, overtime, and vacation. These issues routinely cause conflicts between employers and employees because of misunderstandings on both sides.

One recurring question that has a simple, obvious answer is whether an employer is required to offer the employee a paid leave for military duty. The simple answer is no. As the statute clearly states, an employee absent for military duty is considered to be on furlough or leave of absence.[125] The statute does not require that the employee be paid during that furlough or leave of absence. Confusion sometimes arises because some employers do offer paid military leave of limited duration. This is an act of grace on the employer's part.

Another related issue concerns the employee's use of accrued vacation for military leave. Sometimes employers have required the use of accrued vacation; other employers have prohibited the use of vacation time for military leave. Both policies are violations of USERRA. Since an employee is considered to be on furlough or leave of absence while on military duty, the employee cannot be required to use vacation time. That would be unlawful discrimination with respect to a benefit of employment. On the other hand, if an employee desires to use vacation for military leave, the statute specifically permits them to do so.[126]

Whether an employer can be required to permit an employee to make up work missed during military duty is another issue that came before the United States Supreme Court in *Monroe v. Standard Oil Co.*[127] Monroe worked at an oil refinery and was a member of the Ohio Army National Guard. The refinery, owned by Standard Oil Company of Ohio (Sohio) operated twenty-four hours a day, seven days a week. Monroe worked a five day week, but his work days were different every week. Consequently, a number of times during the year, Monroe's civilian work schedule conflicted with his scheduled military duties. To resolve those conflicts, Monroe was occasionally able to trade shifts with other employees, which was then allowed under the collective bargaining agreement. Sohio did not object. On many occasions, however, Monroe was apparently unable to find another employee to trade shifts to accommodate his military unit's schedule. On those occasions, Sohio, as it was required to do, permitted Monroe to take a leave of absence. Sohio filled Monroe's job with other employees, frequently paying

---

[124] The term *military leave* as it is used in this article refers to an employee's time off from a civilian job taken to perform military duty.
[125] 38 U.S.C. § 4316(b)(1)(A).
[126] *Id.* § 4316(d).
[127] 452 U.S. 549 (1981).

overtime to the substitute. Sohio did not pay Monroe for the time he was on military duty and did not permit him to make up those hours by working out side his usual schedule.[128]

Monroe sued, alleging that the failure to allow him to work a forty-hour week violated a provision of the veterans' reemployment rights law then in effect.[129] Monroe contended he had been denied "an incident or advantage of employment" because of his military affiliation.[130] In a 5 to 4 decision, the Supreme Court held that Sohio had not discriminated against Monroe by not allowing him to make up the hours he lost to military duty.[131] Justice Stewart, writing for the majority, observed that Monroe had been assigned the same burden of weekend and shift work as had other employees and he was allowed to exchange shifts just as other employees.[132] Chief Justice Burger, writing in dissent, cast the issue as whether Monroe had been given "the same meaningful chance as other employees without military commitments to work full time in order to earn a living wage."[133] Working a forty-hour week was a benefit conferred by the employer and which could not be denied an employee with military obligations, in the view of the Chief Justice.[134]

The majority opinion in *Monroe* remains the law, despite the enactment of the new statute. The relevant provisions of USERRA are substantively the same as the veterans' reemployment rights provisions construed in *Monroe*.[135] The issue turns on whether working a forty-hour week is a benefit of employment. There is not an obvious answer to this, and with only two Justices who participated in the *Monroe* decision remaining on the Court, the outcome, should this issue be revisited, cannot be predicted.

G. Preservation of Benefits During Military Leave

1. Generally

USERRA provides that reemployed service members are "entitled to the seniority and other rights and benefits" they had when they left for duty "plus the additional seniority and rights and benefits" they would have attained if continuously employed.[136] This is a clear statutory expression of the

---

[128] *See id.* at 551-52.
[129] *See id.* at 552. The Court was construing the 1974 version of the reemployment legislation. *See* Vietnam Veterans Readjustment Act, *supra* note 7.
[130] Monroe, 452 U.S. at 553.
[131] *See id*. at 565-66.
[132] *See id*.
[133] *See id*. at 566 (Burger, C.J., dissenting). Justices Brennan, Balckmun, and Powell joined the Chief Justice's dissent.
[134] *Id*. at 571.
[135] *See* 38 U.S.C. § 4316(a)-(b); Vietnam Veterans Readjustment Act, *supra* note 7.
[136] 38 U.S.C. § 4316(a).

escalator principle that has existed in veterans' reemployment law for nearly six decades.[137] A person absent from employment for military service is "deemed to be on furlough or leave of absence" during military service and is entitled to the same nonseniority based rights and benefits available to other employees who are on furlough or leave of absence.[138] This includes not only benefits available at the time the person commenced service, but any benefits made available to other employees on a leave of absence of any sort during the time of the person's military service.[139] A service member/employee may be required to pay for benefits continued during military service if other employees on leaves of absence are required to pay for the same benefits.[140]

2. Health Benefits

A service member/employee's health benefits may be terminated upon the person's commencement of military service, subject to the obligation not to discriminate against the service member compared to other employees on leaves of absence.[141] However, employer-sponsored health plans are required to permit a service member/employee to continue coverage during military leave for up to eighteen months from the day military service begins or until the day after the person was required to report back or apply for reemployment, whichever is sooner.[142] The service member/employee may be required to pay up to 102 percent of the full premium for the coverage,[143] except that an employee serving on military duty for less than thirty-one days cannot be required to pay more than the employee share of the premium.[144] If health coverage is terminated because the employee has commenced military duty, no waiting period or exclusion can be imposed upon the employee's return if such waiting period or exclusion would not have been imposed in other circumstances.[145] However, this prohibition is inapplicable with respect to any illness or injury incurred during or aggravated by the person's military service.[146] In other words, an injury that is incurred or aggravated by an employee's military service need not be covered by his or her employer's health plan when the person returns to the civilian job.

3. Pension Benefits

---

[137] *See supra* notes 93-117 and accompanying text.
[138] 38 U.S.C. § 4316(b)(1).
[139] *See id.* § 4316(b)(1)(B).
[140] *See id.* § 4316(b)(3).
[141] *See id.* § 4317.
[142] *See id.* § 4317(a)(1)(A).
[143] *See id.* § 4317(a)(1)(B).
[144] *See id.*
[145] *See id.* § 4317(b)(1).
[146] *See id.* § 4317(b)(2).

For pension benefits based on service credits, an employer is required to credit the reemployed military member with time spent on military duty as if the person had not been absent.[147] If the pension plan involves employee contributions, the service member/employee must be allowed to make up any contributions missed during military service.[148] The employee must be allowed a period of up to three times the length of the military service, but not more than five years, to make up the contributions.[149]

4. Special Protection Against Discharge

A bedrock principle of American employment law is the so-called employment at will doctrine. This is the rule that an employee may be discharged at any time, for any reason, or even for no stated reason.[150] During the last half of the twentieth century, the employment at will doctrine has been subjected to a number of statutory and judicial exceptions.[151] USERRA provides a limited exception for reemployed service members.

A person who has been reemployed after a period of military service cannot be discharged from that employment except for cause for a period of one year if the military service was more than 180 days.[152] If the term of military service was more than thirty days, but less than 180 days, the period of special protection is reduced from one year to 180 days.[153] These periods run from the date of reemployment. Thus, it would appear that a new period commences every time the member is reemployed after an absence of the requisite length. The special protection logically should apply to demotions as well as discharges.[154]

There is, however, no special protection if the military service was less than thirty-one days. In the current age of high operations tempo, this aspect of the statute is most unfortunate. It is easy to find any number of Reserve and Guard members whose unit missions require their skills for numerous periods of time amounting to far more than thirty days over the course of a year or less. But, if no single period amounts to more than thirty days alone, the member

---

[147] *See id*. § 4318(a)(2).
[148] *See id*. § 4318(b)(2).
[149] *See id*.
[150] MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 9 (4th ed. 1998).
[151] A detailed explanation or recitation of those exceptions is beyond the scope of this article. For a discussion of the employment at will doctrine and its attendant exceptions, see generally *id.* at 912-962.
[152] 38 U.S.C. § 4316(c)(1).
[153] *See id*. § 4316(c)(2).
[154] There appear to be no cases precisely on point concerning demotions under USERRA; however, given the broad construction to be given the statute, it would not be sensible for a court to allow a service member/employee to be demoted during the special protection period.

does not receive the special protection from discharge. Guard and Reserve members know that the frequency of absence is just as much an irritant to their employers as the length of their absences. Yet, the statute as written leads to anomalous results in view of its stated purpose to prohibit discrimination against persons because of their military service. In its formulation of the special discharge protection, the statute not only fails adequately to protect some service member/employees from discrimination, it irrationally discriminates among service member/employees.[155]

H. Enforcement and Remedies

The Secretary of Labor is primarily responsible for enforcing and executing the provisions of USERRA.[156] This responsibility is carried out through the Department of Labor's Veterans Employment and Training Service (VETS).[157] A person who is aggrieved by an employer's actions in violation of USERRA may file a complaint with the Secretary through VETS.[158] The Secretary is obligated to investigate each complaint of unlawful actions under USERRA.[159] The Secretary has subpoena power in any such investigation[160]. If the investigation reveals that there was a violation, the Secretary is required to make "reasonable efforts to ensure" that the employer

---

[155] Consider the following scenario: Joe and Mary are both employed by Falcon Airlines in its maintenance department. Joe is also a crew chief with the 940th Air Refueling Wing (AFRC). Likewise, Mary is an avionics technician in the 940th.

In 1998, Staff Sergeant Joe performs the following duty, for which he is absent from Falcon Airlines: January 5-19 - annual training, Beale AFB, for fifteen days; February 23-28 - prepare for operational readiness exercise, Beale AFB, for six days; March 14-19 - operational readiness exercise, Mountain Home AFB, for seven days; May 10-24 - temporary duty in support of Operation Northern Watch, RAF Mildenhall, for fifteen days; July 7-16 - temporary duty to McConnell AFB (to backfill temporary shortage), for nine days; August 7-18 - support embassy recovery mission in Kenya and Tanzania for twelve days; September 22-25 - Central America hurricane relief mission for four days; November 3-12 - classified mission in a classified location for ten days. As a result, his total days absent for military duty is seventy-eight days. In December, Joe is demoted from shift leader by Falcon Airlines with no reason given. USERRA provides him no recourse.

On the other hand, in 1999, Staff Sergeant Mary performs the following duty: March 10-May 8 - support Operation Allied Force for sixty days; May 11-25 - annual training, Beale AFB, for fifteen days. As a result, her total days absent for military duty is seventy-five days. Mary cannot be discharged or demoted by Falcon Airlines except for cause for a period of six months because one of her tours was more than thirty days and less than 180 days.

[156] 38 U.S.C. §§ 4303(11), 4321 (1998).

[157] *Id*. § 4321. VETS informs and educates employees and employers about the provisions of USERRA. It also investigates and mediates USERRA issues. Legal assistance attorneys should refer to the VETS "USERRA Advisor" available at http://www.dol.gov/elaws/userra0.htm.

[158] *See* 38 U.S.C. § 4322.

[159] *See id*. § 4322(d).

[160] *See id*. § 4326.

complies with the law.[161] If these efforts fail to rectify the situation, the complaining employee will be notified by the Department of Labor and informed of the right to proceed with enforcement action.[162]

An employee who has been notified of unsuccessful resolution efforts has two options to enforce USERRA against a private employer. The employee, at his or her own expense, may commence an action against the employer in the United States District Court.[163] The employee instead may request that the complaint be referred to the United States Department of Justice, which is authorized to act as counsel for the employee in a civil action against the employer in the appropriate federal district court.[164] If the Justice Department refuses representation, then the employee may commence his or her own action against the employer in federal court.[165]

1. Procedure in the District Court

USERRA provides that no fees or court costs may be charged against a person filing suit to enforce the statute.[166] No state statute of limitations applies to USERRA actions,[167] and the statute itself appears to have no time limit for filing suit against a private employer. Only an employer or potential employer is a necessary party respondent in a USERRA suit.[168] Finally, employers may not seek judicial relief under the statute.[169]

2. Remedies Against Private Employers

The district court may award compensatory damages for lost wages or benefits in a USERRA suit.[170] If the court finds that the violation was willful, the court may order the employer to pay an additional amount, equal to the compensatory damages, as liquidated damages.[171] Additionally, "[t]he court may use its full equity powers . . . to vindicate fully the rights or benefits"

---

[161] *Id.* § 4322(d).
[162] *See id*. § 4322(e).
[163] *See id*. § 4323(a)(2)(B). In fact, unlike the Title VII procedure, filing a complaint with the Secretary of Labor is not a prerequisite to an employee's suit against a private employer. *See id*. § 4323(a)(2)(A).
[164] *See id*. § 4323(a)(1).
[165] *See id*. § 4323(a)(2)(C).
[166] *See id*. § 4323(c)(2)(A).
[167] *See id*. § 4323(c)(6).
[168] *See id*. § 4323(c)(5). This is an exception to the usual rules of joinder. *See* FED. R. CIV. P. 19.
[169] 38 U.S.C. § 4323(c)(4). This provision would prevent an employer from seeking declaratory relief as did the employer in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991). See *supra* note 81 and accompanying text.
[170] *See* 38 U.S.C. § 4323(c)(1)(A).
[171] *See id*. § 4323(c)(1)(A)(iii).

guaranteed by USERRA.[172] The court may award attorney fees, expert witness fees, and other litigation costs to a prevailing employee.[173]

3. Enforcement Against State Governments

USERRA purportedly applies to state governments as employers.[174] That has always been a constitutionally disputable notion. Whatever its validity, the ability to enforce USERRA against the states was almost certainly laid to rest by the recent United States Supreme Court decision in *Alden v. Maine*.[175]

Following the decision of the Supreme Court in *Seminole Tribe of Florida v. Florida*,[176] that Congress lacks power under Article I of the Constitution[177] to abrogate the states' sovereign immunity in federal court, this Eleventh Amendment[178] argument began to show up, and succeed, in USERRA suits.[179] In response, Congress limited USERRA suits against states to state court.[180] Seven months later, the Supreme Court decided *Alden v. Maine*.

In *Alden*, several employees of the state of Maine sued for overtime pay and other relief under the Fair Labor Standards Act (FLSA).[181] The FLSA, like USERRA, purports to apply to the states.[182] Alden's action was brought in a state court in Maine.[183] The Supreme Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages

---

[172] *Id*. § 4323(c)(3).
[173] *See id*. § 4323(c)(2)(B).
[174] *See id*. § 4303(4)(A)(iii) (*employer* defined to include a state); *id*. § 4323(c)(7) (noting that states subject to same remedies as private employers).
[175] ___U.S.___, 119 S.Ct. 2240, 144 L.Ed. 636 (1999).
[176] 517 U. S. 44 (1996).
[177] U.S. CONST. art. I.
[178] U.S. CONST. amend XI.
[179] *See, e.g.*, Velasquez vs. Frapwell, 160 F.3d 389 (7th Cir. 1998) (holding that the Eleventh Amendment bars a suit brought against the state under USERRA), *vacated in part on other grounds*, 165 F.3d 593 (7th Cir. 1999).
[180] Pub. L.No. 105-368, § 211, 112 Stat. 3315 (1998) (amending 38 U.S.C. § 4323).
[181] 29 U.S.C. § 201-219 (1998).
[182] *Id*. § 203. In 1976, the Supreme Court decided that the application of FLSA to the states was a violation of the Tenth Amendment. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). By 1985, however, the Court was of the opposite opinion. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).
[183] Alden's suit was first brought in the federal district court and dismissed based on the Supreme Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1997). *See* Mills v. Maine, 118 F.3d 37 (1st Cir. 1997). The case was then filed in the state court. Alden, ___ U.S. at ___, 119 S.Ct. at 2246, 144 L.Ed. at 652. The FLSA purportedly confers jurisdiction on state courts to hear certain FLSA suits. *See* 29 U.S.C. § 216(b).

in state courts."[184] This decision almost certainly applies to USERRA because USERRA, like the FLSA, purportedly authorizes suits against states in state courts.

However, service members who are state employees may not be completely without a USERRA remedy in either state or federal court. Eleventh Amendment immunity does not apply to state officials sued in their official capacities if the remedy sought is prospective injunctive relief, nor does it apply to state officials sued for damages in their individual capacities.[185] This is important because in many cases, injunctive relief may be the most important remedy to the plaintiff. The question in a USERRA suit against a state official will be whether the official individually (as opposed to the state itself) is an employer within the meaning of the statute. There seem to be no cases on this point. However, that the term *employer* in USERRA is defined to include "a person . . . to whom the employer has delegated the performance of employment-related responsibilities."[186]

4. Enforcement Against Federal Agencies

The federal government is subject to USERRA.[187] About 73,000 federal employees serve in the Ready Reserve.[188] In USERRA, Congress declares that "the Federal Government should be a model employer in carrying out the provisions of this chapter."[189] The Secretary of Defense and the Secretary of Labor sent a joint memorandum in 1998 to their Cabinet colleagues to spur the federal government to be in fact a model employer.[190] Unfortunately, the sense of Congress and the efforts of the Cabinet sometimes fall short. In 1998, while complaints against private employers and state

---

[184] Alden, ___U.S. at ___, 119 S.Ct. at 2246. 144 L.Ed. at 652.

[185] *See* Alabama v. Pugh, 438 U.S. 781 (1978) (finding that Eleventh Amendment applied in context of 42 U.S.C. § 1983).

[186] 38 USC § 4303(4)(A)(i).

[187] *Id*. § 4303(4)(A)(ii) (employer defined to include federal government).

[188] Douglas J. Gillert, *Rules Adapted To Protect Reservists' Government Jobs*, AMERICAN FORCES PRESS SERVICE, (Aug. 4, 1999) <http://www.defenselink.mil:80/news/Aug1999/n08021999-9908026.html>. American Forces Press Service is part of the DOD-operated American Forces Information Service which supplies news to both civilian media outlets and military base newspapers. The Ready Reserve is made up of National Guard and Reserve units, AGR personnel, and Individual Mobilization Augmentees (IMAs—known in the Air Force as "Category B" Reservists). 10 U.S.C. § 10142 (1998).

[189] 38 U.S.C. § 4301(b). The Office of Personnel Management (OPM) is authorized to promulgate regulations implementing USERRA with respect to federal executive agencies. *Id*. § 4331(b)(1). The OPM has such regulations, though the regulations largely duplicate the statute and are not independently useful. *See* 5 C.F.R. pt. 353 (1999).

[190] Memorandum from the Honorable William S. Cohen, Secretary of Defense & the Honorable Alexis M. Herman, Secretary of Labor, for Members of the Cabinet, Promoting the Federal Government as a "Model Employer" of National Guard and Reserve Members (July 6, 1998).

governments decreased, complaints against federal agencies were up by 10 percent.[191] Surprisingly, the Air Force itself, on occasion, has been identified as less than a "model [civilian] employer" for Air Force Reserve members.[192] It is worth noting that the provisions for enforcing USERRA against federal agencies do not apply to intelligence community agencies.[193] While these agencies are generally subject to USERRA, these agencies have been given the authority to develop their own rules concerning implementation and enforcement of the statute.[194]

A federal civilian employee aggrieved with respect to USERRA rights may file a complaint with the Secretary of Labor through VETS.[195] The Secretary has the same obligation to investigate complaints against federal agencies as against private employers.[196] If an investigation reveals a violation of USERRA by a federal agency, the Secretary is required to make "reasonable efforts to ensure" that the federal agency complies with the law.[197] If these efforts fail to rectify the situation, the complaining employee will be notified by the Department of Labor and informed of the right to proceed with enforcement action.[198] An employee who has been notified of unsuccessful resolution efforts has two options to enforce USERRA against a federal agency. The employee, at his or her own expense, may submit a complaint to the Merit Systems Protection Board (MSPB or Board).[199] Alternatively, the employee may request that the Secretary of Labor refer the complaint to the Office of Special Counsel, which is authorized to act as counsel for the employee in an action on the complaint before the MSPB.[200] If the Office of Special Counsel refuses representation, then the employee may commence his or her own action before the MSPB.[201]

5. Remedies Against Federal Agencies

If the MSPB determines that there has been a violation of USERRA by a federal agency, the Board "shall" order the agency to comply with the statute

---

[191] David Castellon, *Reservists' Complaints Against Their Employers Increase*, A.F. TIMES, Aug. 9, 1999, at 22.
[192] *Id.*
[193] *See* 38 U.S.C. § 4325. The exempt intelligence agencies are those that are generally exempt from the merit protection provisions of Title 5 of the United States Code. *See* 5 U.S.C. § 2302(a)(2)(C)(ii) (1999).
[194] *See* 38 U.S.C. §§ 4315, 4325.
[195] *See id.* § 4322(a)(2)(B).
[196] *See id.*
[197] *Id.* § 4322(d).
[198] *See id.* § 4322(e).
[199] *See id.* § 4324(b).
[200] *See id.* § 4324(a).
[201] *See id.* § 4324(b)(4).

and to compensate the employee for lost wages and benefits.[202] If the employee has submitted the complaint directly to the Board and is not represented by the Office of Special Counsel, the Board may award the prevailing employee attorneys' fees, expert witness fees and other litigation costs.[203] If the MSPB issues an adverse order or decision an employee may petition the United States Court of Appeals for the Federal Circuit for review.[204] If the employee was represented by the Office of Special Counsel before the Board, then he or she may be represented by that agency in the Federal Circuit.[205]

III. STATE LAW PROTECTIONS FOR SERVICE MEMBER/EMPLOYEES

Most states have statutes that, to one degree or another, afford protection to military members similar to the USERRA protections.[206] The scope of these laws varies from state to state. Some merely afford reemployment protection to state and local government employees.[207] Others

---

[202] *Id.* § 4324(c)(2).
[203] *See id*. § 4324(c)(4).
[204] *See id*. § 4324(d)(1).
[205] *Id*. § 4324(d)(2).
[206] *See, e.g.*, ALA. CODE § 31-2-13 (1995); ALASKA STAT. § 39.20.350 (Michie 1992); ARIZONA REV. STAT. §§ 26-167, 26-168 (1991); ARK. CODE ANN. § 21-4-212 (Michie 1992); CAL. MIL. & VET. CODE §§ 394--395.9 (West 1988); COLO. REV. STAT. §§ 24-50-301, 28-3-609 (1998); CONN. GEN. STAT. ANN. § 27-59 (West 1990); FLA. STAT. ANN. §§ 115.09, 295.09 (West 1996); GA. CODE ANN. §§ 38-2-279, 38-2-280 (1995); 10 GUAM CODE ANN. § 63105 (1996); HAW. REV. STAT. § 79-20 (1993); IDAHO CODE § 46-407 (1999); 20 ILL. COMP. STAT. ANN. § 1805/100 (West 1993); IND. CODE ANN. §§ 10-2-4-3, 10-2-4-3.5 (West 1982); IOWA CODE ANN. §§ 29a.28, 29a.43 (West 1995). KAN. STAT. ANN. §§ 44-1125 *et seq.* (1993). KY. REV. STAT. ANN. 38.238 (West 1999); LA. REV. STAT. ANN. §§ 29:38, 29:38.1 (West 1989); ME. REV. STAT. ANN., Tit. 37-B, § 342 (West 1989); MASS. GEN. LAWS ANN. Ch. 33, § 13 (West 1988); MICH. COMP. LAWS ANN. §§ 35.352—35.354 (West 1991); MINN. STAT. ANN. §§ 192.32, 192.34 (West 1992); MISS. CODE ANN. §§ 33-1-19, 33-1-21 (1990); MO. REV. STAT. § 41.730 (1998); MONT. CODE ANN. §§ 10-1-603, 10-1-604 (1998); NEB. REV. STAT. §§ 55-160—55-166 (1998); NEV. REV. STAT. §§ 412.139 *et seq.* (1998); N.H. REV. STAT. ANN. §§ 110B:65, 112:8 (1990); N.J. STAT. ANN. § 38a:4-4 (West 1968); N.M. STAT. ANN. §§ 20-4-6, 20-4-7 (Michie 1989); N.Y. MIL. LAW §§ 242—244, 252 (Mckinney 1990); N.C. GEN. STAT. § 127a-116 (1986); OHIO REV. CODE ANN. § 5903.02 (1993); OKLA. STAT. ANN. TIT. 44, § 209 (West 1996); ORE. REV. STAT. ANN. §§ 408.240—408.270 (Butterworth 1994); 51 PA. CONS. STAT. ANN. § 4101—4102 (West 1976); P.R. LAWS ANN. Tit. 25 § 2089 (1979); R.I. GEN. LAWS §§ 30-11-1—30-11-9 (1994); S.C. Code Ann. §§ 25-1-2250, 25-1-2310—25-1-2340 (Law. Co-Op. 1989); TENN. CODE ANN. § 8-33-101 *et seq.* (1993); TEX. GOV'T CODE ANN. §§ 431.005, 431.006 (West 1998); UTAH CODE ANN. §§ 39-3-1, 39-3-2 (1998); VA. CODE ANN. § 44-98 (Michie 1994); V.I. CODE ANN. Tit. 23, § 1531 (1993); WASH. REV. CODE ANN. §§ 38.40.060, 38.40.110 (West 1991); W.VA. CODE §§ 15-1F-1, 15-1F-8 (1995); Wyo. STAT. ANN. §§ 19-11-104—19-11-114 (Lexis Law Pub. 1999).
[207] *See, e.g.*, ALASKA STAT. § 39.20.350.

actually criminalize an employer's refusal to allow time off for military duty.[208] Many states have statutes that prohibit a broad range of discrimination against service members.[209] The legal assistance attorney advising a client on USERRA issues should not overlook the possibility that greater or additional relief may be had in some cases under state law. Congress recognized as much in USERRA.[210] A state law that purported to restrict rights under USERRA would be, of course, preempted by USERRA.[211] Given the constitutional obstacles to enforcement of USERRA against the states, having state remedies may be very fortunate in some circumstances.[212]

The availability of state law remedies is especially important to members of the National Guard who perform state emergency, disaster relief, and law enforcement mission in state active duty status. In addition, National Guard members may be involved in training in state active duty status. State law may also protect National Guard members who are on full-time state active duty status. State law is important in these situations because USERRA has no application to state active duty performed by Guard members.[213]

IV. LEGAL ASSISTANCE PRACTICUM

USERRA issues are considered to be "mission-related legal assistance" in the Air Force.[214] Regardless of this nomenclature, USERRA is, as a practical matter, mission-related in all the services because of the increased reliance on reserve component resources. Thus, the legal assistance attorney must be comfortable advising on the legal and practical issues that may arise under USERRA.

---

[208] *See, e.g.*, ME. REV. STAT. ANN. Tit.37-B, § 342.
[209] *See, e.g.*, CAL. MIL. & VET. CODE § 394.
[210] *See* 38 U.S.C. § 4302(a).
[211] U.S. CONST., art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . ."); *see also* 38 U.S.C. § 4302(b).
[212] *See supra* notes 174-186 and accompanying text.
[213] In some situations, there are substantial and direct benefits to the federal government provided by National Guard members in state active duty status. An example is found in the fact that the federally owned assets (principally the aircraft) at the four California Air National Guard flying wings are protected 24 hours day by firefighters who are all state active duty personnel. Some of the personnel in California's four security forces squadrons are also state active duty personnel. Without examining personnel records, it would be impossible to distinguish state active duty personnel from the technicians, AGRs, and traditional Guard members working along side them. It seems inequitable not to extend federal protection to state active duty personnel under the circumstances. Fortunately, most state laws are sufficient for that the purpose.
[214] Air Force Instruction 51-504, Legal Assistance ¶ 1.3.1 (May 1, 1996). The Army also places a great deal of importance on USERRA-related legal assistance. *See* Army Regulation 27-3, The Army Legal Assistance Program ¶ 3-6e (Sep. 10, 1995).

Practicing preventive law in the USERRA is highly important. Perhaps the most significant advice a legal assistance attorney can give concerning USERRA is a single word: communicate. Early and frequent communication between the service member/employee and the employer will prevent conflict later. It is especially important to avoid conflict at critical junctures, such as just prior to an exercise or real-world mission. The mobility line is not a good place from which to call an employer, unless the situation was unavoidable. Clients should be advised to request leaves of absence in writing at the earliest known date.[215]

Keeping employers informed about Reserve and Guard matters generally is also an excellent way to avoid USERRA issues. Many Reserve and Guard commanders invite local employers to their bases for community briefings and opportunities to see some of the unit activities up close. A personal telephone call from a commander, first sergeant, or supervisor to an employer frequently can head off routine misunderstandings and maintain good relations.

When informal mechanisms fail to resolve USERRA issues, the legal assistance attorney may want to contact the employer directly, subject of course to current guidance concerning the scope of legal assistance.[216] The Labor Department's Veterans Employment and Training Service will also contact employers. Legal assistance attorneys may desire to refer clients to that Labor Department agency.

Legal assistance attorneys should also be aware of the activities of the National Committee for Employer Support of the Guard and Reserve (NCESGR). The NCESGR publishes fact sheets and other information on USERRA for employers and service members. The committee also has local ombudsmen who will attempt to informally resolve USERRA issues between employers and service members. NCESGR also gives awards to employers friendly to the Guard and Reserve. While it is a DOD sponsored program, NCESGR is run by volunteers, many of whom are business persons.

V. CONCLUSION

For nearly sixty years, Congress has recognized the importance of preserving the ability of those called to service to return to their civilian employment when their service has ended. Legislation concerning veterans' re-employment rights has changed in step with shifts in national defense policy. At the end of the twentieth century, as the United States relies on its reserve forces to an extent never before envisioned, USERRA is essential in

[215] The Department of Defense has provided a sample notification to employers in the its USERRA regulations. *See* 32 C.F.R. pt. 104, app. B (1999).

[216] *See* Air Force Instruction 51-504, Legal Assistance, Notary, and Preventive Law Programs (May 1, 1996).

keeping skilled members in the reserve components. The statute protects the jobs of Reserve and National Guard members and prohibits discrimination in employment for all veterans, including those leaving extended active duty. At the same time, the statute provides straightforward rules for employers to follow concerning the re-employment rights of their service member/employees.

Mutual understanding among the services, employers, and service member/employees is a key element in America's defense policy in the twenty-first century. Legal assistance attorneys therefore perform an important role in our "Total Force" expeditionary military by providing accurate advice on USERRA. A force with strong roots in the free and democratic society that it protects is a paramount American value and USERRA is a pillar that supports that value.

After The Deal Is Done: Debt Collection and Credit Reporting

CAPTAIN JULIE J.R. HUYGEN*

I. INTRODUCTION

After the door-to-door salesman has the contract, after the telemarketer has the credit card number, after the bank has the mortgage, after the car dealer has the lease—in other words, after the deal is done—the consumer becomes the client. No judge advocate engages in legal assistance for any length of time without quickly encountering the first of many clients worrying about a deal-gone-bad. For a lot of those clients, the bad deal means an even worse payment situation, and that may lead to problems with debt collection and credit reporting.

"Complaints to the [Federal Trade] Commission about third-party debt collectors ranked second only to complaints about credit bureaus in 1998."[1] Of the most common complaints by consumers to the Federal Trade Commission as of July 1998, four of the top ten involved debt collection and credit reporting.[2] As long as consumers rely on credit agreements to transact business, those complaints will keep on coming. For a variety of reasons, including easing business transactions and addressing consumer complaints, the federal government has enacted laws governing debt collection and credit reporting. This article discusses the law at its most basic level, examining the process, procedures, and protections of both pieces of legislation—issues about which a legal assistance attorney must be well versed.

II. DEBT COLLECTION

"There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[3]

---

* *Captain Huygen (B.A., Harvard University; J.D., University of Maryland) is the Chief, Military Justice, Kunsan Air Base, Republic of Korea. She is a member of the Maryland State Bar.*

[1] Federal Trade Commission, *Twenty-First Annual Report to Congress Pursuant to Section 815(a) of the Fair Debt Collection Practices Act* (Mar. 19, 1999) <http://www.ftc.gov/os/statutes/fdcpa/senate99.htm> [hereinafter Federal Trade Commission, *Annual Report*].

[2] *See* Paul K. Davis, Senior Attorney, Atlanta Regional Office of the Federal Trade Commission, Lecture at the 43d Legal Assistance Course, The Judge Advocate General's School, United States Army (Oct. 22, 1998).

[3] 15 U.S.C. § 1692(a).

So begins the Fair Debt Collection Practices Act (FDCPA).[4] The FDCPA was enacted as part of the Consumer Credit Protection Act[5] on September 20, 1977 and last amended on September 30, 1996. Its stated purpose is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[6] It achieves this purpose by regulating communication between a debt collector and a consumer or a third party.

A. Process

The process of debt collection is a simple one. A consumer and a creditor conduct a business transaction. The consumer fails to pay, and the creditor pursues the consumer for the amount owed. The creditor uses letters, telephone calls, or personal visits. If and when these efforts fail, the creditor pursues repossession or refers the matter to a debt collector. The debt collector uses letters, telephone calls, or personal visits. If and when these efforts fail, the debt collector or creditor pursues legal action against the consumer.

Clomon v. Jackson[7] is discussed below for its holding, but it is raised here for its facts, which illustrate a typical debt collection process. Ms. Clomon owed $9.42 for a magazine subscription to American Family Publishers (AFP), a company known for its sweepstakes and spokesmen. AFP employed NCB Collection Services (NCB) as its debt collection agency on its debts, numbering approximately one million per year. AFP provided electronic information to NCB, which used the information to send form letters. Without a response from the consumer to the first form letter, NCB's computer system automatically sent additional letters. Not only was a response from the consumer necessary to stop the flow of letters, one was necessary before a human being would even review the consumer's file.[8]

Clomon received six form letters, the first from 'Althea Thomas, Account Supervisor,' the other five from 'P.D. Jackson, Attorney at Law, General Counsel, NCB Collection Services.' Jackson was an attorney, a part-time lawyer for NCB. He approved the form of the letters sent to Clomon and other consumers, but he never actually signed them. In fact, he never had any personal knowledge of Clomon or her file.[9] Eventually, Clomon prevailed on summary judgment and then again on appeal claiming that Jackson made a

[4] *Id.* § 1692.
[5] *Id.* § 1601.
[6] *Id.* § 1692(e).
[7] 988 F.2d 1314 (2nd Cir. 1993).
[8] *See id.* at 1316.
[9] *See id.* at 1316-17.

"false, deceptive, or misleading representation"[10] in violation of the FDCPA by allowing the use of his letterhead and signature on the form letters.[11]

B. Protections[12]

Consumer protection under the FDCPA is contingent upon the Act's definitions, and effective legal assistance on this issue demands a clear understanding of the key definitions in the statute. The legislation focuses its protective power on the communication between the debtor and collector. As a result, the statute's definition of the word "communication" is a logical place to begin an evaluation of the legislation. A *communication* is "the conveying of information regarding a debt directly or indirectly to any person through any medium."[13] It does not, however, include a legal notice, a legal filing or service, or any contact about a filed lawsuit.[14] With regard to the parties, a *consumer* is "any natural person obligated or allegedly obligated to pay any debt."[15] A *creditor* is

> any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.[16]

By contrast, a *debt collector* is defined as "[a] person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[17] A debt collector, under the terms of the FDCPA, includes any employee of a debt collector, any debt collector in the United States,[18] any attorney who regularly engages in debt collection

---

[10] 15 U.S.C. § 1692e.
[11] *See* Clomon, 988 F.2d at 1320-21.
[12] 15 U.S.C. § 1692n. It should be noted that the protections discussed are based on provisions of federal law. States can and do offer more extensive legal protections for consumers from improper actions by debt collectors and creditors, but a discussion of those provisions is beyond the scope of this article. Legal assistance attorneys should be familiar with such protections, if any, offered by the state or states in which their clients conduct their business.
[13] 15 U.S.C. § 1692a(2).
[14] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,101 (1988). This FTC Staff Commentary is not binding but merely interpretive. *Id*.
[15] 15 U.S.C. § 1692a(3).
[16] *Id*. § 1692a(4).
[17] *Id*. § 1692a(6).
[18] The location of the consumer is irrelevant. *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. at 50,102.

activities,[19] and any creditor that collects debts in a name other than its own.[20] However, it does not include a creditor, an employee of a creditor, an attorney of a creditor who collects debts in the creditor's name, or a creditor that collects debts in its own name. Nor does it include a government employee acting in an official capacity or an attorney who represents a consumer against a debt collector.[21] The focus of the controversy is, of course, the *debt*, which is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."[22] A debt can include overdue bills, dishonored checks,[23] and delinquent student loans, while unpaid taxes[24] or alimony, child support,[25] tort, or nonmonetary claims are not considered debt.[26]

When a consumer alleges an FDCPA violation by a debt collector, the standard used to evaluate the claim is the "least sophisticated consumer."[27] As discussed by the Second Circuit Court of Appeals in *Clomon*,

> The most widely accepted test for determining whether a collection letter violates § 1692e is an objective standard based on the "least sophisticated consumer." This standard has also been adopted by all federal appellate courts that have considered the issue. . . . The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd.[28]

---

[19] *See* Heintz v. Jenkins, 514 U.S. 291, 292 (1995). The FTC has recommended to Congress that an attorney engaging in only legal, as opposed to collection, practices not be covered by the FDCPA as a debt collector. Federal Trade Commission, *Annual Report*, *supra* note 1.

[20] *See* 15 U.S.C. § 1692a(6).

[21] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. at 50,103.

[22] 15 U.S.C. § 1692a(5).

[23] *See, e.g.*, Snow v. Riddle, 143 F.3d 1350, 1353 (10th Cir. 1998) (holding that a dishonored check is a debt for the purposes of the FDCPA in that a debt is created when one obtains goods and gives a check in return).

[24] *See, e.g.*, Staub v. Harris, 626 F.2d 275, 279 (3d Cir. 1980) (holding that unpaid taxes are not a debt for the purposes of the FDCPA because there is no traditional commercial relationship between taxpayer and state and the tax debtor is not a consumer debtor).

[25] *See, e.g.*, Mabe v. G.C. Services Ltd. Partnership, 32 F.3d 86, 88 (4th Cir. 1994) (holding that child support is not a debt for the purposes of the FDCPA because it is not incurred to receive consumer goods or services).

[26] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. at 50,102.

[27] *See, e.g.*, Smith v. Computer Credit, Inc., 167 F.3d 1052, 1054 (6th Cir. 1999); Savino v. Computer Credit, Inc., 164 F.3d 81, 85 (2d Cir. 1998); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1175 (11th Cir. 1985) (using standard of "least sophisticated consumer"). *But see* Gammon v. G.C. Services Ltd. Partnership, 27 F.3d 1254, 1257 (7th Cir. 1994) (setting forth standard of "unsophisticated consumer").

[28] Clomon v. Jackson, 988 F.2d 1314, 1318 (2nd Cir. 1993).

In *Clomon*, the court also discussed the least sophisticated consumer standard in the context of consumer protection law. Quoting the United States Supreme Court, the court noted that, "[l]aws are made to protect the trusting as well as the suspicious."[29] Comparing the FDCPA to the Federal Trade Commission Act (FTCA),[30] the court reiterated a point it made in an earlier case that the law "was not made 'for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous.'"[31]

The court reasoned that adopting the least sophisticated consumer standard better served the purpose of consumer protection laws by providing a "standard for evaluating deceptions that [did] not rely on assumptions about the 'average' or 'normal' consumer." [32] The court acknowledged the sensibility of the use of this standard given the ease with which people of below average sophistication or intelligence fall prey to misleading or fraudulent schemes.[33]

Recognizing that even the least sophisticated consumer standard has a limit, the court wrote, "in crafting a norm that protects the naïve and the credulous the courts have carefully preserved the concept of reasonableness. . . [E]ven the 'least sophisticated consumer' can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care."[34] Relying on the standard, the court concluded that its dual purpose was served in that it adequately protected all

---

[29] *Id.* (quoting Federal Trade Commission v. Standard Education Society, 302 U.S. 112, 116 (1937)).

[30] 15 U.S.C. § 41 (1999).

[31] Clomon, 988 F.2d at 1318-19 (quoting Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F.2d 676, 679 (2nd Cir. 1944) (quoting Florence Manufacturing Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910))).

[32] Clomon, 988 F.2d at 1319.

[33] *See id.*

[34] *Id.* The Seventh Circuit Court of Appeals deals with the question of a reasonable but least sophisticated consumer by applying an "unsophisticated consumer" standard.

> Literally, the least sophisticated consumer is not merely "below average," he is the very last rung on the sophistication ladder. Stated another way, he is the single most unsophisticated consumer who exists. Even assuming that he would be willing to do so, such a consumer would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion. Courts which use the "least sophisticated consumer" test, however, routinely blend in the element of reasonableness. *See* Clomon, 988 F.2d at 1319. In maintaining the principles behind the enactment of the FDCPA, we believe a simpler and less confusing formulation of a standard designed to protect those consumers of below-average sophistication or intelligence should be adopted. Thus, we will use the term, "unsophisticated," instead of the phrase, "least sophisticated," to describe the hypothetical consumer whose reasonable perceptions will be used to determine if collection messages are deceptive or misleading.

Gammon, 27 F.3d at 1257.

consumers, "even the naïve and trusting," against deceptive debt collection practices, and it, likewise, protected debt collectors against liability for unusual interpretations of collection notices.[35] Regardless of the legal theory surrounding use of the standard, the least sophisticated consumer standard marks the dividing line that a debt collector cannot cross in an attempt to collect a debt from a consumer. Along this line lie the FDCPA requirements of and restrictions on communication between debt collector and consumer or third party.

1. Requirements

The requirements placed on the debt collector are fairly straightforward. A debt collector must, as a basic matter, provide proper notice of a debt. With the initial communication to a consumer,[36] or within five days of such, the debt collector must send a written notice of the amount of the debt; the name of the creditor; a statement that the debt will be assumed valid unless disputed by the consumer within thirty days;[37] and a statement that, if

---

[35] Clomon, 988 F.2d at 1320. Again, the Seventh Circuit Court of Appeals perceives the issue from a slightly different angle.

> We reiterate that an unsophisticated consumer standard [as opposed to a least sophisticated consumer standard] protects the consumer who is uninformed, naïve, or trusting, yet it admits an objective element of reasonableness. The reasonableness element in turn shields complying debt collectors from liability for unrealistic or peculiar interpretations of collection letters.

Gammon, 27 F.3d at 1257.

The court applied the unsophisticated consumer standard in *Bartlett v. Heibl*, wherein the court wrote, "the letter to Bartlett was confusing; nor . . . could we doubt that it was confusing—we found it so, and do not like to think of ourselves as your average unsophisticated consumer." Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir. 1997). Interestingly, the court went on to say, "Judges too often tell defendants what the defendants cannot do without indicating what they can do, thus engendering legal uncertainty that foments further litigation." *Id*. at 501. The court then included in its opinion a sample letter for debt-collecting attorneys to use and closed with a warning.

> We cannot require debt collectors to use "our" form. But of course if they depart from it, they do so at their risk. Debt collectors who want to avoid suits by disgruntled debtors standing on their statutory rights would be well advised to stick close to the form that we have drafted. It will be a safe haven for them, at least in the Seventh Circuit.

Id. at 502.

[36] *See, e.g.*, Frey v. Gangwish, 970 F.2d 1516, 1518-19 (6th Cir. 1992) (holding that a debt collector is required to provide the validation notice in its initial communication with the consumer, even if the debt collector has already won a judgment against the consumer).

[37] *See, e.g.*, Russell v. Equifax A.R.S., 74 F.3d 30, 34-36 (2d Cir. 1996) (holding that a first notice violated the FDCPA which provided only ten days to pay the debt in contradiction of

disputed, a verification will be obtained and sent.[38] Until the consumer disputes the debt, the debt collector may continue collection efforts, even within the 30-day period. If, within the thirty days, the consumer disputes the debt, then the debt collector must cease collection efforts. In other words, letters and telephone calls in pursuit of collection must stop until the debt is verified. If the consumer registers a dispute, the debt collector may still take legal action against the consumer, even within the 30-day period.[39] The failure of a consumer to dispute the debt is not an admission of liability.[40]

There is an additional requirement of a "mini-Miranda" notice.[41] In its initial written communication with the consumer,[42] the debt collector must state that it is attempting to collect a debt and that any information obtained will be used for that purpose. Failure to provide this notice constitutes a false or misleading representation.[43]

2. Restrictions

A debt collector may contact a third party for location information about a consumer. Location information is limited to a consumer's home address, home telephone number, and work address.[44] When the debt collector makes contact, he must identify himself, state his purpose of confirming or correcting location information, and not identify his employer unless asked. The debt collector may not make contact with a specific third party more than once unless by request or for correction.[45] In addition, the debt collector may not communicate by post card or indicate on mail the nature of his business or the communication. For location information as well as other purposes, the debt collector must contact the consumer's attorney if the attorney is known,[46]

---

the 30-day notice to dispute it and a similar second notice provided only five additional days, five fewer than the thirty days required by law).

[38] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,108 (1988).

[39] *See id.* at 50,109.

[40] *See* 15 U.S.C. § 1692g(c).

[41] *See* Federal Trade Commission, *Annual Report*, *supra* note 1.

[42] *See, e.g.*, Frey, 970 F.2d at 1519-20 (holding that a debt collector is required to provide the mini-Miranda notice in its initial communication with the consumer, even if the debt collector has already won a judgment against the consumer).

[43] *See* 15 U.S.C. § 1692e(11).

[44] *See id.* § 1692a(7).

[45] *See id.* § 1692b(3).

[46] Knowledge of a consumer's attorney is debt-specific. If the consumer notifies the debt collector of legal representation for one debt, then the consumer must re-notify the debt collector for subsequent debts that come to light. Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991).

can be located, and is responsive.[47] A creditor's knowledge of a consumer's attorney is not imputed to a debt collector.[48]

In addition, a debt collector may not contact a third party about the debt without prior consent by the consumer, permission of a court, or a reasonable need to enforce a judgment. Otherwise, the debt collector's contact is restricted to the consumer, consumer's attorney, consumer reporting agency if permitted by law, creditor, creditor's attorney, and debt collector's attorney.[49] Even if there is no mention of the debt,[50] a debt collector may not contact a consumer, without the consumer's consent or a court's permission, at any unusual or inconvenient time or place or at the consumer's workplace if the consumer's employer prohibits such contact. Before 8 *a.m.* and after 9 *p.m.* is presumed inconvenient, while Sunday is not so presumed.[51] These same restrictions apply to contacting the consumer's spouse or the parent of a minor consumer.[52] As with the purpose of acquiring location information, the debt collector must contact the consumer's attorney if the attorney is known, can be located, and is responsive.[53]

A debt collector also cannot contact a consumer if the consumer has refused, in writing, to pay the debt or if the consumer has asked for no further contact. The debt collector may then contact the consumer only to notify the consumer that the collection is stopped, that further remedies may be invoked, or that further remedies will be invoked.[54] Under no circumstances can a debt collector harass, oppress, or abuse any person in pursuit of collection.[55] This prohibition covers not only the consumer but also third parties (e.g., spouse, parent, friend, neighbor, coworker, or boss). The list of debt collector proscriptions is not all-encompassing, but it includes the use or threat of violence or harm to person, reputation, or property; the use of obscene or profane or abusive language; the publication of consumer names other than to a consumer reporting agency; and the repeated or continuous calling to annoy, abuse, or harass.[56] An example of such a prohibition is unnecessary calls, which might, for example, include leaving telephone messages with a

---

[47] *See* 15 U.S.C. § 1692b(6).
[48] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,104 (1988).
[49] *See* 15 U.S.C. § 1692c(b).
[50] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. at 50,103.
[51] *See id.* at 50,104.
[52] *See* 15 U.S.C. § 1692c(d).
[53] *See id*. § 1692c(a).
[54] *See id*. § 1692c(c).
[55] "This was the complaint we heard most frequently in 1998." Federal Trade Commission, *Annual Report*, *supra* note 1.
[56] *See* 15 U.S.C. § 1692d.

consumer's neighbor for the consumer when the debt collector has the consumer's telephone number.[57]

A debt collector is also precluded, though not surprisingly, from using false, deceptive, or misleading representations.[58] As with harassment, this prohibition covers third parties as well as the consumer. Again, the list presented is not exhaustive, but it includes implying affiliation with a governmental agency[59] or a consumer reporting agency; threatening arrest, imprisonment, property seizure,[60] or wage garnishment unless the action is lawful and intended;[61] threatening any illegal or unintended[62] action; threatening the communication of false information; and giving a false name.[63] It also includes lying about the character, amount, or legal status of the debt; lying about whether the contact is from an attorney; lying about the consumer's criminal status; and lying about whether the communication is or is not a legal document and does or does not require action.[64] Though, if a debt collector resorts to legal action, it may only be brought in the judicial district where the consumer resides,[65] the judicial district where the contract in dispute was signed, or the judicial district where the real estate in dispute is situated.[66]

Finally, a debt collector is not permitted to use unfair or unconscionable means to secure collection. A method of debt collection may be unfair if it causes injury that is substantial, not outweighed by countervailing benefits to consumers or competition, and not reasonably

---

[57] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. at 50,104.

[58] *See* 15 U.S.C. § 1692e.

[59] *See, e.g.*, Gammon v. GC Services Ltd. Partnership, 27 F.3d 1254, 1258 (holding that a statement by a debt collector to a consumer regarding services the debt collector provided to federal and state governments to collect delinquent taxes implied to the consumer that the debt collector could cause tax problems for the consumer).

[60] *See, e.g.*, Crossley v. Lieberman, 868 F.2d 566, 572 (3d Cir. 1989) (holding that a statement by a debt collector to an elderly, widowed consumer of a nonexistent lawsuit and foreclosure was an illegal threat).

[61] Lack of intent may be inferred when the amount of the debt is so small as to make the action totally unfeasible. Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. at 50,106.

[62] *See, e.g.*, United States v. National Financial Services, Inc., 98 F.3d 131, 138-139 (4th Cir. 1996) (holding that a threat of legal action was illegal because the debt collector had not retained an attorney to institute a lawsuit).

[63] *See* 15 U.S.C. § 1692e(14).

[64] *See* 15 U.S.C. § 1692e. *See, e.g.*, Schweizer v. Trans Union Corp., 136 F.3d 233, 238 (2nd Cir. 1998) (holding that a letter from a debt collector, made to look like a telegram, did not communicate a false sense of urgency because the debt collector had not used words of urgency in the letter itself).

[65] *See, e.g.*, Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507, 1515 (9th Cir. 1994) (holding that the debt collector improperly filed suit in one county when the consumer resided in another, although the two counties are encompassed by one federal judicial district).

[66] *See* 15 U.S.C. § 1692i.

avoidable by the consumer.[67] Unfair or unconscionable practices include collecting more than authorized by the debt agreement or law, misusing a postdated check, charging for collect calls or telegram fees, and threatening repossession when repossession is not legal or intended.[68]

C. Penalties

The FDCPA provides penalties for someone wronged by a debt collector, who might be a consumer or a third party (e.g., spouse, parent, relative, or friend).[69] A wronged party may seek damages against a debt collector in federal or state court[70] within one year of the date of the violation. A debt collector may be held liable for actual damages, including out-of-pocket expenses as well as damages for humiliation, embarrassment, anguish, and distress.[71] Furthermore, a debt collector may be held liable for statutory damages[72] up to $1,000 per individual or $500,000 per class plus attorney's fees and court costs.[73] The amount of damages depends on the frequency, persistence, and nature of the debt collector's noncompliance as well as the extent to which it was intentional.[74] Generally, the debt collector is held to a standard of strict liability unless the debt collector demonstrates by a preponderance of the evidence that the violation was unintentional and caused by a bona fide error.[75]

In addition, an FDCPA violation may be an unfair and deceptive act or practice in violation of the FTCA.[76] Suspected violations should be reported to the Commission, which can pursue violators and report violations to Congress.[77] For example, in October 1998, the Commission announced a

---

[67] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. at 50,107.
[68] 15 U.S.C. § 1692f.
[69] *See, e.g.*, Wright v. Financial Services of Norwalk, Inc., 22 F.3d 647, 649-50 (6th Cir. 1994) (holding that executrix of a consumer had standing to sue a debt collector).
[70] *See, e.g.*, Bates v. C & S Adjusters, Inc., 980 F.2d 865, 867-68 (2nd Cir. 1992) (holding that the proper venue was the state to which the consumer had moved and had his mail forwarded, not the state where the creditor and debt collector were located and where the consumer's mail had been addressed).
[71] *See* Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. at 50,109.
[72] *See, e.g.*, Bartlett v. Heibl, 128 F.3d 497, 499 (7th Cir. 1997) (holding that statutory damages do not require that the consumer actually have suffered any harm).
[73] *See* 15 U.S.C. § 1692k(a)(2).
[74] *See id.* § 1692k(b).
[75] *See id.* § 1692k(c). *See, e.g.*, Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507, 1514 (9th Cir. 1994) (holding that there was no bona fide error because the debt collector did not prove that there were "reasonable preventive procedures").
[76] *See* 15 U.S.C. § 1692l. The FTCA is codified at 15 U.S.C. § 41 (1998).
[77] *See* 15 U.S.C. § 1692m.

settlement in which Nationwide Credit, Inc., agreed to pay a $1 million civil penalty, the largest ever in a debt collection case.[78]

D. Practice Notes

There are several practical considerations that would almost certainly be helpful to the legal assistance attorney.

The legal assistance attorney should be cautious about representing herself as a consumer's attorney, especially if contacting a debt collector in writing or via telephone. Unless the attorney makes it clear that the debt collector should contact the consumer directly, the debt collector is obligated to restrict contact to the attorney.[79] In the Air Force, the limits on the legal assistance program combined with the frequent moves of attorneys and client-consumers make it difficult for a legal assistance attorney to take on long-term representation of a client with debt collection problems.

Consider having a form letter for a client to use when replying to initial communication from a debt collector. The letter should cite the FDCPA and should be signed by the consumer, not the attorney. It should demand verification of the debt[80] and give convenient days and times for contacting the consumer at home. It should also state that the debt collector should not contact the consumer at the workplace. Depending on the consumer's specific situation, the letter might also contain a refusal to pay the debt or a request for no further contact.[81] In today's computer-reliant society, maintain such a letter (or, for that matter, letters) on a computer and preparing for the client while the client waits, should be almost as easy as the touch of a button.

Be sure to advise a client who is experiencing financial difficulties to use the resources available to him (e.g., the assistance of his first sergeant and/or commander and the counseling services of the Family Support Center). Remind the client that a military member is expected to pay just financial obligations in a proper and timely manner.[82]

Inform commanders and first sergeants about procedures regarding airmen's indebtedness. A commander should process a complaint received about an airman's indebtedness,[83] but the commander should not give out

---

[78] "Many of the alleged violations are the same as those addressed in a settlement with the Commission that NCI entered into in 1992; the company paid a civil penalty of $100,000 at that time." Federal Trade Commission, *Annual Report*, *supra* note 1.
[79] *See* 15 U.S.C. § 1692c(a)(2).
[80] *See id*. § 1692g.
[81] *See id*. § 1692c.
[82] Air Force Instruction 36-2906, Personal Financial Responsibility ¶ 7.1 (Jan. 1, 1998) [hereinafter AFI 36-2906]. Violations of this responsibility could result in criminal liability for the military member. *See* 10 U.S.C. § 934, UNIF. CODE OF MILITARY JUSTICE art. 134 (1998); MANUAL FOR COURTS-MARTIAL, United States, pt. IV, ¶ 71 (1998 ed.) [hereinafter MCM].
[83] AFI 36-2906, *supra* note 82, at ¶¶ 3.1, 3.4.

information (e.g., the airman's address[84] or action being taken against the airman).[85] The Air Force does not have the authority to force payment (e.g., order from a commander) without a court order,[86] but it may take action against an airman who fails in his financial responsibilities.[87] It is worth noting that an airman, like any other citizen, has the right to file for bankruptcy and that a bankruptcy filing in and of itself cannot be grounds to take action against the airman.[88]

III. CREDIT REPORTING

While any deal-gone-bad has immediate undesirable consequences, such as a consumer getting embroiled in the process of debt collection, it has a potential long-term aftereffect—the credit report. A negative credit report can keep a consumer from having a credit card, obtaining an insurance policy, buying a house, getting a job, and more. Because a credit report can have such a powerful impact, its importance cannot be understated, and the law that regulates credit reporting, the Fair Credit Reporting Act (FCRA),[89] should not, indeed cannot, be ignored.

A. Process

Credit reports are generated from a process of information exchange. A consumer and a creditor conduct a business transaction. The creditor reports the business transaction to a consumer reporting agency. The consumer reporting agency compiles the consumer's business transactions, as reported by all creditors, as well as information of public record and produces a credit report. Creditors update the information, and the consumer reporting agency updates the credit report. The consumer reporting agency provides the credit report to would-be creditors and other business entities, who may request the credit report and use the information it contains only for the purposes allowed by law.

---

[84] *See id.* ¶ 4.6.
[85] *See id.* ¶ 3.1.4.
[86] *See id.* ¶ 3.4.2.
[87] *See id.* ¶ 3.1.6.
[88] Adverse action is appropriate only if there is continued financial irresponsibility, fraud, deceit, evasion, false promises, or circumstances indicating a deliberate nonpayment or grossly indifferent attitude. *Id.* ¶ 5.1.2; 10 U.S.C. § 934, UNIF. CODE OF MILITARY JUSTICE art. 134; MCM, pt. IV, ¶ 71.
[89] 15 U.S.C. § 1681 (1999). The FCRA was most recently amended by the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, div A, tit. II, subtit. D, ch. 1, § 2401, 1104 Stat. 3009-426 (1996) (amending 15 U.S.C. § 1681b (1999)), the Intelligence Authorization Act for Fiscal Year 1998, Pub. L. No. 105-107, 111 Stat. 2248 (1997), and the Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, § 1, 112 Stat. 3208 (1998) (amending 15 U.S.C. § 1601).

The FCRA requires that credit reports be accurate, updated, and provided and used for limited purposes. It places responsibility on all parties involved in the process of credit reporting—consumers should review their credit reports for accuracy and report errors; those who furnish information must provide accurate, updated information; consumer reporting agencies must produce accurate, updated reports and provide them only for the purposes permitted by the FCRA; and those who use the information must do so only for the permitted purposes.

B. Protections[90]

As with the FDCPA, the protections available under the FCRA depend on the definitions of some of the key aspects of a credit-based transaction. A *person* is any individual, business, government, or other entity.[91] In the context of the FCRA, the term "person" might refer to a furnisher, supplier, or user of credit information, though it usually does not refer to the subject of the information. A *consumer* is, quite simply, an individual,[92] usually the subject of a credit report. A *consumer reporting agency* is any person that regularly engages in assembling or evaluating consumer credit or other information to furnish consumer reports to third parties.[93] In general, the term does not include those people that provide information to consumer reporting agencies.[94] A *consumer report*[95] is any communication, oral or written, of any information by a consumer reporting agency about a consumer's credit, character, reputation, or lifestyle for the purpose of establishing eligibility for credit, employment, or any other authorized purpose.[96] A report is a consumer, or credit, report if a consumer reporting agency collects information for the report for one of the purposes covered by the FCRA, if the consumer reporting agency expects the report to be used for an FCRA purpose, or if a

---

[90] *See* 15 U.S.C. § 1681t. As with the FDCPA, states may offer more extensive legal protections for consumers than are available under the FCRA. Although a discussion of state law is beyond the scope of this article, legal assistance attorneys should be familiar with such protections, if any, offered by the state or states in which their clients conduct business.

[91] *Id*. § 1681a(b).

[92] *Id*. § 1681a(c).

[93] *Id*. § 1681a(f). This article uses the term *consumer reporting agency* to include a "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis." *Id*. § 1681a(p).

[94] *See, e.g.*, DiGianni v. Stern's, 26 F.3d 346, 348-49 (2nd Cir. 1994) (holding that a retail department store that provided information on the store's customers to consumer reporting agencies was not itself a consumer reporting agency).

[95] The FCRA, despite its title, refers to consumer reports. In keeping with common terminology and everyday understanding, this article uses the term "credit report."

[96] 15 U.S.C. § 1681a(d). A consumer report may be an *investigative consumer report* if it includes information on a consumer's character, reputation, characteristics, or lifestyle obtained through personal interviews. *Id*. § 1681a(e). There are stricter disclosure requirements for investigative consumer reports than for consumer reports. *See Id*. § 1681d.

requestor uses the report for an FCRA purpose.[97] *Employment purposes* include employment, promotion, reassignment, and retention.[98]

Of course, issues under the FCRA usually arise only after credit has been denied or refused. Under the FCRA, this is referred to as an *adverse action*, which is defined more specifically as

> a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such terms does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.[99]

It also means a denial, cancellation, increased charge, reduction, or change of insurance; an adverse employment decision; a denial, cancellation, increased charge, or change of government license; and an action taken in connection with a consumer-initiated transaction and adverse to the consumer's interests.[100]

1. Disclosures

Adverse action occurs only after a consumer's credit information is disclosed. Thus, the FCRA is specific as to when a consumer reporting agency may furnish a consumer report and to whom. There are certain circumstances that allow for the release of a consumer report—in response to a court order or federal grand jury subpoena; per the written consent of the consumer-subject of the report; to a person who intends to use the report for a consumer's credit, employment, insurance, or governmental license or a legitimate business need[101] for a business transaction initiated by the consumer or for the review of a consumer's account; and in response to a child support award or enforcement agency.[102] Aside from the permissible purposes of credit reports, there are conditions on their release. A credit report that contains medical information may not be released for employment purposes or for a credit or insurance

---

[97] *See, e.g.*, Ippolito v. WNS, Inc., 864 F.2d 440, 448-50 (7th Cir. 1988) (holding that evidence of a non-FCRA purpose for a report request does not determine whether the report is a "consumer report").

[98] 15 U.S.C. § 1681a(h). *See, e.g.*, Zamora v. Valley Federal Savings & Loan Association of Grand Junction, 811 F.2d 1368, 1370 (10th Cir. 1987) (holding that employment purposes do not allow an employer to obtain the credit report of an employee's spouse).

[99] 15 U.S.C. § 1691(d)(6).

[100] *See id*. § 1681a(k).

[101] *See, e.g.*, Estiverne v. Sak's Fifth Avenue, 9 F.3d 1171, 1173-74 (5th Cir. 1993) (holding that a report from a check approval company was a credit report and that a store's obtaining the report to determine whether to accept or reject a consumer's check was a legitimate business need).

[102] *See* 15 U.S.C. § 1681b(a).

transaction not initiated by the consumer unless the consumer consents to the release.[103]

When used for employment purposes, a credit report may be released only to a person who certifies to the consumer reporting agency that it will be used properly. Proper use means that the person has notified the consumer in writing that the report may be procured and that the consumer has consented in writing to the procurement. In addition, proper use means that, before a person takes adverse action based on the report, the person must provide the consumer a copy of the report and a written description of the consumer's FCRA rights.[104]

When used for a credit or insurance transaction that is not initiated by the consumer, a credit report may be released only if the consumer authorizes the release or if two conditions are met: (1) the transaction is a firm offer and (2) the consumer may but has elected not to have his name and address excluded from the list provided by the consumer reporting agency to the person initiating the transaction.[105] If released, the credit report is released in redacted form.[106] Under the FCRA, a consumer has the right not to have information released for credit or insurance transactions that the consumer does not initiate. A consumer reporting agency must maintain a system by which a consumer may notify the consumer reporting agency of non-consent for release using a toll-free telephone number.[107] In addition, a consumer reporting agency that operates nationwide must maintain such a system jointly with other nationwide consumer reporting agencies.[108] A consumer reporting agency may furnish a consumer's name, address and former addresses, and employment and former employment to a governmental agency.[109] There are additional provisions for disclosure to the Federal Bureau of Investigation for counterintelligence purposes.[110]

2. Duties

Every entity in the chain of consumer information has responsibilities for establishing and maintaining the integrity of that information. Any weak link may result in a violation of the FCRA and an injury to the consumer. The duties imposed by the FCRA must be taken seriously by those providing and procuring consumer information. The duties in this regard are primarily concerned with the accuracy of the information. For example, a person who

---

[103] *See id*. § 1681b(g).
[104] *See id*. § 1681b(b).
[105] *See id.* § 1681b(c)(1).
[106] *See id.* § 1681b(c)(2).
[107] *See id.* § 1681b(c)(5).
[108] *See id.* § 1681b(e).
[109] *See id*. § 1681f.
[110] *See id*. § 1681u.

furnishes information to a consumer reporting agency may not furnish the information if the person knows or consciously avoids knowing that the information is inaccurate or if the person has correctly been notified by the consumer that the information is inaccurate. A person who regularly furnishes information to a consumer reporting agency has a duty to correct and update such information as well as a duty to notify the consumer reporting agency of disputes, accounts voluntarily closed by the consumer, and delinquent accounts.[111]

A consumer reporting agency must follow reasonable procedures to assure the accuracy of the credit reports it prepares.[112] A credit report may not contain information about bankruptcies older than ten years or judgments or paid tax liens, accounts under collection, criminal records of arrest, indictment, or conviction, or any other adverse information older than seven years. However, a report may contain any and all of this information if it will be used in connection with a credit transaction or life insurance policy of $150,000 or more or for employment with an annual salary of $75,000 or more.[113] A credit report must note if a consumer voluntarily closes a credit account.[114] It must also contain information on the failure of a consumer to pay overdue child support if the information is provided or verified by a governmental agency and is less than seven years old.[115] A consumer reporting agency must provide to furnishers and users of information a notice of their FCRA responsibilities.[116] To that end, the Federal Trade Commission provides notices for consumer reporting agencies' distribution.[117]

A prospective user of FCRA information must identify himself, certify his purpose, and certify that he has no purpose other than the one stated. A consumer reporting agency must then make a reasonable effort to verify the identity and purpose of the prospective user before furnishing a credit report.[118] A user may not resell a credit report or any information therein, unless the user discloses to the providing consumer reporting agency the identity of the subsequent user and the subsequent user's purpose for the information. In addition, the user and the subsequent user take on the same obligations of the consumer reporting agency and the user, respectively, in that

---

[111] *See id*. § 1681s-2(a).
[112] *See id*. § 1681e(b). *See, e.g.*, Spence v. TRW, Inc., 92 F.3d 380, 383 (6th Cir. 1996) (holding that a consumer reporting agency has a duty of reasonable care and that the consumer reporting agency did not violate its duty by providing information about a debt that the consumer had not paid and had not informed the consumer reporting agency was disputed).
[113] *See* 15 U.S.C. § 1681c.
[114] *Id*. § 1681c(e).
[115] *Id*. § 1681s-1.
[116] *Id*. § 1681e(d).
[117] *See* 16 C.F.R. pt. 601, apps. B, C (1999). The FTC notices of a furnisher's and a user's responsibilities under the FCRA are available at http://www.ftc.gov.
[118] *See* 15 U.S.C. § 1681e(a).

each must certify and verify identity and purpose.[119] If a user takes adverse action based on a credit report,[120] the user must notify the consumer of the adverse action; the name, address, and telephone number of the consumer reporting agency; and the consumer's rights to obtain a free copy of the report and to dispute information contained in the report.[121] If a person takes adverse action based on credit information obtained from a non-consumer reporting agency third party or corporate affiliate, the person must notify the consumer of his right to request within sixty days the reasons for the action and the nature of the information.[122] If a user makes a written credit or insurance solicitation, uninitiated by the consumer and based on a credit report, then the user must make a statement to the consumer about the use of the credit report, the conditional nature of the offer, and the right of the consumer to have information withheld from release.[123]

B. Remedies

In addition to the right to access his credit report, a consumer has a number of other important rights under the FCRA. Upon request, a consumer is entitled to a substantial amount of information from a consumer reporting agency: the information on him at the time of his request with the exception of credit or other risk scores or predictors, the sources of the information with the exception of sources for an investigative consumer report, the identification of users and end-users, their addresses, and their telephone numbers in the previous two years for employment purposes and in the previous year for any other purpose, the dates, payees, and amounts of checks used for adverse characterization, and a record of inquiries for a credit or insurance transaction not initiated by the consumer in the previous year. A consumer reporting agency must also provide a written summary of the consumer's FCRA rights[124] and, if the consumer reporting agency operates nationwide, a toll-free telephone number that may be used to contact the consumer reporting agency.[125]

Generally, a consumer reporting agency may charge up to $8 for a disclosure to a consumer unless the consumer requests the disclosure within 60 days of an adverse action, in which case the disclosure is available at no charge. A consumer is also entitled to one free disclosure annually if the

---

[119] *See id*. § 1681e(e).
[120] The information in the credit report that is the basis of the adverse action need not be derogatory or negative. Fischl v. General Motors Acceptance Corp., 708 F.2d 143, 149-50 (5th Cir. 1983).
[121] *See* 15 U.S.C. § 1681m(a).
[122] *See id*. § 1681m(b).
[123] *See id*. § 1681m(d).
[124] *See* 16 C.F.R. pt. 601, app. A. The FTC notice of a consumer's rights under the FCRA is available at http://www.ftc.gov.
[125] *See* 15 U.S.C. § 1681g.

consumer is unemployed and intends to apply for employment in the next 60 days, receives public welfare assistance, or has reason to believe that the consumer reporting agency has inaccurate information because of fraud.[126]

If a consumer reporting agency is notified that a consumer disputes information in his credit report, the consumer reporting agency must indicate the dispute in the credit report.[127] In addition, after the consumer reporting agency receives notice of the dispute from the consumer, the consumer reporting agency has thirty days to reinvestigate the dispute free of charge and record its status or delete it from the file.[128] In the context of such an investigation, the consumer reporting agency has five days to notify the furnisher of the disputed information of the dispute and provide relevant information.[129]

Once a furnisher of information is notified of a dispute, the furnisher must investigate, report the results of the investigation to the consumer reporting agency, and, if the information disputed is found to be incomplete or inaccurate, report the results to all nationwide consumer reporting agencies that received the information. The furnisher must comply with the same time limits as the consumer reporting agency.[130] The consumer reporting agency has five days to notify the consumer of the results of a completed reinvestigation. If the consumer reporting agency finds that the disputed information is inaccurate, incomplete, or unverifiable, the consumer reporting agency must modify or delete it.[131] If deleted, the information may not be reinserted unless the furnisher certifies its completeness and accuracy. Also, if disputed information is deleted, the consumer may request that the consumer reporting agency notify any person who has received a report in the previous two years for employment purposes or in the previous six months for any other purpose of the deletion.[132] If deleted information is later reinserted, the consumer reporting agency must notify the consumer within five days of the reinsertion. The consumer reporting agency may terminate the reinvestigation if it reasonably determines that the dispute is frivolous or irrelevant or if the consumer has not provided sufficient information to investigate. The consumer reporting agency must notify the consumer within five days of such a determination and provide reasons and identification of missing information.

---

[126] *See id*. § 1681j.
[127] *See id*. § 1681c(f).
[128] The 30-day period may be extended for up to fifteen days if the consumer provides the consumer reporting agency additional information in that period unless, in that period, the consumer reporting agency finds that the disputed information is inaccurate, incomplete, or unverifiable. *Id*. § 1681i(a)(1).
[129] *See id*. § 1681i(a)(2).
[130] *See id*. § 1681s-2(b).
[131] A nationwide consumer reporting agency must implement an automated system that reports incomplete or inaccurate information to all nationwide consumer reporting agencies. *Id.* § 1681i(a)(5)(D).
[132] *See id*. § 1681i(d).

If the reinvestigation does not resolve the dispute, then the consumer may file a brief statement that is provided, in whole or in summary, with any subsequent report containing the disputed information.[133]

A consumer reporting agency cannot stop a user of a credit report from disclosing the report's contents to the consumer-subject of the report if the user has taken adverse action against the consumer based on the report.[134] If a consumer believes that a consumer reporting agency or a furnisher or user of credit information has violated the FCRA, the consumer has two years[135] to seek damages in court.[136] There are several causes of action depending upon the circumstances surrounding the case that may be asserted, though damages may be limited. A person[137] who willfully fails to comply with the FCRA is liable for actual damages between $100 and $1,000.[138] A person who obtains a credit report under false pretenses[139] or knowingly without a permissible purpose is liable for the greater of actual damages or $1,000. Punitive damages,[140] court costs, and attorney's fees could also be awarded in the appropriate case.[141] A person who negligently fails to comply with the FCRA is liable for actual damages,[142] court costs, and attorney's fees, though punitive

---

[133] *See id*. § 1681i.

[134] *See id*. § 1681e(c).

[135] The two-year period begins on the date that liability arises unless "a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter . . . ." *Id*. § 1681p. *See, e.g.*, Clark v. State Farm Fire & Casualty Insurance Co., 54 F.3d 669, 671-73 (10th Cir. 1995) (holding that there was no discovery exception to the two-year statute of limitations).

[136] 15 U.S.C. § 1681p.

[137] *See, e.g.*, Mone v. Dranow, 945 F.2d 306, 308 (9th Cir. 1991) (holding that a corporate president and chief executive officer was liable for his actions under the FCRA even if he was acting in his corporate capacity); Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967, 972-73 (4th Cir. 1987) (holding that an employer was liable for the actions of its employee under the FCRA even if the employee was not acting in an official capacity).

[138] 15 U.S.C. § 1681n(a)(1).

[139] *See, e.g.*, Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1273-74 (9th Cir. 1990) (holding that a user obtained a credit report under false pretenses when it obtained the report for the permissible purpose of employment but actually used the report for another, impermissible purpose).

[140] *See, e.g.*, Fischl v. General Motors Acceptance Corp., 708 F.2d 143, 151 (5th Cir. 1983) (holding that negligent noncompliance allows actual damages and attorney's fees; willful noncompliance allows punitive damages, including damages from humiliation, mental distress, and injury to reputation; and a showing of malice is not necessary).

[141] 15 U.S.C. § 1681n. *See, e.g.*, Casella v. Equifax Credit Info. Services, 56 F.3d 469, 474 (2d Cir. 1995) (holding that actual damages did not include the attorney fees incurred by the consumer merely to notify consumer reporting agencies of a dispute, rather than to force their compliance with the FCRA).

[142] *See, e.g.*, Stevenson v. TRW Inc., 987 F.2d 288, 296-97 (5th Cir. 1993) (holding that a consumer could recover actual damages for mental anguish).

damages would probably not be possible.[143] By contrast, a consumer may not bring an action for defamation, invasion of privacy, or negligence against a furnisher, a consumer reporting agency, or a user based on information exchanged pursuant to the FCRA unless the information was false and furnished with malice or willful intent to injure the consumer.[144] Criminal liability may be imposed on a person who knowingly and willfully obtains credit information from a consumer reporting agency under false pretenses[145] or an employee of a consumer reporting agency who knowingly and willfully provide credit information to an unauthorized user.[146]

As with the FDCPA, the Federal Trade Commission is responsible for enforcement of the FCRA. Suspected violations should be reported to the Commission, which can pursue civil penalties for violations pursuant to the FTCA.[147] Other federal agencies have FCRA enforcement authority in certain circumstances,[148] and states may bring actions pursuant to the FCRA.[149]

C. Practice Notes

Not surprisingly, there are a few practical considerations for the legal assistance attorney that would undoubtedly prove helpful when advising clients on the FCRA.

Advise clients to beware of fraud. As business transactions become more automated, electronic information is increasingly valuable and, ironically, more easily obtained. More and more deals are done based on personal information and not on a face-to-face meeting. A consumer can now obtain credit over the telephone and via the Internet with simply a name, date of birth, and Social Security number.[150] Such information is available for the taking—many consumers provide it without question or hesitation, many documents (e.g., driver's license) list it, and many people do not protect it. The same holds true of bank account and credit card information.

Clients should be advised to obtain and review their credit reports from all three major consumer reporting agencies on an annual basis.[151] If a client has experienced a credit problem, the client might be able to receive the reports for free. Otherwise, the client may have to pay up to $8 per report, depending

---

[143] *See* 15 U.S.C. § 1681.
[144] *See id*. § 1681h(e).
[145] *See id*. § 1681q.
[146] *See id*. § 1681r.
[147] *See id*. § 1681s.
[148] *See id*. § 1681s(b).
[149] *See id*. § 1681s(c).
[150] For an overview of Internet consumer privacy issues, see Major R. Ken Pippin, *Consumer Privacy on the Internet: Its "Surfer Beware"*, 47 A.F. L. REV. 125 (1999).
[151] Equifax can be contacted at (800) 997-2493 or http://www.equifax.com. Experian (formerly TRW) can be contacted at (888) 397-3742 or http://www.experian.com. Transunion can be contacted at (800) 888-4213 or http://www.transunion.com.

on the client's state of residence for mailing purposes.[152] Even $24 is well worth the information. Only by regular review of credit reports can a consumer know that his credit history is correct and that he is not the victim of credit fraud.

Clients should also be counseled to consider closing credit accounts that they do not use or need. Accounts that go unused usually go unmonitored and thus are ripe for fraud and abuse. A credit report lists open and closed accounts and account activity as well as creditor information (e.g., mailing addresses).

Be aware that if a client is a consumer involved in the process of debt collection, the client should communicate with the debt collector, the creditor, and the major consumer reporting agencies. If a client is a victim of fraud, the client should communicate with the major consumer reporting agencies, all creditors, the Social Security Administration, and local law enforcement. The client should file a police report, alert the major consumer reporting agencies and all creditors (listed on the credit reports), and contact the Social Security Administration about a change of Social Security number.

IV. CONCLUSION

Consumers are doing deals, and those deals are often going bad, making those consumers potential clients of legal assistance attorneys. For evidence of consumers' financial difficulties, one need look no further than the filing of personal bankruptcies, which hit an all-time high in 1998 and numbered 1,352,030 in the 12-month period ending June 30, 1999.[153]

When assisting financially troubled clients, attorneys need to know and use the consumer protection statutes, including all sections of the Consumer Credit Protection Act. When assisting clients who are experiencing problems with debt collection and/or credit reporting, which are often linked, attorneys must explore all the protections and possibilities available under the Fair Debt Collection Practices Act and the Fair Credit Reporting Act. This article has described them, but more information is readily available, especially on the Internet, where the Federal Trade Commission, state attorney generals, and consumer groups maintain and update pages. A zealous advocate can use this wealth of information to the benefit of his disadvantaged client, the consumer on the back end of a bad deal.

---

[152] The fee that a consumer reporting agency may charge for a credit report is set by law and tied to the Consumer Price Index. 15 U.S.C. § 1681j(a). The present fee is $8 per report except for residents of Connecticut ($5), Maine and Minnesota ($3), and Colorado, Georgia, Maryland, Massachusetts, New Jersey, and Vermont (free). Fee information is available on the web sites of the consumer reporting agencies. *See supra* note 151.

[153] Associated Press, *Personal Bankruptcies Decline* (Aug. 10, 1999) <http://www.nytimes.com/aponline/f/AF-Bankruptcy-Filings.html>.

Consumer Privacy on the Internet: Its "Surfer Beware"

MAJOR R. KEN PIPPIN*

The Federal Government should recognize the unique qualities of the Internet including its decentralized nature and its tradition of bottom-up governance. Existing laws and regulations that may hinder electronic commerce should be revised or eliminated consistent with the unique nature of the Internet.[1]

[S]elf-regulation is the least intrusive and most efficient means to ensure fair information practices, given the rapidly evolving nature of the Internet and computer technology.[2]

We only need to look at several privacy fiascoes of late to realize that the presence of privacy policy statements does little to safeguard Internet user's privacy.[3]

I. INTRODUCTION

* *Major Pippin (B.S., Arkansas Tech University; J.D., University of Arkansas School of Law) is currently the Chief of Cadet Disenrollments at HQ USAFA/JA, United States Air Force Academy, Colorado. He is a member of the Bar of the State of Arkansas.*

[1] William J. Clinton, Presidential Directive, Memorandum for the Heads of Executive Departments and Agencies (July 1, 1997) <available at http://www.whitehouse.gov/WH/New/Commerce/directive.html>.

[2] Federal Trade Commission, *Self-Regulation and Online Privacy: A Report to Congress*, at 6 (July 1, 1999) <http://www.ftc.gov/opa/1999/9907/report1999.htm> [hereinafter Federal Trade Commission, *Self-Regulation and Online Privacy*]. This report examined the new developments in the on-line marketplace and industry progress in self-regulation programs. The FTC vote to issue this report was three to one with Commissioner Anthony concurring in part and dissenting in part.

[3] Mary J. Culnan, *Georgetown Internet Privacy Policy Survey: Report to the Federal Trade Commission*, app. E, at 91 (1999) [hereinafter Culnan, *GIPPS Report*] (comment of Beth Givens of the Privacy Rights Clearinghouse) (also available at http://www.msb.edu/faculty/culnanm/gippshome.html). Professor Culnan was the study director for the GIPPS Report. The report resulted from a survey conducted to provide a progress report to the FTC on the extent to which commercial web sites have posted privacy disclosures based on fair information practices. The Privacy Rights Clearinghouse participated as part of an advisory group for this survey. Ms. Givens submitted a written response to the GIPPS Report on behalf of the Privacy Rights Clearinghouse. The response is at Appendix E of the GIPPS Report as an advisory group comment.

One of the driving forces behind the exponential growth of the Internet[4] is its popularity as a consumer marketplace. The United States Department of Commerce recently reported that on-line sales have tripled from approximately $3 billion in 1997 to approximately $9 billion in 1998.[5] On-line revenues of North American retailers in the first half of 1998 were approximately $4.4 billion.[6] On-line advertising revenues have grown from $906.5 million in 1996 to $1.92 billion in 1998.[7] The Internet, and specifically the World Wide Web,[8] has become a primary source for obtaining goods, services, and information by a large number of people in a very short period of time.

Many do not realize that this exploitation has indirectly resulted in the Internet becoming a vast storage area for personal information on consumers, including information about children.[9] Growth of the Internet and the popularity of that technology has combined to create a perception that Internet has out-paced oversight and control.[10] This has led to concerns as to whether sufficient mechanisms exist to protect consumers, including the protection of consumers' personal information, against unwanted disclosure of that

---

[4] The Internet is the universal network that allows information in the form of words, text, graphics, and sound, to be transferred between computers anywhere in the world. Federal Trade Commission, *Sight Seeing on the Internet* (1999) <http://www.ftc.gov/bcp/conline/pubs/online/sitesee/index.html> [hereinafter Federal Trade Commission, *Sight Seeing on the Internet]*

[5] *See* William M. Daley, Secretary of Commerce, Remarks at United States Department of Commerce Press Conference on E-Commerce, Feb. 5, 1999 (available at http://204.193.246.62/public.nsf'docs/commerce-ftc-online-shopping-briefing).

[6] *See* THE BOSTON CONSULTING GROUP, THE STATE OF ONLINE RETAILING 7 & app. A (Nov. 1998). In July 1999, the Boston Consulting Group released results of a second volume in this study, which revealed that on-line revenues in North America totaled 14.9 billion in 1998, and it was estimated that revenues would top $36 billion in 1999. The Boston Consulting Group, *BCG on E-Commerce* (last visited Nov. 30, 1999) http://www.bcg.com/features/shop/main_shop.html.

[7] *See* Internet Advertising Bureau, *Advertising Revenue Report* (May 1999) <http://www.iab.net/news/content/1998results.html>.

[8] The World Wide Web refers to the worldwide network or linkages of Internet destinations called web sites that can be used to view and retrieve all types of data. The Internet encompasses the World Wide Web, as well as other electronic information exchanging features, such as Telnet, File Transfer Protocol, and USENET newsgroups. Interpretation of Rules and Guides for Electronic Media: Request for Comment, 63 Fed. Reg. 24996, 24997 (1998) (to be codified at 16 CFR ch.1). Federal Trade Commission, *Sight Seeing on the Internet, supra* note 4.

[9] *See* Federal Trade Commission, *Privacy Online: A Report to Congress*, at 3-4 (June 1998) <http://www.ftc.gov/reports/privacy3/index.htm> [hereinafter Federal Trade Commission, *Privacy Online*]. This report to Congress examined the information practices of commercial web sites on the World Wide Web and industry attempts at self-regulation.

[10] *See* Interpretation of Rules and Guides for Electronic Media: Request for Comment, 63 Fed. Reg. at 24997.

information.[11] The hesitation of consumers to conduct on-line purchasing can be traced, to some degree, to uncertainties over how laws and regulations in existence before the emergence of the Internet actually apply to Internet commerce, if at all.[12]

This article is intended to provide the legal assistance attorney a solid foundation of information on which to build expertise in this area of consumer protection law. Hopefully, that will translate into more knowledgeable advice being passed along to the consumer, rather than quick referrals to the state attorney general's office that send the client away with little more than a toll-free phone number and a prayer that somebody can explain if and how information privacy rules apply on the Web.

This article will be broken down by first introducing the main actors involved in Internet privacy issues, followed by a review of the primary laws and regulations touching on Internet privacy, as well as pending legislation, and the self-regulatory effort of the private sector. This article will conclude with suggestions to help the consumer make intelligent choices on information disclosure and reduce the potential for unwanted disclosure of their personal information.

II. THE MAIN PLAYERS IN CONSUMER PRIVACY

Consumer privacy is a complicated issue made even more difficult by the advent of the Internet. The shear volume of people, institutions, organizations, and companies using the Internet contributes immeasurably to the complexity of this issue. However, there is a core group that actually has the greatest potential for affecting long-term change in the area of on-line privacy.

A. Industry

Entities that comprise the Internet industry group are often referred to, as they will be throughout this article, as "Internet marketers" and "web sites." A web site, in reality, is an Internet destination where you can look at and retrieve data. All web sites in the world, linked together, make up the World Wide Web.[13] An Internet service provider is a service that allows consumers to connect to the Internet. When a person signs up (it requires special software

---

[11] *See* Lorrie Faith Cranor et al., *Beyond Concern: Understanding Net Users' Attitudes About Online Privacy*, at 2, 5, 10 (1999) [hereinafter Cranor, *Understanding Net Users' Attitudes*] (available at http://www.research.att.com/projects/privacystudy). *See also* Federal Trade Commission, *Privacy Online*, *supra* note 9, at 46.

[12] *See* Federal Trade Commission, *Commission Announces Proposal to Clarify How the Law Will Apply to Advertising and Commercial Transactions on the Internet* (May 1998) <http://www.ftc.gov/opa/1998/9805/interbus.htm>.

[13] *See* Federal Trade Commission, *Sight Seeing on the Internet*, *supra* note 4.

and a modem), she will be asked to enter a screen name, a secret password, and probably a credit card number. On-line charges are usually billed to a credit card. Some of the most well known Internet service providers include the Microsoft Network, America On-Line, Compuserve, and Prodigy.[14] An on-line service is an Internet service provider with added services and information, such as entertainment and shopping features.[15]

Commercial web sites collect tremendous amounts of personal information, also known as *individually identifiable information*, about consumers.[16] Individually identifiable information is information that can be used to identify an individual, that is elicited from the individual by the company's web site though active or passive means, and that is retrievable by the company in the ordinary course of business.[17] Personal information usually refers to specific items such as name, social security number, address, and phone number. In the context of discussing Internet privacy, its meaning is broader. It commonly encompasses *personally identifiable information*, which is information that can be used to identify, contact, or locate an individual.[18] The FTC divides personal information into two categories. The first is personal identifying information such as name and e-mail address. The second category includes demographic or preference information that is used in conjunction with personal identifying information for market research and the creation of consumer profiles.[19] The manner in which these companies or other entities collect and use this personal information is generally known as *information practices*.[20] *Fair information practices* are generally those information practices used by Internet marketers, that adhere to a set of five widely accepted core principles, both procedural and substantive in nature, which form the basis of privacy protection. These principles constitute safeguards required to assure information practices are fair and provide adequate privacy protection.[21] These principles, which are discussed below,

---

[14] *See id.*
[15] *See id.*
[16] *See id.*
[17] *See* Federal Trade Commission, *Self-Regulation and Privacy Online*, *supra* note 2, at 20.
[18] *See id.* at 10-11, 19-20.
[19] *See* Federal Trade Commission, *Privacy Online*, *supra* note 9, at 4-5, 12-13; Federal Trade Commission, *Self-Regulation and Privacy Online*, *supra* note 2, at 19-20. The Federal Trade Commission has attempted, in both its 1998 and 1999 Commission Reports, to explain personal information, personally identifiable information, and individually identifiable information. Despite this effort, it remains unclear whether the industry and other organizations are using the same terms in the same manner. The Commission has made further attempts to establish the meaning of personal information in the context of on-line privacy by defining the term in the new Children's Online Privacy Protection Rule, 16 C.F.R. pt. 312 (1999), implementing the Children's Online Privacy Protection Act, 15 U.S.C. § 6501 (1999).
[20] *See* Federal Trade Commission, *Privacy Online*, *supra* note 9, at 7, 48-49.
[21] *See id.*

are access/participation, choice/consent, integrity/security, notice/awareness, and enforcement/redress.

Information is collected through a variety of means, including registration pages, user surveys, on-line contests, application forms, and order forms. What many consumers are unaware of is that web sites also collect personal information through *cookies*, or *cookie files*. Cookie technology refers to a file left on a computer's hard drive to track the user's travels around a particular web site. This file is deposited when the person initially visits a site. This technology allows a web site's server to place information about the consumer's visits to the site on the consumer's computer in a text file that only the web site's server can read.[22] Using a cookie, the web site assigns each consumer a unique identifier so that the consumer may be recognized in subsequent visits to the site. When the consumer revisits the web site, the site opens the cookie file and accesses the stored information to help identify the consumer as a return guest. When that person lingers over products or services on a site, that will be noted and deposited to the cookie file, allowing businesses on-line to target their advertising efforts.[23]

Web sites can also collect information about consumers through hidden electronic navigational software that capture information about site visits, including web pages visited and information downloaded, the types of browser used, and the referring web site's Internet address.[24] These types of cookie files are also deposited on a computer when a consumer visits the web site. The files enable a web site to recognize a repeat customer and offer products tailored to the consumers interests. This practice, known as on-line profiling, is best described as aggregating information about consumers' preferences and interests gathered primarily by tracking their movements on-line and, in some cases, combining this information with personal information collected directly from consumers or contained in other databases.[25]

Due to the large increase in the number of children on-line, this segment of the public has established itself as a rich profit source for commercial web sites. More and more web sites are targeting children and are, therefore, using cookie technology and other means to collect personal information on them. While vast amounts of personal information are being collected by web sites on consumers, both adult and children, the rules governing the use of that information has not kept up with emerging technologies that provide new ways of collecting and using that information.

---

[22] *See id*. at 45-46; Federal Trade Commission, *Sight Seeing on the Internet*, *supra* note 4.
[23] *See* Federal Trade Commission, *Privacy Online*, *supra* note 9, at 45-46.
[24] *See id*. at 46. When an individual on the Internet uses an advertising banner on one web site to move to a different web site, the web site displaying the advertising banner is called the referring web site.
[25] *See* Federal Trade Commission, *Self-Regulation and Privacy Online*, *supra* note 2, at 2, 13.

Given the speed at which on-line technology and commerce is growing, the Internet remains a relatively uncharted frontier in terms of general oversight and control by federal, state, and local authorities. As a result, the Internet has become a new fertile ground for consumer scams. While the criminal element is a concern, consumers are more likely to encounter legitimate Internet marketers that have simply failed to address the collection and use of information on its customers. The industry has focused on obtaining information on customers, but has not, in many cases, defined the limits on how they obtain or use the data. As a result, unauthorized disclosure of a consumer's personal information is a possible consequence. As a whole, commercial web sites provide valuable new information and new resources for the consumer, but consumers must understand that this largely unregulated "superhighway" must be traveled carefully to avoid becoming a victim.

The Computer Security Institute recently released a study showing that losses due to Internet security breaches, including identity theft and theft of proprietary information, exceeded $100 million in 1998.[26] Con-artists and criminals have become opportunistic by capitalizing on the technology available and the somewhat unregulated nature of the Internet. What raises additional concern is the more common likelihood that a legitimate Internet marketer will take advantage of an information over-disclosure[27] without the consumer's knowledge. An Internet marketer can gain the full benefit of the information it collects by selling the information to third parties. The marketer, however, does not suffer the potential negative consequences of over-disclosure or unauthorized disclosure,[28] because customers will often never learn of the over-disclosure. Consumers are, therefore, unable to pursue redress. From an economic standpoint, the Internet marketer has either internalized its gains and externalized its losses creating an incentive to overuse the personal information,[29] or in its zeal to make a profit, overlooked the consumer privacy protection.

---

[26] *See* Peter McGrath, *Knowing You All Too Well*, NEWSWEEK, SCIENCE AND TECHNOLOGY, Mar. 29, 1999, at 113 (also available at http://newsweek.com/nw-srv/issue/13_99a/printed/us/st/ty0113_1.htm). The Computer Security Institute (CSI) is a membership organization providing information security education to information, computer and network security professionals. CSI provides education to its members through training seminars on Internet security, network security, risk analysis, and awareness.

[27] The term *over-disclosure* refers to more uses of the information than those to which the customer has agreed.

[28] The term *unauthorized disclosure* refers to any information disclosed that the customer did not consent to. Over-disclosure is distinguished from unauthorized disclosure in that over-disclosure suggests some information disclosed on the customer was based upon customer consent.

[29] *See* Peter Swire, *None of Your Business: World Data Flows, Electronic Commerce, and the European Privacy Directive*, ch. 1, at 4 (1999) <http://www.acs.ohio-state.edu/units/law/swire1/Julychapter1.htm>.

According to an Internet privacy survey conducted by Professor Mary Culnan, professor at the McDonough School of Business at Georgetown University, 92.8 percent of web sites in the survey collected at least one type of personal or individually identifiable information.[30] However, only 65.9 percent of the web sites posted at least one type of privacy disclosure (privacy policy notice or information practices statement) and 34.1 percent did not post either type.[31] Only 9.5 percent of the web sites that collected one type of personal information contained at least one survey item for all five core principles of fair information practices.[32] While this could raise consumer concerns, it actually represents an improvement over a Federal Trade Commission survey conducted a year earlier in which only 14 percent of web sites notified consumers of their privacy policies.[33]

Commercial web sites are generally responsible now for voluntary compliance or self-regulation concerning consumer privacy and fair information practices on-line. While many have raised concerns that this is akin to "the fox watching the hen house," the contrary argument maintains that the local, state, and federal government are all incapable of implementing effective rules and enforcement mechanisms, due partially to the speed at which technology is advancing.[34] Indeed, the concern is that such legislation will hinder the growth of on-line commerce or that such laws and regulations will quickly become obsolete as a result of emerging technology. In light of these concerns and in order to realize the vision of a flourishing on-line marketplace set forth in President Clinton's July 1, 1997, presidential directive,[35] the on-line industry has set into motion a number of self-regulatory measures to improve the confidence of the consumer and fend off attempts at governmental involvement.

In 1998, the Online Privacy Alliance (OPA), a coalition of more than eighty on-line companies and trade associations specifically formed to encourage self-regulation in the area of privacy on-line, announced its Online Privacy Guidelines.[36] Under those guidelines, which apply to individually identifiable information collected on-line from consumers, members of the OPA agreed to adopt and implement a posted privacy policy that provides

---

[30] *See* Culnan, *GIPPS Report*, *supra* note 3.
[31] *See id*. at 6.
[32] *See id*.
[33] *See* Federal Trade Commission, *Self-Regulation and Privacy Online*, *supra* note 2, at 4.
[34] *See id.* at 4, 12; Culnan, *GIPPS Report*, *supra* note 3, at app. E; David W. Carney, *Online Privacy Bill Runs Aground*, TECH L. J. (July 27, 1999) <http://www.techlawjournal.com/privacy/19990727.htm>.
[35] *See* William J. Clinton, Presidential Directive, Memorandum for the Heads of Executive Departments and Agencies (July 1, 1997) <http://www.whitehouse.gov/WH/New/Commerce/directive.html>.
[36] *See* Federal Trade Commission, *Self-Regulation and Privacy Online*, *supra* note 2, at 7-9.

comprehensive notice of their information practices.[37] A privacy policy is a statement on a web site describing how that site collects and uses information about the consumer. Ideally, the policy should be prominently posted and offer options about the use of a consumer's personal information.[38] These options, called "Opt-in" and "Opt-out" provisions give the consumer the ability to choose how their personal information is to be used.[39] An opt-in provision, means the web site will not use the information unless the consumer specifically says it is permissible to do so. An opt-out provision means the web site can use the information collected unless the consumer specifically directs the site no to do so.[40]

Other industry-supporting organizations have attempted to promote self-regulation through the development of seal programs. A seal program requires the licensees to abide by codes of on-line information practices and to submit to various types of compliance monitoring in order to display a program's privacy seal on their web site. This allows consumers to identify web sites that follow specified information practice principles.[41] Programs such as Truste, BBBOnline, and WebTrust, have been developed in an effort to support the industry by promoting the concept of self-regulation.

In 1997, the CommerceNet Consortium and the Electronic Frontier Foundation founded Truste, an independent, non-profit organization.[42] Truste currently has a license agreement which governs the licensee's collection and use of personally identifiable information[43] and has required licensees to adhere to standards for notice, choice, access, and security, based on the OPA guidelines previously discussed. The Trustee program includes third party monitoring and periodic review of licensee information practices.[44]

BBBOnline, a subsidiary of the Council of Better Business Bureaus, began a seal program early in 1999.[45] The Council of Better Business Bureaus is the umbrella organization of the well-known local Better Business Bureaus that promote ethical business practices through a variety of consumer service

---

[37] *See id.*

[38] *See* Federal Trade Commission, *Sight Seeing on the Internet, supra* note 4; Federal Trade Commission, *Privacy Online*, *supra* note 9, at 7; Culnan, *GIPPS Report*, *supra* note 3, at 13.

[39] *See* Federal Trade Commission, *Sight Seeing on the Internet, supra* note 4; Federal Trade Commission, *Privacy Online*, *supra* note 9, *at 9.*

[40] *See* Federal Trade Commission, *Sight Seeing on the Internet, supra* note 4; Federal Trade Commission, *Privacy Online*, *supra* note 9, *at 9.*

[41] *See* Federal Trade Commission, *Self-Regulation and Privacy Online, supra* note 2, at 9-12.

[42] *See id.* at 9.

[43] *See id.* at 10. Individually identifiable information and personally identifiable information generally have the same meaning. However, there does not yet appear to be a universally accepted definition for either term, therefore, the type of information comprising the term may vary among the entities using a particular term.

[44] *See id.* at 9.

[45] *See id.* at 10-11.

and programs.[46] BBBOnline requires applicants to post a privacy policy that meets the program's information practice principles, complete a Compliance Assessment Questionnaire, and agree to participate in an appropriate dispute resolution system and to submit to monitoring by BBBOnline.[47]

WebTrust, created by the American Institute of Certified Public Accountants and the Canadian Institute of Chartered Accountants, began in 1997.[48] The WebTrust program, which licenses the WebTrust seal to qualifying certified public accountants, requires participating web sites to disclose and adhere to stated business practices, maintain effective controls over the security and integrity of transactions, and to maintain effective controls to protect customer information. Seals are awarded after quarterly audits are conducted to ensure compliance with the program's privacy standards. The WebTrust program also has a privacy component, introduced in May 1999, that requires members to conform to OPA guidelines.[49]

In addition to these self-regulatory efforts, many sector-specific programs are beginning to emerge with on-line privacy programs tailored to the business conducted by a particular industry.[50] For example, in 1998, the Interactive Digital Software Association (IDSA) adopted its own set of fair information practice guidelines for member web sites. On June 1, 1999, the Entertainment Software Rating Board (ESRB), an independent rating system for entertainment software and interactive games, introduced ESRB Privacy Online. ESRB Privacy Online requires participants to follow information practice standards that are similar to IDSA guidelines, uses a consumer hotline on-line for reporting violations, and uses an ADR program for disputes.[51] The existence of industry-wide information protection programs and sector-specific efforts raises the issues of the existence of uniformity among the different programs, what standards each program will apply, and whether the consumer will be able to understand the differences between each program's standards. With so many different approaches to the problem of Internet privacy, self-regulation as not yet proven to be the best possible solution.

B. The Federal Trade Commission

The Federal Trade Commission (Commission) enforces consumer protection law through both administrative and judicial processes. In addition to the specific consumer protection statutes such as the Fair Credit Reporting

---

[46] *See* UNITED STATES OFFICE OF CONSUMER AFFAIRS, 1997 CONSUMER RESOURCE HANDBOOK 34 (1996) [hereinafter CONSUMER RESOURCE HANDBOOK].
[47] *See* Federal Trade Commission, *Self-Regulation and Privacy Online*, *supra* note 2, at 10.
[48] *See id.* at 11.
[49] *See id.*
[50] *See id.* at 11-12.
[51] *See id.*

Act,[52] the Commission is also responsible for enforcement of the basic consumer protection statute, the Federal Trade Commission Act (FTCA).[53] The FTCA provides that "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[54] The Commission makes the initial determination as to violations of consumer protection laws in either an adjudicative or rulemaking proceeding. However, even where the Commission determines that a practice is unfair or deceptive under the FTCA, the Commission must still seek either the aid of a court to obtain civil penalties or consumer redress for violations of its orders or trade regulation rules.[55] The FTCA authorizes the Commission to seek injunctive relief and other equitable relief, including redress, for violations of the FTCA, and provides a basis for governmental enforcement of certain fair information practices. However, the federal government as a whole currently has limited authority over the collection and dissemination of personal data collected on-line; a specific example being the Commission's general lack of authority to require businesses to adopt information practice policies.[56]

The issue of on-line privacy is nothing new for the Commission. In 1995, the Commission held its first public workshop on Internet privacy[57] and has since attempted to address new and unresolved privacy concerns in the on-line marketplace. The Commission defined its goals in this regard to include identifying potential consumer protection issues related to on-line marketing and commercial transactions, providing a public forum for the exchange of ideas and the presentation of research and technology, and encouraging effective self-regulation.[58] In short, the Commission should generally be viewed as the primary agency responsible for consumer protection on the Internet and, specifically, for protecting Internet consumer privacy.

The Commission produced two major Congressional reports in the last two years regarding Internet privacy,[59] establishing for itself a leadership role regarding on-line consumer protection. These reports have been part of a four year effort by the Commission to encourage widespread implementation of effective protections for consumer on-line privacy based on the five fair information practice principles.[60] The notice/awareness principle, which is the

---

[52] 15 U.S.C. § 1681 (1998).
[53] 15 U.S.C. § 41.
[54] 15 U.S.C. § 45(a)(1).
[55] *See* Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority* (Apr. 1998) <http://www.ftc.gov/ogc/brfovrvw.htm> [hereinafter Federal Trade Commission, *Overview*].
[56] *See id*.
[57] *See* Federal Trade Commission, *Privacy Online*, *supra* note 9, at 2.
[58] *See id*.
[59] *See generally* Federal Trade Commission, *Self-Regulation and Privacy Online*, *supra* note 2; Federal Trade Commission, *Privacy Online*, *supra* note 9.
[60] *See generally* Federal Trade Commission, *Self-Regulation and Privacy Online*, *supra* note 2.

core principle, states that consumers must be given notice of a company's information practices before personal information is collected from them.[61] The access/participation principle holds that consumers must be given reasonable access to information collected about them and the ability to contest that data's accuracy and completeness.[62] The choice/consent principle requires that consumers be given options with respect to whether and how personal information collected from them may be used.[63] The fourth principle, integrity/security principle requires that companies take reasonable steps to assure that information collected from consumers is accurate and secure from unauthorized use.[64] Finally, the enforcement/redress principle mandates that governmental and self-regulatory mechanisms impose sanctions for noncompliance with fair information practices.[65]

Despite the Commission's leadership role, its conclusions and especially its recommendations on addressing on-line privacy concerns have met with mixed reviews and dissent from consumer privacy organizations, Congress, and from within the Commission itself. The Commission currently endorses self-regulation as the best option available, citing both improved self-regulation efforts on the part of the private sector and the difficulties for the federal government in responding quickly to technological advancements, as well as the fear of hindering electronic commerce. Notwithstanding its overall recommendations, the Commission has endorsed legislative efforts specific to the area of on-line privacy for children, recognizing the heightened vulnerability of children exploring the Internet.

C. Congress

The overall self-regulation endorsement by the Commission has generally staved off most Congressional action so far, but the potential exists for significant change. Indeed, that change has already begun, at least concerning the privacy interests of children using the Internet. Agreeing with the Commission concerning privacy for children, Congress passed the Child Online Privacy Protection Act (COPPA)[66] in October 1998. This legislation requires web site operators and on-line services that operate web sites directed at children to obtain parental consent before collecting information from children under the age of thirteen.[67] COPPA has four primary goals: to enhance parental involvement in a child's on-line activities in order to protect

---

[61] *See id.* at 3.
[62] *See id.*
[63] *See id.*
[64] *See id.* at 3-4.
[65] *See id.* at 3.
[66] 15 U.S.C. § 6501 (1999).
[67] *See* 15 U.S.C. §§ 6501, 6502(a).

the privacy of children in the on-line environment; to help protect the safety of children in on-line forums such as chat rooms, home pages, and pen-pal services in which children may make public postings of identifying information; to maintain the security of children's personal information collected on-line; and to limit the collection of personal information from children without parental consent.[68] A review of the history of congressional action on privacy law reveals a piece-meal approach, targeting specific sectors of the industry without the comprehensive and uniform approach found, for example, in Western Europe.[69] While COPPA might not be considered part of the targeting-by-industry approach used in the past, one could nevertheless conclude this is simply more of the piecemeal approach as it applies to only a small portion of the entire Internet-using population.

Numerous Internet privacy bills are currently awaiting action by Congress, most notably, the Online Privacy Protection Act of 1999[70] and the Consumer Internet Privacy Protection Act of 1999.[71] However, Congress is divided on the issue. Those supporting legislation cite consumer protection as the overriding consideration.[72] By contrast, those in support of self-regulation agree with the Commission, arguing that the speed of change on the Internet effectively minimizes any legislative efforts to protect consumer privacy and that legislation will simply impede electronic commerce.[73]

D. Watchdog Organizations

Not surprisingly, watchdog organizations, mainly comprising consumer advocate groups, generally favor legislation that addresses Internet privacy. These groups use a variety of forums to advocate for the consumer. Their efforts show up on-line, in the newspaper, and in every other available media outlet. Some of these groups are actively involved in litigation and lobbying efforts in Washington. Their activities can shape the way the consumer and any given member of congress feels about Internet privacy, ultimately influencing the way the Internet develops in the future. Organizations such as, Junkbusters, The Center for Democracy and Technology (CDT), The Electronic Privacy Information Center (EPIC), and Privacy Rights Clearinghouse (PRC), are just some of the organizations that have been consistent promoters of consumer rights and privacy. As a group, they have

---

[68] *See* 144 Cong. Rec. S12,789 (daily ed. Oct. 21, 1998) (statement of Sen. Bryan).
[69] *See* Swire, *supra* note 29, at 1-2. Unlike the United States, Western Europe has passed a comprehensive law addressing privacy that treats privacy as a basic human right for individuals. *See* European Union Directive on Data Protection, Council Directive 95/46, 1995 O.J. (L 281) 31.
[70] S. 809, 106th Cong. (1999).
[71] H.R. 313, 106th Cong. (1999).
[72] *See* Carney, *supra* note 34, at 2.
[73] *See id.* at 2.

been highly critical of self-regulation, the Commission's position on Internet privacy, and the lack of affirmative steps taken by the federal government to increase privacy protection on-line.[74]

Junkbusters, a for-profit organization whose mission is "to free the world from junk communications," provides services to both consumers and direct marketers, including tools and information to improve the security of private information transferred on-line.[75] Junkbusters even offers a "Junkbusters Declaration," which a consumer can send electronically to marketers to limit the sale and transfer of private information collected on them.[76] Junkbusters also has software available which can eliminate the deposit of cookies on a computer while browsing the Internet.[77]

The CDT states on its web page that it "works to promote democratic values and constitutional liberties in the digital age."[78] CDT's web site contains a comprehensive guide to on-line privacy, with a "mini-course" discussing the Fourth Amendment to the Constitution, developments in privacy law issues, and recent Supreme Court rulings on privacy issues.[79]

Two additional organizations are focused almost exclusively on the issue of privacy. EPIC, a public interest research center, was established in 1994 to focus public attention on emerging privacy issues related to the National Information Infrastructure.[80] EPIC conducts litigation, sponsors conferences, produces reports, publishes a periodical, and campaigns on privacy issues. EPIC works in association with Privacy International, an international human rights group based in England.[81] PRC, a California based

---

[74] *See* Culnan, *GIPPS Report*, *supra* note 3, at 67-71, 91-94; Jeri Clausing, *After Intel Chip's Debut, Critics Step Up Attack*, N.Y. TIMES ON THE WEB (Feb. 19, 1999) <http://www.nytimes.com/library/tech/99/02/cyber/articles/19intel.htm>. *See also* John Markoff, *Microsoft to Alter Software in Response to Privacy Concerns*, N.Y. TIMES ON THE WEB (Mar. 7, 1999) <http://www.nytimes.com/library/tech/99/03/biztech/articles/07soft. html>.

[75] Junkbusters, *The Mission of Junkbusters* (visited Sep. 6, 1999) <http://www.junkbusters.com> [hereinafter Junkbusters, *Mission*].

[76] Junkbusters, *How to Protect Your Privacy from Commercial Invasions* (visited Sep. 6, 1999) <http://www.junkbusters.com>.

[77] *See* Junkbusters, *Mission*, *supra* note 75. *See also* Junkbusters, *Internet Junkbuster Headlines* (visited Sep. 6, 1999) <http://www.junkbusters.com>.

[78] Center for Democracy and Technology, *CDT's Mission* (visited Sep. 6, 1999) <http://www.cdt.org/mission.shtml>.

[79] *See* Center for Democracy and Technology, *Guide to Online Privacy* (visited Sep. 6, 1999) <http://www.cdt.org/privacy/guide/basic/index.html>.

[80] The National Information Infrastructure (NII) is also known as the "information superhighway." The NII is the interconnection of computers and telecommunication networks, services, and applications. It includes an expansive range of physical facilities and equipment used to transmit, store, process, and display voice, data, and images.

[81] *See* Electronic Privacy Information Center, *Latest News* (visited Sep. 6, 1999) <http://www.epic. org>; Electronic Privacy Information Center, *EPIC Online Guide to Privacy Resources* (visited Sep. 6, 1999)

non-profit consumer organization founded in 1992, provides consumers with a number of educational resources on privacy, including publications focusing on safeguarding personal privacy. In addition, PRC actively advocates concerning consumer privacy issues.[82]

Many, if not all, of these organizations remain skeptical about industry self-regulation efforts, including the seal programs. They argue that these efforts fail to fully address fair information practices and, therefore, do little to safeguard consumers. These organizations perform watchdog duty over consumer electronic media issues and are certainly capable of influencing industry practices on the Internet.

An example of the influence wielded by these watchdog organizations involves industry powerhouse, Intel Corporation. Intel, which unveiled its powerful new Pentium III chip in January 1999, agreed, in response to a firestorm of protest launched by consumer privacy and advocacy groups, to make it possible for computer manufacturers to set the new processor so that a serial number (known as a processor serial number) on the chip would not be recorded by web sites without the user's permission.[83] Intel's original plan was to embed this unique security technology in the Pentium III processor with a hardware code that could potentially identify users to Internet companies. Critics argued that such a device could be used by Internet marketers to track user movements on the Internet.[84] Intel responded to the threats of boycotts and a public affairs blitz by consumer groups with the announcement that the identifying system would be modified so that it would be automatically disabled unless the consumer used a software utility switch to turn it on.[85]

Another recent target of criticism has been seal program operator BBBOnline, which recently gave its "seal of approval" to Equifax, a credit-rating firm that has had its share of trouble with the Commission.[86] Consumer privacy groups cited a 1995 Commission report claiming Equifax had an established record of privacy violations.[87] The Commission reached an agreement with Equifax in 1995 as part of an enforcement action where the Commission accused Equifax of systematically violating the Fair Credit

---

<http://cpsr.org/cpsr/privacy/epic/privacy_resources_faq. html> [hereinafter EPIC, *Privacy Resources*].

[82] *See* Privacy Rights Clearinghouse, *More About Us* (visited Sep. 6, 1999) <http://www. privacyrights.org>. EPIC, *Privacy Resources*, *supra* note 81.

[83] *See* Clausing, *supra* note 74.

[84] *See id*.

[85] *See id.*

[86] *See* Tim Clark, *BBBOnline Takes Flak for Equifax Approval*, CNET NEWS.COM (Apr. 21, 1999) <http://www.news.com/News/Item/0,4,35487,00.html>.

[87] *See id. See also* Equifax Credit Information Services, Inc., 60 Fed. Reg. 9842 (Federal Trade Commission 1995) (proposed consent order).

Reporting Act.[88] The agreement required Equifax to take numerous steps in order to guard the privacy and accuracy of credit reports.[89] These protective measures will face an important test in the future, though any failure may be felt most keenly by the consumer. In the wake of its agreement with the Commission, Equifax has begun the practice of selling credit reports over the Internet to consumers and businesses who want to check personal and customer credit status.[90] The credit reporting company is also working on a system to permit on-line retailers to check the credit ratings of Internet customers while the transaction is taking place.[91] Unless COPPA applies or until a more comprehensive Internet privacy law is passed, consumers will have to continue to rely on legislation such as the FCRA to address, indirectly, problems arising out of the unauthorized disclosure of information.

E. The Consumer

The consumer remains the most important player on the issue of Internet privacy. As stated in the introduction, a growing number of consumers are making the Internet part of their routine in shopping for products and services. It is now estimated that almost eighty million adults in the United States are using the Internet.[92] Analysts estimate that Internet advertising will grow to almost $4.5 billion as we enter the year 2000.[93] Even

---

[88] 15 U.S.C. § 1681 (1998). The Commission charged that Equifax violated the FCRA by failing to assure the accuracy of the consumer credit information it complies and sells to credit grantors, employers, and others organizations. *See* Equifax Credit Information Services, Inc., 60 Fed. Reg. 9842 (Federal Trade Commission 1995) (proposed consent order).

[89] The Commission's consent agreement with Equifax Credit Information Services, Inc., a subsidiary of Equifax Inc., requires Equifax to accept the consumer's version in disputes when documentation provided by the consumer supports the consumer, unless there is a legitimate reason to doubt the authenticity of the documentation. Equifax is also required to reinvestigate, within thirty days, information disputed by a consumer in his or her credit report. If Equifax does not verify the information within that time, Equifax is required to delete the information until it can be verified. Any derogatory information, which is verified after being deleted, cannot be reinserted without providing written notice to the consumer. Furthermore, Equifax is required to furnish consumer reports only for the permissible purposes set forth in the FCRA. The Commission also required Equifax to file a report within 180 days after the order became final, detailing how Equifax had complied with the settlement provisions, submit for approval a methodology for tracking changes on its computer system, and maintain additional record keeping requirements to permit the Commission to monitor Equifax for compliance with the order. Equifax Credit Information Services, Inc., 60 Fed. Reg. 9842 (Federal Trade Commission 1995) (proposed consent order).

[90] *See* Equifax Consumer Services, Inc., *Credit Profile Product Page* (last visited Nov. 7, 1999) <http://www.eqifax.com/econsumer/pgCreditProfile.html>

[91] *See* Clark, *supra* note 86.

[92] *See* Intelliquest, Inc., *Worldwide Internet/Online Tracking Service, 4th Quarter 1998 Report* (Nov. 1998) <http://www.intelliquest.com>.

[93] *See* Federal Trade Commission, *Privacy Online, supra* note 9, at 3.

though the Internet marketplace is growing quickly, some of the emphasis behind self-regulation is industry's recognition that many consumers still have a serious trust deficit when it comes to providing information on-line. The majority of Internet users are not comfortable providing credit card (73 percent), financial (73 percent), or personal information (70 percent) to businesses on-line.[94] However, it is worth emphasizing that in the world of on-line privacy, one does not have to buy something to have personal information collected on them—simply visiting a web site is enough.

Eighty-seven percent of respondents in a recent national survey of experienced Internet users stated that they were somewhat or very concerned about threats to their privacy on-line.[95] Seventy percent of the respondents in a different survey conducted for the National Consumers League reported that they were uncomfortable providing personal information to businesses on-line.[96] Consumers are specifically concerned about potential transfers to third parties of the personal information they have given to on-line businesses.[97] Only about twenty-eight percent of Internet users go beyond merely browsing for information to actually purchasing goods and services on-line.[98] In a March 1998 *Business Week* survey, consumers not currently using the Internet ranked concerns about privacy and communications as the biggest reasons they do not use the Internet.[99]

Many consumers using the Internet are not experienced users, many are minors, and many, while experienced, do not understand who is collecting information on them, how it is collected, what protections exist, and how to respond to the discovery that they have been the victim of unauthorized privacy disclosure. For instance, in a 1998 survey conducted by the Georgia Institute of Technology, 74.3 percent of the Internet users polled thought that web sites were prohibited from reselling personal information collected on them to third parties.[100] Contrast this with the fact that of the 53 percent of the highly trafficked web sites that share or sell information, less than 50 percent

---

[94] *See* Center for Democracy and Technology, *Behind the Numbers: Privacy Practices on the Web* (July 28, 1999) <http://www.privacyexchange.org> [hereinafter CDT, *Behind the Numbers*].

[95] *See* Cranor, *Understanding Net Users' Attitudes, supra* note 11, at 5.

[96] *See* LOUIS HARRIS & ASSOCIATES, INC., NATIONAL CONSUMERS LEAGUE: CONSUMERS AND THE 21ST CENTURY 4 (1999). The National Consumers League (NCL) is a private, nonprofit consumer organization that represents the interests of consumers in the workplace and marketplace through education, research, and advocacy.

[97] *See* Cranor, *Understanding Net Users' Attitudes, supra* note 11, at 2, 10.

[98] *See* Intelliquest, Inc., *Worldwide Internet/Online Tracking Service, 1st Quarter 1999 Report* (Apr. 19, 1999) <http://www.intelliquest.com/press/release78.asp>.

[99] *See Business Week/Harris Poll: Online Insecurity*, BUS. WK., Mar. 16, 1998, at 102.

[100] *See* Georgia Institute of Technology, *Graphic, Visualization, & Usability Center 10th WWW User Survey, 1998, Online Privacy & Security* (last visited Nov. 7, 1999) <http://www.cc.gatech.edu/gvu/user_surveys/survey-1998-10/>.

allow consumers to opt-out of this practice.[101] The consumer may be surprised to discover that no law or regulation prohibits this practice. The sole avenue of relief is contingent upon the entity violating a general consumer law or an industry specific law concerning unfair or deceptive commercial practices.

III. PROTECTION MECHANISMS FOR ON-LINE PRIVACY

Privacy law in the United States is mainly comprised of a collection of statutes targeting specific industries that collect personal data.[102] As yet, no law specifically covers all consumers in the collection of personal data on-line. There also appears to be little in the way of constitutional protection.[103] As a result, the protection of personal information must be established by legislation.[104]

A. Current Internet Privacy Legislation

One such piece of legislation is the Children's Online Privacy Protection Act of 1998 (COPPA),[105] which limits the ability of web sites to collect personal information from persons under the age of thirteen.[106] It also gives the Commission enforcement authority, and it allows states to bring actions to enforce the provisions of COPPA.[107] The key provision of the Act provides:

---

[101] *See* Culnan, *GIPPS Report*, *supra* note 3, at 24-25.

[102] *See* Federal Trade Commission, *Privacy Online*, *supra* note 9, at 40, 62.

[103] The constitutional implications of this issue are beyond the scope of this article. In *United States v. Katz*, 389 U.S. 347 (1967), the Supreme Court stated "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Id.* at 351. *See also* Rakas v. Illinois, 439 U.S. 128 (1978) (reiterating that one who voluntarily discloses something to another assumes the risk of losing Fourth Amendment protection). In *United States v. Miller*, 425 U.S. 435 (1976), the Supreme Court commented on the privacy of bank records and private financial documents. Holding that there was no legitimate expectation of privacy in original financial records, the Court concluded that the Fourth Amendment did not protect information "revealed to a third party . . . even if [it] is revealed on the assumption that it will be used only for a limited purpose and that the confidence placed in a third party will not be betrayed." *Id.* at 443. Thus, it appears there may not be a constitutional right to privacy concerning personal information relayed to an entity on-line. For a general discussion of this issue, including the Supreme Court's risk analysis approach in applying Fourth Amendment protection, see Randolph S. Sergent, *Note: A Fourth Amendment Model for Computer Networks and Data Privacy*, 81 VA. L. REV. 1181 (1995). For an excellent case discussion on constitutional privacy issues and how it applies in conjunction with privacy legislation, see *United States v. Hambrick*, 55 F. Supp. 2d 504 (1999).

[104] *See* Federal Trade Commission, *Privacy Online*, *supra* note 9, at 62.

[105] 15 U.S.C. § 6501 (1999).

[106] *See id.* §§ 6501(1), 6502(b).

[107] *See id.* §§ 6502(c), 6504. Section 6502(c) of COPPA provides that the Children's Online Privacy Protection Rule shall be treated as a rule issued under Section 18(a)(1)(B) of the

> Not later than 1 year after the date of enactment of this Act, the Commission shall promulgate . . . regulations that . . . require that the operator of any web site or on-line service that collects personal information from children or the operator of a web site or on-line service that has actual knowledge that it is collecting personal information from a child --- (I) provide notice on the web site of what information is collected from children by the operator, how the operator uses such information, and the operator's disclosure practice for such information; and (II) to obtain verifiable parental consent for the collection, use, or disclosure of personal information from children.[108]

On April 20, 1999, the Commission issued a proposed rule, consisting of regulations implementing COPPA. The rulemaking effort on this matter was then presented for public comment through the Federal Register.[109] On October 20, 1999, the Commission issued its final rule pursuant to COPPA[110] by releasing the Children's Online Privacy Protection Rule that will become effective April 21, 2000.[111]

B. The Application of Traditional Consumer Privacy Laws to the Internet

In the absence of this type of legislation, it becomes necessary to apply traditional consumer laws, regulations, and other existing rules to consumer transactions on the Internet. Any confusion as to whether these laws and rules apply to the Internet is due to a number of factors, including the difficulty

---

FTCA, 15 U.S.C. 57a(a)(1)(B), which is the provision providing enforcement authority for unfair or deceptive acts or practices under section 5 of the FTCA.

[108] 15 U.S.C. § 6501.

[109] Children's Online Privacy Protection Rule, 64 Fed. Reg. 22750 (1999) (to be codified at 16 C.F.R. pt. 312).

[110] 15 U.S.C. § 6502.

[111] *See* Children's Online Privacy Protection Rule, 64 Fed. Reg. 22750. The Children's Online Privacy Protection Rule, which implements COPPA, imposes several requirements on operators of web sites and on-line services directed to children or who have actual knowledge that the person from whom they seek information is a child. First, these service providers must post, on their web sites, links to a notice that explains their collection, use, and disclose practices for personal information from children. Second, with some exceptions, the service provider must obtain parental consent prior to collection, use, or disclosure of information gathered from a child. Third, these providers may not condition a child's participation in on-line activities on the provision of more personal information than is reasonably necessary to participate in the activity. Fourth, parents must be given the opportunity to review their children's information and have it deleted from the operator's database. Finally, service providers are required to establish procedures to protect the confidentiality, security, and integrity of personal information collected from children. *See* 16 C.F.R. § 312.8 (1999). The Rule also contains a safe harbor provision for service providers following Commission-approved self-regulatory guidelines. Such providers will be deemed to be in compliance with the requirements of the Children's Online Privacy Protection Rule if the operator complies with self-regulatory guidelines that are approved by the Federal Trade Commission. *See id.* § 312.10.

associated with applying traditional terminology to modern Internet practice and, for that matter, the absence of any reference to the Internet within the legislation.

Following its 1998 Federal Register Notice on Interpretation of Rules and Guides for Electronic Media,[112] the Commission conducted a series of public workshops in an effort to generate comment on a proposed policy statement. The statement concerned the applicability of its existing consumer protection rules and guidelines to newer forms of electronic media and the interpretations of certain terms in light of the unique character of the electronic media.[113] One purpose of the notice was to eliminate the uncertainty regarding the application of the Commission's rules and guidelines to activities on the Internet.[114] Other purposes were to clarify how terms such as *writing*, *written*, and *printed* apply when using the Internet for transacting electronic commerce and how to determine whether a required disclosure statement on a web advertisement is "clear and conspicuous."[115] Traditionally, writing, written,

---

[112] Interpretation of Rules and Guides for Electronic Media, Request for Comment, 63 Fed. Reg. 24996, 25000 (1998) (to be codified at 16 CFR ch.1). In a May 6, 1998, Federal Register Notice, the Commission submitted a proposed policy statement regarding the applicability of its consumer protection rules and guides to the new forms of electronic media, such as email, CD-ROMs, and the Internet. As of the writing of this article, the comment period had not ended and the Commission had not issued any policy guidelines on this issue.

[113] *See id.* A Commission workshop was held May 14, 1999, to further review the proposed policy statement published in the Federal Register Notice. The Commission examined a number of factors to determine whether disclosures in traditional media (e.g., print, television, and radio) met the clear and conspicuous performance standard. The Commission may consider a disclosure's type size, placement, color contrast to background, duration, and timing. The existence of any images that detract from the effectiveness of the message is also taken into consideration. *Id*. at 25002. In audio messages, such as those delivered over the radio, the Commission may examine the volume, cadence, and placement of a disclosure, as well as the existence of any sounds that detract from the effectiveness of the message. *Id*. In all media, the Commission examines the language and syntax of the disclosure to determine whether it is likely to be understood by the relevant audience. *Id*. The special attributes of electronic media may call for additional guidance. There are several factors the Commission proposes to use to evaluate the clear and conspicuous standard as applied to electronic media: (1) whether the disclosure is unavoidable by the consumer; (2) the proximity of disclosure to the representation they qualify and its location on the web page; (3) whether, regardless of the size of a disclosure, other elements of an advertisement may distract consumers and cause them to fail to notice, read, or listen to the disclosure; (4) whether the disclosure is appropriately repetitive; and (5) whether the audio and visual presentation enhance the effectiveness of the disclosure. *See* Transcript of Public Workshop, *Rules and Guides for Electronic Media Issues* (May 14, 1999) <http://www.ftc.gov/bcp/rulemaking/elecmedia/index.htm>. As of the writing of this article, the comment period had ended, though the Commission had not yet issued any policy guidelines on this issue.

[114] *See* Federal Trade Commission, *Announcement of Date of Public Workshop*, at 2 (Mar. 1999) <http://ftc.gov/os/1999/9903/rules&guidesworkshopfrn.htm>.

[115] Interpretation of Rules and Guides for Electronic Media, Request for Comment, 63 Fed. Reg. at 25002.

and printed were associated only with communications on paper, but with the advent of new technology, now includes information that is capable of being preserved in a tangible form (such as printing on paper or saving to computer disk) and read.[116] Clear and conspicuous disclosure describes a type of information disclosure performance standard. It is a disclosure of material information, which must be effectively communicated to consumers.[117] More specifically, it concerns a disclosure of material information to consumers in order to prevent deception and to ensure consumers receive complete information regarding the terms of a transaction, or to further public policy goals.[118] The determination of whether the disclosure is effectively communicated is based upon Commission standards involving traditional media criteria and an additional set of factors for addressing the special attributes of electronic media.[119]

1. The Federal Trade Commission Act

The first example of the application of traditional consumer laws to the activities on the Internet concerns the Federal Trade Commission Act (FTCA),[120] which prohibits unfair and deceptive practices in and affecting commerce. The FTCA authorizes the Commission to seek injunctive and other equitable relief, including redress, for violations of the FTCA and provides a basis for government enforcement for certain fair information practices.[121] Failure to comply with stated information practices could constitute a deceptive practice in some cases. Under the FTCA, the Commission has the authority to pursue the remedies addressed under the FTCA for those types of violations.[122] The FTCA also extends to information practices that are inherently deceptive or unfair, regardless of whether the entity has publicly adopted fair information practices.[123]

Two recent cases illustrate the Commission's efforts to enforce the FTCA. In 1998, the Commission's first Internet privacy case addressed deceptive on-line information practices alleged against the web site operator GeoCities, which ran one of the most popular sites on the Internet.[124]

---

[116] *See id*. at 25000.
[117] *See id*. at 25001-02.
[118] *See id*.
[119] *See id*. at 24996, 25001-02.
[120] 15 U.S.C. § 41 (1997).
[121] *See id*. § 45.
[122] *See id*.
[123] *See id*. § 45(a), (b).
[124] *See* Federal Trade Commission, *Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case* (Aug. 13, 1998) <http://www.ftc.gov/opa/1998/9808/geocitie.htm> [hereinafter Federal Trade Commission, *First Internet Privacy Case*].

GeoCities agreed to settle charges that it had misrepresented the purposes for which it was collecting personal identifying information from children and adults using its on-line membership application form and its registration forms for children's activities on the GeoCities site.[125] The settlement, made final in February 1999, required GeoCities to post a prominent privacy notice on its site, to establish a system to obtain parental consent before collecting personal information on children, and to offer consumers it had previously collected information on the opportunity to have that information deleted.[126] In a second similar case, the Commission reached a proposed settlement with Liberty Financial Companies, Inc., operator of the Young Investor web site.[127] Turning again to the FTCA, the Commission alleged the web site falsely represented that personal information collected from children, including information about family finances, would be maintained anonymously.[128] In contravention to the web site's representations, the information was maintained in a format that allowed individuals to be identified.[129]

In addition to the FTCA, other statutes have potential impact on Internet consumer privacy because the institutions to which these laws apply have moved onto the Internet along with the consumer. While these statutes do not specifically address Internet privacy, they can be an effective means of protecting the consumers who use the Internet to transact business. Knowledge of these laws is essential especially since the only law specifically designed to enforce fair information practices, COPPA, was designed to protect children and not adult consumers.

2. Credit Reporting Legislation

One piece of legislation that could provide some assistance with the problem of Internet privacy is the Fair Credit Reporting Act (FCRA),[130] which establishes important privacy protections for consumers' sensitive financial information by governing all transactions relating to consumer credit reports. Under the FCRA, a consumer report is defined as:

---

[125] *See* GeoCites, 63 Fed. Reg. 44624 (Federal Trade Commission 1998) (proposed consent order). The final decision and order are available at http://www.ftc.gov/os/1999/9902/9823015d&o.htm.

[126] *See id.*

[127] *See* Liberty Financial Companies, Inc., 64 Fed. Reg. 29031 (Federal Trade Commission 1999) (proposed consent order). The proposed settlement was submitted for public comment in May 1999. The comment period has not yet expired.

[128] *See id*. (complaint is available at http://www.ftc.gov/os/1999/9905/lbrtycmp.htm.).

[129] *See id*.

[130] 15 U.S.C. § 1681 (1998). For a comprehensive look at the Fair Credit Reporting Act, see Captain Julie J.R. Huygen, *After the Deal is Done: Debt Collection and Credit Reporting*, 47 A.F. L. Rev. 89 (1999).

> Any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 604 [of the Act].[131]

This has importance for the consumer because credit report information is becoming more accessible on the Internet as credit reporting agencies take advantage of this growing business medium. Although a credit report is only supposed to be available to authorized customers, over-disclosure and unauthorized disclosure are certainly possible, if not more likely, on the Internet.[132] The FCRA limits the disclosure of consumer credit reports and other personal financial information to entities with specific "permissible purposes," such as credit evaluation, insurance, employment, or similar purposes.[133] Notwithstanding the use of the Internet to procure protected information from or furnish such information to consumer credit reporting agencies, the FCRA is no less applicable since the Internet is simply a means of obtaining or disclosing the information. Indeed, the FCRA should apply whether the information is disclosed through the act of mailing, hand delivery, or through cyberspace. Willful or negligent noncompliance with FCRA in obtaining or disclosing consumer credit information can result in civil and or criminal liability, and it would appear that such a violation could just as easily occur via the Internet as by other, more traditional means of information disclosure. For violations of the FCRA, the Commission has enforcement authority, or a state attorney general may bring an action for a violation of statute if, after serving notice on the Commission, the Commission chooses not to intervene or remove the case to federal court.[134]

A second piece of legislation, which helps to fill loopholes in FCRA, is the Consumer Credit Reporting Reform Act (CCRRA).[135] The CCRRA narrows the legitimate need purpose for which credit reports can be

---

[131] 15 U.S.C. § 1681(a)(d).

[132] In August 1997, the giant credit bureau Experian (formerly TRW) began offering on-line delivery of credit reports, but shut down the service two days later after a problem with the software was discovered. Seven of the first-day applicants received somebody else's report. Cyrus Afzali, *Web Credit Reports Pulled*, CNN FINANCIAL NETWORK (Aug. 15, 1997) <http://www.cnnfn.com/digitaljam/9708/15/experian>. *See* McGrath, *supra* note 27, at 113. Experian presently does not offer reports on-line.

[133] 15 U.S.C. § 1681b.

[134] *See* Federal Trade Commission, *Overview*, *supra* note 55. *See also* Federal Trade Commission, *First Internet Privacy Case*, *supra* note 124.

[135] 15 U.S.C. §§ 1681-1681t.

disseminated by credit reporting agencies.[136] Under the CCRRA, consumer credit reports may be furnished for employment purposes only if the consumer has consented in writing.[137] Again, since the Internet is no more than a means of collection/dissemination, the CCRRA should clearly be applicable to entities providing credit information via the Internet. As a result, the CCRRA would still require written consent by the consumer before credit reports could be furnished to third parties for employment purposes. Based upon the Federal Trade Commission's own proposed policy statement on the applicability of its own rules and guides to electronic media which implement consumer statutes, such consent could be given by electronic-mail.[138]

3. The Electronic Communications Privacy Act

The Electronic Communications Privacy Act of 1986 (ECPA)[139] amends Title III of the Omnibus Crime Control and Safe Street Act, commonly known as the Wiretap Act.[140] The ECPA applies to both government and private entities, but appears to be more restrictive concerning government interception and access. The ECPA prohibits, among other things, intentional interception of electronic communications and the intentional access of stored electronic communications.[141] With regard to *interception,* the definition is very narrow. The acquisition of the communication must be contemporaneous with its transmission,[142] and the statutory definition limits the term *intercept* to include only acquisition of the contents of a communication.[143] The ECPA specifically authorizes a provider of electronic communication services to

---

[136] *See id*. *See also* Privacy Exchange, *National Sector Laws* (visited Aug. 31, 1999) <http://www.privacyexchange.org/legal/nat/sect/natsector.html>.

[137] *See* 15 U.S.C. 1681b(b).

[138] *See* Interpretation of Rules and Guides for Electronic Media; Request for Comment, 63 Fed. Reg. at 25000 (1998).

[139] 18 U.S.C. §§ 2510-2520, 2701-2709 (1999).

[140] *Id.* § 2510.

[141] *See id.* §§ 2510, 2701. While the term "access" is not specifically defined in the ECPA, section 2701(a)(1) generally prohibits intentional access without authorization, a facility through which an electronic communication service is provided; or intentionally exceeding an authorization to access that facility, and thereby obtaining, altering, or preventing authorized access to a wire or electronic communication while it is in electronic storage in such a system. For a more in-depth discussion of the ECPA, see Lieutenant Colonel LeEllen Coacher, *Permitting System Protection Monitoring: When the Government Can Look and What It Can See*, 46 A.F. L. Rev. 155 (1999).

[142] *See* Steve Jackson Games Inc. v. United States, 36 F.3d 457 (5th Cir. 1994); United States v. Moriarty, 962 F. Supp. 217 (D. Mass. 1997).

[143] *See* 18 U.S.C. §§ 2510(4), 2711. The term *contents* is defined under section 2510(8). "[W]hen used with respect to any wire, oral, or electronic communication, [contents] includes any information concerning the substance, purport, or meaning of that communication." *Id.* § 2510(8). Section 2711 incorporates the definitions set forth in section 2510 for purposes of sections 2701-2711.

record context information of a communication.[144] With regard to stored communications, there is no prohibition against a person or entity providing the service intentionally accessing stored communications,[145] there are specific restrictions on government access into and disclosure of the contents of a stored communication.[146] This strict application is based partly upon the original purpose of the Wiretap Act, which was to prevent excessive governmental intrusions into the privacy of others.[147] In addition, the growth of the Internet, which permits consumer activities beyond the bounds of the protections established the law, seems to have provided a basis for this application of the ECPA.

As mentioned previously, the ECPA specifically permits a provider of an electronic communications service to record information about the context of a communication.[148] This includes information on the duration of the communication and confirmation the communication occurred.[149] A service provider is, however, prohibited from knowingly divulging the contents of the communication to any person or entity.[150] There are exceptions that permit interception or access based upon consent, the needs of the service provider, or when necessary in the ordinary course of business.[151]

Of particular interest to judge advocates is the case of Senior Chief Petty Officer Timothy R. McVeigh.[152] An alleged ECPA violation was one aspect of his 1998 suit against the United States Navy, in response to the Navy's attempts to discharge him for a violation of the homosexual conduct policy.[153] In that case, Senior Chief McVeigh[154] was the subject of an

---

[144] *See id*. § 2511 (2)(h)(ii). That section states that it shall not be unlawful

> for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

Id.

[145] *See id*. § 2701(c)(1).

[146] *See id*. §§ 2702, 2703.

[147] *See* Wiretap Act, Pub. L. No. 90-351, 82 Stat.197 (1968), *reprinted in* 1968 U.S.C.C.A.N. 237.

[148] *See id.* §§ 2511(2)(h)(ii), 2703(c)(1)(a). *But see* United States v. Hambrick, 55 F. Supp. 2d 504, 507 (1999) (suggesting the ECPA permits service providers to turn over any stored data and transactional records over to any nongovernmental entity).

[149] *See* 18 U.S.C. §§ 2511 (2)(h)(ii), 2703(c)(1)(a).

[150] *See id*. § 2702(a)(1). The distinction between context and content is critical to an understanding of the ECPA.

[151] *See id*. §§ 2511, 2517, 2702, 2703.

[152] McVeigh v. Cohen, 983 F. Supp. 215 (D.D.C. 1998).

[153] *See generally* 10 U.S.C. § 654 (1998). For a comprehensive discussion of the legal issues surrounding the military's homosexual conduct policy, see Captain John A. Carr, *The*

involuntary administrative discharge action by the Navy based upon information that McVeigh had allegedly used the word "gay" to describe his marital status in an anonymous America Online (AOL) user profile.[155]

The events began when a civilian Navy volunteer received an electronic-mail message through the AOL service regarding a charity event. The message box indicated it came from the alias "boysrch," but the text of the electronic-mail was signed by someone named "Tim."[156] Through an option available to AOL subscribers, the volunteer searched a directory of member profiles to find the profile for the person who sent the message. The directory indicated that "boysrch" was an AOL member named Tim who lived in Hawaii, worked in the military, and whose marital status was listed as gay.[157] The volunteer forwarded the electronic-mail to her husband, a noncommissioned officer in the Navy, and ultimately, the message found its way to McVeigh's commander.

Under the ECPA, the government could obtain information from the on-line service provider, but only if it obtained a valid warrant or gave prior notice to the on-line subscriber and then issued a subpoena or received a court order authorizing disclosure of the information in question.[158] The Navy, after obtaining the initial information from McVeigh's commander, solicited and obtained personal information from AOL to secure the identity of the AOL subscriber who sent the message to the volunteer.[159] That information was obtained from AOL without a valid warrant or any advance notice with subpoena or court order.[160] It was this information McVeigh claimed made the connection between him and the user profile which formed the basis for discharge.[161]

On January 26, 1998, the federal district court issued a permanent injunction preventing the Navy from involuntarily discharging Senior Chief McVeigh.[162] The court stated that "[t]he subsequent steps taken by the Navy in its 'pursuit' of [McVeigh] were not only unauthorized under its policy, but

---

Difference Between Can and Should: Able v. United States *and the Continuing Debate About Homosexual Conduct in the Military*, 46 A.F. L. REV. 1 (1999).

[154] No relation to the primary defendant in the Oklahoma City Bombing Case.

[155] *See* McVeigh, 983 F. Supp. at 216-17.

[156] *Id*. at 217.

[157] *Id.* It is interesting to note that the profile included some additional, unpublicized information describing interests such as "collecting pics of other young studs" and "boy watching," but the profile apparently had no identifying information such as full name, address, or phone number. *Id*. at 217. The volunteer, though, had communicated with the Plaintiff about his participation in the charity event on previous occasions. *Id*.

[158] *See* 18 U.S.C. §§ 2510-2520, 2701-2709.

[159] McVeigh, 983 F. Supp. at 217-18.

[160] *See id*. at 219.

[161] *See id*. at 218.

[162] *See id*. at 222.

likely illegal under the Electronic Communications Privacy Act of 1986."[163] As for AOL, it admitted to violating its own privacy policy,[164] but it appears that disputed facts and timely public relations work on the part of AOL, insulated AOL, to some extent, from being pursued for an ECPA violation.[165]

As discussed earlier, the ECPA prohibits an on-line service such as AOL from knowingly divulging the contents of an electronic communication to any person or entity while in electronic storage by that service.[166] The ECPA penalizes only knowing or intentional violations,[167] and it was not clear from the facts whether the AOL representative knowingly disclosed the information to the Navy or whether the investigator requesting the information had misled the AOL representative. AOL did ultimately enter into an undisclosed settlement with McVeigh and implemented new safeguards with respect to its own information practices.[168]

The primary importance of this case for consumers is that their personal information is susceptible to disclosure—despite privacy policies established by service providers who collect the information—and current regulatory efforts are not comprehensive enough to cover all unique aspects of electronic media. The ECPA, which is legislation specifically designed to address electronic communication, seems to address only knowing and intentional violations. There is no source of relief to the consumer for accidental or negligent acts by a service provider resulting in disclosure. Indeed, the analysis in *United States v. Hambrick*[169] suggests that service providers can turn over any stored data to nongovernmental entities, not just context information without consequence. The court stated it did

> not find that the ECPA has legislatively determined that an individual has a reasonable expectation of privacy in his name, address, social security number, credit card number, and proof of Internet connection. The fact that the ECPA does not proscribe turning over such information to private entities buttresses the conclusion that the ECPA does not create a reasonable expectation of privacy in that information.[170]

---

[163] *Id.* at 219.

[164] *See* Bradley Graham, *Gay Sailor Takes Navy Retirement Settlement; AOL Also Will Pay For Privacy Violation*, WASH. POST, June 13, 1998, at A03; Janet Kornblum, *AOL Admits to Privacy Lapse*, CNET NEWS.COM (Jan. 21, 1998) <http://news.cnet.com/news/0-1005-200-325806.html>.

[165] After admitting it violated its own privacy policy, AOL issued a public apology, improved its in-house training program for customer service representatives, agreed to an out-of-court settlement with McVeigh, and publicly blamed the Navy for misleading one of their customer service representatives to gain access to the information. *See id.*

[166] *See* 18 U.S.C. § 2702(a)(1)

[167] *See id.* §§ 2511, 2701, 2702.

[168] *See* Graham, *supra* note 164, at A03.

[169] 55 F. Supp. 2d 504 (1999).

[170] *Id.* at 508-9.

Without legal force, the ECPA provides a relatively low incentive for service providers to aggressively protect consumer privacy.

4. Other Privacy Legislation

The Cable Communications Policy Act of 1984 (CCPA)[171] governs cable television subscriber information. The Act contains consumer provisions restricting the collection, storage, and disclosure of personally identifiable information without the subscriber's consent.[172] It requires further that service providers inform the customer at least once a year of the information it collects; the nature, frequency, and purpose of any disclosure; and the consumer's right to access that information.[173] Many cable service providers now have web sites that permit consumers to subscribe, pay bills, and transact other business with the service. Since cable companies with web sites now have the capability to collect and disclose subscriber information on-line, the CCPA may provide some protection to subscribers.

The Right to Financial Privacy Act of 1978 (RFPA)[174] pertains to individual bank records. This Act provides some confidentiality concerning the financial records of depositors by governing the transfer of financial records. The RFPA attempts to strike a balance between the privacy interests of consumers and the interest of law enforcement. Generally, banks are prohibited from disclosing client payment information to the government without a court order, although a number of exceptions exist.[175] Under the consumer provisions, nearly all federal investigators must provide formal written requests to inspect the financial records of an individual kept by a financial institution.[176] The agent must give simultaneous notice to the individual who has an opportunity to challenge the attempt to access their records.[177] Many financial institutions now permit consumers to bank on-line, giving them the ability to access to their accounts and conduct their financial business over the Internet. As a result, information provided to a financial institution in this manner may become the object of a government request for

---

[171] 47 U.S.C. § 521 (1999).
[172] *See id*. §§ 551, 552.
[173] *See id*.
[174] 12 U.S.C. § 3401 (1999).
[175] *See id*. §§ 3403, 3413. There exist fifteen exceptions to the general prohibition. However, an in depth discussion of those exceptions is beyond the scope of this article. For more information on these exceptions and the RFPA generally, as well as how the RFPA applies to Internet commerce, see Bryan S. Schultz, Comment, *Electronic Money, Internet Commerce, and the Right to Financial Privacy: A Call for New Federal Guidelines*, 67 U. CIN. L. REV. 779 (1999); Nancy M. Kirschner, *The Right to Financial Privacy Act of 1978 - the Congressional Response to United States V. Miller: A Procedural Right to Challenge Government Access to Financial Records*, 13 U. MICH. J.L. REFORM 10 (1979).
[176] *See* 12 U.S.C. § 3402.
[177] *See id*. §§ 3402, 3410.

information. The language and intent of the RFPA suggest its application is appropriate in these cases.

A closely related piece of legislation is the Electronic Funds Transfer Act (EFTA)[178] which establishes mandatory guidelines for the relationship between consumers and financial institutions in connection with electronic fund transfers. The EFTA requires institutions operating electronic banking services to inform customers of the circumstances under which automated banking account information will be disclosed to third parties in the ordinary course of business.[179] However, the EFTA does not place restrictions on gathering personal information or limit the storage duration of transaction records.[180]

The Video Privacy Protection Act of 1988 (VPPA)[181] was originally designed to govern video rental records. The VPPA, interestingly enough, arose out of Judge Robert Bork's Supreme Court confirmation hearings during which reporters gained access to the Bork family video rental records.[182] The consumer provisions of the VPPA prohibit video stores from disclosing their customers' names and addresses and the titles of the videos rented or bought.[183] Further, rental operators are required to destroy rental or sales information after one year.[184] There is, however, an exemption that permits any disclosures made incident to the "ordinary course of business" of the videotape store.[185] The application of the VPPA to on-line retailers that sell videotapes and videodiscs was not part of the original legislation because the Internet's commercial viability had not yet evolved.

The final piece of traditional legislation likely to have some applicability to Internet commerce is the Driver's Privacy Protection Act (DPPA).[186] This statute was passed in 1994 arising in part from the aftermath of the stalking/murder of actress Rebecca Schaefer.[187] The murderer allegedly obtained her name and address from a motor vehicle department and used the information to locate and then stalk her.[188] The DPPA prohibits state motor vehicle departments and their employees from releasing personal information from a driver's record unless the request fits within one of several

---

[178] 15 U.S.C. §§ 1693-1693(r) (1998).
[179] *See id*.
[180] *See id*.
[181] 18 U.S.C. § 2710 (1999).
[182] *See* Privacy Exchange, *National Sector Laws* (visited Aug. 31, 1999) <http://www.privacyexchange.org/legal/nat/sect/natsector.html>.
[183] *See* 18 U.S.C. § 2710(b).
[184] *See id*. § 2710(e).
[185] *Id*. § 2710(b)(2).
[186] *Id*. §§ 2721-2725.
[187] *See* Condon v. Reno, 972 F. Supp. 977, 979 n.4 (1997). *See also* Jennifer Carter, *Access to DMV Records May Change*, OR. DAILY EMERALD, Nov. 26, 1996, at 1.
[188] *See* Carter, *supra* note 187, at 1.

exemptions.[189] It further requires the motor vehicle departments to provide a means for a citizen to prevent disclosure of name, address, social security number, medical information, or photograph on lists that are rented out for marketing or provided to other individuals.[190] As the various state motor vehicle departments continue to upgrade services and increase efficiency, this kind of personal information on operators licensed in those states will be accessible on the Internet to authorized and unauthorized individuals. Computer hacking and inadvertent mistakes will likely make licensed drivers susceptible to unwanted disclosure of personal information.

One recent development regarding the DPPA and motor vehicle information concerned the Aware Woman Center for Choice, in West Palm Beach, Florida. Anti-abortion protesters heavily targeted this abortion clinic. This past August, the clinic filed a lawsuit against, among others, CompuServe alleging a violation of the DPPA by the on-line service. The clinic claimed the on-line service provided access to personal information that allowed anti-abortionists to trace the names and addresses of persons who parked at the clinic.[191] Protesters allegedly recorded license plate numbers of vehicles visiting the clinic and used CompuServe to obtain information from state motor vehicle offices concerning the names and addresses of the owners of those vehicles.[192] The clinic went on to state that protesters then used the information to send harassing letters and graphic photographs and, in one case, located and followed a woman who had visited the clinic to a hospital and department store.[193] This case may help define the applicability of the DPPA to Internet transactions and may provide significant guidance concerning the application of other traditional privacy laws to such transactions.[194]

---

[189] *See* 18 U.S.C. §§ 2721-2725. There are fourteen exemptions that generally relate to use by a government agency in the ordinary course of business and health, safety, and research concerns. *See id.*

[190] *See* 18 U.S.C. § 2725, 2725 cmt. at 381 (Supp. 1999)

[191] *See* Courtney Macavinta, *Abortion Clinic Sues CompuServe, ISP*, CNET NEWS.COM (Jan 6, 1999) <http://www.abcnews.go.com/sections/tech/CNET/cnet_abortion990106.html>. *See also* Aware Woman Center for Choice v. Raney, No. 99-5-CIV-ORL-18C (M.D. Fla. filed Jan. 5, 1999). *Aware Woman Center for Choice v. Raney* was dismissed on September 1, 1999, for failure to prosecute. However a similar harassment suit was brought on March 2, 1999, by Manhattan Magnolia, a parent corporation of the Aware Woman Center for Choice, and six other plaintiffs against many of the same defendants in the previous suit, including CompuServe. *See* Manhattan Magnolia v. Unterburger, No. 99-CV-8164 (M.D. Fla. filed Mar. 2, 1999). This most recent suit alleges violations of several constitutional rights and federal statutes, including the Driver's Privacy Protection Act.

[192] *See* Manhattan Magnolia, No. 99-CV-8164, at 3-20 (complaint).

[193] *See id.*

[194] The protection afforded by the DPPA on and off-line may be in jeopardy. In *Condon v. Reno*, 972 F. Supp. 977 (1997), the State of South Carolina won an injunction against the United States preventing enforcement of the DPPA in the state. The court found that the DPPA failed to properly enforce the Fourteenth Amendment guarantee of the right to privacy and concluded that while some of the matters protected by the DPPA are personal in nature,

C. Future Internet Privacy Legislation

The imperfect application of these statutes to modern Internet commerce necessitated congressional action. A host of new legislation pending action in Congress could fill the gaps left by COPPA and by the application of laws drafted before today's Internet was conceived. These bills specifically address the collection and use of personal information on the Internet for all consumers.[195]

The Online Privacy Protection Act of 1999,[196] sponsored by Senator Conrad Burns and Senator Roy Wyden, requires web sites and on-line services to post notices about their information collection and use policies and allow individuals to prevent disclosure of personal information through an opt-out provision.[197] The bill would regulate the activities of web sites and on-line services concerning the collection, use, and disclosure of personal information.[198] Personal information as defined in the bill includes name, address, electronic-mail address, social security number, telephone number, and "information collected on-line from an individual."[199] A similar bill, the Consumer Internet Privacy Protection Act of 1999,[200] sponsored by Representative Bruce Vento, contains three basic provisions. First, the interactive computer services would be prohibited from disclosing personally identifiable information without written consent.[201] Second, if a service attempts to disclose any personal information, it cannot provide false data.[202] Finally, individuals have the right to learn what personal information is being maintained by the service.[203] The primary impact of both Senate Bill 809 and house Bill 313 would be very simple and straightforward. Consumers not falling under the small umbrella of protection provided by COPPA would finally have specific protections concerning the collection, use, and disclosure of personal information furnished on-line. In other words, the on-line privacy gap mentioned earlier would cease to exist.

---

the court found the matters not to be entitled to constitutional protection. The Fourth Circuit upheld the decision, but the issue is far from resolved. *See* Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753, 143 L. Ed. 2d 786 (1999).

[195] This article will only review the four most promising pieces of legislation.

[196] S. 809, 106th Cong. (1999).

[197] *See id.*

[198] *See id*.

[199] *Id. See also* Library of Congress, *Thomas, Legislative Information on the Internet, S. 809* (visited Aug. 22, 1999) <http://thomas.loc.gov/cgi-bin/bdquery/D?d106:144:./temp/~bdjnfB::/bss/d106query.html> (bill summary and status).

[200] H.R. 313, 106th Cong. (1999).

[201] *See id*. Interactive computer service is defined as any information service that provides computer access to multiple users via modem to the Internet.

[202] *See id*.

[203] *See id*.

A third consumer Internet privacy initiative is the Social Security On-line Privacy Protection Act,[204] and it is sponsored by Representative Bob Franks. This legislation, known as House Bill 367, provides that,

> [a]n interactive computer service shall not, by means of a reference service or otherwise, disclose to a third party (1) an individual's Social Security account number, or (2) personally identifiable information which is identifiable to an individual by means of the individual's Social Security account number, without the individual's prior informed written consent.[205]

The Bill also gives authority to the Federal Trade Commission to investigate an interactive computer service to determine whether the service is or has been engaged in any act or practice prohibited by the Act.[206]

The last piece of legislation is the Personal Data Privacy Act of 1999,[207] sponsored by Representatives Maurice Hinchey, Gerald Kleczka, and George Brown. The bill, which is not limited to Internet transactions, would prohibit disclosure of personal data without the express consent of the individual.[208] It requires entities that collect the data, including federal, state, and local government, to provide access to individuals within five days.[209] Individuals must receive a report once a year on their personal data, whether or not they specifically request this report.[210] The bill would also create a private right of action in federal court, with a small set of exemptions that apply to governmental entities.[211]

Although, most of these bills were referred to committee, critics of new legislation governing the Internet may prevent these bills from reaching the floors of either house. They base their objections on evidence suggesting that self-regulatory programs are becoming more effective.[212] The latest Commission report to Congress, *Self-Regulation and Privacy Online*,[213] has garnered enough support for self-regulatory efforts that many members of Congress are opposing legislation targeting consumer on-line privacy.[214] In fact, there appears to be some bipartisan agreement in Congress that Internet

---

[204] H.R. 367, 106th Cong. (1999).
[205] *Id. See also* Library of Congress, *Thomas, Legislative Information on the Internet, H.R. 367* (visited Aug. 22, 1999) <http://thomas.loc.gov/cgi-bin/bdquery/D?d106:20:./temp/~bdIDxN::/bss/d106query.html>.
[206] *See* H.R. 367.
[207] H.R. 2644, 106th Cong. (1999).
[208] *See id.* This is known as the opting out.
[209] *See id.*
[210] *See id.*
[211] *See id.*
[212] *See* Federal Trade Commission, *Self Regulation and Online Privacy*, *supra* note 2, at 12; Culnan, *GIPPS Report*, *supra* note 3, app. E at 65, 74, 89, 95; Carney, *supra* note 34.
[213] *See* Federal Trade Commission, *Self-Regulation and Online Privacy*, *supra* note 2.
[214] *See* Carney, *supra* note 34.

commerce should not be impeded by such legislation. Their arguments in this regard are buttressed by the very situation that proponents of the bill use to support their argument for such legislation—technological advancements on the Internet. Opponents claim that the legislation could not effectively keep pace with technological advancements and would ultimately hinder electronic commerce, while those advancing the new legislation worry that without laws specifically directed at Internet commerce, consumer privacy problems will spin out of control.[215]

D. The Private Sector's Approach

The private sector recently launched an effort to address consumer concerns, by promoting self-regulation through the use of seal programs. Generally, the programs emphasize providing consumers with notice of a company's information practices, the ability to opt-out of information sharing, and assurance that appropriate security is used to protect personal information.[216] The programs center on a contract between the seal program and the seal holder it licenses. The seal is issued in exchange for the Internet marketer's agreement to abide by a specific set of standards for handling personal information and to permit some form of oversight of the agreement.[217] All licensors use the threat of seal revocation and referral to appropriate authorities to assure compliance.[218]

It is important for consumers to understand that seal programs are generally limited to web sites and Internet activity and do not take into consideration a company's other information practices. For example, GeoCities has been a member of the privacy seal program Truste, yet it was required to negotiate a settlement with the Commission last year based on allegations of misrepresentation concerning the purposes for which personal identifying information was being collected.[219] In March 1999, another Truste seal program member, Microsoft, was found to have skirted licensor information practices requirements using a "bug" that transferred computer hardware identification information to the Microsoft secure server without customer consent.[220] The software module that enables customers to register

---

[215] *See id.*
[216] *See* CDT, *Behind the Numbers, supra* note 94, at 11; Federal Trade Commission, *Self-Regulation and Privacy Online, supra* note 2, at 9-12.
[217] *See* CDT, *Behind the Numbers, supra* note 94, at 11; Federal Trade Commission, *Self-Regulation and Privacy Online, supra* note 2, at 9-12.
[218] *See* CDT, *Behind the Numbers, supra* note 94, at 11; Federal Trade Commission, *Self-Regulation and Privacy Online, supra* note 2, at 9-12.
[219] *See supra* notes 124-126 and accompanying text.
[220] *See* John Markoff, *supra* note 74.

their copies of the *Windows 98* operating system for support and updates, contained a number known as a Globally Unique Identifier. That identifier was being transmitted to Microsoft as part of a list of registration information that generally included the owner's name, address, phone number, and other demographic information.[221] Surprisingly, Truste found that Microsoft did not violate the license agreement terms of the seal program.[222] The seal program only covered the Microsoft web site and, therefore, did not apply to privacy breaches involving its software.[223] Microsoft admitted using the *Windows* data-collection technique, but denied it was using the information to track web visitors.[224] Microsoft stated it would discontinue the practice.[225]

IV. HELPING CONSUMERS PROTECT THEMSELVES ON-LINE

The Internet is growing so fast in terms of technology and the amount of commerce being conducted, that oversight and control over the medium is lagging. This under-regulated commercial tool is also a medium where a huge volume of personal information is stored and can be accessed by practically anyone. Moreover, Internet marketers collecting and using the personal information are in a race to seize the potential profits of the Internet. As a result, marketers are probably focusing less on the potential adverse impact of disclosing private consumer information and more on the potential benefit of using the information. This is compounded by the fact that most consumers are unaware of how their personal information is collected, how much is collected, who is collecting it, who is getting it, and for what purpose. On-line marketers become opportunistic beneficiaries of the unauthorized disclosure of personal information, yet are relatively insulated from accountability since the consumer is largely unaware of the practice and unable to stop it.[226]

Overall, legislation has been less than comprehensive. The privacy laws in existence target specific industries, and no Internet privacy law currently exists that offers protection for persons over twelve years of age. Consumers are left to use other consumer laws to provide indirect and imperfect privacy protection. The protection only covers the industry targeted by the legislation and only if the information that may have been obtained without consent is used in violation of the statute. The Federal Trade Commission Act[227] and some of the regulations in existence extend a measure

---

[221] *See id.*
[222] *See* Wired News Report, *Microsoft Off Truste's Hook* (Mar. 22, 1999) <http://www.wired.com/news/news/technology/story/18639.html>.
[223] *See id.*
[224] *See id.*
[225] *See id.*
[226] *See* Swire, *supra* note 29, at 4.
[227] 15 U.S.C. § 41 (1998).

of protection but still do not specifically address consumer Internet privacy. Finally, constitutionally based privacy protection appears, for the most part, non-existent for the Internet consumer, with case law indicating that the consumer assumes the risk of voluntarily providing an on-line marketer personal information.[228]

WebTrust, Truste, BBBOnLine, and other industry-supporting organizations have all launched seal programs. While the seal program standards are higher than current practices of most web sites, these standards generally fall short of meeting the fair information practices principles.[229] Since the seal programs generally do not require licensees to meet all fair information practices, licensees can engage in some questionable information practices without technically violating the seal program license agreement.

Simple advice can be powerful advice for consumers. They need to be encouraged to protect themselves on-line through education. While most experienced users of the Internet can simply be given electronic-mail addresses or a search term to educate themselves, web neophytes may need more assistance. With a five minute demonstration a judge advocate can introduce the client to an almost limitless number of resources on the web that contain timely information addressing consumer privacy issues. Despite the advice and the helpful resources, consumers can find themselves dazzled by Internet's offerings. Following a few simple rules to improve personal information security on the Internet can help avoid being victimized by companies more interested in profits than protecting consumer privacy.

First, always use a secure browser. A browser is simply the software—usually already installed on the newer computers—used to navigate the Internet. The browser should comply with industry security standards, such as Secure Sockets Layer (SSL) or Secure Electronic Transaction (SET).[230] These programs encrypt or scramble the purchase information sent over the Internet, ensuring the security of your transaction. Browsers with these standards can be found and downloaded for free over the Internet.[231] Also, consider buying a filter, which is software that allows individuals to block access to web sites and content that may be unsuitable.[232] Finally, any advice that can be passed along concerning cookies and cookie technology would also be quite helpful.[233]

Second, make it a habit of shopping with companies they know or have investigated. This can be done by reviewing pamphlets, catalogs,[234] or reviews by other consumers.[235]

---

[228] *See supra* note 103.
[229] *See* Culnan, *GIPPS Report*, *supra* note 3, app. E at 91.
[230] American Express Company, *Shop Safely Online* (1998) <http://www.ftc.gov/bcp/conline/pubs/online/cybrsmrt.htm> [hereinafter American Express, *Shop Safely Online*].
[231] *See id*.
[232] *See* Federal Trade Commission, *Sight Seeing on the Internet, supra* note 4.
[233] *See supra* notes 22-26 and accompanying text.
[234] *See American Express, Shop Safely Online, supra* note 230.

Third, keep passwords private. This point cannot be over-emphasized. Consumers should also use combinations of numbers, letters, and symbols for passwords.[236]

Fourth, be advised that consumer laws and rules that do not specifically address privacy do apply on-line. Knowledge of these laws can be helpful when information collected on the consumer is used in violation of such a law or rule. Parents with children should be informed of the Children's On-line Privacy Protection Act.[237]

Fifth, always review how the company secures financial records and personal information if a consumer intends to pay bills or check their account status on-line.[238]

Sixth, consumers should minimize the amount of personal information they provide on-line. It may be unrealistic to expect those who use computers to stop providing personal information on-line. However, consumers should be made aware that something as harmless as a contest or "prize give-away" on the Internet provides yet another opportunity for the consumer to dump more and more personal information on the Internet, to be sold, transferred, and used in a variety of ways.

Seventh, consumers should read and understand a company's privacy policy. If the web site fails to provide a privacy policy, consumers should be sensitive to the increased risks associated with transacting business on that site. Consumers should look for opt-in and opt-out provisions in a privacy policy.[239] This will provide them with greater control over their personal information.

Eighth, consumers should not let down their guard just because there is some sort of seal of approval. Seal programs do not assure privacy protection.[240] Consumers need to know about the benefits and the limits of seal programs and how easy it is to be misled about the scope and type of protection offered by the site with a privacy seal.

Finally, advise consumers to "bookmark" the Federal Trade Commission web site.[241] In fact, every legal assistance attorney should do the same. The Commission web page is an open door to a wealth of information

---

[235] Consumers should be cautioned about product reviews found on-line. Such reviews might be nothing more than a "lure" or "hook" ploy designed to fool the customer about the value of the product.

[236] Such advice should be easy to provide to would-be consumers since members of the Department of Defense are responsible for practicing good operation security by using similar techniques on their computers at work.

[237] 15 U.S.C. § 6501 (1999). For a discussion of this legislation, see *supra* notes 105-111 and accompanying text.

[238] *See American Express, Shop Safely Online*, *supra* note 230.

[239] *See id.* For a complete discussion of seal programs, see *supra* notes 41-49 and accompanying text.

[240] *See* CDT, *Behind the Numbers*, *supra* note 94.

[241] The Federal Trade Commission web site address is http://www.ftc.gov.

on consumer privacy and even includes the latest version of the *Consumer Resource Handbook*.[242]

V. CONCLUSION

This article only scratches the surface concerning what judge advocates and consumers need to know about consumer internet privacy, privacy law, exploring the Internet, and preserving the privacy of an individual's personal information. Indeed, it is possible that by the time this article is published, significant changes in the law and advancements in technology could cause some portions of this article to become outdated. Considering that, judge advocates must be sensitive to maintaining their expertise by reading the new developments in case law, and technology news from the various information sources, including, of course, the Internet.

Information overload from the enormous advancement of technology, and constantly evolving issues surrounding privacy on the Internet, as well as the practical problem of pulling one's self away from daily responsibilities of justice, claims, or contracts, can make it difficult to stay on top of legal issues concerning the Internet. In that regard, this article can be used as an overview or "stepping off" point for learning more about Internet privacy. However, the hope is that the legal assistance attorney will gain a better understanding of the resources, the current attitudes and developments, and the issues involved. With this knowledge, judge advocates will be in a better position to advise the client who surfs the web.

[242] *See* CONSUMER RESOURCE HANDBOOK, *supra* note 46.

Preventive Law Programs: A SWIFT Approach

LIEUTENANT COLONEL MICHAEL A. RODGERS*

One of the keys to successfully managing a base legal office is to maintain a system of repeatable processes.
– Major General William A. Moorman, The Judge Advocate General[1]

I. INTRODUCTION

An opening proposition, albeit at the risk of understatement, for the reader's consideration: the preventive law program is a very important program. Yet, the daily tempo of a typical wing legal office often demonstrates a different reality. At worst, the actions of the staff judge advocate and the legal office staff reinforce the notion that the preventive law program is not at all important. At best, their actions reflect a perception that although the preventive law program may be important, not all important programs warrant equal support. At many installations it is tacitly understood that the "real" mission of the wing legal office is to meet statutory requirements under the Uniform Code of Military Justice[2] and to preserve commanders' prerogatives to take actions consistent with the overall mission of the United States Air Force.[3] In other words, the preventive law program is perceived to drain office resources from more important mission-related tasks. This perception is wide of the mark. In fact, a vigorous preventive law program can actually liberate resources, which can then be placed against other tasks.

Given the benefits associated with a preventive law program, one must wonder why a prejudice appears to exist in the Air Force. Most likely, the prejudice exists because few members of a legal office have been part of a vigorous preventive law program and, consequently, have not witnessed the tangible benefits. This article is intended to dispel erroneous perceptions of the preventive law program and to highlight its worth. The article provides those

---

* *Lieutenant Colonel Rodgers (B.A., Ohio State University; J.D., University of Cincinnati; LL.M., George Washington University) is the Staff Judge Advocate, Altus Air Force Base, Oklahoma. He is a member of the Ohio State Bar.*

[1] Major General William A. Moorman, The Judge Advocate General, Graduation Address at the Staff Judge Advocate Course 99-A, United States Air Force Judge Advocate General School (July 2, 1999).

[2] 10 U.S.C. §§ 801–946, UNIF. CODE MILITARY JUSTICE (1998).

[3] The stated mission of the Air Force is "to defend the United States through control and exploitation of air and space." DEPARTMENT OF THE AIR FORCE, GLOBAL ENGAGEMENT: A VISION FOR THE 21ST CENTURY AIR FORCE (1996) [hereinafter GLOBAL ENGAGEMENT].

responsible for the program, at the installation level, with a system of repeatable processes calculated to increase the odds of developing and maintaining an enduring and relevant preventive law program. Realization of a successful preventive law program requires a broad understanding of the object and scope of the program and the responsibilities of those involved in the program. Those issues are identified in the next part of the article.

II. THE AIR FORCE PREVENTIVE LAW PROGRAM

The rationale for maintaining a preventive law program is that a good preventive law program can educate commanders, service members, and service members' families on a variety of legal issues.[4] Arising from this educational effort are the expectations that legal problems can be prevented and that the time and resources needed to correct legal errors and uncertainties can be reduced.[5] With these expectations in mind, the program's statutory and regulatory lineage assign responsibilities for the program.[6] The Chief of the Legal Assistance Division, Air Force Legal Services Agency (Legal Assistance Division), is charged with the overall operation of the Air Force Preventive Law Program and provides general guidance regarding its implementation.[7] A faculty member at the Air Force Judge Advocate General School serves as the Director of the Preventive Law Program.[8] The responsibilities of this faculty member are to compile and distribute preventive law information to legal offices throughout the Air Force.[9] The installation staff judge advocate is responsible for the preventive law program at the installation and for determining the scope of the program.[10] Although the staff judge advocate has wide latitude in deciding the breadth of the program, certain program areas must be included.[11]

A. Deployment Preparation

---

[4] *See* Air Force Instruction 51-504, Legal Assistance, Notary, and Preventive Law Programs ¶ 3.1 (May 1, 1996) [hereinafter AFI 51-504].

[5] *See id*. Clearly, if the expenditure of time and resources devoted to resolving the range of legal problems is reduced, then those resources can be reallocated to address military justice problems and those issues infringing upon commanders' prerogatives to act in furtherance of the Air Force mission.

[6] *See* 10 U.S.C. § 1044 (1998); Air Force Policy Directive 51-5, Military Legal Affairs ¶ 1.11 (Sep. 27, 1993) [hereinafter AFPD 51-5]; AFI 51-504, *supra* note 4, ¶ 3.2.

[7] AFPD 51-5, *supra* note 6, ¶ 12.1. The Air Force Legal Services Agency is located at Bolling Air Force Base, Washington, D.C.

[8] *See id*. ¶ 12.4. The Air Force Judge Advocate General School is located at Maxwell Air Force Base, Montgomery, Alabama.

[9] *See id*.

[10] *See id*. ¶ 12.5.

[11] *See* AFI 51-504, *supra* note 4, ¶ 3.2.2.

Since 1989 the United States has engaged in thirty-six deployments.[12] In contrast, during the 40 years of the Cold War, the United States engaged in only ten deployments.[13] This increase in operations tempo and the Air Force evolution to the Expeditionary Aerospace Force[14] have driven the deployment preparation requirement to the forefront.[15] According to Air Force instructions,[16] a minimally acceptable deployment program must educate members on their personal legal needs for mobility readiness and deployment and their rights under the Soldiers' and Sailors' Civil Relief Act (SSCRA)[17] and the Veterans' Re-employment Rights Act (now Uniformed Services Employment and Reemployment Rights Act).[18] Obvious topics include the importance of preparing wills, powers of attorney, and other necessary documents before deployment. Predeployment planning significantly reduces last minute document preparation and reduces the anxiety levels of the military member, family members, and the command element.

B. Commander Awareness

Staff judge advocates are required to advise their convening authorities of the statutory duty under the Uniform Code of Military Justice[19] to at all times communicate directly with the staff judge advocate in matters relating to administering military justice.[20] In addition, the staff judge advocate is

---

[12] *See* Greg Seigle, *Peacekeeping Undermines US Combat Readiness*, 32 JANE'S DEFENCE WEEKLY, July 28, 1999, at 21.

[13] *See id*.

[14] The Expeditionary Aerospace Force (EAF) is a restructuring of the Air Force into ten main "expeditionary" groups that would rotate responsibility for foreign deployments. Their maximum time on call would be one ninety-day period in every fifteen months. The EAF is expected to ease the strain of increasing overseas missions. The change marks the first major overhaul for the Air Force since the Cold War ended. *See* Tom Raum, *Air Force Is Restructuring To Ease Strain Of Missions*, PHIL. INQ., Mar 6, 1999.

[15] In fact, the Legal Assistance Division has developed, in consonance with the EAF, a model personal legal readiness plan. The model plan is unique in that it proposes to measure personal legal readiness by the percentage of troops who have made a decision as to whether or not they want a will or power of attorney, and the percentage of expeditionary force troops desiring wills or powers of attorney who have received them prior to deployment day. This contrasts with the current metric, which only measures the percentage of deployable troops contacted about having a will or power of attorney. The model plan pins the troops down ahead of time and aims to avoid the usual last-minute rush to the legal office. *See* Legal Assistance Division of the Air Force Legal Services Agency (last updated Sep. 14, 1999) <http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jaca/ slides/Default.htm>.

[16] *See* AFI 51-504, *supra* note 4, ¶ 3.2.2.1.

[17] 50 U.S.C. app. §§ 501–593 (1990).

[18] 38 U.S.C. §§ 4301–4333 (Supp. 1996).

[19] 10 U.S.C. § 806(b), UNIF. CODE OF MILITARY JUSTICE art. 6(b) (1998).

[20] *See* Air Force Instruction 51-102, The Judge Advocate General's Department ¶ 3 (July 19, 1994) [hereinafter AFI 51-102].

charged with a number of responsibilities: providing legal services required by commanders and staff agencies; advising commanders on disciplinary matters, preparing charge sheets and assisting in preparing nonjudicial punishment actions; providing legal advice and assistance to Security Police and Air Force Office of Special Investigations personnel; and providing advice to commanders and investigating officers on all investigations conducted under a commander's inherent authority or under regulation; providing legal advice and reviewing actions for legal sufficiency; acting as Air Force liaison with the United States Attorney and other federal, state, and local legal departments, administrative agencies, and judicial bodies; representing Air Force interests in utility rate matters; supporting and representing Air Force interests in environmental and civilian labor matters; providing briefings required by law, directive, instruction, or policy; drafting and reviewing operation and exercise plans for compliance with the law of armed conflict; providing advice to commanders and their staffs on international law matters, including foreign criminal jurisdiction, host country law, civil litigation, negotiations, and treaty and agreement interpretation; and providing advice and counsel to participants in all mobility and contingency operations.[21]

When commanders and staff agencies are aware of the full range of legal services provided by the legal office, the imperative to get things done "yesterday" is significantly diminished. Staff judge advocates are well advised to invest the time to educate commanders and staff on the advantages to the command of timely reliance on legal services and on all legal matters affecting command.[22] Judge advocates at every echelon should be reminded that timely communication with commanders and staff agencies regarding the status of legal services is a fiduciary duty borne by the members of the legal office.[23]

C. Tax Assistance

The Volunteer Income Tax Assistance Program (VITA) involves volunteers, trained by the Internal Revenue Service (IRS), who provide free tax assistance at on-base locations to individuals who need basic assistance with preparation of their income tax return. Air Force-wide, this program has been a phenomenal success and has become a welcomed "entitlement" for service members, retirees, and family members. To illustrate this point, for the 1999 tax season, Air Force legal offices and IRS officials trained 4,129 unit tax volunteers.[24] Their efforts resulted in electronic filing of 114,980 federal tax

---

[21] *See id.* ¶ 3
[22] *See* AFI 51-504, *supra* note 4, ¶ 3.2.2.2.
[23] AIR FORCE RULES OF PROFESSIONAL CONDUCT, Rule 1.4 (1997).
[24] *See* Legal Assistance Division of the Air Force Legal Services Agency, *1999 Base Tax Program Statistics* (Bolling Air Force Base, Washington, D.C.) (undated) (on file with the author).

returns and 4,952 state returns.[25] Conservatively, this yielded almost $9.4 million in savings to Air Force personnel.[26] Despite the success of the VITA program, legal offices do not consistently promote the tax program to the fullest extent. Too often, a legal office squanders this annual opportunity to put its best foot forward. An aggressive, well-publicized tax program, consisting of a core of trained unit tax advisors, extends the influence of a legal office into every organizational element on the installation. Coupled with an electronic tax filing system, VITA provides an excellent opportunity to generate an amazing amount of goodwill and credibility for a legal office.[27]

D. Legal Assistance and Consumer Protection

This has been aptly termed the "meat and potatoes" of the day-to-day activities of the majority of the legal office staff.[28] The Air Force provides legal assistance to eligible beneficiaries concerning personal, civil legal problems, subject to the availability of legal staff resources.[29] The Air Force has structured the program into two categories. The first, mission-related legal assistance, ensures that the legal difficulties of military members do not adversely affect command effectiveness or readiness. Eligible beneficiaries typically include active duty members, including reservists and guardsmen on federal active duty, and their family members who are entitled to an identification card.[30] Mission-related legal assistance includes wills, living wills, powers of attorney, and notaries; SSCRA and veterans' reemployment rights issues; casualty affairs; dependent care issues; involuntary allotment issues; landlord-tenant and lease issues; tax assistance; and other issues deemed mission related by The Judge Advocate General, major command staff judge

---

[25] *See id.*

[26] *See id.* The Legal Assistance Division maintains a list of charges for tax return processing. *See* Legal Assistance Division of the Air Force Legal Services Agency (last updated Sep. 14, 1999) <http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jaca/TAXLST.htm>.

[27] The IRS has contracted with Universal Tax Systems, Inc., for electronic filing software to complement the VITA program. The TaxWise software is a comprehensive tax preparation system with over 1,800 forms plus integrated state and electronic filing modules. Universal Tax Systems is based in Rome, Georgia, and their web site can be found at http://www.taxwise.com.

[28] In calendar year 1998, Air Force legal assistance offices helped 264,657 clients during 464,147 total office visits. Office personnel drafted 62,551 wills, 179,253 power of attorneys and notarized 392,462 documents. Legal Assistance Division of the Air Force Legal Services Agency, *Air Force Legal Assistance Statistics – Year Ending 1998* (Bolling Air Force Base, Washington, D.C.) (undated) (on file with the author).

[29] *See* 10 U.S.C § 1044 (1998).

[30] *See* AFI 51-504, *supra* note 4, ¶ 1.3. Additional beneficiaries include civilian employees stationed overseas and their family members who are entitled to an identification card and reside with them, and members of the Reserve and National Guard not on Title 10 status, but who are subject to federal mobilization in an inactive status, are eligible for legal assistance for wills and powers of attorney. *Id.* ¶ 1.3.2.

advocates, numbered air force staff judge advocates, the base staff judge advocate, or the commander.[31]

The second category, non-mission-related legal assistance, is not specifically defined in the instruction; however, it is limited to personal, civil legal problems. Non-mission-related legal assistance is provided as resources and expertise permit, as determined by the SJA. Typical beneficiaries are those personnel eligible for mission-related legal assistance, retired personnel and their family members who are entitled to an identification card, and unremarried former spouses entitled to a dependent identification card.[32]

Legal assistance, whether mission related or non-mission related, does not include the following activities: business or commercial enterprises (except in relation to the SSCRA); criminal matters; ethical issues; law of armed conflict issues; official matters in which the Air Force has an interest; legal concerns or issues raised on behalf of another person; representation of a client in a civilian court or an administrative proceeding; and drafting or reviewing real estate sales or closing documents, separation agreements, divorce decrees, or inter vivos trusts (unless the SJA determines an individual attorney within the office has the expertise to do so).[33]

The benefit of the legal assistance program to military members, family members, and retirees is truly incalculable. Whether measured by client dollars saved, legal entanglements avoided, or increased morale, this area can certainly be an unqualified success. The only possible negative aspect of a legal assistance program are that access is difficult or that the legal assistance providers display a poor "bedside manner." Given the Air Force members' overwhelming demand for legal assistance, each of these negative aspects may have some basis in reality.[34]

Access for legal assistance clients can be a problem. Far too frequently, the demand for legal assistance will expand to fill whatever time is devoted to it. This creates a nearly unavoidable domino effect. The staff, then, becomes

---

[31] *See id.* ¶ 1.3.1.

[32] *See id.* ¶ 1.4. Additionally, 10 U.S.C. § 1044 (a)(3) extends legal assistance to those officers of the commissioned corps of the Public Health Service who are on active duty or entitled to retired or equivalent pay.

[33] *See* AFI 51-504, *supra* note 4, ¶ 1.2. As a reminder to the legal assistance practitioner, TJAG Policy Letter 18 states that when a proper professional treatment of a member's legal problem exceeds the scope of the legal assistance program, it is essential that each office establish and maintain a procedure for referral of clients to the civilian bar that is free from even the appearance of favoritism or other impropriety. TJAG Policy Letter 18, *Preventive Law and Legal Assistance Policy* (Feb. 4, 1998) (Office of The Judge Advocate General, Washington, D.C.)

[34] According to The Deputy Judge Advocate General, staff judge advocates should ensure clients have access to legal assistance and the office should adopt an attitude demonstrating a commitment to "taking care of our people." Major General Andrew M. Egeland, Jr., The Deputy Judge Advocate General, Keynote Address at the Staff Judge Advocate Course 99-A, United States Air Force Judge Advocate General School (June 21, 1999).

inundated with clients (many of whom are visibly upset by the difficulty of their legal circumstances) wanting and expecting relief. Judge advocates, overtaxed with clients and suffering from a lack of time and resources, might then have difficulty maintaining a professional, helpful attitude. Thus, it is foreseeable that customer service might suffer. A well-conceived preventive law program can help break this chain of cause and effect.

III. THE SWIFT APPROACH

A smooth running, successful preventive law program does not happen by accident. It must be designed with specific standards and goals in mind to develop a cogent strategy for success. Sufficient time devoted to planning and maintenance will result in an effective preventive law program that will lead to an appreciable reduction in the overall workload, including legal assistance. Once established, the program must be reviewed periodically to ensure it is still on track. While this approach sounds simple, there certain limiting factors common to most legal offices can and do interfere. First, the judge advocate responsible for the preventive law program is very often one of the newest judge advocates in the office. Second, given the demands placed upon the legal office, responsibility for the preventive law program is assigned as an additional duty as opposed to a primary duty. Third, the preventive law program is not the top priority for allocation of scarce legal office resources. Despite these limiting factors, a successful preventive law program is attainable.

Since few legal offices have sufficient time to devote to the development of a preventive law program, a "template" approach provides an expedient alternative. This approach is known by the acronym "SWIFT." The SWIFT approach accedes to the notion that most, if not all, programs conducted by the legal office are very important. Further, it also recognizes that all very important programs may not be considered equal. Stated another way, the SWIFT approach is an attempt to enable a legal office to field a coherent preventive law program that is not burdensome to the legal office staff and does not require exhaustive support efforts. The SWIFT approach is characterized by the following five key elements: Sustainable, Wide-ranging, Interactive, Friendly, Transportable. These elements do not purport to be the only way to design a preventive law program; in fact, an individual legal office may include additional elements that account for its unique set of circumstances. Nevertheless, the SWIFT approach represents a point from which a deliberate, repeatable process to develop or reinvigorate an installation preventive law program can begin.

A. Sustainable

The primary impediment for many preventive law programs is an inability to continue their momentum. This problem is most acute when the legal office staff is undermanned and overworked. Preventive law has historically been one of the first areas to suffer a cutback when resources are scarce. Thus, a successful program must be able to weather frequent adverse conditions. By way of illustration, suppose the current chief of preventive law at a base legal office has developed a comprehensive preventive law program. It requires his personal attention to conduct a variety of presentations and briefings across the installation. It also relies upon a state-of-the-art Internet homepage. Then suppose that the chief is reassigned. What will happen to the preventive law program? Commonly, the quality of the program will take a precipitous drop because it is not sustainable. To be sustainable, a preventive law program cannot overreach its inherent limitations. Such limitations include available time, personnel, equipment, and funding.

Sustainable programs take a cue from the larger, institutional Air Force in that they should define their core competencies[35] and "privatize" the remainder.[36] Arguably, a legal office should focus its direct energies on meeting the required program elements. Other program areas can be satisfied by reliance upon representatives from outside agencies. For instance, many states have a robust child welfare agency. These agencies often provide free assistance in pursuing paternity and support claims. Other enterprising state agencies undertake representation regarding separation and divorce agreements. Likewise, the state attorney general or the local Better Business Bureau may sponsor an aggressive consumer advocacy program. By tapping into these existing agencies, publicizing their location and telephone numbers, and by personally referring clients to these agencies, the preventive law program can maintain its vitality during periods of staff transition or unforeseen exigencies.

Similarly, legal office web sites should be developed for the long term.[37] While a web site is a fine way to introduce your services to your

---

[35] The core competencies of the Air Force consist of Air and Space Superiority, Global Attack, Rapid Global Mobility, Precision Engagement, Information Superiority, and Agile Combat Support. GLOBAL ENGAGEMENT, *supra* note 3, at 9.

[36] Privatization is the transfer of government assets or operations to the private sector. For a summary of Air Force efforts in this area, see Sheila E. Widnall, Privatization–A Challenge of the Future, Address at the Base and Civic Leader Dinner, McClellan Air Force Base (Feb. 7, 1996) <http://www.af.mil/news/speech/current/Privatization_--_A_Challeng.html>.

[37] Prospective Air Force webmasters are advised to review Air Force Instruction 33-129, Transmission of Information Via the Internet (Jan. 1, 1997) [hereinafter AFI 33-129], prior to constructing their web site. That Air Force instruction outlines responsibilities and procedures for accessing information and properly establishing, reviewing, posting, and maintaining government information on the Internet. Additionally, failure to observe the prohibitions and mandatory provisions in paragraphs 6.1.1. through 6.1.12 of the instruction is a violation of Article 92, Uniform Code of Military Justice, for military members. *See* 10 U.S.C. § 892, UNIF. CODE MILITARY JUSTICE art. 92 (1998). Violations by civilian employees may result in

clients, it is only useful if it is well maintained.[38] Often webmasters focus solely on the chore of building a homepage and neglect to include features that make the site helpful and easy to use and maintain. Too often, a web site may look fantastic, but provide little real benefit for a client. Large, slow-loading images and technologically advanced "bells and whistles" are unneeded barriers to clients operating with older equipment and software in that accessibility can be hindered. In addition, the Air Force Legal Information Services Directorate of the Air Force Legal Services Agency noted that animated images, multimedia, Java, ActiveX, and other web page "applets" often become form-over-substance distractions.[39] While one or two animations on a page may add luster, too many will create an unprofessional "amusement park" look.[40]

Outdated materials or nonfunctioning links also increase client frustration and defeat the purpose of the web site. In today's information driven world, these difficulties multiply quickly when the webmaster does not have sufficient time to keep the page updated. It is axiomatic that on-line reference materials be current if they are to serve as useful tools. One way to ensure that these reference materials are kept up to date is to link them to other web sites that are continuously amended. As an example, if the legal office web site provides tax information, consider a direct link to the Internal Revenue Service (IRS) homepage.[41] The IRS maintains an excellent site with both current and past year forms and publications. Additionally, the IRS site allows people to e-mail questions directly to a customer service liaison. By linking to such a site, the web site remains current with no additional effort from the

---

administrative disciplinary action without regard to otherwise applicable criminal sanctions for violations of related laws. *See* AFI 33-129, ¶ 1.

[38] Memorandum from Major General Bryan G. Hawley, The Judge Advocate General, for All Staff Judge Advocates, Chief Circuit Judges, and Chief Circuit Trial and Defense Counsel, Legal Office Web Sites (Oct. 2, 1997) (directing that web sites be current, professional, appropriate to the audience, free of sensitive information, and contain a visible disclaimer) (on file with the author).

[39] *See* Legal Assistance Division of the Air Force Legal Services Agency, *The Legal Office Guide to Creating and Maintaining a Useful Web Site* (visited Sep. 14, 1999) <http://aflsa.jag.af.mil/flite/training/web_site.htm> [hereinafter Legal Assistance Division, *The Legal Office Guide]*. Applets are self-contained applications that are used to add multimedia effects and interactivity to web pages, such as video displays, animations, calculators, real-time clocks, and interactive games. Applets can be activated automatically when the page containing them is displayed in a web browser, or they may require some action on the part of the site visitor, such as clicking an element on the page. MICROSOFT, GETTING STARTED WITH MICROSOFT FRONTPAGE 2000 280 (1998).

[40] *See* Legal Assistance Division, *The Legal Office Guide*, *supra* note 39. A truly useful site with legal assistance and preventive law links is maintained by the United States Air Force Judge Advocate General School, which can be found at http://aflsa.jag.af.mil/flite/links/prevlaw.html.

[41] Internal Revenue Service, *The Digital Daily* (last updated Sep. 14, 1999) <http://www.irs.ustreas.gov>.

webmaster. The clients also receive the benefit of receiving timely, valuable, and relevant information directly from the most knowledgeable source. Ultimately, these types of links enhance the preventive law program. They meet legitimate client needs and serve to reduce the number of clients visiting the legal office.

B. Wide-Ranging

This key element requires that the preventive law program address the true needs of the clients. While certain legal issues, such as wills and family law, are prevalent at every Air Force installation, other legal matters may be much more common at only a few installations. At basic and technical training centers, the majority of clients may be young, single troops or troops with new families. Consequently, the preventive law program may have to emphasize financial responsibility and consumer rights, issues that tend to arise on installations with younger Air Force members. An installation with a more mature population or with a large number of retirees may have a program with a decidedly different focus. To take the argument a step further, legal offices at overseas installations must deal with a host of issues that would probably never arise at an installation in the continental United States.

Thus, it is necessary for the preventive law program to identify the needs of its clientele and address them. It may be possible to gather this information through questionnaires, feedback forms, or surveys conducted in the units on the installation. Another approach might be to talk with commanders, first sergeants, and senior enlisted members to determine what kind of issues they most commonly deal with. Yet a third suggestion would be to review the client database and determine what type of services clients are requesting.[42]

A good preventive law program should be described as having something for everyone. While a smorgasbord approach may sound burdensome, a legal office should play to its strengths and leverage its weaknesses. If the active duty staff is not strong in a particular area of the law, seek support from practitioners in the reserve components or from nearby installations.[43] Develop alliances with local bar associations and invite their

---

[42] The Legal Information ON-line System (LIONS) is a perfect tool for this function. LIONS collects client information through a "point and click" screen interface that resembles the AF Form 1175 (Legal Assistance Record). *See* Air Force Legal Information Services Directorate of the Air Force Legal Services Agency (last updated Sep. 14, 1999) <http://aflsa.jag.af.mil/JAS_HELPDESK/lions.htm>.

[43] In searching for ways to tap expertise, judge advocates should be advised that telecommuting is an effective and efficient tool which enables a reservist to perform training away from the normal training location or place of attachment. For guidance regarding telecommuting for individual mobilization augmentee (IMA) training, see TJAG Policy Letter 35, *Use of Telecommuting (Distant Training) for IMA Training* (Feb. 4, 1998) (Office of The Judge

members to share their expertise. In return, attend the local bar association meetings and explain the differences between pay and allowances or some other esoteric area of military practice. Nurturing professional and courteous relationships while in garrison can pay great dividends, especially when judge advocates and their clients are deployed.

C. Interactive

This element encompasses three components. The first is the traditional notion of feedback. Clients must be provided with a means to communicate with the legal office. Clients will let you know what aspects of your preventive law program do or do not work. They will also tell you which areas are ripe for improvement. The feedback component could consist of a survey (paper or electronic), a client message service, (telephonic or electronic), or a client discussion session. The discussion session may be a good approach to use when presented with a captive audience. For instance, at a quality force meeting, ask the commanders, first sergeants, or supervisors for their views regarding the preventive law program. Guaranteed, they will have an idea or two worthy of serious consideration.

Second, think of ways to present information using different media. Maybe the claims program and distant clients would benefit if the claims briefing could be mailed to the client and viewed on a videotape. Perhaps legal-oriented public service announcements for inclusion on the commander's radio or television channels would be appropriate. Pushing the envelope further, consider a live or taped "Ask the Lawyer" program or an e-mail question and answer program. Needless to say, if you consider the latter options, seek approval from higher headquarters and strictly comply with the applicable codes of professional responsibility.[44]

The third "interactive" component recognizes a need for clients to help themselves. All too often, the legal assistance staff shoulders every hardship faced by the client. While this willingness to help is laudable and to be fostered, such an approach is not necessarily consistent with a sound legal assistance or preventive law program. Rather, it is indicative of poor time management skills and a harbinger of stress for an overworked staff. An unspoken aim of the preventive law program—and, for that matter, the legal assistance program—is to teach clients how to anticipate, avoid, and extricate

---

Advocate General, Washington, D.C.), and Air Force Policy Directive 51-8, Assignment, Training, and Management of The Judge Advocate General's Department Reserve (TJAGDR) (Apr. 1, 1999).

[44] As a preliminary step, an Air Force lawyer should become very familiar with certain rules of professional responsibility: Rule 1.1, Competence; Rule 1.2, Establishment and Scope of Representation; Rule 1.6, Confidentiality of Information; and Rule 1.7, Conflict of Interest. AIR FORCE RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.2, 1.6, 1.7 (1997).

themselves from legal peril. One way to achieve that aim is to allow clients to bear some of the workload and responsibility. As the parable declares, give a man a fish and he will eat for a day, but teach a man to fish and he will eat for a lifetime.

For example, a client faced with an angry creditor asks his legal assistance attorney to draft a response and dumps a shoebox full of old bills and letters on the desk. If the judge advocate performs the duty without substantial participation by the client, then the client is relieved of the responsibility for his own legal deliverance. Clients can and should perform most simple administrative tasks. Sample letters can be made available and the client can be tasked with composing a first draft to the creditor for the attorney's review. In this manner of active client participation, it is more likely the client will learn something about organizing finances, responding to creditors, and his rights as a consumer.

D. Friendly

A thriving preventive law program has a friendly client interface and must be client centered. Open access to the legal office staff must be the rule. Obstacles should be eliminated whenever possible. The staff should internalize the notion that there are no dumb questions. Remember that lawyers practice a specialty once considered impossible for the lay person to understand. Stated in another fashion, clients display a measure of bravery by merely approaching a member of the staff with their question, especially if the question concerns a private, sensitive, or embarrassing matter. Accordingly, all clients should be placed at ease and their questions given confidential, reasoned responses.[45]

In addition, the preventive law materials must be drafted with the client in mind. Handouts should be written in plain language and not legalese. Ideally, if a segment of the clientele does not speak English, then a member of the staff should speak the language. At a minimum, handouts should be written to meet their language needs. Finally, if the preventive law program relies upon a web site it should be easy to find, navigate, and understand. As noted earlier, information on the web site has to be current and all links from the site should be active.

Being visible on the installation is another aspect of being "friendly." Newspaper articles, the tax program, or a special event in conjunction with Law Day are excellent vehicles for hoisting the legal office standard. Posters and newspaper articles must convey the right message—one that lets the base population know the legal office staff has anticipated their needs and is prepared to help. Consider assigning personnel to tend to the particular needs

[45] *See id*. Rule 1.6. To this end, it is important to make sure clients understand the rules of confidentiality that protect any communication from disclosure whether that communication is a simple as a single question or as complicated and emotional as the facts of a divorce.

of a specific unit (e.g., squadron judge advocates). This hands-on approach may prove beneficial for those units that deploy frequently or operate on weekends or evening shifts. Commanders and staff are more likely to approach visible, friendly judge advocates, thereby advancing the commander's awareness element of the preventive law program.

E. Transportable

In today's Air Force, the idea of transportable preventive law means a program that goes where the troops go. Frequent deployments have become a fact of life. As a result, the preventive law program must be mobile. Connectivity from the deployed location to the home legal office is an absolute necessity.[46] Unless the deployed judge advocates are going to be solely devoted to providing legal assistance, it can be beneficial to fashion a method of allowing clients to independently assist themselves with the resolution of simple, recurring legal problems. Access to the Internet, fax capability, telephones (defense switching network and commercial), and mail must be considered. However, judge advocates should be mindful that in a deployed environment, dependable communication is not assured. Backup resources must be contemplated. When space or weight is a limiting factor, statutes, regulations, and sample letters on disk or CD-ROM may be useful substitutes.[47]

Viewing "transportable" in a different light, consider taking the preventive law program on the road. Expand upon the idea of commander's calls or unit-designated judge advocates by creating special events. Special events are very useful in quickly targeting information for a large homogeneous audience. If the installation has an abundant retiree population, address their needs. Seek opportunities to present a special program at their regularly scheduled meetings and seminars. As an alternative, host a seminar and invite representatives from the Social Security Administration, the Veterans Affairs Administration, TRICARE, and various state agencies. Family members of deployed personnel represent another target of opportunity. Consider a special event before, during, or after units deploy.

---

[46] To assist the judge advocate responding to a contingency operation or on-scene claims situation, the Legal Information Services Directorate has developed a variety of technology kits. For example, the "Big Block" kit consists of a laptop computer (with additional battery), color printer, fax, copier, and scanner, reference CD-ROMs, digital camera, microcassette recorder, transcribing equipment, zip drive, power strip, office supplies (including extra alkaline batteries), toner cartridges, and microcassette tapes. For additional information on available deployment kits, see Air Force Legal Information Services Directorate of the Air Force Legal Services Agency (last updated Sep. 14, 1999) <http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/LETTERS/JASMAIL/index1.htm>.

[47] For a listing of CD-ROM products, see Air Force Legal Information Services Directorate of the Air Force Legal Services Agency (last updated Sep. 14, 1999) <http://aflsa.jag.af.mil/flite/products.html>.

As an additional bonus, when legal offices host special events they forge strong bonds with the agencies to which they refer clients. Clients also begin to recognize that each call for assistance does not have to start with the legal office—they can go directly to the responsible state or federal agency. In this manner, the number of clients contacting the legal office for simple referrals and information can be significantly reduced with no adverse impact upon the clientele.

IV. CONCLUSION

A thriving preventive law program provides a suitable opportunity for a wing legal office to exert a major, positive influence upon the installation. A successful program cannot be established in an *ad hoc* fashion. Rather, it calls for a premeditated, comprehensive approach. The SWIFT approach, with its system of repeatable processes, is one technique for increasing the likelihood of creating a prosperous program. The SWIFT approach fulfills the statutory and regulatory program requirements and frees scare resources for use on other worthy tasks. By becoming a champion for the preventive law program, the legal office staff can ensure that a prime opportunity to enhance mission effectiveness will not be left to chance.

A Primer on Veterans' Benefits for Legal Assistance Attorneys

CAPTAIN GERALD A. WILLIAMS*

A soon-to-be ex-wife of a separating military member comes into your office for legal assistance. She has the proverbial "quick question," which you know will be anything but quick. She hands you a completed divorce kit and informs you that her husband is going to be an active reservist and then retire. He has been to the base hospital several times since he returned from Desert Storm and she wants to know how she can find out what benefits she and her two children may be entitled to receive from the Department of Veterans Affairs (VA). She would also like to know what to do if her husband fails to pay either her alimony or child support. She has heard that there is something called a VA pension and wants to know whether that, like a military pension, is marital property subject to division in her divorce. Before you reach for the lawyer referral service phone number, there is some guidance you can give her.

Although this article does not explain the myriad of benefits administered through the Department of Veterans Affairs, it will provide an overview of the key areas likely to be encountered during legal assistance, including VA programs dealing with disability payments, access to medical care, home loans, and education benefits. The final section briefly discusses the impact of discharge characterization on various VA benefits.

I. DISABILITY COMPENSATION AND PENSION BENEFITS

Air Force judge advocates must be familiar with basically two important types of VA payments, disability compensation payments and pension benefits. Disability compensation payments are paid to veterans who are disabled by injury, illness, or disease incurred or aggravated while on active duty.[1] Pension benefits are paid to veterans with low incomes and low net worth who are disabled for reasons that do not relate to their military

* *Captain Williams, USAFR (B.S. Oklahoma State University; J.D., University of Oklahoma College of Law), is an IMA assigned to the legal office at Luke Air Force Base. As a civilian, he is a staff attorney for the Department of Veterans Affairs Regional Counsel's Office in Phoenix. He is a member of the Oklahoma and Arizona State Bars.*

[1] 38 C.F.R. § 3.4(b) (1998). *See generally* Veterans Affairs Pamphlet 80-99-1, Federal Benefits for Veterans and Dependents (1999) (overview of benefits available through the Department of Veterans Affairs) [hereinafter VA Pamphlet 80-99-1].

service.[2] However, the first key to understanding these VA benefits is understanding the *service-connected* concept because establishing service-connection is the threshold requirement for compensation payments as well as many other VA benefits.

A. Definition of Service-Connected

Service-connection is established by proving that an injury or disease was incurred or aggravated by military service. Even so, it is only a slight exaggeration to say that service-connected really means something a veteran received medical care for while or within a year of being on active duty. Although the term service-connected is not defined in any one place for all purposes, it is usually defined as a "disability resulting from personal injury suffered or disease contracted in line of duty, or . . . aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military."[3] In addition, to this basic definition, there are a number of presumptions.

The presumptions are listed in various federal statutes and are often the subject of intense political debate. They have the effect of eliminating the veteran's burden of proof. For example, for wartime disability compensation, there is a presumption of service-connection for any chronic disease that manifests itself, within one year of discharge, to the point where the veteran could get a ten percent disability rating.[4] Also included on the presumption list are various nutritional deficiencies (designed to compensate former prisoners of war), peptic ulcer disease, and most cancers if the veteran qualifies as a radiation-exposed veteran.[5] There are also additional presumptions for Vietnam-era veterans[6] and for "undiagnosed" Persian Gulf-related medical conditions.[7] In short, if an individual enters the armed forces with a

---

[2] *See* 38 C.F.R. § 3.3(a)(2). These pensions should be distinguished from the monthly pension given to individuals awarded the Congressional Medal of Honor. *See* 38 U.S.C.A. § 1562(a) (West 1999); 38 C.F.R. § 3.802.

[3] *See* 38 U.S.C.A. §§ 1110, 1131; *id*. §§ 101(16), 1131; 38 C.F.R. § 3.1(k). *See generally* Ford v. Gober, 10 Vet. App. 531 (1997) (finding insufficient evidence to establish veteran's psychiatric condition had been incurred during wartime). *See also* 38 U.S.C.A. § 1103 (conditions caused by the use of tobacco products are not service-connected). This is a different analysis than service-connected for military justice purposes. *See* Note, *Military Law: Should Military Personnel Be Court-Martialed For Offenses That Are Not Service-Connected*?, 42 OKLA. L. REV. 116 (1989).

[4] 38 U.S.C.A. § 1112(a)(1). VA rating decisions are made through VA regional offices after a claim has been filed. The VA rating schedule provides degrees of impairment from zero to 100 percent in increments of ten percent. *See infra* notes 12–15 and accompanying text. *See also* 38 C.F.R. § 3.304(f) (requirements for post-traumatic stress disorder).

[5] *See* 38 U.S.C.A. § 1112(c)(1)(2); 38 C.F.R. §§ 3.309(d), 3.311.

[6] *See* 38 U.S.C.A. § 1116; 38 C.F.R. § 3.313. *See also* 38 U.S.C.A. § 1805; 38 C.F.R. § 3.814 (allowances to children of Vietnam veterans suffering from spina bifida).

[7] *See* 38 U.S.C.A. §§ 1117–1118; 38 C.F.R. § 3.317.

preexisting congenital heart condition that gets worse and they received some type of medical treatment for it while on active duty, it will most likely be considered service-connected.[8] This rating could then trigger entitlements to disability compensation and access to medical care. This is not because the VA is running some type of giveaway program. It is because the standards of proof correctly give the benefit of the doubt to the veteran.[9]

B. Disability Compensation Benefits

The first step in the disability compensation claims process is for the veteran to complete a VA Form 21-526 and turn it in to a VA regional office.[10] After a physical exam and a few months of waiting, the claimant will get a written rating decision from a veterans service center manager with the VA regional office. This letter will inform the veteran what their disability rating is, how much money he will receive because of his disability, and what his appellate rights are if he desires to challenge it.[11]

The rules for determining what level of disability a veteran receives are extremely complex,[12] are different than the Air Force's Medical Evaluation Board process[13] and are probably beyond the scope of legal assistance.

---

[8] There are over thirty-five medical conditions that trigger a service-connection presumption. 38 U.S.C.A. § 1112. On November 30, 1999, President Clinton signed the Veterans Millennium Health Care and Benefits Act. 106 Pub. Law No. 117, 113 Stat. 1545 (1999). As a result, bronchiolo-alveolar carcinoma is now also presumed to be a service-connected condition. *Id.* § 503 (to be codified at 38 U.S.C. § 1112(c)(2)(P)).

[9] The Department of Veterans Affairs has a stated policy of administering the law "under a broad and liberal interpretation consistent with the facts of each individual case." 38 C.F.R. § 3.303(a); *Id*. § 4.3 (resolves reasonable doubt in favor of the veteran).

[10] Every state, as well as Guam and Puerto Rico, has a VA regional office. Some states have more than one. Examples include California (Los Angeles, San Diego, Oakland), New York (Buffalo, New York City), and Texas (Houston, Waco). There is even one overseas regional office, the Manila Regional Office in Pasay City, Philippines.

[11] Veterans Affairs Manual M21-1, pt. IV, change 82, ch. 9, exhibits A–C (1996) [hereinafter VA Manual]; *See also* 38 C.F.R. § 19.25 (1998).

[12] 38 C.F.R. §§ 4.1–4.150. Due to the complexity of the subject, a complete discussion of the VA ratings system is beyond the scope for this article. There are seventy-four different regulations providing guidance on topics as diverse as painful motion, the endocrine system, and mental disorders. *Id.* In addition, there are other regulations providing rules of construction. For example, one of the rules is known as the bilateral factor. It applies when a compensable disability exists in more than one place (e.g., both arms, both legs, paired skeletal muscles) and provides for an additional ten percent of the value of the combined rating being added. *See id*. § 4.26. *See also* Richard v. West, 161 F.3d 719 (Fed. Cir. 1998) (holding veteran's claim for service-connected compensation benefits did not survive his death).

[13] Air Force Instruction 36-3212, Physical Evaluation for Retention, Retirement, and Separation (Jan. 1, 1998). Air Force Physical Evaluation Boards do use the VA's disabilities rating schedule. *Id.* ¶ 1.7. However, the Air Force and VA run separate programs authorized under different statutes with different goals. The VA may rate any service-connected condition without regard to overall physical fitness. In contrast, the Air Force may rate only conditions that make someone unfit for continued military service. *Id.* ¶ 1.9.

Another difficult concept involves the use of the combined ratings table.[14] Veterans frequently have more than one medical condition that is considered service-connected. However, a 30 percent rating for a knee injured during a parachute jump is not simply added to a 10 percent rating for a stiff joint in an index finger to get an overall disability rating of 40 percent. The example in the regulation is illustrative. A condition with a 60 percent disability rating and an additional condition warranting a 30 percent disability rating yield an overall disability rating of 72 percent, which will then be rounded to 70 percent.[15]

Unless you have had experience as a VA claims adjudicator, it may be better to do nothing more than provide procedural advice to a legal assistance client. If a client wants to appeal their disability rating, it is best to refer them to a counselor from a veterans service organization (e.g., American Legion or Veterans of Foreign Wars).[16] The stakes can be high. In addition to possible government employment implications, a single veteran with a 100 percent service-connected rating is entitled to receive disability compensation in the amount of $1,989 per month, tax-free.[17] Depending on the disability rating, married veterans can receive an additional $34 to $112 per month and between $18 to $60 per month for each additional child.[18] In some cases, clothing allowances for the veteran may also be allowed.[19]

If you are also the claims officer, there is yet another area where VA compensation benefits could impact your recommendations. If you have a medical malpractice claimant who has also received medical care at a VA hospital, it is possible she has simultaneously filed a VA claim for compensation payments. Doing so is allowed under federal law.[20] However,

---

[14] *See* 38 C.F.R. § 4.25.

[15] *Id.*

[16] VA employees can also explain the appeals process.

[17] *See generally* 38 U.S.C.A. § 1114. Veterans with a 100 percent rating are also entitled to unlimited commissary and base exchange privileges. *See* Department of Defense Regulation 1330.17-R, Armed Forces Commissary Regulations ¶ 2-101.4i (Apr. 1987); Air Force Joint Instruction 34-210, Army and Air Force Exchange Operating Policies ¶ 2-9a(9) (Dec. 15, 1992). The VA will help eligible veterans complete a DD Form 1172, Application For Uniformed Services Identification Card DEERS Enrollment, to obtain commissary and base exchange access.

[18] 38 U.S.C.A. § 1115.

[19] Clothing allowances are provided to veterans who either have a service-connected disability requiring a prosthetic device (including a wheelchair) that tends to wear or tear clothing or who have a skin condition requiring medication that damages outer garments. *See id*. § 1162 (stating that the amount of the allowance is $528 per year); 38 C.F.R. § 3.810.

[20] 38 U.S.C.A. § 1151. This statute was enacted before the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 2671-2680 (West 1999), and provided a remedy for service-connected medical conditions for individuals who were injured from surgical or medical treatment in VA facilities. *See also* 38 C.F.R. § 3.154. *See also* E. Douglas Bradshaw, *Veterans Administration Benefits and Tort Claims Against the Military*, ARMY LAW., Sep. 1986, at 6. This issue is most likely to come up at Kirkland Air Force Base, New Mexico, and Nellis Air Force Base, Nevada, where they have joint VA and Air Force medical facilities.

the claimant cannot receive a double recovery from both the medical malpractice claim and the VA. The statute has an offset provision.[21]

C. Pension Payments

There are three basic types of pensions: old law pensions, section 306 pensions, and improved pensions.[22] Due to the passage of time, it is unlikely an Air Force judge advocate will encounter an old law pension issue.[23] For Section 306 pensions, low-income veterans may be eligible to receive VA pension payments if they served on active duty for at least ninety days and one of those days was during a period of war.[24] There is also a requirement that the veteran either be disabled for non-service-connected reasons or be at least sixty-five years old.[25] The non-service-connected disability cannot be due to the veteran's "willful misconduct or vicious habits."[26] A slightly different pension is known as the improved pension. It is the type you are most likely to

---

[21] 38 U.S.C.A. § 1151(b). *See generally* Brown v. Gardner, 513 U.S. 115 (1994) (holding that VA's requirement to prove negligence was inconsistent with statute); Neal v. Derwinski, 2 Vet. App. 296 (1992) (portion of FTCA settlement offset by Dependency and Indemnity Compensation payments). After the *Brown* decision, Congress amended the law in 1996 to return to a negligence based standard. 38 U.S.C.A. § 1151(a)(1). *See also* Department of Veterans Affairs, Op. Off. Gen. Counsel, 01-99 (June 11, 1999), *summarized in* 64 Fed. Reg. 31,680–31,681 (1999) (patient cannot get compensation under 38 U.S.C. § 1151 for physical disability from sexual assault by VA physician but can receive compensation for psychiatric disability).

[22] Section 306 pensions were passed as part of the Veterans' Pension Act of 1959, Pub. L. No. 86-211, § 1, 73 Stat. 432 (1959). Improved pensions were passed into law in 1978. Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 95-588, 92 Stat. 2497–2511 (1978). The eligibility date for Section 306 pensions expired on December 31, 1978. VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.01c(2) (1995). A person filing a new claim for pension benefits must qualify under the improved pension program. *See* VA Manual M21-1, pt. IV, ch. 10, change 64, ¶ 10.08 (1994); VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.01c(1) (1995). However, existing section 306 pensions and old law pensions are protected. 38 C.F.R. § 3.960.

[23] 38 C.F.R. § 3.1(v). The last date for eligibility for old law pensions was June 30, 1960. VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.01c(2). Old law pensions are part of a different statutory scheme. Old law pensioners do not get cost-of-living increases, although their income limits are increased each year by a cost-of-living factor. *Id.* ¶ 16.01c(5). Old law pensions are valued because a veteran's spouse's income is excluded from his annual income for VA pension determination purposes. 38 C.F.R. § 3.261.

[24] 38 C.F.R. § 3.3(a)(2).

[25] *Id*. § 3.3(a)(2)(iv).

[26] *Id.* The term *vicious habit* is not specifically defined. As an aside, claims for service-connection, filed after October 31, 1990, for a primary or secondary disability that resulted from either drug or alcohol abuse, can no longer be paid. VA Manual M21-1, pt. IV, change 83, ch. 11, ¶ 11.04e(1)(a) (1995).

see during legal assistance. It has similar military service and disability requirements and specifically covers Persian Gulf War veterans.[27]

Each of these pensions have different payment amounts and different income limitations. Attempting to calculate income limitations for receipt of a VA pension is difficult because it is done on a case-by-case determination of reasonableness[28] and the rules governing what is and is not considered to be income for this purpose are complex.[29] The amount of the pension also depends on the health of the veteran and the number of dependants.[30] There are also special benefits and procedures for homeless veterans.[31]

D. Appellate Rights

If the veteran disagrees with the VA regional office's decision concerning either his compensation or pension benefits, he can appeal.[32] The first step is to either reopen his claim by sending in new evidence or appealing to the Board of Veterans' Appeals (BVA).[33] To appeal to the BVA, a Notice

---

[27] 38 C.F.R. § 3.3(a)(3). In improved pension cases, the veteran's adjusted income determines the payment amount. The higher the claimant's "countable income," the lower the rate of VA benefits payable. VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.01b(1) (1995).

[28] 38 C.F.R. § 3.274(a).

[29] 38 U.S.C.A. § 1552; 38 C.F.R. §§ 3.260–3.275. *See* Cutler v. Derwinski, 2 Vet. App. 336 (1992) (veteran's wife's workers compensation settlement was properly attributed as income to him); Department of Veterans Affairs, Op. Off. Gen. Counsel, 4-89 (Mar. 14, 1989) (concluding gift of a savings bond is counted as income for improved pension purposes), *summarized in* 54 Fed. Reg. 38,036 (1980). For improved pensions, items counted as income include individual retirement account distributions, Vietnam-era bonus payments, income from joint accounts, and VA compensation payments. *See* VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.41 (1995). In addition to a separate list of medical expenses that can be deducted, excluded items include welfare payments, agent orange products liability settlement payments, mineral royalties, loans, and redress payments to World War II Japanese internees. *Id.*

[30] Examples of the 1999 improved pension maximum annual rates include $8,778 for a veteran without a dependent, $11,497 for a veteran with a dependent, $10,729 for a veteran who is permanently housebound, and $14,647 for a veteran needing regular aid and attendance. *See* VA Pamphlet 80-99-1, *supra* note 1, at 60.

[31] In addition to pension benefits, the VA has a Healthcare for Homeless Program that operates at seventy-one sites. Access to mental health providers and substance abuse programs are included. *See generally* DEPARTMENT OF VETERANS' AFFAIRS, VA PROGRAMS FOR HOMELESS VETERANS (Nov. 1998). The VA's Domiciliary Care for Homeless Veterans Program provides residential counseling and rehab services to ambulatory veterans. *Id.* The VA also makes foreclosed properties available to homeless provider organizations for either substantial discounts or $1 a year leases. *Id. See also* 38 C.F.R. § 1.710 (provisions for delivery of correspondence and payments to homeless veterans).

[32] VA appellate rights are explained in detail on VA Form 4017s. *See also* Veterans Affairs Pamphlet 01-96-1, Understanding the Appeal Process (Apr. 1996) [hereinafter VA Pamphlet 01-96-1].

[33] The Board of Veterans Appeals has its own procedures and rules governing practice before its administrative judges. *See* 38 C.F.R. §§ 19.1–20.1304. The President, with the advice and

of Disagreement[34] must be sent within one year from the date of the VA regional office's decision. Attorneys' fees are not authorized, so the veteran should seek out a representative from a veterans service organization for help.

Even though the appeal is to the BVA, the local VA regional office will review the appeal first.[35] This gives the local office an opportunity to change its decision. If it does not, it will prepare a Statement of the Case summarizing the basis for the ruling and mail it to the veteran.[36] At that point, the veteran has sixty days to submit a VA Form 9[37] to the VA office that made the determination being appealed. Completing the VA Form 9 is known as submitting a substantive appeal.

The veteran's appeal to the BVA can be done in writing or he may request a hearing.[38] The BVA will even send board members from Washington, D.C., to the local VA regional office to conduct a hearing.[39] These types of BVA hearings are called Travel Board Hearings and can take a significant amount of time to schedule. Once the BVA has made a decision, a veteran has 120 days to appeal to the United States Court of Veterans Appeals.[40] At this point, attorneys' fees of up to 20 percent of the total amount of any past due benefit are allowed.[41] If the case concerns a question of statutory interpretation, decisions of the Court of Veterans Appeals can be appealed to the United States Court of Appeals for the Federal Circuit.[42]

The veteran may also request a hearing from the VA regional office to present evidence to reopen his claim.[43] Doing so gives the veteran an opportunity to testify and call witnesses on his behalf. The VA will furnish the hearing room, provide a hearing officer, and make a transcript of the hearing. If the claim is subsequently denied, the record is put in the veteran's claims file and forwarded to the BVA.[44]

---

consent of the Senate, appoints the Chairman of the Board of Veterans Appeals for a 6-year term. 38 U.S.C.A. § 7101(b)(1) (West 1991).

[34] A Notice of Disagreement can be a letter. It is defined as any written communication from the veteran or her representative that is timely filed and "expresses disagreement with an appealable decision." VA Manual M21-1, pt. II, ch. 7, ¶ 7.04 (1997).

[35] 38 C.F.R. § 19.26.

[36] *Id.* §§ 19.29-19.30.

[37] The VA Form 9 will be mailed to the veteran along with the Statement of the Case.

[38] 38 C.F.R. § 20.700(a).

[39] *Id.* §§ 20.702-20.705.

[40] CT. VET. APP. R. 4(a).

[41] 38 U.S.C.A. § 5904(d)(1) (West 1999).

[42] *See* Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) (noting that 120 day time limit is subject to doctrine of equitable tolling).

[43] 38 U.S.C.A. § 7105(a). "A claimant has a right to a hearing at any time and on any issue under 38 C.F.R. part 3 or 4." VA Manual M21-1, pt. IV, change 85, ch. 35, ¶ 35.01 (1997). *See also* VA Pamphlet 01-96-1, *supra* note 32, at 15.

[44] VA Manual M21-1, pt. IV, change 85, ch. 35, ¶ 35.02h(3).

E. Dependency and Indemnity Compensation Payments for Family Members

There are a number of programs for surviving family members of veterans.[45] Perhaps the most important such program is the Dependency and Indemnity Compensation (DIC) program. DIC payments may be available to widows who have not remarried, unmarried children under 18, dependent children between the ages of 18 and 23 if they are attending a VA approved school, and low-income parents of deceased service members or veterans.[46] Under a recent change, a surviving spouse, who terminates her remarriage, can now regain her ability to receive DIC payments.[47]

The initial threshold is dependent upon how the veteran died. To be eligible, the death must be from either, a disease or injury incurred or aggravated while on active duty, an injury incurred or aggravated during inactive duty training, or a disability compensable by the VA.[48] The death cannot be the result of the veteran's willful misconduct.[49]

DIC payments may also be authorized to survivors of veterans whose death was unrelated to the service-connected disability.[50] These payments require the veteran to have received a rating indicating total continuous disability within one of two time periods: at least ten years immediately before his death or since being released from active duty and for at least five years

---

[45] Although Dependency and Indemnity Compensation payments are the most well known benefit, there are other possible benefit payments as well. *See, e.g.*, 38 C.F.R. § 3.23 (1998) (pensions for non-service-connected deaths for surviving spouses); *id*. § 3.24 (improved pension rates for surviving children); *id*. § 3.806 (death gratuity); *id*. § 3.813 (benefits for survivors of Vietnam-era veterans who died due to chloracne or porphyria cutanea tarda); *id*. § 3.814 (monetary allowance for children of Vietnam veterans suffering from spina bifida). *See generally* Martin v. Brown, 7 Vet. App. 196 (1994) (holding pension owed to veteran at the time of his death was not countable as income when determining widow's pension). *See also* 38 C.F.R. § 3.212 (unexplained absence for seven years creates presumption of death).

[46] *See generally* 38 C.F.R. § 3.5. *See also* 38 U.S.C.A. § 103 (special provisions relating to marriages); *id*. § 1313 (if no surviving spouse, $361 for one child, $520 for two); *id*. § 5110(l); 38 C.F.R § 3.20 (surviving spouse's benefit for month of death); *id.* § 3.25 (DIC for parents); *id*. § 3.50 (requirements to be considered a surviving spouse); *id*. § 3.57 (dependent child requirements). To be a surviving spouse, there must have been continuous cohabitation for the duration of the marriage. *Id*. § 3.53. *See also* Air Force Instruction 36-3002, Casualty Services (Aug. 26, 1994).

[47] Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 502, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C. § 103(d)).

[48] 38 U.S.C. § 101(14); 38 C.F.R. § 3.5.

[49] Forshey v. West, 12 Vet. App. 71 (1998) (concluding widow's DIC request was properly denied because active duty Navy member, who died in motorcycle accident due to intoxication and failure to wear a helmet, did not have a service-connected death); Myore v. Brown, 9 Vet. App. 498 (1996) (concerning active duty Marine who died from self-inflicted gunshot wound to the head playing Russian roulette while home on leave).

[50] 38 C.F.R. § 3.22.

immediately before his death.[51] Payments under these provisions are subject to an offset against any awards from judicial actions brought due to the veteran's death.[52]

F. Divorce and Compensation Benefits

A judge advocate who provides legal assistance long enough will, at some point, have a former spouse come in and complain that her ex-husband just got a 30 percent VA disability rating and now she is entitled to only half of 70 percent of his military pension. There is nothing the former spouse can do to stop the veteran from waiving his military retired pay in favor of tax-free VA compensation benefits.[53] In fact, if a military retiree files a claim for VA compensation, a waiver of the retired pay is automatic unless the veteran requests otherwise.[54] There is, however, one little known consequence for the veteran.

Although VA benefits are almost never subject to garnishment,[55] the VA will honor an assignment order from a court if a veteran, who is entitled to receive military retired pay, elects a waiver in order to receive compensation payments.[56] This raises three issues. First, the VA will only garnish compensation, not pension payments.[57] Second, only the amount waived is subject to garnishment.[58] Third, it would be helpful if the former spouse had a way to get accurate information concerning the amount and type of the veteran's VA payments without having to resort to litigation.

---

[51] *Id*. § 3.22(a).
[52] *Id*. § 3.22(d).
[53] *See* 38 U.S.C.A. §§ 5304(a)-5305; 38 C.F.R. § 3.750(c); VA Manual M21-1, pt. IV, ch. 21 (1995). A veteran may waive military retired pay by completing a VA Form 21-251. For a detailed discussion of the implications of this issue under the Uniformed Service Former Spouses Protection Act, see Captain Kristine D. Kuenzli, *Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?*, 47 A.F. L. REV. 1 (1999).
[54] 38 C.F.R. § 3.750(c).
[55] The general rule is that veteran's benefits payable under Title 38 cannot be reached by any "legal or equitable process, before or after receipt by the beneficiary." 38 U.S.C.A. § 5301(a). *See generally* Bennett v. Arkansas, 485 U.S. 395 (1988) (finding that state could not attach prisoner's VA benefits). *Cf.* Repash v. Repash, 528 A.2d 744 (1987) (concluding veteran's disability benefits were income for purposes of establishing amount of alimony); Pfeil v. Pfeil, 341 N.W.2d 699 (1983) (determining that disability benefits lost their protected status when invested in real estate).
[56] 5 C.F.R. § 581.103(c)(7) (1998).
[57] *Id*. There is no authority to garnish pension payments. VA Manual M-21, pt. IV, change 32, ch. 19, ¶ 19.13 (1994).
[58] VA Manual M-21, pt. IV, ch. 19, ¶ 19.13. The amount garnished is subject to the percentage limitations specifically listed and any state law limitations as well. 5 C.F.R. § 581.402. The lowest percentage (frequently 50 percent) controls the actual percentage of the garnishment. For example, Arizona limits the amount of a garnishment to "one-half of the disposable earnings of a debtor for any pay period." ARIZ. REV. STAT. ANN. § 33-1131C (West 1990).

Although you could guess the amount of the waiver based on the amount missing from the retired pay, if the veteran is not providing accurate information to his ex-wife, it could be difficult. Since VA adjudication records are protected under the Privacy Act,[59] a court order is necessary before access will be permitted.[60] However, there is a better way. It is possible to call or write a VA regional office and request the monthly rate of a veteran's pension, compensation, or educational allowance.[61] Doing so is an easy and free way to get accurate information.

II. ACCESS TO MEDICAL CARE

While Department of Defense hospitals have been downsizing, VA facilities have been rapidly expanding. There are currently 172 VA medical centers.[62] Although that number has not increased since 1989, over the last ten years, the number of VA outpatient clinics has increased from 230 to over 600.[63] During that same period, the number of outpatient visits per year has increased from 22.6 million to 37 million.[64] So, who is entitled to all this medical care?

The old rule was basically that a veteran could get medical care only for his service-connected medical conditions.[65] There were some noteworthy exceptions,[66] but the system almost seemed to encourage fragmented health care. The Veterans' Health Care Eligibility Reform Act of 1996[67] significantly

---

[59] 5 U.S.C.A. § 552a (West 1991).
[60] 38 C.F.R. § 1.576(b)(11).
[61] 38 C.F.R. § 1.502 (provides for disclosure to "any person"). The call should be made to the VA regional office closest to the veteran's home. The telephone number should be available through the blue pages of most telephone books.
[62] Department of Veterans Affairs, *VAnguard*, Mar. 1999, at 12 [hereinafter cited as *VAnguard*]. Included among the 172 medical centers is one in San Juan VA Medical Center in Puerto Rico. The VA also operates 131 nursing homes, 40 domiciliaries, and 206 vet centers. *Id.* Vet centers provide counseling to help veterans resolve war-related psychological issues and readjust to civilian life. There are vet centers in every state and in Guam, Puerto Rico, and the Virgin Islands. Domiciliaries provide rehabilitative and long-term health care for veterans who need assistance but do not need to be in a nursing home. The VA also operates outpatient clinics in Guam and the Philippines. Access to VA nursing home care is now mandatory for veterans who need it for a service-connected disability or to veterans who need nursing home care and have a service-connected disability rating of at least 70 percent. Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 101, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C. § 1710A).
[63] *See VAnguard*, *supra* note 62.
[64] *Id.*
[65] 38 C.F.R. § 17.60(a)(1). Medical care could also be provided to veterans with a low income and low net worth. *Id*. § 17.60(b)(2).
[66] Veterans could receive medical care for a non-service-connected condition if it was aggravating a service-connected condition. *Id*. § 17.60(a)(5).
[67] Pub. Law No. 104-262, § 1, 110 Stat. 3177 (1996) (codified at 38 U.S.C.A. §§ 545, 1705, 1706, 7319, 7230, and 7321 (West 1999)).

changed the access rules. Today, VA medical centers and outpatient clinics are actually competing to become the primary care provider of choice for all veterans. Modern VA health care closely resembles non-federal health care delivery systems. To be seen at a VA hospital, you must first be an enrolled patient.[68] After enrollment, like TRICARE,[69] there are access priorities. Access priorities determine whether and in what order the patients can be given medical care.

A. Access Priorities

The VA has seven priority groups.[70] Priority group one consists of veterans with a 50 percent or more service-connected disability rating. The second priority group includes veterans with a 30 or 40 percent service-connected disability rating. Group three includes veterans with a 10 or 20 percent service-connected disability rating, former prisoners of war, Purple Heart recipients,[71] veterans who received medical discharges, and veterans receiving care under 38 U.S.C. § 1151.[72] Priority group four consists of veterans who are either receiving an increased pension because they need either regular aid and attendance or are housebound and veterans who are

---

[68] 38 U.S.C.A. § 1705(c)(1). This statute was widely misread to mean all veterans had to enroll by October 1, 1998, or forever lose access to VA care. In reality, a veteran can enroll at any time. In addition, there are provisions allowing VA medical treatment while an application is pending. 38 C.F.R. § 17.34 (tentative eligibility determinations).

[69] TRICARE is a managed care system for individuals who are eligible for military medical care. It has a choice of three plans under TRICARE: Prime, Extra, and Standard. TRICARE Prime is similar to a Health Maintenance Organization (HMO). It uses military hospitals and a network of civilian providers. There are no deductibles or claims forms. Primary care managers control referral to medical specialists. TRICARE Extra uses a preferred provider network and military hospitals on a space available basis. TRICARE Standard is a fee for service plan. Although it provides for the most flexibility in selecting health care providers, it is also the most expensive to the patient. 32 C.F.R. § 199.17.

[70] *See* 38 U.S.C.A. § 1705(a); 38 C.F.R. § 17.99. There are additional health care programs for veterans with service-connected conditions who are either traveling or residing in foreign countries. DEPARTMENT OF VETERANS AFFAIRS, FOREIGN MEDICAL PROGRAM HANDBOOK (Oct. 1995). The VA can also provide counseling for veterans who were victims of sexual harassment or sexual trauma. 38 U.S.C.A. § 1720D. The entitlement to this service was going to end on December 31, 2001. However, it was recently extended through December 31, 2004. Veterans Millennium Health Care and Benefits Act, § 106 Pub. Law No. 117, § 115, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C. § 1720D). These same amendments require the VA and the Department of Defense to study "the extent to which former members of reserve components of the Armed Forces experienced physical assault of a sexual nature or battery of a sexual nature while serving on active duty for training." *Id.*

[71] Veterans Millennium Health Care and Benefits Act §112 (to be codified at 38 U.S.C. § 1705(a)(3)).

[72] *See* 38 U.S.C.A. §§ 1705(a)(3), 1710(a)(2)(C). *See also supra* notes 21-22 and accompanying text for a discussion of compensation benefit offsets for medical malpractice claims.

catastrophically disabled. Group five consists of low-income veterans[73] with no service-connected disability rating. Priority group six is made up of veterans who are either seeking care due to exposure to a toxic substance, radiation, or for disorders associated with service in the Persian Gulf[74] or who have a zero percent service-connected disability rating. The last group consists of other veterans, with income above a certain level, who agree to pay under a co-pay plan.[75]

These priority groups are going to take on increased significance in the future. In the event the VA does not have sufficient resources to provide timely care to everyone, it will be required to limit health care to patients with higher access priorities.[76] This is significant because there is some indication that demand for VA heath care increased after enrollment was offered to veterans in all priority groups.[77] As of March 1999, the VA had enrolled 4,003,708 patients, with priority group five easily having the most members.[78] Of the over four million veterans enrolled, only 2,449,867 used the VA health care system between October 1998 and March 1999.[79]

B. Financial Information

Veterans, who want to enroll based in part on their inability to pay for any portion of their health care, must complete a VA Form 10-10EZ providing their personal financial data.[80] Income from the patient's spouse is also considered.[81] This process is known as a means test. The threshold amount for program eligibility is adjusted annually.[82] It is important to be accurate

---

[73] The current means test threshold is $22,351 for single veterans and $26,824 for veterans with one dependent. GOVERNMENT ACCOUNTING OFFICE, VA HEALTH CARE: PROGRESS AND CHALLENGES IN PROVIDING CARE TO VETERANS, GAO/T-HEHS-99-158, at 5 (July 15, 1999) [hereinafter GOVERNMENT ACCOUNTING OFFICE].

[74] There are two good sources for information on medical conditions. *See* DEPARTMENT OF VETERANS AFFAIRS, ANNUAL REPORT TO CONGRESS: FEDERALLY SPONSORED RESEARCH ON GULF WAR VETERANS' ILLNESS FOR 1997 (March 1998); INSTITUTE OF MEDICINE, VETERANS AND AGENT ORANGE, 1996.

[75] 38 U.S.C.A. § 1710(f)(1).

[76] 38 U.S.C.A. § 1705(a). The VA is required to manage health care resources by providing care first to patients with higher access priorities. *Id.*

[77] GOVERNMENT ACCOUNTING OFFICE, *supra* note 73, at 7. Expanded services also increased demand. *Id.* at 2.

[78] *Id.* at 6. Priority group five had 1,378,924 enrollees. *Id.*

[79] *Id.*

[80] 64 Fed. Reg. 54,212 (1999). The VA Form 10-10EZ is titled, "Application for Health Care Benefits." It is available at VA medical centers and on the Internet at www.va.gov/forms. Veterans applying for care based on being in categories 1, 2, 3, 6 and 7 do not need to complete sections of the form requesting financial information. *Id.*

[81] Block IIC on the VA Form 10-10EZ requests the gross income from the previous calendar year for the veteran, spouse, and any dependent children.

[82] VA Pamphlet 80-99-1, *supra* note 1, at 5. The new threshold amounts are announced each January. *Id.*

with this information because the VA has the authority to cross reference this information with data provided to the Social Security Administration and the Internal Revenue Service.[83]

If the veteran is not eligible for free medical care, then co-payments are going to be required. The amount of the co-payments depends on the type of patient and service. For Medicare eligible patients, the patient is responsible for the Medicare deductible for the first ninety days of care during any 365-day period.[84] The patient is charged half of the Medicare deductible for any further care. In addition, all patients are charged $10 a day for inpatient care and $5 a day for nursing home care.[85] For outpatient appointments, the co-payment is based upon 20 percent of the cost of the average outpatient visit.[86] Pharmacy services can also result in a co-payment. Medication for service-connected conditions is free.[87] It is also free to veterans receiving a VA pension.[88] Otherwise, the veteran will be charged $2 per drug for each thirty-day supply of medication.[89]

On top of this perhaps already complex financial structure is the VA's right to bill the patient's private insurance carrier for treatment of conditions that are not service-connected.[90] Even so, the veteran is not responsible for expenses under the terms of this policy (e.g., deductible, co-payment, or uncovered items).[91] There are additional rules for emergency medical care[92]

---

[83] *Id.*
[84] 38 U.S.C.A. § 1710(f)(3)(E) (West 1999).
[85] *Id.* § 1710(f)(2)(B).
[86] *Id.* § 1710(g)(2). *See generally* VA Manual M-1, pt. I, ch. 4, ¶ 4.31 (1993). Military retirees are entitled to VA medical care on the same basis as other discharged veterans. 38 C.F.R. § 17.94 (1998) (outpatient services for military retirees); VA Manual M-1, pt. I, ch. 4, ¶ 4.24. However, Department of Defense patients are frequently seen in VA facilities under sharing agreements. In addition, the Department of Defense has now been required to enter into an agreement with the Department of Veterans Affairs to reimburse the VA, either directly or through a TRICARE contractor, for medical care provided to military retirees. *See* Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 113, 113 Stat. 1545 (1999).
[87] Only charges for medication for non-service connected conditions are authorized. 38 U.S.C.A. § 1722A(a)(1).
[88] *Id.* § 1722A(a)(3)(B).
[89] *Id.* § 1722A(a)(1).
[90] *Id.*
[91] *Id.* § 1729(a)(3).
[92] Veterans may be reimbursed for emergency medical care if a delay would have been hazardous to the patient's life or health, the condition is related to a service-connected condition, and the VA or other federal facilities were not feasibly available. *See* 38 U.S.C.A. § 1728; 38 C.F.R. §§ 17.54, 17.120–17.121 (prior authorization requirements); Zimick v. West, 11 Vet. App. 45 (1998) (concluding facts did not support reimbursement for microsurgery at non-VA facility to save finger in part because there was no service-connection). *See also* Veterans Millennium Health Care and Benefits Act § 111 (establishes payment systems for reimbursement for emergency treatment) (to be codified at 38 U.S.C. § 1725). *See generally* Nolte v. West, No. 96-1311, 1999 WL 184901 (Vet. App. 1999) (finding there should be no reimbursement for psychiatric treatment for depression that was not service-connected).

and situations in which VA medical care cannot be provided either because the veteran lives too far from a VA facility or because the care required is beyond the scope of the facility.[93]

C. Medical Benefits Package

Effective November 5, 1999, the VA enacted a medical benefits package describing the inpatient and outpatient care available to enrolled veterans.[94] The package is divided into the two components of basic care and preventive care. Basic care includes both inpatient and outpatient medical and surgical care, mental health care, prescription drugs, medical supplies, various counseling services, durable medical equipment, home health care, pregnancy and delivery services, and hospice and palliative care.[95] The basic care component also includes two aspects that may be especially helpful for legal assistance attorneys. First, training and counseling services are available to a veteran's immediate family members or to a legal guardian if the veteran is going to live with them.[96] Second, VA providers will complete forms based on their examination or knowledge of a veteran's medical condition (e.g.

---

[93] *See* 38 U.S.C.A. § 1703; 38 C.F.R. § 17.52. The VA will contract with local facilities to provide hospital care for veterans when the VA is not capable of providing care due to facility capability or geographic inaccessibility if the treatment is needed for either a service-connected condition or something aggravating a service-connected condition. *Id*. § 17.52(a)(1). The VA will contract for medical services under the same circumstances if the veteran has at least a 50 percent service-connected disability rating or has recently received VA inpatient care. *Id*. § 17.52(a)(2). There are also provisions to contract for hospital care for women veterans. *Id*. § 17.52(a)(4). *See generally* Meakin v. West, 11 Vet. App. 183 (1998) (Board of Veterans' Appeals has jurisdiction to decide fee basis care).

[94] Generally, a veteran must be enrolled to receive VA health care. 64 Fed. Reg. 54,212 (1999) (to be codified at 38 C.F.R. § 17.36). However, there are ten exceptions to this rule, three of which are especially significant. First, VA medical care will be provided to unenrolled veterans with a service-connected disability rating of 50 percent or higher. *Id.* at 54,217 (to be codified at 38 C.F.R. § 17.37(a)). Second, veterans with a service-connected condition will be able to access VA inpatient and outpatient care for that condition. *Id.* (to be codified at 38 C.F.R. § 17.37(b)). Third, veterans discharged or released from active duty for a disability incurred or aggravated in the line of duty may also seek care. *Id.* (to be codified at 38 C.F.R. § 17.37(c)).

[95] *Id*. (to be codified at 38 C.F.R. § 17.38). The following are specifically excluded from the medical benefits package: abortions, in vitro fertilizations, access to drugs and medical equipment that are not approved by the Food and Drug Administration (unless the patient is part of a research study), sex change operations, health care for prisoners, and membership in spas and health clubs. *Id.* (to be codified at 38 C.F.R. § 17.38(c)). Some aspects of this care package will be contracted out to non-VA medical facilities. *See supra* note 93.

[96] 64 Fed. Reg. at 54,217 (to be codified at 38 C.F.R. § 17.38(a)(1)(vii)). The veteran's medical condition must involve either a service-connected disability or a non-service-connected disability in a patient who needs these services in order to be appropriately discharged from a hospital. *Id.*

Family Medical Leave Act forms, life insurance applications).[97] The preventive care component includes periodic physical and eye exams, medication monitoring, immunizations, and genetic counseling.[98]

D. Medical Care for Family Members

Dependants of veterans may be eligible for health care through CHAMPVA.[99] CHAMPVA is a health benefits program that is separate from TRICARE. However, eligibility is fairly restricted. First, the dependant cannot be eligible for either TRICARE or Medicare Part A[100] because they have reached the age of 65.[101] Second, they must fall into one of three categories: (1) the spouse or child of a veteran who has a permanent and total service-connected disability, (2) the surviving spouse or child of a veteran who died from a service-connected condition or was totally disabled from a service-connected condition at the time of his death, or (3) the surviving spouse or child of a veteran who died in the line of duty.[102] In addition, dependants under age 65 must be enrolled in both Medicare Parts A and B to be eligible for CHAMPVA.[103]

III. HOME LOANS

The VA guarantees home loans for almost all active duty military members and veterans. Although the VA does not actually loan money, eligible veterans are able to purchase a home without a down payment, at

---

[97] *Id.* (to be codified at 38 C.F.R. § 17.38(a)(1)(xiv)). However, VA physicians will not complete these forms under circumstances where a third party would customarily pay other health care professionals to do these exams but will not pay the VA. *Id.*

[98] *Id.* (to be codified at 38 C.F.R. § 17.38(a)(2)).

[99] *See* 38 U.S.C.A. § 1713 (West 1999); 38 C.F.R. § 17.84. A former spouse, who lost CHAMPVA benefits due to remarriage, can now reapply for them after a divorce from an additional marriage. Veterans Millennium Health Care and Benefits Act § 502 (to be codified at 38 U.S.C. § 103(d)(5)(B)).

[100] Medicare provides health insurance coverage for most Americans over 65 years of age, the permanently disabled, and individuals with a certain renal disease. Medicare Part A is financed by payroll taxes and covers hospital costs. Medicare Part B is optional coverage that usually requires a monthly premium. It covers outpatient visits and diagnostic tests. P. YOUNGER, HEALTH CARE FRAUD AND ABUSE COMPLIANCE MANUAL app. B:9 (1997). *See also Medicare Subvention: Challenges and Opportunities Facing a Possible VA Demonstration, Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means*, 106th Cong., 1st Sess. (1999) (statements of William J. Scanlon and Stephen P. Backhus), *reprinted in* GAO Report GAO/T-HEHS/GCD-99-159 (July 1, 1999).

[101] VA Pamphlet 80-99-1, *supra* note 1, at 42.

[102] 38 U.S.C.A. § 1713(a). However, spouses and children of Persian Gulf veterans are entitled to health status evaluations through December 31, 2003. Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 205, 113 Stat. 1545 (1999) (to be codified in notes after 38 U.S.C.A. § 1117).

[103] *See* VA Pamphlet 80-99-1, *supra* note 1, at 11. *See also* 38 U.S.C.A. § 1713(d) (1999).

relatively low fixed interest rates, and are able to finance the VA funding fee.[104] Depending upon the amount of the loan, the VA will guarantee up to 50 percent of the loan or up to $50,750.[105] Lenders are generally willing to offer loans up to four times the amount of the guarantee (or up to $203,000) without a down payment. The VA also informs the buyer of the reasonable value of the property. However, the VA only guarantees the loan, not the condition of the property. In addition, veterans can get their VA entitlement back or use any remaining balance for additional home purchases.[106] Clearly, the VA Home Loan Guarantee is an incredibly significant benefit.[107]

A. Eligibility

Almost anyone who has served on active duty in the armed forces is entitled to a VA home loan guarantee.[108] Members currently on active duty

---

[104] *See* 38 C.F.R. § 36.4312. On home purchase loans, charges associated with recording fees, the credit report, taxes, hazard insurance, a survey, title examination, and flood zone determinations cannot be financed. *Id*. § 36.4312(d). *See also id*. § 36.4337 (underwriting standards). On interest rate reduction loans and on refinanced loans, the veteran is able to finance the closing costs. *Id*. § 36.4312(a). *See generally* 38 U.S.C.A. § 3710 (authorizing statute for loans for purchase or construction of homes).

The VA funding fee is based on the status of the veteran and the amount of the down payment. At the discretion of the veteran and the lender, the VA funding fee may be included in the loan amount. 38 C.F.R. § 36.4254. For veterans of active duty service, who are making first time purchase and construction loans, the VA funding fee is 2 percent if there is no down payment, 1.5 percent if there is a 5 percent down payment, and 1.25 percent if there is a 10 percent down payment. These rates are slightly higher for veterans with only Guard or Reserve service. VA Manual M26-1, change 3, ch. 8, ¶ 8.02 (1998). VA funding fees are not charged on loans made to disabled veterans and to unremarried surviving spouses of veterans who died due to military service. 38 C.F.R. § 36.4254(d)(5).

[105] 38 U.S.C.A. § 3703(a)(1)(A).

[106] To apply to get back a VA loan entitlement, complete a VA Form 26-1880. A veteran can get his or her VA entitlement back if either the property has been sold and the loan has been paid in full or a qualified veteran assumes the loan and substitutes his or her entitlement for the same entitlement used originally. 38 C.F.R. § 36.4203(a)(3). If the veteran cannot meet these restoration conditions, he or she may still have a remaining entitlement for use in another VA loan. VA Manual 26-1, change I, ch. 2, ¶ 2.12 (1997). *See generally* 38 U.S.C.A. §§ 3713–3714; 38 C.F.R. §§ 36.4218, 36.4333, 36.4508.

[107] *See generally* Bernard Ingold, *The Department of Veterans' Affairs Home Loan Guaranty Program: Friend Or Foe*?, 132 MIL. L. REV. 231 (1991); Veterans' Affairs Pamphlet 26-4, VA Guaranteed Home Loans for Veterans (1995) [hereinafter VA Pamphlet 26-4]; Veterans' Affairs Pamphlet 26-91-1, VA Home Loans: A Quick Guide For Homebuyers & Real Estate Professionals (1996); Veterans' Affairs Pamphlet 26-96-1, Settlement Costs (1996); Veterans' Affairs Pamphlet 26-93-1, VA Direct Home Loans for Native American Veterans Living on Trust Lands (1993).

[108] 38 U.S.C.A. § 3701. To obtain a VA Certificate of Eligibility, complete a VA Form 26-1880 and attach a copy of your DD Form 214. If the member is still on active duty and does not have a DD Form 214, she must submit a statement of service including the name of the base or command, her date of entry on active duty, and the duration of any lost time. VA Pamphlet 26-4, *supra* note 107, at 7. Active duty members also must submit a military Leave

are eligible if they have served 181 days.[109] Veterans who served at least ninety days on active duty during a war are also eligible.[110] Other veterans must also have been on either active duty for 181 days or discharged for a service-connected disability.[111] However, time served on active duty in either the National Guard or Reserve does not count toward these time limits unless the military member was activated for federal service.[112] Surviving spouses of members who either died on active duty or from a service-connected disability also qualify.[113] Veterans who either served six years in the Selected Reserve[114] or were discharged prior to six years for a service-connected disability are eligible as well.[115]

B. Special Rules for Assuming a VA Mortgage

VA loans, issued after March 1, 1988, have set criteria before they can be assumed.[116] If a veteran attempts to avoid these restrictions by selling his home without notifying the lender, then a lender holding a VA loan may

---

and Earnings statement. 38 C.F.R. § 36.4337(f)(2). For members serving in the Selected Reserve, an NGB Form 22 may be substituted for a DD Form 214. The veteran must also be a good credit risk. *See* 38 U.S.C.A. § 3710(b)(3); 38 C.F.R. § 36.4337. *See also id*. § 36.4325(a) (VA has no liability if either the lender or holder participated in intentional misrepresentation). Additional guidance can be found on VA Form 26-0592, Counseling Checklist for Military Homebuyers.

[109] VA Pamphlet 26-4, *supra* note 107, at 6.

[110] 38 U.S.C.A. § 3702(a)(2)(A). This includes the Persian Gulf War. *Id*. § 3702(a)(2)(D).

[111] *Id*. § 3702(a)(2)(B).

[112] *Id*. § 101(21)–(22).

[113] *See id*. § 3701(b)(2); VA Manual 26-1, ch. 2,¶ 2.05 (1996). Spouses of military members who have been in either MIA or POW status for at least ninety days also qualify. *Id.* ¶ 2.06.

[114] The Selected Reserve is the main component of the Ready Reserve. The President has the authority to order up to 200,000 members of the Selected Reserve to active duty for up to 270 days. 10 U.S.C.A. § 12304 (West 1999). VA home loan guaranty entitlement based on reserve service was recently extended through September 30, 2007. Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 711, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C.A. § 3702(a)(2)(E)).

[115] 38 U.S.C.A. § 3701(b)(5)(A).

[116] Loans issued before March 1, 1988 are fully assumable. *See* 38 U.S.C.A. § 3714(f)(1)(A); 38 C.F.R. §§ 36.4275, 36.4310. However, the buyer must be found creditworthy before the VA will issue a release of liability to the seller. Veterans' Affairs Pamphlet 26-7, VA Lenders Handbook ¶ 2.05 (1998). If the loan is not paid in full in connection with the sale, it is possible for someone to sell their home and still remain liable to the Government on their VA loan even though they no longer own the property. *Id.* In addition, a release of liability from the VA only releases the seller from any liability he has with the Government. The VA release does not release the seller from any liability he has with their lender and does not by itself restore a veteran's loan guaranty entitlement. *Id*. *See also* Veterans' Affairs Pamphlet 26-68-1, Selling Your GI Home? (1989).

demand immediate full payment of the principal and interest.[117] A lender may allow a buyer to assume a VA loan only if the payments are current, the buyer is found to be creditworthy, and the buyer is contractually obligated to purchase the property and assume full responsibility for repayment of any unpaid balance.[118] If these criteria are met, the veteran is released from liability for the assumption.

C. Methods for Veterans to Avoid Foreclosure

By way of background, the VA does have some significant rights when faced with a veteran who may default on the VA loan.[119] The holder of the note is generally required to give the VA notice when the borrower has not made payments for sixty days.[120] In addition, the creditor cannot take any action to terminate the borrower's rights until thirty days after providing notice to the VA that it intends to do so.[121] During this thirty-day window, the VA may pay the holder the unpaid balance and require the holder to assign the loan and the security for the loan to the VA or to a designee.[122] If the VA does not order this assignment within the thirty days, the lender is free to proceed with foreclosure. In order to minimize loses to both the VA and the veteran, the VA has several programs to work with veterans who find themselves in positions where they can no longer make their mortgage payments.[123]

A veteran facing default does have several options beyond either paying enough to make the note current or offering a deed in lieu of foreclosure.[124] First, forbearance is the most common method of avoiding foreclosure.[125] With this option, your legal assistance client may offer to pay

---

[117] 38 U.S.C.A. § 3714(b). *See generally* Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992) (holding that VA entitled to summary judgment against veteran who claimed due process violation in foreclosure sale).

[118] *See* 38 U.S.C.A. § 3714(a)(1); 38 C.F.R. § 36.4508.

[119] Over 152,000 VA guaranteed loans with a total value of $11.4 billion went into default between July 1, 1995 and June 30, 1997. The VA had guaranteed a value of $4 billion on those loans. Surprisingly, more active duty military members than veterans defaulted on their VA loans. DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, ATTRIBUTES OF DEFAULTED VA HOME LOANS, Report No. 9R5-B10-047 (Mar. 25, 1999).

[120] *See* 38 C.F.R. § 36.4315; VA Manual M26-4, change 11, ch. 2, ¶ 2.06a (1992). There are provisions for constructive notice. They include a letter from the note holder asking for deed in lieu of foreclosure advice or a bankruptcy notice. VA Manual M26-4, change 6, ch. 2, ¶ 2.03c(4)(a) (1992).

[121] *See* 38 C.F.R. § 36.4317; VA Manual M26-4, change 11, ch. 2, ¶ 2.06a. The 30-day requirement may be waived. *Id*. change 11, ch. 2, ¶ 2.06b.

[122] *See* 38 U.S.C.A. § 3732(a)(2); 38 C.F.R. § 36.4318.

[123] *See* Urs Gsteiger, *Representing A Veteran After Default of an Assumed VA Guaranteed Home Loan*, ARMY LAW., Jan. 1993, at 3. A VA Form 26-8762 contains a list of borrower's rights.

[124] A deed in lieu of foreclosure is not an option if there is a second lien on the property.

[125] VA Manual M26-4, ch. 2, ¶ 2.08a (1992).

back part of the delinquency along with his monthly payments. If this is not realistic, then the note holder may agree to accept partial payments or to suspend payments for a set period of time. Although the VA has no authority to require this of a lender, note holders frequently cooperate as long as the veteran can demonstrate he will be able to resume payments on a specific date.[126] Second, if forbearance options will not work, the lender also has the authority to reamortize the loan by adding the amount of the delinquency to the loan balance.[127] Of course, doing so increases both the loan amount and the monthly payments. Third, if the client has the ability to pay but the lender is unwilling to modify the payment terms, VA refunding may be an option. The VA, in its discretion, can actually buy the loan from the holder and take over as the creditor.[128] At that point, the VA may continue to serve as the note holder or it may sell the note.[129] In spite of all these programs, sometimes sale of the property is the only option. Fourth, the VA can facilitate a compromise sale.[130] Under certain circumstances, a veteran may sell his home for less than the amount due on the loan.[131] The VA then pays the difference between the balance on the loan and the proceeds from the sale, though the amount cannot exceed the maximum amount of the loan's guaranty.[132] It is actually possible for the original borrower to sell his home for substantially less than is owed and walk away from the transaction owing nothing. However, any VA loan entitlement will not be restored.[133]

IV. EDUCATION BENEFITS

The primary education benefits administered by the VA are through the Montgomery GI Bill.[134] Although there are three separate categories of

---

[126] *See id.* ch. 2, ¶ 2.03.
[127] VA Manual M26-4, change 15, ¶ 2-8 (1993).
[128] *See* 38 U.S.C.A. § 3720(a)(5); 38 C.F.R. §§ 36.4318, 36.4322; VA Manual M26-4, change 11, ch. 2, ¶ 2.06c(2) (1995).
[129] VA Manual M26-4, ch. 2, ¶ 2.12.
[130] *See* 38 C.F.R. §§ 36.4323, 36.4342; VA Manual M26-4, ch. 2, ¶ 2.09 (1992); Major Bruce D. Lennard, *One Dollar May Move You In, But It Can Take A Lot More To Move You Out*, THE REPORTER, Sep. 1997, at 26.
[131] The VA has the authority to compromise, waive, or release any right or claim. 38 U.S.C.A. § 3720. This authority includes the right of the VA to reduce the number and size of debts it has against veterans. A compromise sale may be appropriate when it will preclude the establishment of an uncollectable debt. Some of the criteria include that the default was caused by circumstances beyond the debtor's control, that there is no indication of bad faith, and that the obligor cooperated with the VA in exploring alternatives to the sale. 38 C.F.R. § 36.4323(e)(1)–(4).
[132] VA Manual M26-4, ch. 2, ¶ 2.09.
[133] 38 C.F.R. § 36.4203(a)(3).
[134] *See generally* Veteran's Affairs Pamphlet 22-90-2, Summary of Educational Benefits Under the Montgomery GI Bill–Active Duty Educational Assistance Program, Chapter 30 of Title 38 U.S. Code (1997).

eligibility, for anyone currently on active duty the general rule is that a veteran is eligible for benefits upon discharge if they served for at least two years and elected to have their military pay reduced by $100 per month for twelve months.[135] Discharges for convenience of the government, for hardship, or for a medical condition could shorten that active duty service requirement.[136]

The amount of the payments and the flexibility of how they may be spent[137] is especially useful. Full time students who served at least three years on active duty receive $528 a month[138] for up to 36 months[139]. Full time students who served two years on active duty receive $429 per month.[140] These funds can be used toward an undergraduate or graduate degree, a certificate or diploma from business, technical, or vocational schools, or various other types of education.[141] Payments for tutors and work-study programs are also available.[142] Generally, any course of study that leads to some type of degree or certificate will be covered.[143] GI bill funds can now also be used to pay for courses that prepare veterans for admissions tests.[144]

Educational benefits are also available for dependents. Spouses who have not remarried and children of veterans are eligible under certain circumstances: (1) the veteran either died or is permanently and totally disabled as the result of active duty service, (2) the veteran died from any cause while rated permanently and totally disabled from a service-connected

---

[135] 38 U.S.C.A. § 3011 (basic educational assistance entitlement for service on active duty). There are also programs available for the Selected Reserve and for individuals who had a remaining entitlement under the Vietnam Era GI Bill. VA Pamphlet 80-99-1, *supra* note 1, at 17–20. *See also* Veteran's Affairs Pamphlet 22-90-3, Summary of Educational Benefits Under the Montgomery GI Bill–Selected Reserve Educational Assistance Program, Chapter 1606 of Title 10 U.S. Code (1998); Veteran's Affairs Pamphlet 22-79-1, Summary of Educational Benefits Under the Post-Vietnam Veterans' Educational Assistance Program (1997).

[136] 38 U.S.C.A. § 3011(a)(1)(B)(ii).

[137] 38 C.F.R. § 21.7220 (course approval list). GI Bill funds cannot be used for bartending or personality development courses. *Id*. § 21.7222.

[138] 38 U.S.C.A. § 3015(a)(1) (amount of assistance).

[139] *Id*. § 3013(c)(1) (duration of benefits).

[140] *Id*. § 3015(b)(1).

[141] *See id*. § 3687 (apprenticeship or other training); *id*. § 3241(b) (flight training).

[142] 38 C.F.R. § 21.7141 (tutorial assistance); VA Manual M27-1, pt. I, change 49, ch. 9, (1995) (work-study allowance program).

[143] 38 C.F.R. § 21.4253(b). *See also id.* at § 21.4254 (procedures for nonaccredited courses); *id*. § 21.4255 (required refund policy for nonaccredited courses). A college or educational institution will be considered accredited by the VA if it is recognized by a national accrediting agency or by the applicable state agency. *Id.* § 21.4253(c). Students seeking educational benefits should complete a VA Form 22-1990, Application for VA Education Benefits. The school completes a VA Form 22-1999, Enrollment Certification, and returns it to the VA. Students receiving benefits should complete a VA Form 22-1995, Request for Change of Program or Place of Training, before switching schools or changing their educational objective (e.g., college to a vocational school).

[144] Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 701, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C. § 3002(3)). Examples would college or graduate school entrance exams like the ACT, SAT, LSAT, MCAT, and GRE.

disability, (3) the military member has been listed as either missing in action or as a prisoner of war for over ninety days, or (4) the military member is detained by a foreign government or power for over nintey days.[145] The opportunities are similar to the veterans' programs and the rate for a full time student is $485 per month.[146]

V. IMPACT OF DISCHARGE CHARACTERIZATION

Translating the terms of art used in the military for discharges[147] into set rules for VA benefits is difficult because the statues use definitions that do not correlate with the popular names for the various types of discharges. Instead, the statutes operate using terms like "under conditions other than dishonorable."[148] This can be particularly troubling because the only VA benefits that absolutely require an honorable discharge are the Montgomery GI Bill and VA home loan program for members of the Selected Reserve who have served for at least six years.[149] All other VA benefits are determined based on the actual discharge characterization, the level of the court-martial, and the nature of the offense.

Although VA benefits do not technically ever vest, it is critical to understand at the outset that, as a general rule, no discharge characterization can ever erase the ability of a veteran to receive VA benefits based on prior honorable enlistments.[150] Although it may seem unusual that someone could

---

[145] 38 U.S.C.A. § 3501 (definition of eligible person); 38 C.F.R. § 21.3021. *See also id*. §§ 21.3040–21.3045 (eligibility requirements for children); *id*. §§ 21.3046–21.3047 (eligibility periods for surviving spouses).

[146] 38 U.S.C.A. § 3532 (computation of allowance); *id*. § 3511 (duration of educational assistance).

[147] The two punitive discharges are known as a dishonorable discharge and a bad conduct discharge, and they can only be adjudged at a court-martial. *See generally* MANUAL FOR COURTS-MARTIAL, United States, pt. II, Rule For Court-Martial 1003(b)(9) (1998 ed.). The three administrative discharges are known as a discharge under other than honorable conditions, a general discharge, and an honorable discharge. *See generally* Air Force Instruction 36-3208, Administrative Separation of Airmen ¶ 1.18 (Oct. 14, 1994) [hereinafter AFI 36-3208].

[148] 38 U.S.C.A § 101(18).

[149] *See id*. §§ 3011, 3225; *id*. § 3701(b)(5)(A) (Selected Reserve requirements). Military members who have paid into the GI Bill will lose that money, as well as their educational benefits, unless their final discharge from active duty is characterized as honorable. 38 U.S.C.A. § 3011(a)(3)(B). A general discharge will not be sufficient.

[150] Department of Veterans Affairs, Op. Off. Gen. Counsel 61-91, (July 7, 1991), *summarized in* 56 Fed. Reg. 50,149 (1991) [hereinafter Op. Off. Gen. Counsel 61-91]. Military courts share this view. *See* United States v. Perry, 48 M.J. 197 (C.A.A.F. 1998) (concluding there is no right to instruction on recoupment of Naval Academy education); United States v. Perry, No. ACM 30766, 1995 WL 229140 (A.F.C.C.A. 1995) (holding it was not error to instruct that VA benefits may have vested from earlier discharge); United States v. Hansen, 36 M.J. 599 (A.F.C.M.R. 1992) (finding no error with instruction to members that VA benefits from prior honorable service are not forfeited by punitive discharge). *But see* Department of the Army

receive a Dishonorable Discharge and still qualify for a VA home loan or medical care, the rationale is that subsequent dishonorable service should not bar benefits from individuals who successfully completed the period of service to which they had originally agreed.[151]

The VA reviews veterans' military records on a case-by-case basis to determine whether the individual's service was "under conditions other than dishonorable."[152] Generally, no VA benefits will be paid to veterans who were discharged after their first enlistment as a conscientious objector,[153] as the result of a sentence from a general court-martial,[154] after resigning for the good of the service,[155] for being a deserter, or after receiving a discharge under other than honorable conditions for being absent without leave for at least 180 days.[156] If, however, the person was determined to be insane at the time of the event, they may still be eligible for benefits notwithstanding the nature of the

---

Pamphlet 27-9, Military Judges Benchbook 69–70 (1996) (A punitive separation "deprives one of substantially all benefits administered by the Department of Veterans Affairs.").

[151] *See* Op. Off. Gen. Counsel 61-91, *supra* note 151. If a member has a three year enlistment, reenlists at two years, and then gets a BCD two and a half years from his original entry on active duty, the honorable discharge received for the two year term will not count as an honorable discharge for VA purposes. *See* 38 U.S.C.A. § 101(18); VA Manual M21-1, pt. I, change 2, ch. 3, ¶ 3.10a (1994).

[152] VA Manual M21-1, pt. IV, change 83, ch. 11, ¶ 11.01a (1995). *See also* Linsday v. Brown, 9 Vet. App. 225 (1996) (concluding widow of veteran, who received bad conduct discharge from Navy for being absent without leave and a discharge under other than honorable conditions from the Army for fraudulent enlistment, was not entitled to death pension); Camarena v. Brown, 6 Vet. App. 565, 567-68 (1994) (concluding someone with a bad conduct discharge is not a "veteran" for purposes of veterans benefits legislation, 38 U.S.C. § 101); Rogers v. Derwinski, 2 Vet. App. 419 (1992) (holding widow of veteran who submitted Chapter 4 request when faced with drug charges at a special court-martial was not entitled to Dependancy and Indemnity Compensation payments). An honorable characterization of a member's service by the armed forces is binding on the VA. 38 C.F.R. § 3.12(a). There are additional rules concerning void enlistments (e.g., concealment of age or physical defect). *Id.* § 3.14.

[153] The text from the statute reads, "a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority." 38 U.S.C.A. § 5303(a). *See also* Air Force Instruction 36-3204, Procedures for Applying as a Conscientious Objector (July 15, 1994) (includes a discussion of loss of VA benefits).

[154] Interestingly, a discharge from a general court-martial, even if it is subsequently upgraded, still prohibits VA benefit payments. *See* Department of Veterans Affairs, Op. Off. Gen. Counsel 10-96, (Oct. 28, 1996), *summarized in* 61 Fed. Reg. 66,784 (1996); Helige v. Principi, 4 Vet. App. 32 (1993) (determining that veteran who passed sanity board before court-martial was not insane; dishonorable discharge upgraded to bad conduct discharge still prohibited entitlement to VA benefits because sentence was from general court-martial). Upon request, the VA will mail a DD Form 293 to members wishing to upgrade their discharge. If it has been more than 15 years, a DD Form 149 should be used.

[155] Applies to commissioned officers only.

[156] *See* 38 U.S.C.A. § 5303(a); 38 C.F.R. § 3.12(c).

discharge.[157] This exception does not apply if the member is discharged after a Chapter 4 discharge or a Resignation In Lieu of Court-Martial is submitted to avoid trial by general court-martial,[158] for either mutiny or spying,[159] for an offense that involved moral turpitude, for misconduct that was willful and persistent, or for homosexual acts that involved some type of aggravating factor.[160] The VA will consider the discharge to be under dishonorable conditions in these situations.[161] Any entry level separations[162] "shall be considered under conditions other than dishonorable."[163] By contrast, void enlistments and members dropped from the rolls will be reviewed on a case-by-case basis.[164] Finally, anyone who has committed a homicide will not be entitled to VA benefit payments.[165]

The rules for access to medical care also require explanation. Otherwise eligible veterans who received either an honorable or general discharge at the time of separation can access VA medical care without the review of a VA regional office.[166] However, a veteran who has had his discharge under other than honorable conditions upgraded to a general

---

[157] The VA uses a medical, rather than a legal, definition of insanity. There is no discussion that the veteran is unable to distinguish right from wrong. Under the VA definition, a person is insane if he exhibits,

> due to disease[,] a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

38 C.F.R. § 3.354.

[158] A Chapter 4 discharge refers to a request submitted by an enlisted Air Force member to be discharged in lieu of court-martial under Chapter 4 of AFI 36-3208. *See* AFI 36-3208, *supra* note 147, ch. 4. A Resignation in Lieu of Court-Martial, or RILO, is an equivalent request submitted by an officer. *See* Air Force Instruction 36-3207, Separating Commissioned Officers ¶ 2.23 (May 29, 1997).

[159] *See generally* 38 U.S.C.A. § 6104 (forfeiture for treason); *id*. § 6105 (forfeiture for subversive activities); 38 C.F.R. § 3.903 (subversive activities).

[160] The military's homosexual conduct policy, 10 U.S.C.A § 654 (West 1995), and the Air Force policy and discharge procedure, permit discharge for homosexual conduct. *See* AFI 36-3208, *supra* note 147, ¶ 5.36. If the facts indicate that in addition to engaging in such conduct, there were aggravating factors (e.g., the conduct took place in public, with a minor, or by force) present, the Air Force member can be discharged under other than honorable conditions. *Id.* ¶ 5.37.3.

[161] 38 C.F.R. § 3.12(d)(5).

[162] Entry level separations are those that occur within 180 days of entry onto active duty. *See* AFI 36-3208, *supra* note 147, ¶¶ 1.19.1, 5.22.

[163] 38 C.F.R. § 3.12(k)(1).

[164] *Id*. § 3.12(k)(2)-(3).

[165] *Id*. § 3.11.

[166] VA Manual M-1, pt. I, ch. 4, ¶ 4.37a (1993).

discharge, must have a VA medical facility complete a VA Form 10-7131 and submit it to the VA Regional Office for review.[167] In some cases, veterans with a discharge under other than honorable conditions may be entitled medical care only for conditions incurred or aggravated due to military service.[168] Individuals with a punitive discharge (i.e., a bad conduct or dishonorable discharge adjudged by a court-martial) from a first enlistment will not be able to access VA medical care.[169]

VI. ANSWER TO THE "QUICK QUESTION"

This article began with a hypothetical divorce fact pattern involving a Gulf War veteran husband separating from active duty, a civilian wife, and two children. Assuming there are no discharge characterization issues, the husband will be entitled to receive, at a minimum, a VA home loan guaranty and access to medical care. He may also be eligible for education benefits and should apply for service-connection for any medical condition or symptom he has had since returning from that conflict. The former spouse is not going to be entitled to any VA benefits because she will no longer be either married to a veteran or considered to be a surviving spouse. If her husband is eligible for either compensation or pension payments, they are his separate property. The children, however, may be entitled to VA medical and educational benefits if their father becomes disabled. In addition, if he receives any type of additional VA payment because he has dependent children, he has an obligation to pass that additional amount on to the children.

VII. CONCLUSION

VA benefits explanations do not always lend themselves to a chart or to a quick question. However, there is no reason judge advocates should not be able to provide useful and accurate guidance during legal assistance. A few simplified, general rules illustrate the point. For example, almost every compensation or pension question in legal assistance could be answered, at a minimum, with a recommendation that the client apply for the benefits sought. If the client wants either an explanation of or desires to appeal a rating decision, then in addition to any assistance provided by the judge advocate, he should be referred to a veterans' service organization counselor.

For divorce clients, there are two key things to remember. First, compensation and pension benefits are the veteran's separate property and are not subject to division. Second, the VA will only garnish compensation payments and only if there has been an offset against the veteran's military

---

[167] *Id.* ¶ 4.37b. The purpose of the form is to request a determination on whether the veteran's service was other than honorable.
[168] *See* 38 C.F.R. § 3.360; VA Manual M-1, pt. I, ch. 4, ¶ 4.38.
[169] VA Manual M-1, pt. I, ch. 4, ¶ 4.38(b)(3).

retired pay. On the real estate front, a client nearing default should not simply be told to offer a deed in lieu of foreclosure. The VA will work with her and refer her to the loan guaranty section of the nearest VA regional office. It is also critical that both trial and defense counsel remember that no discharge characterization, punitive or otherwise, can ever erase the ability of veterans to receive VA benefits based on prior honorable enlistments.

Almost everyone who has ever served in the armed forces will be directly impacted by some VA benefit. Accordingly, all military personnel should have at least a basic understanding of what is available and how those benefits can significantly improve their lives. Of course, judge advocates provide an important service to military members in the form of legal advice on these and many other issues. All judge advocates must have a sound, working knowledge of these benefits and programs and how they interact with each other.

Introduction to Estate and Tax Planning Fundamentals

MAJOR JOSEPH E. COLE*

Advising clients concerning the best way to administer and preserve an estate can be either one of the most basic or most complicated exercises faced by an attorney. On one hand, the clients may be a happily married couple with no children whose only goal is to memorialize their intentions to leave their belongings to the surviving spouse. Conversely, the client could be driven by concerns that the $50 million family business empire she's built will be destroyed by poor business management, legal attacks from some of her malcontent children she would like to disinherit, or the vagaries of the federal estate tax system. Paramount to the success of any estate plan[1] is an acknowledgement by the estate owner of what he or she wishes to accomplish through the estate planning process. Some important and fundamental estate planning questions concerning the best method to accomplish the client's goals are what significance, if any, the probate process will have on the estate; how the estate will be affected by taxes; and, of maximum importance to some, what can be done to ensure preservation of the greatest amount of assets for the heirs.

While the wishes of these clients might vary greatly, they generally share a common link—the desire to preserve assets of the estate. Yet, different estate owners could have vastly different concepts of asset preservation. To one, the goal may be to pass on all of her assets to her husband so that he can have the flexibility to do as he wishes. Another may be concerned about the amount the government will take from the estate. Still another may be interested in avoiding the costs of probate. Many different factors can impact the ability of the estate owner to preserve the estate. Lack of proper planning, poor decision-making, and an ignorance of the tools available to achieve specific estate planning objectives are just a few of the reasons. This article begins with the practical considerations inherent in the probate and administration of an estate. Thereafter, the article will address the importance of federal estate and gift taxation and offer a review of property ownership methods for transferring wealth outside of probate. The article will conclude with an examination of some of the means available to address fundamental

* *Major Cole (B.S., University of Missouri-Columbia; J.D., Saint Louis University) is Chief Circuit Trial Counsel, Eastern Circuit, Bolling AFB. He is a member of the Missouri Bar.*

[1] One way an estate plan has been defined is as "an arrangement for the use, conservation, and transfer of one's wealth." HAROLD WEINSTOCK, PLANNING AN ESTATE 2 (3d ed. 1988 & Supp. 1993).

estate planning objectives within the proscriptive landscape of the federal estate tax system.[2]

I. ESTATE ADMINISTRATION

Prior to consideration of more complex estate planning tools, it may be helpful to address the simple and still most basic legal device to transfer wealth through methods of descent and distribution—the will. The "last will and testament"[3] is a universal phrase in the lexicon of modern America. Indeed, the general knowledge of wills is so commonplace that it would be difficult to find a competent adult who could not express the fundamental functions of a will. Understanding of the concept diminishes once the testator has passed away and the will begins to function as the legal mechanism to effect the intentions of the decedent. To bring about those intentions, the will must meet certain formal requirements.

Before the formalities even become a concern, though, the creator of the will, the testator, must meet the underlying standards of competency. The traditional requirements for proving competency are that the testator knew the nature and extent of his or her property, knew who the natural objects of his bounty were, understood the distribution being made, and knew how these factors related to provide for the disposition of his or her property.[4] After addressing the issue of competency, the validity of the will generally depends on satisfaction of the formal requirements.[5] After meeting these formal requirements, the will has the legal authority to serve as the instrument for transferring assets to the desired beneficiaries.

---

[2] The purpose of this article is to introduce some basic estate and tax planning fundamentals. This is by no means intended to be a treatise on estate planning. Rather, it is intended to be a survey of some of the more prominent issues in this very broad and complex area of practice and an attempt to familiarize practitioners with the interplay between estate planning techniques.

[3] Although once commonly believed that each word (i.e., will and testament) had a separate meaning when used as an instrument to dispose of private wealth, there is no evidence to support such a finding. In fact, it appears that the words have been used interchangeably and together to mean the same thing. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 31 (1990).

[4] For a thorough discussion of the issue of competency and mental capacity in general, see *id.* at 123-142.

[5] The origin of will formalities in the United States derives from provisions in two English sources, the Statute of Frauds, and the Wills Act. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) [hereinafter Langbein, *Revolution and the Future*]. At the core, the formalities are that the will is written, signed by the testator, and witnessed by two witnesses. Even if there is some debate as to what function these formalities play, all states have incorporated some version of the Wills Act into their jurisdictions.

Why does the law require such formality? Most agree that the formalities themselves are the evidence of a testator's final intentions regarding the distribution of his or her estate.[6]

> [T]he fact that a testator's will follows a standardized form is evidence that he or she intended that the document function as a will. Similarly, we caution a testator of the seriousness and finality of the event because cautioning increases the chances that the document represents his or her final, deliberate wishes regarding the distribution of his or her estate, as opposed to some momentary whim.[7]

Others assert that the formalities themselves are a means to an end, that is, the requirements serve as a formalized standard simplifying the probate process by enabling the document to be recognized as a will.[8] While the establishment of the will formalities may aid this process, the will cannot effect the intentions of the testator until it is admitted to probate.

In common parlance, the term *probate* is often used to address both aspects incumbent in the settling of an estate—validation and administration.[9] The term probate initially referred only to the proceedings used to validate a will.[10] *Administration*, on the other hand, meant the process in which the court-appointed personal representative of a decedent was responsible for all the proceedings inherent in concluding the affairs of the estate.[11] Notwithstanding variances in the procedural and substantive provisions between states, probate codes generally require property of the estate be subject to administration and recognize that the will is the sole means to affirmatively direct the transfer of property owned at death.[12] If any of the probate property is not disposed of by will, the net probate estate—the amount remaining after paying any allowances required by state statute, the expenses of probate administration and any other claims—will pass under state intestacy

---

[6] *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) [hereinafter Langbein, *Substantial Compliance*].

[7] *See* Langbein, *Substantial Compliance*, *supra* note 6, at 491.

[8] *See* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996), for a discussion of some of the theories behind Wills Act formalities, as well as a look at freedom of testation and the paradox existing between the competing goals of formalism, testamentary intent, and normative views of society on testate succession.

[9] Grayson M.P. McCouch, *Will Substitutes Under The Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1125 (1993) (citing MAX RHEINSTEIN & MARY ANN GLENDON, THE LAW OF DECEDENTS' ESTATES 478 (1971)).

[10] "The term *probate* originally applied only to the proceedings used to prove (*probare*) a will; it stood in contrast to *administration*, which comprised all subsequent proceedings winding up the estate." Langbein, *Revolution and the Future*, *supra* note 5, at 1108 (citing RHEINSTEIN & GLENDON, *supra* note 9).

[11] *See id.*

[12] *See* McCouch, *supra* note 9, at 1125. For an example of a standard provision, see UNIF. PROBATE CODE § 2-502 (amended 1993).

statutes.[13] The probate process, however, does not apply to those assets that transfer by some other method, such as through contract, joint ownership with right of survivorship, or by statute. These nonprobate assets transfer in accordance with the appropriate legal process governing the subject of the property.[14] As seen in the next section, the growing use of these alternative methods of property ownership and the attendant methods of beneficiary designation has focused greater attention on probate avoidance techniques.[15]

The majority of clients probably are not exactly sure what probate is, but they are sure that it is something they want to avoid if at all possible. This predisposition against the probate process has a long history in the annals of testate succession.[16] Since the publication of Norman Dacey's, *How to Avoid Probate*,[17] in the 1960s, there has been no shortage of commentary on this topic. Some of the fears of probate relate to the potential disadvantages in the process, such as cost, delay, and loss of privacy as a result of the public nature of the court proceedings.[18] While the probate system itself may be somewhat responsible for this reputation, most jurisdictions have taken steps to simplify probate procedures to help reform the process.[19]

II. NONPROBATE DISPOSITIONS

Perhaps as a result of the probate process or because of their practicality and ease of function, nonprobate transfers have become the primary method used by individuals to transfer wealth through succession.[20] Characterizing this change as a revolution, Professor Langbein captured the prevailing view that has more application today than when it was first written:

---

[13] *See* McCouch, *supra* note 9, at 1125.

[14] If the testator's interest in property terminates at death, the property itself is not part of the probate estate. *See* Langbein, *Revolution and the Future*, *supra* note 5, at 1129-1130.

[15] *See id.* at 1109.

[16] Evidently, dissatisfaction with the cost of probating an estate is not a new phenomenon. "Probate fees were a subject of complaint against the church courts in the Commons' Supplication against the Ordinaries of 1532. Fees which had previously been regulated by a provincial scale were set by statute." Lloyd Bonfield, *English Common Law: Studies in the Source: Article: Contrasting Sources: Court Rolls and Settlements as Evidence of Hereditary Transmission of Land Amongst Small Landowners in Early Modern England*, 1984 U. ILL. L. REV. 639, 642 (1984) (citing RALPH HOULBROOKE, CHURCH COURTS AND THE PEOPLE DURING THE ENGLISH REFORMATION 1520-1570 95 (1979)).

[17] N. DACEY, HOW TO AVOID PROBATE (1965).

[18] *See generally* WEINSTOCK, *supra* note 1, at 125-28.

[19] With eighteen states having adopted the Uniform Probate Code (UPC) and with the advent of small estate procedures to simplify the procedural requirements, the probate process has become somewhat less formalized. The following states have adopted the UPC in some fashion: Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. *See generally* UNIF. PROBATE CODE (amended 1993). For a discussion of the reform issues in testate succession, see Leslie, *supra* note 8.

[20] *See* Langbein, *Revolution and the Future*, *supra* note 5, at 1108.

> Probate, our court-operated system for transferring wealth at death, is declining in importance. Institutions that administer noncourt modes of transfer are displacing the probate system. Life insurance companies, pension plan operators, commercial banks, savings banks, investment companies, brokerage houses, stock transfer agents, and a variety of other financial intermediaries are functioning as free-market competitors of the probate system and enabling property to pass on death without probate and without will. The law of wills and the rules of descent no longer govern succession to most of the property of most decedents. Increasingly, probate bears to the actual practice of succession about the relation that bankruptcy bears to enterprise: it is an indispensable institution, but hardly one that everybody need use.[21]

These financial intermediaries have all but dispensed with the title-clearing purpose of probate. Once the primary purpose of probate, this need to transfer title to heirs or devisees through some type of post-death legal process has been greatly diminished as a result of the immediate transfer of ownership available through the use of will substitutes. Three of the most common types of will substitutes are life insurance, joint accounts, and revocable living trusts.[22] While this may be a reflection of the changing modes of wealth holding, these will substitutes have become an integral part of how individuals hold and transfer wealth in the United States.

If properly prepared, these substitutes can effectively take the place of the will as the traditional means of transferring property. What distinguishes them from a will is, not surprisingly, that the property is conveyed without the need for probate. These devices avoid probate by disposing of property while the owner is alive. The grantor/owner, however, retains complete power over the property during life, leaving an ownership interest that vests in the beneficiary at the grantor's death.[23] While the goal of probate avoidance is an appropriate one in estate planning, the purported cost of the process may make this approach unattractive. Some of the costs include probate court fees, attorney fees, appraiser fees, and executor and guardian commissions.[24] More importantly, the use of some nonprobate transfers can create estate planning problems concerning federal estate taxation.[25] Indeed, when making the

---

[21] *Id*.

[22] Although certainly not an exhaustive list, these forms of nonprobate transfers are discussed because of the prevalence of life insurance and jointly held property, as well as the rise in use of the revocable living trust. See Langbein, *Revolution and the Future*, *supra* note 5, for a discussion of other will substitutes.

[23] For example, the value of a jointly held savings account transfers automatically to a surviving owner in an account that is owned jointly with a right of survivorship. See *infra* notes 90-93 and accompanying text.

[24] *See* DUKEMINIER & JOHANSON, *supra* note 3, at 33.

[25] For example, someone may think that it would be a good idea to hold a large portion of their estate in life insurance since the proceeds would pass to the beneficiaries outside of the administration of probate. Even though the proceeds of those policies would be sheltered from

decision whether to use nonprobate transfers, an evaluation of the tax implications is critical.

A. Gift and Estate Taxation

One of the main sources of concern regarding actually planning an estate, and the common thread binding all will substitutes, is the effect of taxation on the estate. As a result of high tax rates[26] for transfer of estate property, much of the attention on estate planning is focused on methods of tax minimization and avoidance. The federal government employs a unified estate and gift tax, which means the same tax rates apply regardless of whether the property is transferred by gift or as part of the gross estate of the decedent.[27]

When evaluating the tax implications of the transfer of property, consideration must be given to the impact of the *unified credit*. Before application of the estate tax, the estate is able to claim a credit against the taxes owed.[28] That credit, which is currently $211,300, represents the amount of estate tax that would be due on a transfer of $650,000.[29] This unified credit amount is then subtracted from the amount of tax otherwise owed as a result of the transfer of the taxable estate.[30] As a result, for example, if the taxable portion of the estate of a decedent is $650,000 or less, there is no federal estate tax owed on the transfer of those assets to the heirs of the estate because the credit will offset the amount of tax owed. By the year 2006, the amount that can be transferred free from estate taxes will increase to $1,000,000.[31] While

---

probate, the value of the policy would be considered as a taxable asset of the decedent's estate for estate tax purposes. *See* I.R.C. § 2042 (1999).

[26] After the application of the unified credit, the initial rate for estate tax is 37 percent on the amount of the taxable estate greater than the applicable exclusion amount. There is a graduated tax rate schedule that eventually is capped at 55 percent on all estates greater than $3,000,000. *See id*. § 2001(c).

[27] *See id*. § 2001.

[28] *See id*. § 2010(a).

[29] *See id*. § 2010(c).

[30] *See id*. § 2010(a).

[31] If an individual dies with a taxable estate (generally, the gross estate plus adjusted lifetime taxable gifts minus administration expenses and other deductions) greater than the applicable exclusion amount, the estate will be subject to estate taxes on the balance over the applicable exclusion amount. The applicable exclusion amount (and thus the applicable credit amount or unified credit) is found in I.R.C. § 2010(c). The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 1(a), 111 Stat. 788 (1997), increased the exclusion amount from the prior $600,000 as follows:

Year	Applicable Credit Amount	Applicable Exclusion Amount
1998	$202,050	$625,000
1999	$211,300	$650,000
2000 & 2001	$220,550	$675,000

this is a sizable amount to pass free of taxation, many will substitutes also provide great opportunities to pass large amounts of assets to descendents while at the same time avoiding probate procedures. One common way to transfer assets in an effort to avoid probate is through gifts but, of course, this approach is not without its own tax implications.

The gift tax is an excise tax on the gratuitous transfer of property (or services) made during the life of the transferor/donor "for less than full and adequate consideration in money or money's worth."[32] In general, a gift is complete when a donor has severed control over the property to such a degree that she is powerless to change the disposition of the property.[33] In *Metzger v. Commissioner*,[34] the United States Tax Court dealt with the concept of a completed gift. The case involved an application of the relation-back doctrine to a gift of money paid by checks from Mr. Metzger (through his son acting under authority of a power of attorney). The gifts were made during one tax year and deposited during that year, but not paid by the drawee bank until the next tax year.[35] Of critical importance to the court was that the decedent intended to make the gifts, delivered them to the donee, had sufficient funds in his account to cover the checks, and actually transferred the money prior to his death.[36] The court held that under these facts where "there is no uncertainty as to the donor's intent and unconditional delivery of the gifts and no danger of a scheme to avoid estate taxes . . . that the gifts should relate back to the date of deposit."[37] This view was later followed by the Internal Revenue Service (IRS) in a revenue ruling in similar case that was decided by applying *Metzger*. The IRS found that a gift was complete on either the date on which the donor no longer has the power to change the disposition of the gift or the date on

---

2002 & 2003	$229,800	$700,000
2004	$287,300	$850,000
2005	$326,300	$950,000
2006 & After	$345,800	$1,000,000

BROWN, FEDERAL ESTATE AND GIFT TAXES EXPLAINED 9 (CCH Inc., 31st ed. 1998).

[32] I.R.C. § 2512.

[33] *See* 26 C.F.R. § 25.2511 (1999). "As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete." *Id*. § 25.2511-2(b).

[34] 38 F.3d 118 (4th Cir. 1994), *aff'g* 100 T.C. 204 (1993).

[35] *See id*. at 121. The Tax Court first applied the relation back doctrine to income tax deductions for charitable contributions finding that when checks had been unconditionally delivered, promptly presented for payment, and duly paid upon presentment, the payment of the checks related back to the date of delivery. *See* Spiegel v. Commissioner, 12 T.C. 524 (1949).

[36] *See* Metzger, 38 F.3d at 121.

[37] *Id*. at 123.

which the donee deposits or otherwise presents the check for payment, whichever occurs first.[38]

The reason the issue was raised at all in *Metzger* was because of the taxpayer's desire to take advantage of the favorable tax protection that would have resulted had the gifts been treated as being given in separate years.[39] For gift and estate purposes, the most favorable aspect of the gift tax rules is that the first $10,000[40] in gifts made to a donee in a year is excluded from taxes.[41] Any gifts over this amount are subject to gift tax[42] and will have the concurrent effect of decreasing the amount of the unified credit.[43] The entire amount of the unified credit is available unless the decedent made taxable gifts during his lifetime. If such gifts were made, the amount of the gift tax is subtracted from the amount available as a credit for estate taxes.[44] The annual $10,000 gift tax exclusion is limited to the gift of a present interest, which means that the donor must transfer an unrestricted right to the immediate use, possession, or enjoyment of the item.[45]

Another key aspect of "gifting"[46] is that annual gifts to spouses are treated differently than gifts to other donees. The value of a gift to a spouse is deducted from the amount of taxable gifts made during a calendar year.[47] The net result is that there is no limitation and no immediate tax consequences on any gifts made to a spouse.[48] Spouses also receive different treatment under

---

[38] Rev. Rul. 96-56, 1996-2 C.B. 161.
[39] *See* Metzger, 38 F.3d at 121.
[40] For each calendar year after 1998, the annual exclusion shall be increased by a cost-of-living adjustment. *See* I.R.C. § 2503(b)(2).
[41] *See id*.
[42] *See id*. § 2502(a). After deducting the annual exclusion from any gifts made during the tax year, the gift tax rate begins at 37 percent and increases to 55 percent depending upon the amount of the gift. *See id*. § 2010(c)(1).
[43] *See* BROWN, *supra* note 31, at 15.

> Although the gift credit must be used to offset gift taxes on lifetime transfers, regardless of the amount so used, the full credit is allowed against the tentative estate tax. The rationale for such full application is that, under Code Sec. 2001(b)(2), the estate tax payable is calculated using the cumulative transfers at life and at death as then reduced by the amount of gift tax paid by a decedent. If a portion of the unified credit was used to avoid the payment of gift taxes, the gift tax paid reflects the amount subtracted under Code Sec. 2001(b)(2). The estate tax payable is necessarily increased by the amount of the gift tax credit used.

Id. at 9.
[44] *See* I.R.C. § 2001(b).
[45] *See* 26 C.F.R. § 25.2503-3(b). For a discussion of the application of the gift tax annual exclusion to gifts of future interests, see *infra* notes 119-133 and accompanying text.
[46] The process of gift making in order to take advantage of favorable tax rules.
[47] *See* I.R.C. § 2523(a).
[48] *See id*. *But see* 26 C.F.R. § 25.2503-2(f) (gifts to a noncitizen spouse are treated differently and are limited to $100,000 annually).

the gift rules in that if one spouse makes a gift to a third party, the other spouse can treat half of the value of the gift as if he was the actual donor.[49] Since the amount of the annual exclusion is limited, this gift splitting allows one spouse to give up to $20,000 per year tax free so long as the other spouse does not also make a gift to the same donee.[50]

Of course, the gift tax rules can have important consequences on lifetime transfers made by a donor. Nevertheless, there are some rather advantageous applications of the annual exclusion benefits for a donor. The practical benefit derived from the annual exclusion is that by giving away assets of the estate, the donor is actually decreasing the size of estate, thereby decreasing the estate's exposure to estate taxes. The secondary, albeit intangible, benefit is that the donor will probably receive certain contentment in actually seeing a beneficiary use and enjoy the gift during the donor's lifetime.

The first step to understanding how these gift rules interact with estate taxes is to determine what part of the estate is subject to taxation. The estate tax is levied upon the distribution of property that occurs upon the death of an individual.[51] Like the gift tax, the estate tax is a tax upon the transfer of property itself. Thus, the inquiry into estate taxation must begin with an understanding of the *gross estate,* which is the starting point for determining what property is subject to taxation. The value of the gross estate is determined by ascertaining the value of a decedent's property "real or personal, tangible or intangible, wherever situated" at the time of death.[52] While this provision seems to encompass almost all property, it is actually not all-inclusive. The definition is limited to the "the value of all property to the extent of the interest therein of the decedent at the time of his death."[53] In other words, the gross estate is made up of all property owned by a decedent at death,[54] certain life insurance,[55] joint interests in property,[56] and transfers of property in which the decedent retained the ability to amend, alter, or revoke.[57] The next consideration is to establish of the amount of the gross estate that is taxable. The taxable estate is calculated by subtracting allowed deductions from the gross estate of the decedent.[58] While there are many deductions from

[49] *See* I.R.C. § 2513(a).
[50] *See id*.
[51] "A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." *Id.* § 2001(a).
[52] *Id.* § 2031.
[53] *Id.* § 2033.
[54] *See id*.
[55] *See id.* § 2042.
[56] *See id.* § 2040.
[57] *See id.* § 2038.
[58] *See id*. § 2051.

the gross estate,[59] the two most significant items for estate tax planning purposes are the marital deduction and the unified credit.[60] When property is transferred to a surviving spouse[61] through the decedent's estate, the estate tax rules provide for an unlimited marital deduction for that property to the extent that such interest in the property is included in calculating the gross estate of the decedent.[62] In essence, all property that is passed from the decedent's estate to the surviving spouse is free from estate taxes.

B. Life Insurance

A life insurance policy is similar to a will in that the beneficiary determinations[63] are revocable until the testator's death. Yet, life insurance is different from a will because a life insurance policy is a contract between the owner of the policy and the insurance provider, with the policy's beneficiary serving as a third-party beneficiary of that contract. Given the contractual nature of this nonprobate instrument, the assets pass outside of the will and cannot be overridden by an inconsistent bequest of life insurance proceeds set forth in the will.[64] However, "[t]he fact that a contract is called an insurance contract does not automatically entitle it to treatment as insurance for estate tax purposes if it is not, in fact a contract of insurance."[65] Generally, in order to be considered an insurance contract, the owner of the policy must have an insurable interest in the person or thing insured.[66] That is, the owner of the policy must take an actuarial risk that the insured will live for a certain amount of time and that the owner will suffer a loss if the insured does not live as long as expected.[67]

---

[59] For example, funeral expenses, estate administration expenses, casualty and theft losses, bequests to qualified charities, and debts and enforceable claims against the estate are all deductions from the gross estate. *See id*. §§ 2051-2056.

[60] For a discussion of the unified credit, see *supra* notes 28-31 and accompanying text.

[61] This unlimited deduction is only available for spouses who are United States citizens. *See* I.R.C. § 2056(d)(1). While this disallows the marital deduction where the surviving spouse is not a United States citizen, the qualified domestic trust (QDT) option under section 2056(d)(2) allows the marital deduction if the decedent used a QDT as defined in section 2056(A), or one is created prior to the date of the tax return.

[62] *See* I.R.C. § 2056.

[63] Beneficiary determinations refer to decisions by the grantor as to the amount of property to be transferred and to whom.

[64] *See* McCouch, *supra* note 9, at 1148 (citing Roberta R. Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 TEMP. L. REV. 277, 285 (1989) (noting that courts uniformly find that revocable life insurance is a nontestamentary asset which cannot be revoked by will)).

[65] BROWN, *supra* note 31, at 107.

[66] *See* Johnny C. Parker, *Does Lack of an Insurable Interest Preclude an Insurance Agent from Taking an Absolute Assignment of his Client's Life Policy?*, 31 U. RICH. L. REV. 71 (1997).

[67] *See* BROWN, *supra* note 31, at 107.

The benefits of life insurance as a method of transferring property revolve around its ease of transferability combined with the favorable tax treatment for the beneficiaries.[68] As a result, life insurance has many uses in an estate plan. First, life insurance can be the source of an estate that did not previously exist or supplement a smaller estate by providing income to help meet the needs of the insured's family/heirs. In addition, life insurance benefits provide liquidity to an estate that might be encumbered by large holdings of real property, a closely held business, or stock that has restrictions placed upon resale. More likely than not, the estate and the heirs are either interested in keeping these assets intact or, at a minimum, avoiding a fire sale of the asset for less than market value just to have ready cash to pay estate taxes. Yet another use of life insurance is as a means of protection against estate taxes. For example, the death benefits can provide ready assets to the estate for use in paying estate taxes or serve as the principal of a trust providing protection to beneficiaries to offset the effects of estate taxes.

Inasmuch as life insurance is a major part of most estate plans, it often makes up a significant part of the gross estate of the decedent.[69] A way of removing these assets from the gross estate is to ensure that the decedent no longer holds any *incidents of ownership* over the policies.[70] Generally, this term refers to "the right of the insured or his estate to the economic benefits of the policy."[71] Some examples of incidents of ownership include the power to change beneficiaries, the right to assign the policy or revoke an assignment, the power to cancel or surrender the policy, and the power to borrow against the cash value of the policy.[72] Regardless of whether the policy is owned directly by the decedent or indirectly through a trust, a corporation, or another individual, the determining factor is whether or not the decedent retained incidents of ownership.[73] If the decedent policy owner maintains any such incident of ownership over a life insurance policy, the amount receivable by other beneficiaries as insurance on the life of the decedent shall be included in the value of the gross estate of the decedent and thereby subject to estate taxation.[74]

The result in *United States v. Rhode Island Hospital Trust Co.*[75] made that painfully clear. In that case, a father purchased a life insurance policy on the life of his son, the decedent. The father paid all premiums on the policy

---

[68] Life insurance benefits are generally not taxable to the recipient. I.R.C. § 101(a).

[69] The amount of the life insurance policy on the life of the decedent is included in the gross estate of the decedent if death benefits are either receivable by the decedent's estate or receivable by other beneficiaries and decedent retained any incidents of ownership in the policy at death. *See* I.R.C. § 2042.

[70] *See id.*

[71] 26 C.F.R. § 20.2042-1(c)(2) (1999).

[72] *See id*.

[73] *See Id*. § 20.2042-1(c)(2)-(6).

[74] *See* I.R.C. § 2042.

[75] 355 F.2d 7 (1st Cir. 1966).

and, at the time of the decedent's death, was the primary beneficiary of the policy. Although the son never had possession of the policy, he was accorded substantial power under the policy, including the right to change beneficiaries, to assign the policy, and to borrow against the value of the policy. The court held that even though decedent's father was the legal owner and beneficiary of the policy, the decedent possessed incidents of ownership in the policy at his death causing the proceeds of the policy, paid to his father, to be included in the son's gross estate.[76] Critical to the court was the plain language of section 2042 of the Internal Revenue Code and the connotations raised by the terminology used in the statute.[77] "Power can be and is exercised by one possessed of less than complete legal and equitable title. The very phrase 'incidents of ownership' connotes something partial, minor, or even fractional in its scope. It speaks more of possibility than of probability."[78]

Within that realm of possibility, those who attempt to transfer policy ownership incidents to avoid treatment as part of the gross estate will also be affected by the time in which such transfers are made.

> If (1) the decedent made a transfer (by trust or otherwise) of an interest in any property, or relinquished a power with respect to an property, during the 3-year period ending on the date of the decedent's death, and (2) the value of such property (or an interest therein) would have been included in the decedent's gross estate under [section 2042] the value of the gross estate shall include the value of any property (or interest therein) which would have been so included.[79]

Once a source of extensive litigation,[80] this issue appears to have been resolved in *Leder v. Commissioner*.[81] The facts in *Leder* involved a decedent who at the time of his death was insured under a $1,000,000 life insurance policy. His wife was the policy owner and sole beneficiary. The decedent's wholly owned corporation paid the premiums for the policy. On February 15, 1983, Mrs. Leder transferred the policy to herself as a trustee of an inter vivos trust. Mr. Leder died on May 31, 1983. Upon his death, the proceeds of the policy were distributed according to the trust and were not included in the decedent's gross estate on the estate's federal estate tax form. The ruling was that since Mr. Leder never possessed ownership rights to the policy, it did not matter that Mrs. Leder transferred the policy to a trust; the proceeds of the

---

[76] *See id*. at 13.
[77] *See id*. at 10.
[78] *Id.*
[79] I.R.C. § 2035(a).
[80] *See* Headrick v. Commissioner, 918 F.2d 1263 (6th Cir. 1990), *aff'g* 93 T.C. 171 (1989); Leder v. Commissioner, 893 F.2d 237 (10th Cir. 1989), *aff'g* 89 T.C. 235 (1987); Schnack v. Commissioner, 848 F.2d 993 (9th Cir. 1988); Detroit Bank & Trust Co. v. United States, 467 F.2d 964 (6th Cir. 1972); Bel v. United States, 452 F.2d 683 (5th Cir. 1971).
[81] 893 F.2d 237.

policy would not be brought into his estate.[82] Although the policy was transferred within three years of the Mr. Leder's death, this would not be a factor as the proceeds were not considered part of the decedent's gross estate.[83]

Having conceded this point, the IRS will no longer litigate this issue.[84] Nor will the IRS pursue the similar issue involving policies that are not payable to decedent's estate over which decedent held no incidents of ownership, but for which the decedent made premium payments within three years of his death.[85] At one time, the death benefits of the policy would have been included in the insured's gross estate under the theory that the premium payments were a constructive transfer.[86] Although this is no longer the case after *Leder*,[87] the downside to transfers of this sort is the possible gift tax implications and whether the transfer was of a present interest. Generally, a transfer of ownership rights in a life insurance policy results in a taxable gift.[88] Such concerns as the date the policy is transferred and whether or not the policy is fully paid up are important to a determination as to valuation of the life insurance and the valuation of the gift created by the transfer.[89]

C. Joint Property

As a will substitute, the use of joint tenancy in property is extremely effective. The main benefit of a joint estate can be found in the doctrine of survivorship, which maintains that "when two or more persons are seized of a joint estate, . . . the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be."[90] While either party can sever a joint tenancy, neither party has the ability to bequeath property held by both parties in joint tenancy.[91] This aspect also incorporates a probate avoidance feature, in that ownership of the property will pass to the surviving joint tenant as an operation of law without becoming part of the estate of the decedent.[92]

---

[82] *See id*. at 240.

[83] This timing is significant because property transferred within three years of decedent's death may be included in the gross estate of the decedent if the transferred property itself would have been included in the gross estate. *See* I.R.C. § 2035.

[84] *See* Headrick, 93 T.C. 171, *action on decision*, 1991-012 (July 3, 1991).

[85] *See id*.

[86] *See* Bel, 452 F.2d at 692.

[87] 893 F.2d 237.

[88] For a discussion of this issue, see *infra* notes 118-136 and accompanying text.

[89] *See* 26 C.F.R. § 25.2512-6 for valuation methods for certain life insurance and annuity contracts.

[90] United States v. Jacobs, 306 U.S. 363, 370 (1939).

[91] *See* Sullivan v. Commissioner, 175 F.2d 657 (9th Cir. 1949).

[92] State property law governs the manner in which property may be "jointly titled" (title held by more than one individual or entity) and whether a particular form of joint ownership provides the "right of survivorship" (the automatic transfer of a decedent's share of jointly

Whether used as a method of holding real estate or as the preferred choice for checking, savings, and investment accounts, holding property jointly has become commonplace.[93]

Despite this ubiquity, joint ownership of property can have adverse effects on the taxability of the property both for estate and income tax purposes. For instance, half the value of any property owned by a husband and wife as joint tenants[94] with right of survivorship shall be included in the gross estate of the first spouse to die.[95] The effect of this is that title to the property will transfer to the surviving spouse, but the estate of the decedent will be increased by half of the value of that property even though the decedent has no control over the disposition of that property. The end result is that the decedent's estate suffers a tax burden without the decedent getting any of the benefit of control of the property.

With regard to income taxation, a major consideration is the effect on the income tax basis of the property acquired after the death of the first joint tenant. Generally, the income tax basis of property acquired from an individual by inheritance is its fair market value on the date of the individual's death.[96] A spousal joint tenancy, which is included in the gross estate of a decedent, receives a new tax basis for income tax purposes.[97] The calculation of that basis has been the subject of some confusion. Currently, for any spousal joint tenancies the rule has the same application as the rule pertaining to the gross estate of a deceased joint tenant. Since half of the value is included in the gross estate of the decedent, the basis of the property is adjusted so that the new basis of the property is equal to half of the original value of the property plus half of the current value of the property.[98]

This approach was challenged by a taxpayer in *Gallenstein v. United States*.[99] In 1955, Mrs. Gallenstein and her husband, as joint tenants, purchased real property for $38,500; an amount totally derived from Mr. Gallenstein's earnings. After Mr. Gallenstein's death in 1987, Mrs. Gallenstein became the sole owner of the property. She subsequently sold some acreage of the property in 1988 for the amount of $3,663,650. After

---

owned property to the surviving joint owner(s)). *See generally* Robert Danforth, *Taxation of Jointly Owned Property*, 823 TAX MANAGEMENT PORTFOLIO (BNA, Inc. undated).

[93] *See generally* Langbein, *Revolution and the Future*, *supra* note 5.

[94] Although property can be jointly held by individuals who are not spouses, issues arising from spousal joint tenancies are most prevalent in estate planning situations. Community property considerations are beyond the scope of this article and will not be addressed.

[95] *See* I.R.C. § 2040(b) (1999). This section only applies to a surviving spouse who is a United States citizen. In the case of a surviving non-U.S. citizen spouse, (for the estates of decedents dying after November 10, 1988) the full value of the joint tenancy property is included in the decedent's gross estate except to the extent that that the spouse can prove contribution to the purchase or improvement of the property. *See id*. § 2056 (d)(1)(B).

[96] *See id*. § 1014(a)(1).

[97] *See id*. § 2040(b).

[98] *See id*. §§ 1014, 2040(b).

[99] 975 F.2d 286 (6th Cir. 1992).

filing one federal income tax return and reporting a taxable gain of $3,556,596, she then amended that return two different times resulting in a final return which reported no gain on the sale of the property. Mrs. Gallenstein's position was that since her husband had provided all the consideration for the property, the contribution test that was in place when they purchased the property should be applied.[100] That contribution test was used to track the amount a survivor contributed to the purchase of joint property. The test, very simply, stated that any amount paid toward the property by the survivor would not be included in the decedent's gross estate.[101] She argued that since she had contributed nothing to the purchase of the property, the value of the property should be included in her husband's estate and subject to estate tax, and that she should inherit the property at its fair market value at the date of her husband's death. Having then inherited the property at its fair market value, she should not be required to pay taxes on the subsequent sale of the property. Mrs. Gallenstein argued further that the tax law changes that mandated application of the current test to certain joint interests of a husband and wife was not appropriate.[102] The test mandated by the new tax laws required that half the value of the property owned jointly would be included in the decedent's gross estate without regard to the amount actually paid to purchase the property by the survivor or the decedent.[103] Under this test, she would have been required to pay a substantial tax on the sale of the property because half the ten-fold increase in the value of property would have been attributed to her as a joint tenant.

The court held that because the effective date provisions of the Economic Recovery Tax Act of 1981[104] did not expressly or by implication repeal the effective date of the Tax Reform Act of 1976,[105] and since the Tax Reform Act stated that it did not apply to joint interests created before 1977, the fifty percent inclusion rule of section 2040(b) of the new tax law did not apply.[106] Since this provision was not applicable, the property was controlled by the old joint property rule relied upon by Mrs. Gallenstein. This meant that the entire value of the property was included in the husband's gross estate[107] and subject to a step up in basis equal to the fair market value of the property at the time of the decedent's death.[108] Since the husband died only six months prior to her selling the property, the fair market value of the property was so close to the actual sale price there was no taxable gain on the sale of a property that had actually grown substantially in value. This approach has been followed in other cases resulting in a kind of safe-harbor for spousal joint

[100] *See id*. at 288 (citing the original version of I.R.C. § 2040).
[101] *See id*.
[102] *See id*. at 287.
[103] *See* I.R.C. § 2040(b).
[104] Pub. L. No. 97-34, 95 Stat. 172 (1981).
[105] Pub. L. No. 94-455, 90 Stat. 1520 (1976).
[106] *See* Gallenstein, 975 F.2d at 292.
[107] *See* I.R.C. § 2040(a).
[108] *See id*. § 1014(a).

tenancies created prior to 1977, in that those individuals enjoy the benefit of the old contribution test.[109]

C. Trusts

The inter vivos or revocable living trust permits an individual to transfer property to a trust during his or her life, while still maintaining the ability to control the disposition of the property, including the power to terminate the trust and have the title revert to the original owner.[110] A revocable living trust will transfer legal title to property from one party (the grantor/testator) to a third party (the trustee) who will then manage the property (the corpus or principal) for the beneficiary until some stated time when ownership of the property will be transferred to the beneficiaries.[111] Functioning as a will substitute, the revocable living trust effects the intent of the grantor to transfer assets to surviving beneficiaries, while retaining all of the beneficial rights to the property of the trust.[112] This includes the right to receive income and, perhaps most importantly, the power to amend or even revoke the trust prior to death.[113] While the revocability of this trust is valuable to the grantor because of its flexibility and control, there is a major drawback to this type of trust. The power to revoke the trust indicates the grantor has dominion over the property and, as a result, the assets of the trust are included in the gross estate of the decedent making the assets subject to estate taxation.[114]

Living trusts may also be irrevocable, in that the trust cannot be changed even if personal or family circumstances change.[115] If property is irrevocably transferred to a trust, the trust becomes the owner of the property as opposed to the original grantor.[116] A disadvantage of the irrevocable trust becomes obvious when compared to a revocable trust. Once a transfer is made to an irrevocable trust, the grantor loses the ability to control the assets in the trust. However, the tradeoff is that as long as the grantor renounces his interest

---

[109] *See, e.g.*, Patton v. United States, 116 F.3d 1029 (4th Cir. 1997); Anderson v. United States, No. WMN-95-1182, 1996 U.S. Dist. LEXIS 7713 (D. Md. 1996).

[110] *See generally* Berall et al., *Revocable Inter Vivos Trusts*, 468-2nd TAX MANAGEMENT PORTFOLIO (BNA, Inc. undated). See 1A AUSTIN SCOTT, SCOTT ON TRUSTS ¶ 54.3 (4th ed. 1987 & Supp. 1998), for a discussion of the issues and potential problems regarding the disposition of property by will in accordance with an inter vivos trust.

[111] *See* 1A SCOTT, *supra* note 110, ¶ 2-4, regarding the elements of, parties to, and terms of a trust.

[112] *See* Berall et al., *supra* note 110, at A-27.

[113] *See id*.

[114] *See* I.R.C.§ 2038.

[115] *See* 1A SCOTT, *supra* note 110, ¶ 2-4.

[116] *See id*.

in the property by transferring the assets irrevocably to the trust, the property will not be included in the gross estate of the decedent.[117]

A remarkably efficient method for taking advantage of this favorable estate tax treatment is the irrevocable life insurance trust. The life insurance trust works in one of two ways. The first method permits the grantor to purchase life insurance and then transfer ownership of the policy to a trust. The second approach allows the grantor to transfer assets to a trust that can then be used to purchase life insurance on behalf of the grantor. In either case, provided the grantor retains no incidents of ownership, the trust will be the owner of the policy. Upon the death of the grantor, the trust will pay the proceeds of the policy to the trust beneficiaries in accordance with the specifications of the grantor.[118] Two of the more common uses for these trusts include the ability to provide liquid assets for the beneficiaries and to have cash available in the event any estate taxes are owed.

Issues to be considered with an irrevocable life insurance trust center on the gift tax treatment of transfers made to the trust. Normally, the transfer of funds to a trust to purchase insurance or the transfer of an insurance policy to the trust would be considered a gift of a future interest. Generally, a transfer of a future interest would not qualify for the annual $10,000 gift tax exclusion and would, as a result, be subject to the gift tax.[119] A *future interest* is defined as "reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time."[120] Contrast that with the definition of a *present interest*, which is "[a]n unrestricted right to the immediate use, possession, or enjoyment of property or the income from property."[121] The important question is when enjoyment begins.[122] If there is any substantial period of time between the time the gift was made and the beneficiary's enjoyment of the gift, it is a gift of a future interest.[123] Since a transfer to an irrevocable life insurance trust does not contain a right to use, possess, or enjoy the property, it is not a gift of a

---

[117] Since the grantor will no longer have an interest in the property that is the principal of the trust, it will not be subject to consideration as part of the gross estate. *See* I.R.C. § 2033.

[118] See Slade, *Personal Life Insurance Trust*, 210-4th TAX MANAGEMENT PORTFOLIO (BNA, Inc. undated), for a detailed explanation and analysis of the use of life insurance trusts in estate planning. See also 1A SCOTT, *supra* note 110, ¶ 57.3, for a discussion of the general validity of insurance trusts irrespective of the tax implications of such trusts.

[119] *See* I.R.C. § 2503(b).

[120] 26 C.F.R. § 25.2503-3(a) (1999).

[121] 26 C.F.R. § 25.2503-3(b).

[122] *See* Fondren v. Commissioner, 324 U.S. 18, 20-21 (1945). The Fondrens made gifts to their minor grandchildren in trust with the income and the corpus available if necessary for the support of the grandchildren. The corpus of the trust would be distributed to the grandchildren in installments after each reached the age of twenty-five.

[123] *See id.* The court does not, however, explain how much time comprises a substantial period of time.

present interest.[124] Seemingly then, such a transfer would be considered a gift of a future interest and would not qualify for the gift tax annual exclusion.[125]

This view was tested in *Crummey v. Commissioner*.[126] The Crummeys, as grantors, created an irrevocable living trust for the benefit of their four children. The Crummeys then began making contributions to the trust. They filed gift tax forms for the 1962 and 1963 tax years and claimed an annual exclusion (for some of the contributions) for each beneficiary consistent with the amount allowable at that time. The IRS did not allow the exclusions claimed for the gifts made to the Crummeys' children then under the age of 21 based on the position that the gifts were of a future interest.[127] The Crummeys contended that, as guardians of their minor children, they had the right to demand on behalf of each child a distribution each year and that the transfer should be treated as a gift of a present interest qualifying for the annual exclusion.[128] The court sided with the Crummeys. The demand power[129] given to the minor children enabled them as donees to be legally and technically capable of immediately enjoying the property.[130] In making its decision, the court relied on the result in *Perkins v. Commissioner*,[131] where the tax court found that if the parents could make a demand on behalf of their children and there was no indication that it could be resisted, the gift was of a present interest.[132] The result of the Crummey case is that when trust beneficiaries are given unrestricted right to demand immediate distribution of trust property, the beneficiaries are generally treated as having a present interest in the property.[133]

Because of the control granted to the holder of this kind of general demand power, there are some estate taxation effects. First, the value of the property subject to such a power of appointment (or demand power) is

---

[124] *See* I.R.C. § 2503(b).

[125] If the same gift was made to a revocable living trust it would not be considered a gift at all for gift tax purposes. The asset and any income generated from it would be treated as belonging to the donor because of the control retained over the asset due to the revocable nature of the trust.

[126] 397 F.2d 82 (9th Cir. 1968).

[127] *See id*. at 83.

[128] *See id*. at 84. The lower court found that because of the broad rights given to minors under California law, a minor beneficiary had the right to demand a partial distribution of the trust and that such a distribution would constitute a present interest. *See* Crummey v. Commissioner, 25 T.C.M. (CCH) 772, 780 (1966). As natural guardians, the Crummeys asserted that they could also make such a demand.

[129] This power is a general power of appointment and is the power to determine who will become the owner of the property. As such, it is defined as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate." I.R.C. § 2041(b)(1)(A). It is now also known as the *Crummey* power.

[130] *See* Crummey, 397 F.2d at 88.

[131] 27 T.C. 601 (1956).

[132] *See id*. at 603.

[133] *See* Estate of Cristofani v. Commissioner, 97 T.C. 74, 84-85 (1991).

included in the value of the gross estate of the decedent.[134] By contrast, a power to invade the principal of a trust (as opposed to a power of appointment like that used by the Crummeys which was limited to payment of the amount of a gift made during the year) would not result in the inclusion of the value of the principal of the trust in the gross estate. Provided the power to invade the principal of the trust is limited by an "ascertainable standard relating to the health, education, support, or maintenance of the decedent," it will escape inclusion in the gross estate of a decedent who held such a power.[135] A second qualification on the beneficiary's power to demand a distribution is that as long as the lesser of $5,000 or five percent of the trust assets are subject to the demand power, a transfer to the trust can qualify for the gift tax annual exclusion.[136] With tax benefits such as these, it's no wonder that individuals use varying trust techniques to maximize the assets of an estate.

One way that some of these trust concepts are put to use to make the most of favorable tax treatments is through the *bypass* or *credit shelter trust*. Taking advantage of the unified credit and marital deduction provisions in the Tax Code, a credit shelter trust allows a married couple to shield up to $1,300,000 from estate taxes.[137] In practice, a general credit shelter trust would consist of up to $650,000 (the unified credit exclusion amount) of a grantor's assets transferred into the trust.[138] The purpose of the trust is to provide income for the surviving spouse as the beneficiary. The remaining assets above the exclusion amount would then be transferred to the surviving spouse at death. The amount transferred to the trust is not subject to estate taxes because the decedent's unified credit applies to the transfer.[139] Also, the amount transferred to the spouse is not taxable to the decedent's estate because of the unlimited marital deduction.[140] Upon the death of the surviving spouse,

---

[134] *See* I.R.C. § 2041.
[135] *See id.* § 2041(b)(1)(A).
[136] *See id.* § 2041(b)(2).
[137] *See id.* § 2010(c).
[138] Although this is a more simplified example of the bypass trust, a more complex variation of the same approach would be to have two trusts where the marital deduction portion of one spouse's estate would go into one trust and the residue of that spouse's estate would go into another trust. The first trust qualifies for the marital deduction; the second trust could pay income to the surviving spouse while keeping the principal of the estate separate from the surviving spouse's estate. *See* WEINSTOCK, *supra* note 1, at 90.
[139] *See* I.R.C § 2010(a).
[140] A shortcoming in this use of the marital deduction arises when a lifetime benefit, such as the right to receive income, occurs in the trust. When a spouse's interest in property terminates upon his or her death, this type of transfer could be seen as a terminable interest, thereby disqualifying the asset for the marital deduction. If the interest that passes to the surviving spouse will terminate because of a lapse of time or the occurrence of an event or the failure of an event to occur and then pass to some other person, no marital deduction will generally be allowed with respect to such interest. *See id.* § 2056(b). To avoid this occurrence, a trust can be set up so that such a lifetime benefit would be considered as qualified terminable interest property (QTIP). This practice results in the so-called "QTIP" trust. *See id.* § 2056(b)(7)(B).

the assets of the trust would pass to the successor beneficiaries named by the grantor, and if those assets were less than $650,000, the first decedent's unified credit could be used to avoid estate tax liability on those assets.[141] The surviving spouse's remaining assets could be transferred upon her death to her heirs and the unified credit would still apply to that transfer because every decedent is allowed unified credit.[142] This method makes great use of applicable tax considerations while utilizing estate planning tools to bring about the desired estate distribution.

III. ESTATE DISTRIBUTION

Notwithstanding the efforts of an individual to manage their estate and avoid probate using the appropriate will substitute, the starting point for controlling the disposition of one's estate is still the last will and testament. Indeed, when considering how best to use the varied estate planning tools, the will should be the foundation upon which the estate plan is built. Even after using joint tenancy or other probate avoidance vehicles to transfer assets upon death, the will is still critically important. For example, a will is the only way for the testator to identify the desired guardian of any minor children that survive.[143] A will is also the main way to distribute personal property that cannot be transferred through some other manner according to the testator's wishes (e.g., ensuring that a particular beneficiary receives a specific family heirloom).[144] In addition to these functions of a will, there are a number of ways to further enhance the testator's ability to control the estate.

The first of these is the *contingent* or *testamentary trust*. Fundamentally the same in principle as any trust,[145] the testamentary trust is distinguished because it does not come into operation until the testator's death.[146] These trusts have the advantage of giving the testator the benefit of controlling the trust without the costs associated with the creation and maintenance of the trust during his lifetime.[147] To illustrate, if a minor child inherits an estate through a will, most states would create a trust for the minor child and then appoint a custodian or a conservator to manage the assets of the child.[148] By having the foresight to place a contingent trust for minors in the

---

[141] *See id.* § 2010(c).
[142] *See id.* § 2010(a).
[143] *See* DUKEMINIER & JOHANSON, *supra* note 3, at 102-103.
[144] *See id*. at 32.
[145] *See generally* 1A SCOTT, *supra* note 110.
[146] *See id*.
[147] *See* Jay D.Waxenberg & Henry J. Leibowitz, C*omparing the Advantages of Estates and Revocable Trusts*, ESTATE PLANNING (Sept./Oct. 1995).
[148] Commonly, a will directs the named executor to appoint a custodian under the applicable "Uniform Transfers to Minors Act" or similar applicable statute for any transfer to a minor from the estate. *See* Uniform Transfers to Minors Act, UNIF. TRANSFERS TO MINORS ACT (1969 & Supp. 1994) some form of which has been adopted in most states.

will, the parents can appoint this trustee themselves and dictate the terms of the trust.[149] An additional benefit of this approach is that the testator determines the course of action for support of a minor child free from the influence of family or friends who may lack the ability to adequately perform as a fiduciary for the benefit of the child.

Another testamentary trust used to protect estate assets for the benefit of the surviving children is the *simple family trust*. Like the contingent trust, this trust is also created in the will and becomes effective only upon the death of the testator.[150] The major benefit of this type of trust is that while the principal is retained to provide for the long-term support of the children, the trust can also create income for the surviving spouse. A testator may wish to avoid leaving the property to the surviving spouse for a number of reasons, including concerns about the surviving spouse's mental capacity or inability to manage the assets of the estate. The testator may also be worried that if the surviving spouse remarries, the assets could be transferred to the new spouse, frustrating the testator's intention of passing on the estate to the surviving children. This simple trust allows the testator to name a trustee who will then manage the assets to provide income to the spouse and preserve the corpus of the trust for the benefit of the children.[151] As previously mentioned, there are potential estate tax issues raised by this type of terminable interest.

Yet another method for using the will to achieve the management needs of the testator, is the *pour-over will*. With this instrument, the testator makes a bequest of the residue of the estate into a revocable living trust, essentially "pouring over" the remaining unspecified assets of the estate into a living trust.[152] The trust must be identified in the testator's will and the terms of the trust must be in a written document executed before or concurrently with the execution of the testator's will.[153] One of the benefits of the pour-over will is

---

[149] The contingent trust functions in the following manner: the parent bequeaths the property to a trust to be administered by a trustee for the benefit of the children (in the event their spouse does not survive them). The trustee then manages the assets for the children until the youngest child reaches the age of majority or the age specified in the trust. At that time, the principal of the trust would be paid to the beneficiaries equally. The role of the trustee up to the time the children reach the appropriate age is to use income from the trust, as specified in the will, to provide for the needs of the children. Of course, the trustee must exercise their authority in a manner consistent with state law. *See generally* STEPHAN R. LEIMBERG ET AL., THE TOOLS AND TECHNIQUES OF ESTATE PLANNING (1998).

[150] *See generally* 1A SCOTT, *supra* note 110.

[151] This device places a restraint on the surviving spouse's ability to consume the principal of the trust. Such "spendthrift" provisions protect the corpus of the trust for the surviving beneficiaries. *See generally* 1A SCOTT, *supra* note 110.

[152] *See generally* V. Woerner, Annotation, *"Pour-Over" Provisions from Will to Inter Vivos Trust,* 12 A.L.R. 3d 56 (1967). See also Berall et al, *supra* note 110, at A-27, for a discussion of the use of a revocable trust as a receptacle for pour-over from a probate estate. See 1A SCOTT, *supra* note 110, ¶ 54.3, for a discussion of the issues and potential problems regarding the disposition of property by will in accordance with an inter vivos trust.

[153] *See generally* 1A SCOTT, *supra* note 110.

that if the trust is not funded during the life of the testator the difficulty of maintaining the trust during his or her lifetime can be avoided. Regardless of whether the trust is funded, the pour over to the trust as a result of the will does not exempt the assets from probate. The assets not previously transferred to the trust will still pass through probate.[154]

IV. CONCLUSION

The tools and techniques available for use in planning an estate are as plentiful and individualized as the estate owners themselves.[155] There are many elements to be considered when determining how an estate owner chooses to incorporate the use of such methods in his or her estate plan. Without careful planning and consideration, property ownership and distribution decisions can have a significant, and sometimes conflicting, effect on the objectives of the person planning an estate. An individual who is making decisions of this kind without considering a comprehensive estate plan will likely be uninformed as to how the interplay of ownership arrangements, disposition alternatives, and federal estate taxation is key to effectively managing an estate consistent with one's goals. The consideration of all of these factors, coupled with and governed by the estate owner's individual concerns regarding management and control, is vital to effective estate planning.

[154] *See* WEINSTOCK, *supra* note 1, at 162.

[155] There are a host of other estate planning mechanisms such as qualified personal residence trusts, disclaimers, powers of attorney, charitable remainder trusts, and family limited partnerships to name just a few.

The Deployment Will

CAPTAIN THERESA A. BRUNO*

In most systems of enlightened jurisprudence, the strict observance of those formalities required in the execution of ordinary testaments is dispensed in favor of the wills of seamen and soldiers. This indulgence granted to the military and naval professions seems to be based on solid and sufficient reasons. Soldiers and seamen are generally but little acquainted with men and business habits. They are, for the most part, unsuspicious and confiding, and fall an easy prey to the artful and designing. Their mode of life is such, that the materials to make a will, in situations of extremity, are not always at hand; and they are sometimes unexpectedly called to the battlefield with such slight premonition, that they scarcely have time more than to announce to the bystanders their wish as to the testamentary disposition of their property.[1]

I. INTRODUCTION

Senior Airman Sarah Winston is notified on a Monday morning by her first sergeant that she is deploying to the Kingdom of Saudi Arabia on Wednesday with a group from her unit, the 21st Space Wing's Civil Engineer Squadron.[2] She receives and follows a detailed list of things she must accomplish before leaving. She stops at the Military Personnel Flight, receives a briefing from representatives of the Office of Special Investigations, and updates her parental control power of attorney at the legal office. However, when asked by the paralegal at the legal office if she needs a will, she indicates she recently executed a will and does not need a new one.

Captain Gladys Miller from the base legal office is notified that a mobility processing line for the 21st Civil Engineer Squadron is scheduled for Wednesday at 5 *a.m.* She packs her deployment kit, with fill-in-the-blank wills, a file of powers of attorney, and a notary seal. Captain Miller meets Senior Airman Flores, the mobility line paralegal, at the processing line at

---

* *Captain Bruno (B.A., Northern Arizona University; J.D., Drake University) is an Assistant Staff Judge Advocate at Peterson Air Force Base, Colorado. She is a member of the State Bar of Arizona. She is a 1999 recipient of the American Bar Association Standing Committee on Legal Assistance for Military Personnel Legal Assistance Distinguished Service Award.*

[1] MODERN PROBATE OF WILLS 503-04 (Fred B. Rothman 1994) (1846).

[2] References made to the 21st Space Wing or its units are used as examples throughout this article. The individuals named in this article are fictitious. Any similarity to actual persons, living or dead, is unintentional and purely coincidental.

0445. Senior Airman Winston processes through the deployment line at 6 *a.m.*, and when she arrives at Captain Miller's station, she says simply, "Ma'am, I am afraid I do need a will. I thought I had one at home with guardian provisions for my child but I cannot find it."

Captain Miller sets out to create what may be one of the most widely used and convoluted documents used on the mobility line—the "fill-in-the-blank" will. The scope of this article includes an assessment of the fill-in-the-blank will and its statutory validity, commentary on the difficulty of probating a holographic will in some jurisdictions, comments concerning the disposition of an original will, and a discussion of the considerations involved with executing a will during an exercise.[3] As this article will show, treatment of holographic wills from state to state is not uniform. Consequently, this article will also offer potential solutions to this problem and a recommendation concerning the future use of will drafted from the mobility processing line.

II. BACKGROUND OF THE DEPLOYMENT WILL

Air Force legal offices are required to assist in the preparation of "mission related" legal documents, which includes wills and powers of attorney for clients.[4] To that end, wills, powers of attorney, and living wills are the subject of many preventive law seminars and briefings given to Air Force members. Yet, while the importance of and the need for these documents is communicated to Air Force members, the number of airmen who heed this advice and take steps to procure these documents is not always clear. Sadly, a significant number of wills are still created at a mobility processing line while a unit is poised to leave for a contingency operation, rather than in advance, at the legal office, where there is more time and greater resources available to do a more complete job.

When airmen do avail themselves of these legal services, personnel in most Air Force legal offices use a computerized will program, known as DL

[3] A number of states were selected for this article for distinct reasons. To represent the creation of a will, California is featured as the leading state for preprinted fill-in-the-blank wills, while Arizona is analyzed because its legislation differs from the California law. Both Arizona and California were selected as states representative of the Uniform Probate Code. To represent the unique military aspect attributable to holographic wills and their revocation, Maryland and New York were selected. Statutory wills are available in a select number of states based on the now-defunct Uniform Statutory Wills Act. The two states represented that continue to follow the old Uniform Statutory Wills Act are New Mexico and Massachusetts. The four states of Maine, Michigan, California and Wisconsin have statutory fill-in-the-blank wills that do not pattern the Uniform Statutory Wills Act and were selected for this reason. For an interesting look at probate procedures and their application to the military, Tennessee, Arkansas, and North Carolina were selected.

[4] Air Force Instruction 51-504, Legal Assistance, Notary, and Preventive Law Programs ¶ 1.3 (May 1, 1996).

Wills, to help these airmen.[5] Computerized will programs facilitate the interview process with clients and allow for uniformity of document preparation.[6] In addition, DL Wills allows the user to select a jurisdiction of residency and provides various state law notes that may be applicable depending on which part of the computer program is being used. Indeed, as a deployment tool, DL Wills can and has been downloaded to laptop computers for use during a mobility processing line operation. In fact, the use of DL Wills on the mobility line should be and is considered a primary method of testamentary preparation. However, given the inevitable uncertainties of a contingency operation, such as the lack of electric power, a non-functioning printer, or the need to relocate at the last minute, the DL Wills program might not be a useful tool. While some legal offices have often used fill-in-the-blank wills as a primary testamentary method, others resort to this method only in the event of a contingency.

III. THE DEPLOYMENT WILL OPTIONS – TOOLS OF THE TRADE

Captain Miller has three options available to her to prepare Senior Airman Winston's will. Captain Miller can create a DL Will, have Senior Airman Winston complete a fill-in-the-blank will, or use a statutory will applicable in some jurisdictions.[7] Since Captain Miller does not have a laptop available at the mobility processing line, she would likely decide to use a fill-in-the-blank will form from her mobility briefcase. However, Captain Miller's use of this fill-in-the-blank will raises concerns as to whether Senior Airman Winston is receiving a valid legal document. In an attempt to address these concerns, the next two sections examine the requirements for a valid will and the appropriate treatment of a holographic will.

A. Requirements for a Valid Will

Under the Uniform Probate Code (U.P.C.), an individual "18 or more years of age who is of sound mind may make a will."[8] All wills must be in writing, signed by the testator in the presence or "conscious presence"[9] of two witnesses who sign either at the time the will is created or a short time after the

---

[5] DL Wills is the common name for a will program called Drafting Libraries developed by Attorney's Computer Network, Inc.

[6] *See* Captain James J. Gildea, *Computer-Assisted Wills Program*, 112 MIL. L. REV. 227 (1986).

[7] *See* Gerry W. Beyer, *Statutory Fill-in Will Forms-The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769 (1993) [hereinafter Beyer, *Theoretical Constructs and Empirical Findings*].

[8] UNIF. PROBATE CODE § 2-501 (1993).

[9] *Id.* § 2-503 (a)(2).

will execution ceremony.[10] States that have enacted the U.P.C. requirements for wills have, for the most part, followed the language, intent, and structure of the U.P.C.[11] Although non-U.P.C. jurisdictions vary tremendously in their requirements for a valid will,[12] in U.P.C jurisdictions, wills that do not comply with the required execution provisions are treated as valid holographic wills.[13] Moreover, in UPC jurisdictions a will may or may not have been witnessed, but if the document is not entirely in the handwriting of the testator or the material provisions are not sufficient to meet the requirements of U.P.C jurisdictions, the document created on the mobility processing line may nevertheless be considered a holographic will.[14]

B. Holographic Wills

Holographic wills are those that can be executed without witnesses present and that are valid as long as the "material portions of the document are in the testator's handwriting."[15] Historically, holographic wills have carried with them the Statute of Frauds stigma of fraud and forgery.[16] This thread of doubt and its concordant cautious attitude are still reflected in some jurisdictions that make holographic will statutes rigid in both rule and application.[17] Non-U.P.C. states typically follow the requirement that holographic wills must be "entirely in the handwriting of the testator" with no

---

[10] *Id.* § 2-503 (a)(3).

[11] *See, e.g.,* ARIZ. REV. STAT. ANN. § 14-2502 (West 1995); *but see* NEB. REV. STAT. ANN. § 30-2328 (Michie 1995) ("An instrument which purports to be testamentary in nature but does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator.").

[12] *See, e.g.,* N.C. GEN. STAT. § 31-10 (1984) ("However, if there are not at least two other witnesses to the will who are disinterested, the interested witness and his spouse and anyone claiming under him shall take nothing under the will, and so far only as their interests are concerned the will is void."); *see also* KY. REV. STAT. ANN. § 394.040 (Michie 1984).

[13] *See* UNIF. PROBATE CODE § 2-503 (b).

[14] On the mobility processing line, witnesses and the testator are not afforded the traditional attestation protections. For example, there is not usually time to make sure that the testator does not know the witnesses personally and to ensure that the witnesses are administered an oath. In many situations on the mobility line, the witnesses are those who are next in line. For a discussion on the protective functions of execution, see generally John H. Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 491 (1975) ("While a holographic will may be unwitnessed, it must be 'entirely' or 'materially' in the handwriting of the testator, and usually be dated by him.").

[15] OKLA. STAT. ANN. tit 84 § 54 (West 1990). *See also* UNIF. PROBATE CODE § 2-503 cmt.

[16] *See* Gulliver & Tilson, *Classification of Gratuitous Transfers,* 51 YALE L.J. 1, 14 (1941) ("A holographic will is as obtainable by compulsion as easily as a ransom note."). *See also* Langbein, *supra* note 14; R.H. Helmholz, *The Origin of Holographic Wills in English Law,* 15 LEGAL HISTORY 97 (1994).

[17] For example, one state previously required dates and signatures at the bottom of the document. MICH. COMP. LAWS § 700.123 (1995), *repealed by* MICH. COMP. LAWS § 700.8102 (effective Apr. 1, 2000).

witnesses required.[18] However, a trend toward accepting holographic wills as valid testamentary documents free from cumbersome requirements is emerging.[19] In fact, a sizeable majority of states have now adopted the U.P.C. analysis of holographic wills.[20] The U.P.C. specifically permits wills that are not entirely in the handwriting of the testator.[21] In commentary, the U.P.C. provides for wills that leave blank spaces for a testator to fill in a named beneficiary or personal representative.[22] Jurisdictions that have embraced the amended U.P.C. language have done so with interesting variety.[23] Some states preface the usefulness of a holographic will as a document that can be created without the assistance of an attorney.[24] Often the catch-all for wills that do not meet statutory requirements, the holographic will statute has become a sometimes unpredictable factor in the equation of testamentary good intent.

IV. SURVEY OF STATES

A. California Holographic Wills

The acceptance of fill-in-the-blank wills under the holographic wills statute took an interesting, and a clearly minority, turn in California in the early 1980s. The fill-in-the-blank will, as a testamentary tool, gained acceptance in California in the decisive case of *Estate of Black*.[25] That case involved a fill-in-the-blank will that the testator had purchased commercially.[26] In *Black*, the

---

[18] *See, e.g.*, NEV. REV. STAT. ANN. § 133.090 (Michie 1993) ("A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state and need not be witnessed.").

[19] *See* Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159 (1988).

[20] *See generally* UNIF. PROBATE CODE art. II, pt. 5.

[21] *See id*. § 2-503 (b).

[22] The Uniform Probate Code explains the requirements for a holographic will involving a preprinted form:

> A valid holograph can also be executed on a printed will form if the material portions of the document are handwritten. The fact, for example, that the will form contains printed language such as "I give, devise, and bequeath to _____" does not disqualify the document as a holographic will, as long as the testator fills out the remaining portion of the dispositive provision in his or her own hand.

Id. § 2-503 (b) cmt.

[23] *See, e*.g., ARIZ. REV. STAT. ANN. § 14-2503 (West 1995) ("material provisions"); *see also* IDAHO CODE § 15-2-503 (1979) ("material provisions"); b*ut see* ALASKA STAT. § 13.12.502(b) (Michie 1998) ("material portions").

[24] *See* IDAHO CODE § 15-2-503, cmt. 102 ("[F]or persons unable to obtain legal assistance, the holographic will may be adequate.").

[25] 641 P.2d 754 (Cal. 1982).

[26] *See id.* at 760.

testator completed three copies of a one page preprinted commercially marketed will form that was intended to be used as a one page will.[27] She then went into specific handwritten detail relating to the desired disposition of her estate.[28]

Because there was commercially printed material on the will, the trial court and appellate court both interpreted the document to be invalid under the existing holographic will statute in California, which required the will be "entirely in the handwriting of the testator."[29] On appeal, the California Supreme Court rejected the notion relied upon by the lower courts that the testator's intent was important in determining whether the testator meant to include the printed matter on the will form.[30] Rather, the court embraced the theory that the test to determine the validity of a fill-in-the-blank will was whether the testator intended the material provisions to be read as part of the will.[31] In what has been described as an effort by the California Supreme Court to validate the testator's wishes,[32] the court liberally construed the state statute for holographic wills and admitted the will to probate as a valid document.[33]

Up to that time, there were generally two theories courts relied upon to determine the validity of holographic wills, the surplusage theory and the intent theory. The surplusage theory overlooks the printed matter and reads only what the testator wrote, while the intent theory requires that all the words be created by the testator or that there be clear intent on the face of the will that demonstrates the testator's desired intent to use a fill-in-the-blank will.[34] Following *Black*, the California legislature responded to what was becoming a

---

[27] *See id.* at 755.
[28] *See id.*
[29] *Id. See also* CAL. PROB. CODE § 6111 cmt. 260 (West 1990).
[30] Black, 641 P.2d at 759.
[31] *See id.* at 758.
[32] *See* Robert P. Kirk, Jr., Comment, *The New Holographic Will in California: Has it Outlived its Usefulness?*, 20 CAL. W. L. REV. 265 (1984). Struggling to view the proffered holographic as valid, the court stated,

> rejection of the instrument as a will would have the unfortunate practical consequence of passing her estate through the laws of intestacy to the daughter of a predeceased husband by a former marriage—in fact, a stranger to her—thereby excluding those whom she described in the holograph as "my very dear friends" and "my adopted family" and the charity which was apparently close to her heart and which she specifically wished to benefit.

Black, 641 P.2d at 759.
[33] *See* Black, 641 P.2d at 762 (noting that the trend favored liberal construction of holographic will statutes in order to give effect to the testator's testamentary intent). *See also* Estate of Wong, 47 Cal. Rptr. 2d 707 (Cal. Ct. App. 1995).
[34] *See* Black, 641 P.2d at 757. *See also* Estate of Muder, 765 P.2d 997, 999 (Az. Ct. App. 1988) (discussing surplusage theory); Kirk, *supra* note 32; Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L. J. 628 (1980).

trend in that state favoring the surplusage theory,[35] and amended its holographic will statute to specifically allow for the commercially prepared form will.[36] Thus, under current California law, holographic wills are valid if the signature and the material provisions of the will are in the testator's handwriting.[37] If, however, the document is not dated, then proof as to the date of execution or proof of testamentary intent may be necessary.[38] Whether or not the document is dated, testamentary intent is the primary consideration concerning the validity of a holographic will.[39] With regard to preprinted or fill-in-the-blank will forms, the intent is the primary consideration. To the extent the printed portions of the document are not material to the substance of the will or essential to its validity as a testamentary disposition, a fill-in-the-blank document will be considered a valid holographic will.[40] Indeed, there are four considerations when making the determination whether a document containing printed language should be invalidated as a holographic will: whether the printed provision is relevant to the substance of the will, whether it is essential to the will's validity, whether the testator intended to incorporate the printed portion, and whether invalidation of the holograph would defeat the testator's intent.[41]

---

[35] *See* Kirk, *supra* note 32.

[36] The California statute, in response to *Black*, was enacted stating, "Any statement of testamentary intent contained in a holographic will may be set forth either in the testator's own handwriting or as part of a commercially printed form will." CAL. PROB. CODE § 6111(c).

[37] *See* CAL. PROB. CODE § 6111(a). Witnesses to the signing or execution of the will are not necessary. *Id.*

[38] *See id.* § 6111(b).

[39] *See* Estate of Tillman, 288 P.2d 892 (Cal. Ct. App. 1955). The court stated,

> Before an instrument may be probated as a will it must appear from its terms, viewed in the light of the surrounding circumstances, that it was executed with testamentary intent. The testator must have intended, by the particular instrument offered for probate, to make a revocable disposition of his property to take effect upon his death. It bears emphasis that we are here concerned not with the meaning of the instrument, but with the intention with which it was executed. Regardless of the language of the allegedly testamentary instrument, extrinsic evidence may be introduced to show that it was not intended by the testator to be effective as a will.

Id. at 894 (citations omitted). *See also* Estate of Oravetz, 22 Cal. Rptr. 624 (Cal. Ct. App. 1962); Estate of Kuttler, 325 P.2d 624 (Cal. Ct. App. 1958) (defining *testamentary intent* as the intent that a particular instrument offered for probate, make a revocable disposition of property to take effect upon death); Estate of Spencer, 197 P.2d 351 (Cal. Ct. App. 1948).

[40] *See* Black, 641 P.2d at 755 (concluding that the printed clause of the commercial will form referring to a personal representative was "patently irrelevant" to the substance--the dispositive provisions of her will). *See also* Estate of Southworth, 59 Cal. Rptr. 2d 272 (Cal. Ct. App. 1996) (concluding that printed portion of donor card referenced a future intention and, as a result, there was no testamentary intent).

[41] *See* Southworth, 59 Cal. Rptr. 2d at 277 (citing Black, 641 P.2d at 756-57).

Although the statutory language and the case law appear to follow a trend toward do-it-yourself wills, the California statute has not been and likely will not be modeled in any other jurisdiction.[42] Of greater concern for judge advocates is the application of this provision to preprinted wills used by the legal office. A fill-in-the-blank will prepared by the legal office for use on the mobility line may not be considered a commercially printed form. Though commercially printed is not defined, it is possible the legal office form may not find acceptance under the state statute because it is not commercially printed. However, given the position of the California Supreme Court concerning this issue, legal office fill-in-the-blank will forms can be used in California provided the testamentary intent of the testator is not otherwise obscured.

B. Arizona Holographic Wills

Arizona has a rich history of decisions dealing with different styles of preprinted fill-in-the-blank wills. Earlier Arizona statutes required that a holographic will be "entirely written and signed by the hand of the testator."[43] Dealing with that rule, the Arizona Court of Appeals reviewed a series of cases prior to the enactment of the current U.P.C. version of the holographic will statute in 1988.[44] Specifically, on the same day the Arizona Court of Appeals in both Division One and Division Two[45] addressed preprinted wills in different fact scenarios in *Estate of Schuh*[46] and in *In re Estate of Mulkins*.[47] Both cases addressed whether preprinted provisions in a fill-in-the-blank will invalidated the document under Arizona's holographic will statute. In short opinions, the court determined in both cases that the printed portions of the document were not essential to understand and validate the entire will.[48] The courts, guided by the prevailing theories of surplusage and intent, decided that the wills could be read under the surplusage theory without the printed material, thereby validating both documents.[49]

---

[42] Telephone Interview with Lawrence W. Waggoner, Professor, University of Michigan School of Law (July 15, 1999).

[43] Estate of Muder, 765 P.2d 997, 999 (Az. Ct. App. 1988) (citing ARIZ. REV. STAT. ANN. § 14-123 (West 1956)).

[44] *See* ARIZ. REV. STAT. ANN § 14-2503 (West 1995).

[45] Due to geographical concerns and caseload, the Arizona Court of Appeals is split into these two separate units. Division One is located in Phoenix, Arizona, and Division Two is in Tucson, Arizona.

[46] 496 P.2d 598 (Az. Ct. App. 1972).

[47] 496 P.2d 605 (Az. Ct. App. 1972).

[48] *See* Schuh, 496 P.2d at 599. "When the will is read in the manner suggested by appellants, disregarding the printed material, we find that it is entirely self-sufficient and able to stand entirely alone without reliance upon any of the printed portion." *Id. See also In re* Estate of Mulkins, 496 P.2d at 607.

[49] *See* Schuh, 496 P.2d at 599, Mulkins, 496 P.2d at 606.

Faced in 1973 with a new statutory provision taken directly from the U.P.C.,[50] Arizona addressed the issue of holographic wills again in *Estate of Muder.*[51] Two months before his death, Muder had completed, on a commercially printed form, his last will and testament in the presence of one witness.[52] The issue was whether it was a valid holographic will. Like California, holographic wills are valid if the signature and the material provisions are in the handwriting of the testator.[53] To serve as a will, the document, even if it was a holographic will, must demonstrate the testator's intent to dispose of property upon his death.[54] The court, citing language in *Black,* determined that the words on the fill-in-the-blank will and the handwritten provisions of the testator could be read together as a valid document.[55] The court concluded that the state legislature "intended to allow printed portions of the will form to be incorporated into the handwritten portion of the holographic will as long as the testamentary intent of the testator is clear and the protection afforded by requiring the material provisions be in the testator's handwriting is present."[56] As for fill-in-the-blank forms, the court stated, "[w]e hold that a testator who uses a preprinted form and *in his own handwriting* fills in the blanks by designating his beneficiaries and apportioning his estate among them and signs it, has created a valid holographic will."[57]

Given *Muder* and the state's endorsement of fill-in-the-blank wills, clients on the mobility processing line who are residents of the state of Arizona and who have executed a fill-in-the-blank will, can do so with confidence that the wills are valid in their home state. But, because Arizona, unlike California, does not have a statute that specifically mentions preprinted will forms, caution should still be exercised if relying entirely upon the trend in Arizona toward acceptance of fill-in-the-blank wills.[58]

---

[50] ARIZ. REV. STAT. ANN. § 14-2502 (B) ("Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills under § 14-2503, portions of the document that are not in the testator's handwriting.").
[51] 765 P.2d 997.
[52] *See id.* at 1001-02.
[53] *See* ARIZ. REV. STAT. ANN § 14-2503.
[54] *See* Muder, 765 P.2d at 999 (defining testamentary intent).
[55] *See id.* (citing Estate of Black, 641 P.2d 754 (Cal. 1982)).
[56] *Id.* at 1000.
[57] *Id.* Whether such an expansive approach to such statutes will prevail is not clear. As noted by Justice Moeller, the statute does not take into account these "do-it-yourself" wills, and incorporating preprinted language into the handwritten words of a testator to find a valid holographic will the majority went too far. *Id.* at 1003 (Moeller, J., dissenting). Justice Moeller concluded that the fill-in-the-blank will forms could not be valid holographic wills. *Id.*
[58] S*ee id.*

C. New York Holographic Wills

New York has a rather unique statutory probate scheme that appears to carve out a special exception for military members who wish to create a holographic will. With the exception of holographic wills, all other wills created in New York must comply with traditional statutory requirements concerning signatures and witnesses, along with the requirement that the document be "in writing."[59] To the extent a will does not comport with these requirements, it may qualify as a holographic will, though the application of the holographic will provision is unusually narrow.

Specifically, the New York statute provides:

> (b) A nuncupative or holographic will is valid *only if* made by:
> (1) A member of the armed forces of the United States *while in actual military or naval service during a war, declared or undeclared, or other armed conflict* in which members of the armed forces are engaged.
> (2) A person who serves with or accompanies an armed force engaged in actual military or naval service during a war, declared or undeclared, or other armed conflict in which members of the armed forces are engaged.[60]

While only military members are afforded the option of a holographic will, in order to create a valid holographic will, the document must be "entirely in the handwriting of the testator"[61] and the member must be serving in the military.[62] Despite what appears to be a probate provision designed to benefit the military member, these specific aspects of the law may limit the usefulness of a holographic will.

The statute does not define the word "entirely," and it is not clear from the statute whether including portions of the document that are not in the testator's handwriting would invalidate the will. A strict reading of the statutory language suggests that such provisions would be fatal. There is little case law interpreting this point, though in one case, a holographic will was admitted to probate even though a portion of the will was type written.[63] The court stated that although the typewritten will was not strictly holographic, "the law applicable to holographic wills was applicable to testator's typewritten will, since it was executed by testator's own hand and control."[64] The court continued, "[i]n the case of a holographic will the dangers of fraud and

---

[59] *Id.* § 3-2.1(a)(1). Individuals must follow a number of strict requirements to make a valid will. For example, the testator must sign or acknowledge the will in the presence of two witnesses who must also sign the document, the signatures must be at the bottom of the will, and the testator must declare at the time of the signing, that this is his will. *Id.* A valid holographic will does not need to comply with these requirements. *Id.* at § 3-2.1(a).
[60] N.Y. EST. POWERS & TRUSTS, § 3-2.2(b) (McKinney 1998) (emphasis added).
[61] *Id.* § 3-2.2(a)(2).
[62] *Id.* § 3-2.2 (b)(1).
[63] *See In re* Will of Felson, 135 N.Y.S.2d 737 (N.Y. Sup. Ct. 1954).
[64] *Id.* at 738.

imposition or of undue influence are greatly diminished and it is unnecessary to examine as closely the terms and manner of publication."[65] Without more guidance, however, it is difficult to predict whether this more liberal interpretation would prevail over a strict reading of the statute.

In addition to what appear to be strict format requirements, courts have taken a narrow view of what constitutes military service. In *In re Will of Poppe*,[66] the testator created a paper writing that was offered for probate.[67] The court examined the will, which had one witness signature and no attestation clause, under the holographic will provision.[68] Finding that the holographic will statute did not apply, the court noted that "the privilege of informal testation" is for military members only.[69] The court, finding no proof that the decedent had any military status, denied the will as a holographic document and refused to admit it to probate. A more severe exclusionary view was applied in *In re Will of Dumont.*[70] Mr. Dumont enlisted in the military and was sent to France in 1918. A few months later, he returned to the United States and was stationed at Ellis Island, New York. While in New York, Mr. Dumont announced at a formal dinner event that he wanted everything he owned to go to his fiancée, whom he later married.[71] Mr. Dumont was then assigned to Arizona and later honorably discharged from the military after he became ill from tuberculosis. Mr. Dumont died in California in 1920. Remarkably, the court determined that Mr. Dumont's statements were not valid as a nuncupative will because, at the time Mr. Dumont attended the party and made the statements, he was not in "actual military service."[72] Noting that he was not under immediate orders to go some place for the purpose of war, the court stated that the statute extended a special privilege that could not be expanded beyond its true meaning.[73] The court did acknowledge that being on actual military service has been interpreted to mean being on an expedition.[74] Use of the term "expedition" suggests a military operation other than actual warfare. In that regard one court stated,

---

[65] *Id. See also In re* Field's Will, 97 N.E. 881 (N.Y. 1912) (use of preprinted will form did not invalidate holographic will).
[66] 302 N.Y.S.2d 708 (N.Y. Surr. Ct. 1969).
[67] *See id.* at 709.
[68] *See id.*
[69] *Id.*
[70] 9 N.Y.2d 606 (N.Y. Surr. Ct. 1938), *aff'd,* 13 N.Y.S.2d 289 (N.Y. App. Div. 1939), *aff'd,* 25 N.E.2d 388 (N.Y. 1940). While the case dealt with nuncupative wills, the requirements for such wills are identical in this respect to the requirement for holographic wills. Indeed, these requirements are found in the same legislative provision. *See* N.Y. EST. POWERS & TRUSTS, § 3-2.2
[71] *See* Dumont, 9 N.Y.2d at 607-08.
[72] *Id.* at 608.
[73] *See id.* at 609.
[74] *See id.* at 608 (citations omitted).

> [t]he necessity for this exception in favor of the soldier respecting wills is found in the stress, peril, urgency, and travail attending his being in actual warfare, his actual going into war or 'on an expedition,' his being in military service in the enemy's country, his being on the eve of embarkation and the like, and the lack of reasonable time, opportunity, and means for putting the will into form and in writing.[75]

In today's expeditionary Air Force, any member being deployed for war or any operation other than war will likely enjoy the benefit of this provision, though judge advocates must be careful dispensing advice concerning the holographic will provision given the lack of statutory and judicial guidance.

D. Maryland Holographic Will

Similar to New York, Maryland allows for holographic wills signed by military members, though the Maryland statute is more narrowly written. The Maryland provision explains holographic wills as follows:

> *(a) Signed by person in armed services* – A will entirely in the handwriting of a testator who is serving in the armed forces of the United States is a valid holographic will if signed by the testator *outside of a state of the United States*, *the District of Columbia*, or a territory of the United States even if there are no attesting witnesses.[76]

This narrow construction can present problems for military members from Maryland. First, since the Maryland statute addresses only those holographic wills made outside of the United States, the District of Columbia, or a territory of the United States,[77] a will created in Colorado on a mobility line, for example, is not likely to meet the requirements of this statute. As a result, caution should be exercised when preparing a holographic will for a Maryland resident on a mobility processing line within the geographical boundaries of the United States. Outside of those boundaries, the holographic will would need to specifically delineate where the military member was at the time the document was drafted and signed in order to meet the statutory mandate. Though, it is difficult to imagine a perfect scenario in which a military member, in his or her free time while engaged in an operation overseas, would be able to correctly create a document fulfilling the requirements of this statute.

In this regard, whether on the mobility line at a base in the United States or overseas, the use of fill-in-the-blank wills for Maryland residents raises a second concern. Because the statute very precisely requires the will be

---

[75] *In re* Zaiac's Will, 295 N.Y.S. 286, 301 (N.Y. Surr. Ct 1937) (citation omitted), *modified on other grounds*, 5 N.Y.S.2d 897 (N.Y. App. Div. 1938), *modification rev'd*, 18 N.E.2d 848 (N.Y. 1939).
[76] MD. CODE ANN., EST. & TRUSTS § 4-103 (1991) (emphasis added).
[77] *See id.*

"entirely in the handwriting of the testator,"[78] this would appear to preclude the use of a fill-in-the-blank will. As with the New York holographic will provision, this issue has not been clearly resolved.

Taken to its logical conclusion, this well-intentioned statute is fraught with inherent difficulties that limit its usefulness on a practical level. Preparing a fill-in-the-blank will for a client under this statute may either fail at its inception because it is not in the testator's handwriting or fail in the geographic location requirement. At a minimum, details about this statute should be relayed to clients so they can determine if the benefit of creating a holographic will under Maryland's statute outweighs the risk.

E. Maryland and New York Statutory Revocation Clauses

Both Maryland and New York have a unique statutory provision that affects the durability of a fill-in-the-blank will. These states have statutory provisions that actually invalidate a will created by a military member one year after separation from the military. The New York statute is as follows:

> (b) A will authorized by this section becomes *invalid*:
> (1) If made by a member of the armed forces, upon the expiration of *one year following his discharge* from the armed forces.
> (2) If made by a person who serves with or accompanies an armed force engaged in actual military or naval service, upon the *expiration of one year* from the time he has ceased serving with or accompanying such armed force.
> (3) If made by a mariner while at sea, upon the expiration of *three years* from the time such will was made.[79]

This statutory language is nearly identical to the Maryland provision, which states that "[a] holographic will is void one year after the discharge of the testator from the armed services unless the testator has died prior to the expiration of the year or does not then possess testamentary capacity."[80] With regard to testamentary capacity, New York has a similar provision which states that if the person does not have testamentary capacity at the end of the one year period then the validity of the will continues until such time as such this capacity is regained.[81]

Typically, a will is valid until revoked by some act on the part of testator referred to in the U.P.C. as "burning, tearing, canceling, obliterating, or destroying the will or any part of it."[82] Yet, in New York and Maryland, a

---

[78] *Id.*
[79] N.Y. EST. POWERS & TRUSTS § 3-2.2 practice commentary 395 (McKinney 1998) (emphasis added). "For nuncupative and holographic wills under this section to be valid, the testator must die within a year of her discharge from the armed services." *Id.*
[80] MD. CODE ANN., EST. & TRUSTS § 4-103(b).
[81] *See* N.Y. EST. POWERS & TRUSTS § 3-2.2(d). Once testamentary capacity is regained, the will remains valid for one year thereafter. *Id.*
[82] UNIF. PROBATE CODE § 2-507 (a)(2) (1993).

client could create a valid handwritten holographic will and one year after leaving the military and without regard to the intent of the client, it would become an invalid document by operation of law. In addition, the provisions in New York go even further, allowing a client to revoke a holographic will with another holographic will or an oral declaration of intent witnessed by two individuals.[83] By contrast, Maryland's statute seems to limit the ways a will can be revoked by setting forth the way in which a will can be revoked.[84]

Clients who are residents of either New York or Maryland who wish to complete a holographic will should do so entirely in their own handwriting and probably should not use a fill-in-the-blank will. In addition, a military member executing a will while on the mobility line should be advised about the holographic will and its application in both Maryland and New York, including the effects of statutory invalidation within one year of discharge. Such advice is in keeping with the general rule explained to most clients in legal assistance, that estate planning needs should be reevaluated annually, if not more often. The provisions in both Maryland and New York are proof positive of the need to evaluate judge advocate interactions with clients on the mobility line. These statutes highlight the need for aggressive preventive law interaction to identify and serve these clients well before they are selected for a deployment.

V. STATUTORY WILLS

A handful of states have enacted what is known as a *statutory will*,[85] as means to accommodate a growing number of people in the United States who fail to execute a will.[86] By enacting statutes that provide for fill-in-the-blank wills, states are relying upon a legislative attempt to bridge the gap between the sophisticated estate planner and the person who dies intestate. Statutory

---

[83] The New York revocation statute includes a direct reference to holographic and nuncupative wills made by military members.

> In addition to the methods set forth in paragraph (a), a will may be revoked or altered by a nuncupative or holographic declaration of revocation or alteration made in the circumstances prescribed in 3-2.2 by any person therein authorized to make a nuncupative or holographic will. Any such nuncupative declaration of revocation or alteration must be clearly established by at least two witnesses; any such holographic declaration, by an instrument written entirely in the handwriting of the testator, although not executed and attested in accordance with the formalities prescribed by this article for the execution and attestation of a will.

N.Y. EST. POWERS & TRUSTS § 3-4.1(b).

[84] *See* MD. CODE ANN., EST. & TRUSTS § 4-105.

[85] *See* Beyer, *Theoretical Constructs and Empirical Findings*, *supra* note 7, at 771. *See also* Gerry W. Beyer, *Statutory Will Methodologies - Incorporated Forms vs. Fill-In Forms: Rivalry or Peaceful Coexistence?*, 94 DICK. L. REV. 231 (1990).

[86] *See* Beyer, *Theoretical Constructs and Empirical Findings*, *supra* note 7, at 771.

wills are not new to the world of jurisprudence. They were used in the 1920s in England and enacted in the United States in 1984 by the National Conference of Commissioners on Uniform State Laws.[87] To date, only two states follow the Uniform Statutory Wills Act,[88] which was patterned after the Uniform Probate Code in language and intent, and they are New Mexico[89] and Massachusetts.[90] Statutory will provisions that do not use the format of the Uniform Statutory Wills Act were first enacted in California in 1982.[91] Maine,[92] Wisconsin,[93] and Massachusetts[94] all followed California's lead, enacting statutory will legislation in the 1980s. Although the original law was repealed,[95] Michigan will retain its statutory will, with new statutory provisions effective April 1, 2000.[96]

Statutory wills were designed with the express goal of providing a reasonable alternative to a large segment of the population that is either distrustful of testamentary tools or of the legal profession.[97] The positive attributes of the statutory fill-in-the-blank will are the relative ease with which a person can complete the document and the ability to consider, in the comfort of one's own home, the division of personal items.[98] The statutory will is viewed, not as a substitute for legal assistance with an attorney, but as an intestacy alternative for many individuals who would not otherwise create a will.[99]

All statutory wills share the same general concepts and provide testators with a cautionary introduction directing them to a lawyer if they lack understanding.[100] Pursuant to the general legislative scheme, statutory wills

---

[87] *See* Gerry W. Beyer, *Statutory Fill-in-the-Blank Will Forms*, PROBATE AND PROPERTY, Nov./Dec. 1996, at 26 [hereinafter Beyer, *Fill-in-the-Blank Will Forms*].

[88] In 1996, the National Conference for Commissioners on Uniform State Laws removed the Uniform Statutory Wills Act after only twelve years from the list of uniform state laws. Minutes of the Third Meeting of the Executive Committee of the National Conference of Commissioners on Uniform State Laws (July 16, 1996) (on file with the national Conference of Commissioners).

[89] N.M. STAT. ANN. § 45-2A-17 (Michie 1995).

[90] MASS. GEN. LAWS ANN. ch. 191B, § 1-1.

[91] CAL. PROB. CODE § 6240 (West 1990).

[92] ME. REV. STAT. ANN. tit. 18-A, § 2-514 (West 1998).

[93] WIS. STAT. ANN. § 853.55 (West 1991).

[94] MASS. GEN. LAWS ANN. ch. 191B, § 1-1 (West 1994).

[95] *See* MICH. COMP. LAWS ANN. § 700.123c (West 1995), *repealed by* Pub Acts 1998, No. 386**,** § 8101 (effective Apr. 1, 2000).

[96] Telephone Interview with Lawrence W. Wagonner, Professor, University of Michigan School of Law (July 14, 1999).

[97] *See* Beyer, *Fill-in-the-Blank Will Forms*, *supra* note 87, at 27.

[98] *See* Beyer, *Theoretical Constructs and Empirical Findings*, *supra* note 7, at 777.

[99] *See id.* at 778-79.

[100] *See, e.g.*, CAL. PROB. CODE § 6240 ("Read the whole will first. If you do not understand something, ask a lawyer to explain it to you."); WIS. STAT. ANN. § 853.55 ("IF THIS WISCONSIN BASIC WILL WITH TRUST DOES NOT FIT YOUR NEEDS, YOU MAY WANT TO CONSULT WITH A LAWYER."); ME. REV. STAT. ANN. tit. 18-A § 2-514 ("IF

provide blank space for testators to choose, by name, individuals to act as the personal representatives and guardians for their children. Generally, statutory wills also allow testators to select beneficiaries for the disposition of the residuary estate and personal effects. However, the Massachusetts and New Mexico statutory will provisions automatically leave the surviving spouse with children either a statutory dollar amount or one half the balance of the statutory will estate, whichever is greater.[101]

In the context of a mobility line, the statutory will is simply a state sanctioned fill-in-the-blank will. Although similar to the preprinted wills permissible in some jurisdictions, the statutory will has both the statutory authority and the legal backing of state probate judges and attorneys. Normally, the statutory will can be read and completed with ample time to consider available options and provisions, including warnings and caveats.[102] However, a client on the mobility line has little time to read an entire statutory will with explanatory notes. A member would be faced with choices that must be made and details that must be completed in order to validate and execute the will. To assume that a deploying member would be able to fully grasp all the issues that arise when completing a will in a short amount of time under an impending deployment is, perhaps, not realistic. This makes the role of the legal assistance attorney critical. She must be able to explain quickly and clearly all the alternatives available and all of the pitfalls.

In that regard, the statutory will itself encourages individuals completing the document to ask an attorney any questions that they may have.[103] Additionally, individuals completing the will are encouraged to question information contained on the document that is unclear.[104] If a member on the mobility line questions a statutory provision or the effect of a certain disposition, the particular military attorney must understand the implications of a statutory will in all of the applicable jurisdictions. Completing a statutory will with the assistance of an attorney would be, in many respects, analogous to assisting clients who complete state-specific divorce or separation paperwork. Unlike DL Wills,[105] the statutory will does not prompt an attorney with state-specific information and cautionary advice. An attorney on a mobility line who opts to utilize a statutory will must be familiar with that particular jurisdiction's statutory will, updating any enacted changes immediately.

YOU HAVE ANY DOUBTS WHETHER OR NOT THIS WILL ADEQUATELY SETS OUT YOUR WISHES FOR THE DISPOSITION OF YOUR PROPERTY, YOU SHOULD CONSULT A LAWYER.").

[101] *See* MASS. GEN. LAWS ANN. ch. 191B, § 5 (limits amount available to spouse with issue to $300,000); N.M. STAT. ANN. § 45-2A-6 (limits amount available to spouse with issue to $150,000).

[102] *See* Beyer, *Theoretical Constructs and Empirical Findings*, *supra* note 7, at 777.

[103] *See id.*

[104] *See id.*

[105] *See supra* note 5 and accompanying text.

VI. PROBATE OF HOLOGRAPHIC WILLS

As though the difficulties of execution and validation of holographic wills were not sufficiently problematic for the mobility line judge advocate, specific concerns regarding probate warrant particular attention. Arkansas,[106] Tennessee[107] and North Carolina[108] have statutory provisions that may affect the probate of holographic wills made by clients on the mobility line.

A. Probate of a Holographic Will in Arkansas

Arkansas has an intricate set of provisions governing the probate of a holographic will. To probate a holographic will in Arkansas, "[t]he entire body of the will and the signature shall be written in the proper handwriting of the testator."[109] Whether or not witnessed at the time of execution, a holographic will requires the testimony of three credible disinterested witnesses to verify that the handwriting and signature of the testator are indeed his.[110] Arkansas specifically requires that,

> the entire body of the will and the signature shall be written in the proper handwriting of the testator, the will may be established by the evidence of at least three (3) credible disinterested witnesses to the handwriting and signature of the testator, notwithstanding there may be no attesting witnesses to the will.[111]

The same requirement to prove authenticity is also found in the statutory provision for "proof of will." That provision states that "[a] holographic will shall be proved by the testimony of at least three (3) credible disinterested witnesses proving the handwriting and signature and such other facts and circumstances as would be sufficient to prove a controverted issue in equity."[112] The Arkansas provision focuses on two specific issues concerning the probate of a holographic will: credibility and disinterest.

First, credibility is usually defined as "worthy of belief," but with regard to Arkansas probate law, it means something more.[113] In *Sanders v. Abernathy*,[114] the Arkansas Supreme Court addressed the issue of whether a witness was credible for purposes of probating a will. Adopting the language

---

[106] ARK. CODE ANN. § 28-40-117 (Michie 1987).
[107] TENN. CODE ANN. §§ 32-2-105, -1-105 (1984).
[108] N.C. GEN. STAT. § 31-3.4, -18.2, -18.4 (1984).
[109] ARK. CODE ANN. § 28-25-104.
[110] *See id.* §§ 28-25-104, -40-117.
[111] *Id.* § 28-25-104.
[112] *Id.* § 28-40-117(b).
[113] BLACK'S LAW DICTIONARY 366 (6th ed. 1990).
[114] 253 S.W.2d 351 (Ark. 1952).

of a prior case and the analogous requirement under change of venue statutes, the court said, "[a] credible person is one who has the capacity to testify on a given subject and is worthy of belief; and one who lacks knowledge on the subject under investigation is not a credible person to be accepted as worthy of belief on that particular inquiry."[115] Credibility then requires not only that the witnesses comes across as believable and trustworthy, but that the witness actually has the knowledge to answer inquiries about the testator's handwriting.

A second requirement concerns disinterest. Disinterest is defined as "[o]ne who has no interest in the cause or matter in issue, and who is lawfully competent to testify."[116] In *Barnard v. First Methodist Church of Mena*,[117] the Arkansas Supreme Court reviewed a holographic will that was witnessed by church members, one of whom was an attorney.[118] The court held that the three witnesses who testified from the church demonstrated that they were disinterested in the outcome of the case.[119] Although it was alleged that the witnesses were interested because they were members of the church which stood to gain from the will, the court felt that, "[a]ll such witnesses were mature and no gain would inure to them, individually, under the will [and that t]hey were competent witnesses."[120]

The importance of these requirements was emphasized in the case *In re Estate of Sharp*,[121] which dealt with proof of an ordinary will. In that case, the court held that only one of the three witnesses who testified met the statutory requirements of disinterest and credibility.[122] According to the court, one of the disqualified witnesses stood to benefit under the will, and the other "did not recognize the signature of the purported testator and had no recollection concerning the manner of its signing."[123] With only one of the three witnesses meeting the statutory requirement, the will could not be probated.[124]

---

[115] *Id.* at 353 (citing Dewein v. State, 179 S.W. 346 (1915)).
[116] BLACK'S LAW DICTIONARY 468 (6th ed. 1990).
[117] 288 S.W.2d 595 (Ark. 1956).
[118] *See id.* at 596.
[119] *See id.*
[120] *Id.*
[121] 810 S.W.2d 952 (Ark. 1991). *See also* Earney v. Sharp, 846 S.W.2d 649 (Ark. 1993). Although these cases did deal with the statutory provision for an ordinary will, the requirement for disinterested and credible witnesses is the same for holographic wills.
[122] *See* Sharp, 810 S.W.2d at 952 (citing ARK. CODE ANN. § 28-40-117(a)). Section 28-40-117(a) requires only two witnesses for proof of an ordinary will. ARK. CODE ANN. 28-40-117(a).
[123] *Id.*
[124] *See id.* at 953 (citing ARK. CODE ANN. § 28-40-117(a)). On remand, the probate judge allowed additional proof of the will. The case was again appealed to the Arkansas Supreme Court. Without considering the additional proof, the court reiterated its holding in *In re Estate of Sharp* concerning the two disqualified witnesses. Earney, 846 S.W.2d at 649. Reversing and remanding the case again, the court noted that lack of competent and disinterested witnesses resulted in a failure of proof. *Id.*

Applying the law in Arkansas to the situation on a mobility line, a fill-in-the-blank will created by a testator will not likely make it past the initial requirement of "entirely in the handwriting of the testator."[125] Assuming a fill-in-the-blank will or even a holographic will meeting the Arkansas statutory threshold if introduced at probate, witnesses become an immediate concern. Locating witnesses who are disinterested in the outcome of the case, familiar with the testator's handwriting and who are credible often eliminates family members. However, coworkers, first sergeants, or a landlord may meet the Arkansas threshold of disinterest and credibility assuming they could testify regarding the testator's handwriting and signature. Judge advocates who offer a holographic will to a military member from Arkansas are potentially binding the member and the member's family for years to come. Given the short time available in predeployment processing, providing Arkansas residents with a holographic will must be done with caution.

B. Probate in North Carolina – The "Valuable Papers" Provision

North Carolina is another state with a rigid holographic will requirement, but additional concerns accompany probate of such wills. Like Arkansas, North Carolina has established that a valid holographic will is one that is entirely in the testator's handwriting, subscribed by the testator.[126] However, North Carolina does allow for wills that have some printed material on the face of the document, as long as the meaning of the words written by the

---

[125] ARK. CODE ANN. § 28-25-104

[126] *See* N.C. GEN. STAT. § 31-3.4 (1984). The North Carolina holographic wills statute is as follows:

> (a) A holographic will is a will:
> (1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to constitute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will, and
> (2) Subscribed by the testator, or with his name written in or on the will in his own handwriting, and
> (3) Found after the testator's death among his valuable papers or effects, or in a safe-deposit box or other safe place where it was deposited by him or under his authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by him or under his authority for safekeeping.

Id.

testator is clear[127] and the printed words are not necessary to give meaning to the written words of the testator.[128]

Two distinct requirements for probating a holographic will deserve comment. First, three competent witnesses must testify that the will is in the handwriting of the testator and that it was signed by the testator.[129] Unlike Arkansas, the requirements for competency are not stringent. Indeed, witnesses are required only to have some degree of familiarity with the handwriting and signature of the testator, but disinterest and credibility are not specifically required.[130] Second, the holographic will must have been found among the testator's "valuable papers or effects."[131] In that regard, the statute also gives effect to a holographic will found in a safety deposit box or safe storage site.[132] This requirement is satisfied if the purported holographic will is found among the testators valuable papers or effects, in a safe deposit box, in a safe place selected by the testator or under their authority, or in the possession of a person who received the document from or on the authority of

---

[127] *See id.* § 31-3.4(a)(1).

[128] *See* Pounds v. Litaker, 71 S.E.2d 39, 40 (N.C. 1952). This interpretation of the requirements of a holographic will generate some concern as to the validity of a fill-in-the-blank will. The Supreme Court of North Carolina stated that "[a]n instrument which contains printed matter is not entitled to probate as a holographic will where the printed matter aids in expressing the intention of the testator." *Id.* (citing 57 AM. JUR. *Wills* § 634 (1948)). Noting that a blank form could be used to complete a will, the court acknowledged that a holographic will is generally valid even if it contains words not in the handwriting of the testator provided the words were not necessary and did not affect the meaning of the document. *Id.* at 42.

[129] N.C. GEN. STAT. § 31-18.2. *See also In re* Will of Loftin, 210 S.E.2d 897 (N.C. Ct. App. 1975) (holding that requirements of statute were not met concerning a holographic codicil where only one witness could attest that the handwriting was that of the decedent). The North Carolina holographic will probate provisions are as follows:

> A holographic will may be probated only in the following manner:
> (1) Upon the testimony of at least three competent witnesses that they believe that the will is written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will is in the handwriting of the person whose will it purports to be; and
> (2) Upon the testimony of one witness who may, but need not be, one of the witnesses referred to in subdivision (1) of this section to a statement of facts showing that the will was found after the testator's death as required by G.S. 31-3.4.

N.C. GEN. STAT. § 31-18.2.

[130] *See* Loftin, 210 S.E.2d at 899 (concluding that a witness who testifies to being "well acquainted" with the decedent's handwriting and who was not cross-examined on that point was presumed competent). Indeed, there is no requirement the witnesses actually observed the testator write or sign the will. *See* N.C. GEN. STAT. § 31-3.4(b).

[131] *Id.* § 31-3.4(a)(3). The testimony of at least one witness is necessary to establish the location of the holographic will. *Id.* § 31-18.2(2) (referencing section 31-3.4(a)(3)).

[132] *See id.* § 31-3.4(a)(3)).

the testator.[133] The statutory purpose for this location requirement was to provide some indication whether the testator wanted the purported document to be considered the last will and testament.[134] Serving as evidence of intent, the location among other valuable papers demonstrates the testator's evaluation of the importance of the document.[135] To the extent, however, there is evidence contradicting the testators estimation of the importance of the document, the location of the document will not matter. The Supreme Court of North Carolina acknowledged as much when it stated that a document "placed among the author's valuable papers without her knowledge and consent, it would of course have no validity as a will even though found among the papers after the author's death."[136] Nevertheless, for residents of North Carolina, the location of a document purporting to be a holographic will remains an important indication of the testator's intent. In fact, North Carolina's statutory history is traced to 1784, and it remains the only jurisdiction with a valuable papers requirement.[137]

As a practical matter, the North Carolina provision does not work well in a mobility line setting. Coupled with the requirement that a holographic will be entirely in the handwriting of the testator, the location of the holographic will at the death of the testator also bears on the final outcome in probate court. The North Carolina statute is a yet another example of the varying considerations and vast national inconsistency that must be analyzed and explained to the client before creating a will on the mobility line.

Another aspect of the North Carolina probate legislation that has a unique affect upon military members concerns the need for an oath. In addition to the conditions for probating a holographic will, wills of members of the armed forces must satisfy another requirement that the documents are "admitted to probate . . . upon the oath of *at least three credible* witnesses."[138]

---

[133] *See In re* Will of Church, 466 S.E.2d 297, 298 (N.C. Ct. App. 1996) (finding that a pocketbook was a safe place because testatrix kept all her important documents in pocketbooks).

[134] *See In re* Will of Gilkey, 124 S.E.2d 155, 158 (N.C. 1962) (affirming the trial court's determination that a will placed in a safety deposit box by the testatrix's son and not by the testatrix herself was sufficient under the statute requiring the will be found in a place with valuable papers).

[135] *See id.* "The requirement that the writing be found after the death among the testatrix's valuable papers was to show the author's evaluation of the document, important because lodged with important documents, to become effective upon death because left there by the author." *Id.*

[136] *Id.*

[137] *See id.* at 156. Tennessee, the last state to use a valuable papers requirement, repealed it in 1941. *See id.* at 158. *See also* Smith v. Smith, 232 S.W.2d 338, 342 (Tenn. Ct. App. 1949) (discussing repeal of the valuable papers requirement and the application of the law without that provision).

[138] N.C. GEN. STAT. § 31-18.4 (1984) (emphasis added). The North Carolina armed forces probate provision reads as follows:

This statute does not require the oath merely for holographic wills, but appears to apply to any type of validly executed will.[139] The statute does not require the witnesses to have been present at the time the will was executed, nor is it concerned with the content of the document.[140] This military provision requires only that the witnesses affirm that the signature on the document is actually that of the individual whose will is now offered for probate.[141] Interestingly, these witnesses are specifically required by the language of the statue to be "credible," though the term is not defined.[142] Whether this military provision requires more or different credibility than is expected of an ordinary witness is not addressed in the statute or in case law.

The reason for such a requirement for military members is not immediately clear. Initially, the idea of distrust might appear to be the motivation for a continuing statutory requirement that members of the armed forces face a greater burden when their wills are probated. It may be that in addition to having the other witnesses required by various probate provisions, witnesses for a military member must carry a greater measure of credibility. A better explanation may be that the statute affords members of the military more flexibility in the probate of their wills. Rather than relying on testimony by witnesses who are merely competent and who must testify as to the handwriting on the document, military members need only produce three believable witness to attest to the authenticity of the signature. To be sure, there have been no cases that have analyzed and ruled upon the probate of a military will, much less the purpose or goals of the military provision. While the impact on a military member's will is, at best, unknown, the need to advise residents of North Carolina of this provision has not diminished.

C. Probate of Holographic Wills in Tennessee

Tennessee is another state that deserves mention for its statutory provisions for probate of military members' will. At one time, residents of

---

> In addition to the methods already provided in existing statutes therefor, a will executed by a person while in the armed forces of the United States or the merchant marine, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the State at the time said will is offered for probate) upon the oath of at least three credible witnesses that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases pending in courts and at issue on the date of its ratification.

Id.

[139] *See id.*

[140] *See id.*

[141] *See id. See also In re* Will of Loftin, 210 S.E.2d 897 (N.C. Ct. App. 1975).

[142] N.C. GEN. STAT. § 31-18.4 (1984).

Tennessee faced strict requirements for the probate of a holographic will.[143] That is no longer the case. A holographic will requires that the signature and "material portions" of the will be in the handwriting of the testator.[144] In this regard, the Tennessee holographic will statute seems to be similar to U.P.C. requirements, allowing a will to be admitted to probate even though portions of the will are not in the testator's handwriting.[145] This would be consistent with the statutory purpose of the holographic will provision. Noting that the primary concern is the intent of the testator, one court explained that "testamentary intent must accompany the performance of the statutory requirement."[146] In order to help solidify the question of intent, Tennessee also requires the testimony of two witnesses to confirm that the handwriting that makes up the signature and material provisions is that of the testator.[147] While there is no requirement of disinterest, credibility, or competency for witness testimony, the evidence is evaluated using the appropriate rules of evidence and procedure.[148] Like other holographic will statutes, the witnesses did not have to actually witness the will.[149]

---

[143] *See* Smith v. Smith, 232 S.W.2d 338, 341-2 (Tenn. Ct. App. 1949) (discussing the previous, more stringent holographic will provision, including now repealed valuable papers provision). To the extent a military member dies with a holographic will executed on or before February 15, 1941, the old requirements still apply. *See* TENN. CODE ANN. § 32-1-110 (1984) (provision preserving previous holographic will requirements for wills executed on or before February 15, 1941).

[144] TENN. CODE ANN. § 32-1-105; Smith, 232 S.W.2d at 341.

[145] *See* UNIF. PROBATE CODE § 2-503 (1993). The Tennessee statute does not explain the meaning of the term *material portions* and there is no case law interpreting that provision. Presumably, printed words that appear on such a document will not affect the probate of the will provided those provisions are not essential to the meaning of the handwritten portion of the document. This would be consistent with other jurisdictions with similar provisions. *See supra* notes 15-24 and accompanying text.

[146] Smith, 232 S.W.2d at 341. The court noted further that notwithstanding the repeal of the valuable papers requirement, the location of the purported will (whether or not found among other important papers or in some other safe place) is sound evidence of the testator's intent that the document actually serve as a will. *Id.* at 342.

[147] *See* TENN. CODE ANN. § 32-1-105; Smith, 232 S.W.2d at 341 (noting that the testator not even required to know he was a will). *See also* Davidson v. Gilreath, 273 S.W.2d 717 (Tenn. Ct. App. 1954). This case explains the three step inquiry that must be followed in Tennessee: (1) Whether the will was a valid holographic will, (2) Whether two witnesses were able to testify to the handwriting of the testator and (3) Whether the testator's intent was to make the disputed document the last will and testament. *Id*. at 718.

[148] *See* Smith, 232 S.W.2d at 341; Scott v. Adkins, 314 S.W.2d 52, 56-57 (Tenn. Ct. App. 1957). Under the previous holographic will provision found in section 32-1-110, three "credible" witnesses were required to prove the will. TENN. CODE ANN. § 32-1-110. In addition, interested witnesses were considered competent to testify on the issue. Franklin v. Franklin, 16 S.W. 557, 558 (Tenn. 1890). Whether these standards are applicable today is doubtful, in light of the removal of this language from the current holographic wills provision and the stated desire to rely on the rules of evidence to evaluate the witnesses' testimony.

[149] *See* TENN. CODE ANN. § 32-1-105.

In what appears to be an alternative rather than a substitute, Tennessee allows for wills of military members to be probated under a special statutory provision. Operating as a military probate option, the statute is curiously vacant of references, definitions, or case law interpretation. To help understand the military probate protection in Tennessee, both the state statute for holographic wills and the state statute for the execution of a will are illustrative. Generally, for any will other than those wills that are nuncupative and holographic, the Tennessee statute requires that the testator actually state that the document is his will, that he sign or acknowledge his signature in the presence of at least two witnesses, and that those witnesses sign the document in the testator's presence.[150] In the military probate provision,[151] there are two available options[152] for probate.

Under the first option, instead of two witnesses being required to either witness the will or later acknowledge the signature, only one witness is required.[153] The witness needed for purposes of probating a military will is defined as a "colonel, lieutenant colonel, major or commanding officer of the regiment, or captain or commandant of the vessel."[154] Interestingly, there is no requirement that the officer acting in the role analogous to a witness actually see the member sign the will.[155] Instead, the officer is only required to state that the "the testator acknowledged, or that the subscribing witnesses proved, the will before him."[156] Essentially, the first military probate option allows for a commander to act as a witness to witnesses of a will for purposes of introducing the military member's will to probate.[157] In order for this statute to

---

[150] *See id*. § 32-1-104.
[151] *See id*. § 32-2-105.
[152] Throughout the text of this section, references will be made to *option one* and *option two* under section 32-2-105. This statute does not detail whether the statute is intended to be read in its entirety or in disparate sections. Without clear statutory guidance and no state case law on this statute, the statute will be interpreted as two distinct military probate options for the purposes of this article.
[153] *See id*. § 32-2-105(a). In its entirety the provision reads:

> (a) Any last will of any person in the military or naval service of the United States, made outside this state, or at sea while in such service, may be admitted to probate by the probate court of the county where the testator was domiciled, upon the certificate of the colonel, lieutenant colonel, major, or commanding officer of the regiment, or captain or commandant of the vessel, setting forth that the testator acknowledged, or that the subscribing witnesses proved, the will before him; but the heirs or next of kin of the testator may, in like manner and time prescribed for other contests, contest the validity of the will, in which case the authentication shall be prima facie evidence.

Id.
[154] *Id.*
[155] *See id.*
[156] *Id.*
[157] *See id.*

apply, a commander must be able to certify that the member executed a will, either through information from the member or the two witnesses. It is hard to imagine a commander remembering the specifics of who executed a will or who acted as witnesses to a will, especially given the fact that probate is often many years after the will is finalized. It is also noteworthy that the first Tennessee probate option has no language limiting its applicability to times of deployment and seems to imply broad application be indicating that it applies to "[a]ny last will of any person in the military or naval service."[158] Also, under this first military probate option in Tennessee, the testator's heirs are permitted to contest the will.[159]

The second military probate option in Tennessee applies to "[t]he will of any person serving in the armed forces of the United States or any auxiliary thereto and executed while serving therein."[160] While the second option does not reference the first military probate option at all, it seems to intend that witnesses are the first course of action in probate and, "[w]here it *first* be shown that proof of due execution of such will may not be had of the subscribing witnesses thereto, if any, due the inability to locate them, their death or the unavailability of their testimony."[161] It is not clear *which* witnesses or *who* is supposed to be identified as witnesses, but the statute seems to imply that the will failed the state will execution requirement[162] and the member's will is being probated under this second option. The second option requires no witnesses at all, requiring only that the signature on the will is genuine.[163]

The Tennessee Court of Appeals addressed the question of whether the testator's signature on a holographic will was genuine in the case of *In re Estate of Jones*.[164] The testatrix in that case created a holographic will in 1932

---

[158] *Id.*
[159] *See id.*
[160] *Id.* § 32-2-105(b)(1). The second option reads:

> The will of any person serving in the armed forces of the United States or any auxiliary thereto and executed while serving therein, may be admitted to probate upon proof satisfactory to the tribunal having jurisdiction over such probate of the genuineness of the signature of the maker of such will, where it first be shown that proof of due execution of such will may not be had of the subscribing witnesses thereto, if any, due to the inability to locate them, their death or the unavailability of their testimony for any reason adjudged sufficient by the tribunal having jurisdiction over such probate.

Id.
[161] *Id.* (emphasis added).
[162] *See id.* § 32-1-104 (1984) ("The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses.").
[163] *See id.* § 32-2-105(b)(1) (1984).
[164] 314 S.W.2d 39 (Tenn. Ct. App. 1957).

which was valid under the then-existing state holographic wills statute,[165] which is identical to the current Tennessee holographic wills statute.[166] Even though neither the statute in effect at the time of the case nor the current statute required it, the probate court reviewed the will for a genuine signature.[167] The first holographic will was created by the testator in 1932 and was signed, "Maude Hall Jones." A second holographic will, written sometime in 1952, was signed only with the name "Maude."[168] The probate court denied probate of the second holographic will because the testator had not signed the will with her full name.[169] Disagreeing with the lower court, the Tennessee Court of Appeals decided that the signature of "Maude" on the 1952 holographic will was a sufficient genuine signature for purposes of probate.[170] In remanding the case, the court decided that the signature on a will need only be "valid."[171]

The decision in *In re Estate of Jones*, may have an effect on option two of the military probate provision requiring proof of genuineness.[172] Rather than simply requiring a signature, like the holographic will statute in Tennessee, the military probate provision in option two goes one step further and requires that the signature be genuine. Given the ruling in *In re Estate of Jones*, it may be that the requirement in option two of the military probate provision would be satisfied with a signature that is valid. Whether the holographic will would require a genuine signature as the statute outlines or merely a valid signature based on the guidance in *In re Estate of Jones* is not certain. The statute for military probate most likely uses the term genuine for a reason, though it is unclear how Tennessee courts would evaluate this requirement.

The second option sets a limit on the introduction of a will to probate "[m]ore than ten years from the date of the declaration by the president of the United States or a resolution of Congress declaring the end of the hostilities during which such will was executed."[173] This provision is the first mention in

---

[165] *See id.* at 40-1.
[166] *See* TENN. CODE ANN. § 32-1-105.
[167] *See* Jones, 314 S.W.2d at 45.
[168] *Id.* at 42.
[169] *See id.* The court also refused to incorporate the valid 1932 holographic will into the holographic will created in 1952 which would have allowed for the valid signature in 1932 to be applied to the document in 1952. Rather, the court insisted that the two wills were separate writings. *Id.* at 44.
[170] *Id.* at 42.
[171] *Id.* at 47.
[172] *See* TENN. CODE ANN. § 32-2-105.
[173] *Id.*§ 32-2-105(b)(2). That provision reads:

> (2) However, no such will shall be admitted to probate where the same be offered for probate more than ten (10) years from the date of a declaration by the president of the United States or a resolution of Congress declaring the end of hostilities during which such will was executed and in which the testator was a member of the armed forces, and nothing provided in this

the statute of hostilities, and no cases to date have interpreted this statute. Moreover, it is not clear whether the language about hostilities was only intended to apply under the second option of the statute or whether the entire statute was designed for times of hostilities. If the language about hostilities is intended only to apply to the second probate option, military members are offered two distinct methods for probating their wills in Tennessee, one applicable in times of hostilities and one applicable regardless of the existence of a conflict.

Taken as a whole, Tennessee's military probate provision is valuable to military members in two ways. First, under option one or option two, military members are afforded relaxed witness requirements for purposes of probate. Second, if no witnesses are available at all, proof of the genuineness of the signature of the testator is sufficient. Yet, what appears to be favorable about the statute is in some ways disconcerting. It is unclear in the statute whether option one and option two are to be read together or separately. To that end, it is uncertain whether option two is available only after the requirements of option one fail to be met. In addition, it is unclear whether only option two is intended to be applied during a time of hostility or whether the whole statute is applicable to hostile military service. Last, the statute does not delineate whether or why a will contest is applicable only under option one and not option two.

VII. ADDITIONAL DEPLOYMENT CONCERNS

Returning to the original hypothetical, Captain Miller has rallied a number of witnesses and executed a will for Senior Airman Winston. With a completed will in her hand, she is not quite sure what to do next. Should she return the will to Senior Airman Winston who is about to step on a plane? Perhaps she should send it to Senior Airman Winston's home or call her first sergeant to pick it up. This issue deserves to be addressed.

A. Disposition of the Original Will

On the mobility processing line, a judge advocate is surrounded by questions from military members with limited time and numerous worries. The concern about what to do with an original will is often raised. Many jurisdictions allow for the registration of an original will with the clerk of

---

> subsection with reference to such wills shall void modes of probating wills made by members of the armed forces but this subsection shall, as to the wills of members of the armed forces made as provided herein, afford an additional method of probate.

Id.

court.[174] If deposited with the court, the will is generally maintained in a confidential manner, sealed until the testator's death.[175] Depositing the will with the clerk of court may appear to be a safe storage place for an original will. Unfortunately, in at least one jurisdiction, both staffing and space considerations have resulted in a decline in this statutory offering.[176] This can be compounded by the fact that the testator may be executing a will in a jurisdiction different from his legal residence. Thus, the judge advocate facing a decision about treatment of the original will should not advise clients that storage with the county or local clerk is assured.

When determining the best way to maintain the will, it is important to consider what should be done with the document after the testator dies. The U.P.C. provision, like that of many jurisdictions, provides answers to that question. Under the U.P.C., "[a]fter the death of the testator and on request of an interested person, a person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate court."[177] Additionally, a person who does not deliver a will upon the death of a testator, "is liable to any person aggrieved for any damages that may be sustained by the failure."[178] Disposing of the original document in a manner both consistent with the testator's wishes and the law mandates appropriate consideration of disposition of an original will before the time of death.

One option for safekeeping of the original will is to have the member use a preprinted memorandum cover letter authorizing the original will be sent to a family member or agent of the testator's choosing. This method has been utilized in the Army,[179] with members sending their original wills home with explanation letters to family members. The benefit of this option is that the testator is able to decide, in advance, who he or she wants to receive the original will. The will, as a precautionary measure to enhance privacy, can be enclosed in a sealed envelope within the envelope that is used to mail the will. Also, this option ends the judge advocate's responsibility to safeguard the original will upon mailing.

Another option is sending the original will back to the unit with the first sergeant or command staff. This option requires, at a minimum, coordination with the unit to ensure they have a secure place within the

---

[174] *See* UNIF. PROBATE CODE § 2-515 (1993). The following states are examples of jurisdictions that allow for the deposit of the original will with the clerk of the court. S.D. CODIFIED LAWS § 29A-2-515 (1995), N.M. STAT. ANN. §45-2-515 (1993), MONT. CODE ANN. § 72-2-535 (1993), DEL. CODE ANN. tit. 12 § 2513 (1998); WIS. STAT. § 853.09(1998) and COLO. REV. STAT. § 15-11-515 (1999).

[175] *See* UNIF. PROBATE CODE § 2-515.

[176] Telephone Interview with Richard Schlegel, Probate Court Administrator, El Paso County, Colorado (July 22, 1999).

[177] UNIF. PROBATE CODE § 2-516.

[178] *Id.*

[179] *See* Gildea, *supra* note 6, at 235.

command section to store the document. Members should be told, in advance, where the will is stored so that when they return from their deployments, they can retrieve the original document. However, the threat of liability and the requirement that the original will be deposited with the court at the time of the testator's death would not be obviated by storage within the command section. To the contrary, the legal office staff may incur an additional burden to ensure that commanders and first sergeants understand their legal obligation and duty in this regard.

If a member is executing a holographic will on the deployment line, it is essential that this document be replaced upon the member's return. To ensure this is accomplished, members must know where their original will is located. Members who return from a deployment should complete two tasks: execute a new, non-fill-in-the-blank will and destroy, upon the execution of a valid will, the deployment will bearing their signature. The only sure course to avoid having a probate court grapple over which document was intended to be the final will is to educate members on the availability of legal assistance, and once a new will is executed, the appropriate methods of revocation.

B. The Exercise Will

To ensure preparedness and mission readiness, installations routinely conduct exercises on the mobility line. At the time of an exercise, members are whisked through the stops on the mobility line and asked if they need to complete a litany of documents, to include a will. At this time, for purposes of training, many legal offices prepare a document for an individual using either accurately obtained client information or false details merely given to complete a will. Either way, a judge advocate should use the opportunity to ensure that participating members return to the legal office if they do not actually have valid wills.

An exercise can become a setting for a disaster with regard to will preparation. Often, military members are given a card with instructions on how to act and what to say when they get to a particular stop on the line. For example, some members are told to act as though they are conscientious objectors and others are told to pretend to be opposed to Anthrax vaccine. The goal of these role-playing scenarios is to ensure staff at each stop can handle the usual and sometimes unusual requests of military members deploying to some distant location. A military member may be given a card and told to ask for a will or may be instructed to pretend to request a general power of attorney. The possibility of a mistake can not be overlooked or ignored. A member could potentially leave the exercise with a will that is or, more likely, may be construed to be valid and, more importantly, revokes a previous valid will. The variations are numerous, but if the computer program DL Wills or a fill-in-the-blank will is used during an exercise, for example, it is important to remember that the words, "It is my express intent to revoke all previous wills

and codicils I may have created" often appear as introductory words to the will. A family of a testator who dies with a will created on the exercise mobility line would accidentally be left to contest the validity of that will or to prove that the testator's intent was not to create a final will.

There may also be instances where the actor in a mobility line exercise scenario does not have a will and suggests that creating one would benefit the requirements of the exercise. In addition, some legal offices also use the mobility line as an opportunity to evaluate units concerning the need for legal documents among its members. Clearly, an office policy must be established to evaluate the balance between assisting a small number of clients on the exercise mobility line and the possibility an unintended will might be executed during this time. In order to avoid such problems, exercise wills should be labeled, "EXERCISE. NOT INTENDED TO CREATE A VALID, BINDING LEGAL DOCUMENT." This phrase should appear on the face of each page of the will. At the conclusion of the exercise, members should again be reminded that the document is not a binding will. They should also be advised to seek legal assistance from a judge advocate to ask any questions that may have arisen during the preparation of a will and to give the attorney an opportunity to explain the provisions and the options available.

VIII. CONCLUSION

> Where a person contemplates making a will he should appreciate its importance as an instrument. He should remember that it is to constitute the final expression of his wishes concerning his property and such other matters as he may choose to mention therein. It is to dispose of property acquired in a lifetime. The future happiness and welfare of the persons most dear to him may depend upon its terms. Whether viewed from a property or family standpoint, it is often the most important document a person, even of small means, is ever called upon to prepare. In short, a will may be a man's monument or his folly.[180]

The law concerning fill-in-the-blank wills—and for that matter, wills in general—can be confusing, and for a mobility line judge advocate, sorting through that legal quagmire is not an easy task. However, two approaches to this problem may be helpful. First, preventive law must remain a focus for legal offices in the Air Force.[181] Traditionally, legal offices have published articles in the base newspaper or base bulletin about the importance of a will. These methods reach Air Force members, grab their attention, and should be continued. Wills can be mentioned at the introduction to a briefing for first sergeants and commanders on military justice, to newcomers at a base

[180] DANIEL S. REMSEN, THE PREPARATION OF WILLS AND TRUSTS 13 (1930).

[181] For an overview of the preventive law program and suggestions on how to establish a viable program, see Lieutenant Colonel Michael Rodgers, Preventive Law Programs: A SWIFT Approach, 47 A.F. L. REV. 111 (1999).

information fair, to claimants attending a claims briefing, or to attendees at a required Law of Armed Conflict briefing. For the message to be sent and, most importantly, heard, a legal office team approach is necessary.

Second, the Air Force must decide to permit or prohibit fill-in-the-blank wills on the mobility line. If state statutes cannot provide a uniform answer to fill-in-the-blank wills, the Air Force must provide a solution.[182] If the Air Force determines fill-in-the-blank wills are permitted on a mobility line, this would require, at a minimum, training for legal assistance attorneys on the varying state laws with updates regularly distributed. Additionally, and perhaps as a temporary substitute for formal training, a frequently updated handout or web site with quick state law references must become part of the deployment line kit.

As a recommended course of action, the Air Force could require a computer generated will on the mobility line. Not only is the computer generated will quick and accurate, it is consistent and state sensitive. Given the varying requirements for holographic wills, the limited application of statutory wills, and the added pressure of probate precautions, using a computer program to draft wills is the safest and most reliable approach. For those offices not currently using computers on the deployment line or when a back-up method is required, the only viable alternative, given stringent state law variations, is a will written entirely in the handwriting of the testator.[183]

A fill-in-the-blank will is a document without uniform acceptance. States that follow the U.P.C., like Arizona, provide guidance and continuity across state lines. States that have their own peculiar requirements, however, make using a mobility line will a dangerous prospect. Without uniformity and guidance, Senior Airman Winston's will may or may not be sufficient to achieve her intended goals. The judge advocate on the mobility line simply does not have the time or resources to prescribe different courses of conduct for each client.

Wills are heralded by the Air Force as the most important document created for a client.[184] However, most guidance addresses how to execute a will in the legal office and the care and preparation that must be afforded a

---

[182] *See, e.g.,* TJAG Policy Letter 18, *Preventive Law and Legal Assistance Policy* (Feb. 4, 1998) (Office of The Judge Advocate General, Washington, D.C.) [hereinafter TJAG Policy Letter 18].

[183] As an example, the legal office Peterson Air Force Base developed an "Emergency Will" to be used in the event of a computer shutdown. A provision on the face of the document is printed in capital letters and reads, "This is a holographic will example. The testator must write this document in his/her own handwriting. Do not allow anyone to use this example as a fill-in-the-blank will."

[184] TJAG Policy Letter 18 emphasizes the importance of wills in the Air Force. "A will is the most significant document many of our clients will ever sign. Our preparation and execution of those documents in our office should reflect that importance. We can do so by establishing a will program that provides the highest degree of professionalism." TJAG Policy Letter 18, s*upra* note 182.

client. Guidance must be issued for mobility line judge advocates who are often alone on the line without the support or resources found in a legal office, facing a line of potential clients, each from a different state, and each requesting a will. With a sound policy and reliable guidance, judge advocates throughout the Air Force can provide complete and accurate legal advice so that deploying Air Force member's can focus on their duties and the mission.