

Representing Victims of Intimate Partner Violence Connected with the Military

A Handbook for Civil Attorneys

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Nothing in the handbook should be construed as legal advice. The information contained in the handbook is for instructional purposes only and general in nature. Nothing in the handbook should be relied upon in determining how to proceed in an individual case.



Representing Victims of Intimate Partner Violence Connected with the Military

A Handbook for Civil Attorneys

Introduction

This handbook is intended to provide information to attorneys representing survivors and victims of intimate partner violence who are connected with the military. “Connected with the military” covers quite a lot of ground – service members, veterans, or partners of abusive service members or veterans. Since these clients may have specific legal issues related to the military, it is important that civilian attorneys understand those specific issues, or they run the risk not

Battered Women’s Justice Project

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only of inadequate representation, but also of increasing danger to the client.

In the past, attorneys who practiced near a major military installation would develop expertise in military-related areas of law due to sheer numbers of active-duty military and family members present near the installation. Now, however, location does not determine whether an attorney needs this information. Increasing activations and deployments of National Guard and Reserve troops for the conflicts in Iraq and Afghanistan have meant that people in every locality now need to understand deployment-related issues, and more survivors are coming to local programs with military-related questions. All attorneys may find themselves representing or advising victims who have questions about military protective orders, divorce, military retirement division, or numerous other topics specific to these clients.

This handbook specifically focuses on working with military-connected victims and/or survivors of intimate partner violence because there is little information available on this topic. Although there are many resources for those who represent service members and/or veterans, for those who represent intimate partner violence survivors, little information is available on the ways these two topics intersect for military-related survivors.

Whatever your practice, however, it is highly recommended that if you are going to handle any military-connected divorces or family law matters, you obtain a copy of Mark E. Sullivan's "Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families."¹ Sullivan is THE authority on these matters. Published by and available through the American Bar Association, the book is an indispensable source of information regarding this topic. While this handbook provides brief overviews of different topics, with a focus on dealing with intimate partner violence cases, Sullivan's book is an in-depth discussion of issues on which this document only scratches the surface.

The handbook is organized around legal topics that affect military-connected victims and survivors. Although it contains information likely to be useful to military attorneys or legal assistance officers, it is aimed more at civilian attorneys who are relatively unfamiliar with the structure, culture, and laws of the military.

As anyone who practices law is aware, it can be somewhat dangerous to make general statements about how things work. Each locality, and in fact each court, has local customs, rules, and practices that affect how we represent our clients. Unless you are familiar with these local practices, you will not be as effective as possible. The same is true here. General information, based on statutes, regulations, and policies, is provided. However, because some things do seem to vary from service to service, from installation to installation, or from command to command, it is vital to know your own local military installations and to develop your own contacts within those installations. Not all of the practice tips contained in this

¹ Mark E. Sullivan, *Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, (2nd Ed. Am. Bar 2011).

handbook will pertain to you and your clients in your local community, but many should be useful.

Throughout this handbook, there will be various military acronyms used. They are fully explained the first time they are used, with the acronyms thereafter. Appendix A contains a listing of acronyms used in the handbook.

The terms “victim” and “survivor” are used throughout this handbook relatively interchangeably. Some people distinguish the two by saying that a “victim” is still in a dangerous situation, while a “survivor” has gotten out. This is a somewhat simplistic distinction, which doesn’t necessarily honor what survivors do to keep themselves and their children alive while they are in a relationship with an abuser. Further, there is an argument to be made that calling everyone survivors is not necessarily accurate, either, as some will not, in fact, survive. “Victim” is the term most often used in the legal context, as well as by the military. As such, it is sometimes simpler to use the term used in the context being discussed. If that is not enough to ponder, there’s also an argument that “victims” have a legal status to which certain rights accrue. Therefore, using that label becomes important in assuring recognition of, and access to, those rights. There is no right or wrong answer, nor one to which everyone who works with victims/survivors agrees. At any rate, if you are reading this handbook, you probably use the term “clients,” which works either way!

At the end of each chapter, a list of Web Resources is provided to elaborate on the content in the chapter. Although all of the links were working when this document was posted, please be aware that Web links do change and can break, so it may be necessary to paste the title of the resource into your Web browser to find the information.

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About the Author

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From 2006 – 2009, Schell was an Assistant District Attorney in Essex County, New York, where she had primary responsibility for prosecution of domestic violence, stalking, and sexual assault cases. Prior to joining the District Attorney’s office, she was the Legal Director at The Legal Project, representing survivors of intimate partner violence and sexual assault in civil legal matters, training attorneys, and supervising the legal work of the organization.

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CHAPTER 1

Intimate Partner Violence

The term “intimate partner violence (IPV)” rather than “domestic violence” is used in this handbook because it is more descriptive. “Domestic violence” is often considered to include child abuse and other kinds of intra-familial violence that do not fit the pattern of coercive control typifying most IPV. Coercive control as a model for understanding IPV helps differentiate it from other kinds of violence that may occur within families.² Some kinds of family violence are not used as a method of control and manipulation. Parents may abuse children. Children hit their siblings. Caregivers may harm elders. There may even be isolated acts of physical violence between intimate partners. Some victims use violence that has the purpose of self-defense. However, none of this violence happens because one person wants something and knows s/he can get what s/he wants by using violence. These acts of violence happen for the same reasons other kinds of interpersonal violence happen. They happen because the perpetrators are angry, their impulse control is lowered due to drugs or alcohol, they are trying to impress someone else, or they simply don’t care whether someone else is being harmed. In coercive control IPV, however, power and control are the purposes.

Although all forms of violence are harmful, and all victims need assistance, violence that is part of an ongoing pattern of coercive control is likely to be both highly damaging to the victims and extremely persistent. Coercive control violence is likely to remain hidden. It often manifests itself in ways that may not be immediately obvious, with an abuser using whatever methods determined to be most effective in controlling the victim’s behavior.

One thing one can always be sure of when working with victims is that abusers will use anything to gain their objectives. The issues about which victims are most vulnerable become the methods by which abusers assert control. For instance, a mother who fears losing her children above all else will hear repeatedly, “If you leave, I’ll get custody of the kids and make sure you’ll never see them again.” Advocates and civil legal services providers have worked with survivors whose pets, prized family heirlooms, or other family members have been threatened or harmed. There are also survivors who were introduced to illegal drugs by an abuser and then had their behavior controlled by withholding of those drugs once they had become physically addicted. Medical conditions, isolation from family and support groups, immigration status, economic and



² J.B. Kelly & M.P. Johnson, [Differentiation among types of intimate partner violence: Research update & implications for interventions](#), [46(3)] Fam. Ct. Rev. 476 –499 (July 2008).

educational status, and constant emotional assaults on victims' senses of self can all be exploited by abusers in their quests for control and power. In short, victims' greatest vulnerabilities will become the abusers' most valued tools.

However, the threat of physical violence is almost always present, even if kept in the background, and IPV is all too often lethal for the victims and children and sometimes for the abusers as well. It is well documented that the possibility of physical violence spikes dramatically when the victim takes concrete actions to separate from the abuser and the abuser feels in danger of losing control over the victim.³ Victims who are taking steps toward leaving abusers – seeking court intervention, getting legal advice, going to shelters – are those most in danger of experiencing escalating and potentially deadly violence. Those of us who work with victims and survivors should never forget this fact.

The gendered nature of IPV is that it is far more likely for the male partner to be the one who feels entitled to assert control and the female partner to be the one on the receiving end.⁴ While there are some kinds of interpersonal violence, which happen more evenly between men and women, coercive control is only rarely exerted by women over men. When it happens, it is no less damaging, and male survivors require most of the services female survivors require. However, understanding the gender dynamics of this problem is essential in order to have an accurate picture. The biggest danger to most men in this gendered pattern is that those who perpetrate this violence may be killed by the victims in either immediate or longer-term self-defense or may, in fact, kill themselves. Unfortunately, such suicides are too often committed after abusers take the lives of the victims and sometimes the children. All you have to do is read the newspaper or look on the Internet on any given day, and it is very likely you will find at least one story about such murders. One of the interesting ironies of the work that has been done over the past thirty or so years to deal with IPV is that, while the homicide rate for female victims killed by intimate partners has gone down slightly, the homicide rate for male victims killed by intimate partners has decreased quite dramatically.⁵ The best guess is that new laws, shelters, and other forms of assistance for victims have made it less likely for a victim to feel at once so terrified and so trapped in the relationship that killing the abuser becomes perceived as the only way to protect the victim and the children.

³ See, e.g., Office of Justice Programs, Bureau of Justice Statistics, *Intimate Partner Violence in the U.S. Victim Characteristics*, <http://www.bjs.gov/content/intimate/victims.cfm>; Tina Hotton, Jurista Canadian Centre for Justice Statistics, *Spousal Violence After Marital Separation*, [21(7)] Catalog # 85-002 (2003); Cathy Humphries & Ravi K. Thiara, *Neither justice nor protection: women's experiences of post-separation violence*, [25(3)] *J. of Social Welfare & Fam. Law* (2003).

⁴ See, J. Belknap & H. Melton, *Are heterosexual men also victims of partner abuse?*, VA Wnet.org. National Online Resource Center on Violence Against Women (2005).

⁵ A. Cooper & E.I. Smith, *Homicide Trends in the United States, 1980-2008*. Office of Justice Programs, Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf>. (2011); Laura Dugan, et al., *Explaining the Decline in Intimate Partner Homicide: The Effects of Changing Domesticity, Women's Status, and Domestic Violence Resource*, [3(3)] *Homicide Studies* (Aug 1999).

A useful tool for understanding the range of tactics abusers use is the Power and Control Wheel, which is found in Appendix B. It was developed by Domestic Abuse Intervention Programs, Duluth, Minnesota and has also been adapted for the military. It provides a clear visual regarding the different kinds of tactics used by abusers and helps explain how different tactics reinforce one another and are effective in manipulating survivors.

In relationships in which one partner is using such tactics against the other, it is critical to understand that context is everything. An abuser will make rules and enforce those rules, but the rules *will* change over time. Victims are not victims because they cannot learn what the rules are. Rather, abusers retain control by changing those rules, so the victims cannot learn how to avoid the “consequences” of violating the abuser’s rules. A vital question to ask a survivor when you hear something that does not make sense to you in your world is “What does this mean to you?” The answers to this question may allow us to understand simultaneously, as much as possible, the client’s reality and to present that reality to a court. If a court can begin to understand the client’s reality, it is more likely to make appropriate decisions in her case.

An example of this would be a client telling the attorney about the abuser taking out and cleaning his/her weapon. In non-IPV cases, this might be an entirely innocuous act, and it may seem difficult to figure out why this is important. Once the client is asked what it means, the attorney will likely discover that this is a common tactic the abuser uses to remind the client that s/he has the gun and might decide to use it at any time. The client might describe a history of verbal threats that accompany this behavior or a pattern in which the abuser only does this after an argument. It will be important for the court to be able to see this as a threatening action in order to begin to understand the client’s life. As discussed below, connection with the military may provide some additional methods of power and control, but at the same time, it can provide alternative methods of accountability for abusers.

Safety Planning

The potential lethality of IPV is one reason those who represent survivors must be comfortable with the concept of safety planning. There are many good descriptions about how to go about safety planning, and many tools that have been developed to assist with the process. Some of these tools are listed in the Web Resources section at the end of this chapter. It is critical to understand that safety planning is not a one-time event. It is an ongoing, collaborative process with the victim.

Although safety planning may sound somewhat esoteric and mysterious, it is not. It is simply common sense planning for possible dangerous scenarios. It is something at which attorneys can excel, because part of what attorneys are trained to do is look at the potential consequences of legal pleadings and motions, witness testimony, clauses in contracts and wills, and myriad other potential hazards. Safety planning is something that will not feel unfamiliar to attorneys. There are allies who can help attorneys and their clients with this process. Domestic violence

advocates can be of great assistance. There may be other resources available, which could include law enforcement. It is important to note that safety planning for IPV cases includes courthouse settings. For instance, the parties may go to court and be in the same waiting area and/or courtroom, despite there being a protective order. Talk with the client about whether it is safe to be in the same waiting area and ask if there is a separate waiting room to use. It may be sufficient to talk to court officers or bailiffs to request their assistance in watching the abuser to be sure there are no confrontations. After court, ask them to hold the abuser at the courthouse for 20 minutes or so to give the client a chance to leave to reduce risk of contact and confrontation.

Each safety plan must be specific to your client's circumstances. If the client is employed outside of the home, there must be discussion about how to address safety (and perhaps that of co-workers) in the workplace. The client's home, car, friends' or relatives' homes, the children's or client's school, day care, doctors' offices, grocery stores, churches, and any other places the client and/or the children may frequent are all places around which safety planning can focus. The places attorneys are most likely to need to work through with a client are offices and courts.

In thinking about safety planning, you may have to look very carefully at your office procedures to see whether you need to make some changes to preserve the client's safety. Although confidentiality is always important for attorneys and clients, it requires a whole new level of scrutiny when dealing with IPV cases. Do not assume that you can mail or email documents or correspondence to a victim/survivor. Make sure you have a safe telephone number to leave a safe message. Never underestimate an abuser. Make sure office procedures are such that no one calling from the outside can get information, no matter who they say they are, until identity is verified. Even when identity has been verified, it is vital to be diligent about getting written releases from clients prior to any release of information. In IPV cases, confidentiality can save lives.

Victims often have a very good sense of what their level of risk may be, but not always. Attorneys might want to do some reading about assessing risk in IPV cases and what factors correlate most highly with physical violence.⁶ Although such assessments are not perfect at predicting actual violence, if you have a client telling you the abuser has threatened the family with a firearm, threatened suicide, made specific threats against the client or the children, has strangled the client, forced the client to have sex, or has stalked the client repeatedly, you will want to make sure that you do all the safety planning you can with that client, as these factors are known to correlate with lethality.

However, it is important to remember that no safety plan is foolproof. No Order of Protection will stop an abuser intent on killing, and survivors know this. Frequently, such potentially lethal

⁶ See, e.g., Department of Defense Instruction DODI 6400.06.6.6.2; Jacquelyn C. Campbell, et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ Journal (Nov. 2003). Available at VAWnet.org. National Online Resource Center on Violence Against Women.

violence only escalates at the point when the victim/survivor is taking definitive steps to get away. Attorneys representing victims may find that clients state, very sincerely, that their abusive partners will kill them if they try to leave. Sometimes the best “safety plan” is what advocates call “harm reduction” rather than actual safety. Harm reduction involves safety planning to help a client figure out how to avoid violent assaults if possible and to plan for ways to minimize harm to the client and the children during such an incident. That may involve an escape plan, a plan for getting the client and the children to some safe place within the home, or a plan to have a code word set up within a seemingly innocuous phone call, so the person called knows to call the police, send some other form of help, or assist in some other way worked out in advance. Advance planning is the key. The middle of a crisis is not the time to try to figure out what to do, unless that is your only option.

IPV, Post-Traumatic Stress Disorder (PTSD), and Traumatic Brain Injury (TBI)

Although combat-related conditions like PTSD and TBI are sometimes correlated with certain types of violence,⁷ we need to be careful not to let them be used as an excuse for violent behavior. “My PTSD made me do it” is not a valid excuse for committing acts designed to enforce coercive control over a partner. It is always vital to look carefully at the history of such behaviors by the abuser. A TBI or PTSD will NOT turn someone into a person who believes s/he is entitled to have what s/he wants when s/he wants it, without regard for the partner’s wishes or needs. If that attitude of entitlement is already present, combat trauma and related conditions may in fact exacerbate the violence already present in the relationship. More overt forms of violence, which are often physical or sexual, are more likely to come to the attention of law enforcement. Physical and sexual violence are usually the only kinds of violence that are officially recognized and counted.

It is also true that some physical violence by one intimate partner against the other actually IS related to symptoms of PTSD or TBI. However, this violence does not involve use of coercive control.

“Although combat-related conditions like PTSD and TBI are sometimes correlated with certain types of violence, we need to be careful not to let them be used as an excuse for violent behavior.”

⁷ See, e.g., *Victim Advocate Guide: Intimate Partner Violence (IPV) and Combat Experience*, Battered Women’s Justice Project & Avon Foundation for Women (2011).

It may happen in sleep or during a flashback and happens to be directed at the intimate partner because that is the person who is there at the moment. This violence, however, is likely to be seen as a problem by those committing the acts and is not an IPV tactic.

This is a complex area in a world that looks for simple answers to problems. One of the real issues in IPV is that there are no simple answers. Treating PTSD will help if the violence is truly part of the symptoms being suffered by the veteran or service member. However, treating PTSD will not change people's sense of entitlement and belief that whatever they do is justified; neither will anger management, substance abuse treatment, incarceration, or batterers' intervention programs if these beliefs are not challenged. Victims would certainly like those programs to help. Research, however, shows that they do not help everyone.⁸ The only thing that can help is a radical re-focus of abusers' sense of entitlement, so they no longer view themselves as the center of the universe.

That can only happen when abusers recognize that their behavior is a problem and sincerely want to change. Sometimes the criminal justice system can be the catalyst for that necessary change, but sometimes it is not.

While it is important to recognize when service members and veterans are dealing with problems stemming from their service to our country, we do them no favors by excusing or condoning their acts of coercive control against intimate partners, and in so doing, may endanger the victims and their children.

Web Resources:

Domestic Violence.org – Personalized Safety Plan.
<http://www.domesticviolence.org/personalized-safety-plan/>

⁸ See, R.C. Davis, B.G. Taylor, & C.D. Maxwell, *Does batterer treatment reduce violence? A randomized experiment in Brooklyn*. Washington, DC: National Institute of Justice (2000); L. Feder & L. Dugan, *Testing a court-mandated treatment program for domestic violence offenders: The Broward experiment*, National Institute of Justice (2004); L. Feder & D.B. Wilson, *A meta-analytic review of court-mandated batterer intervention programs. Can courts affect abusers' behavior?* [1] J. Exp. Crim. 239-262 (2005).

“While it is important to recognize when service members and veterans are dealing with problems stemming from their service to our country, we do them no favors by excusing or condoning their acts of coercive control against intimate partners, and in so doing, may endanger the victims and their children.”

National Center on Domestic and Sexual Violence – “Safety Planning”
http://www.ncdsv.org/publications_safetyplans.html

National Coalition Against Domestic Violence.
<http://www.ncadv.org/protectyourself/SafetyPlan.php>



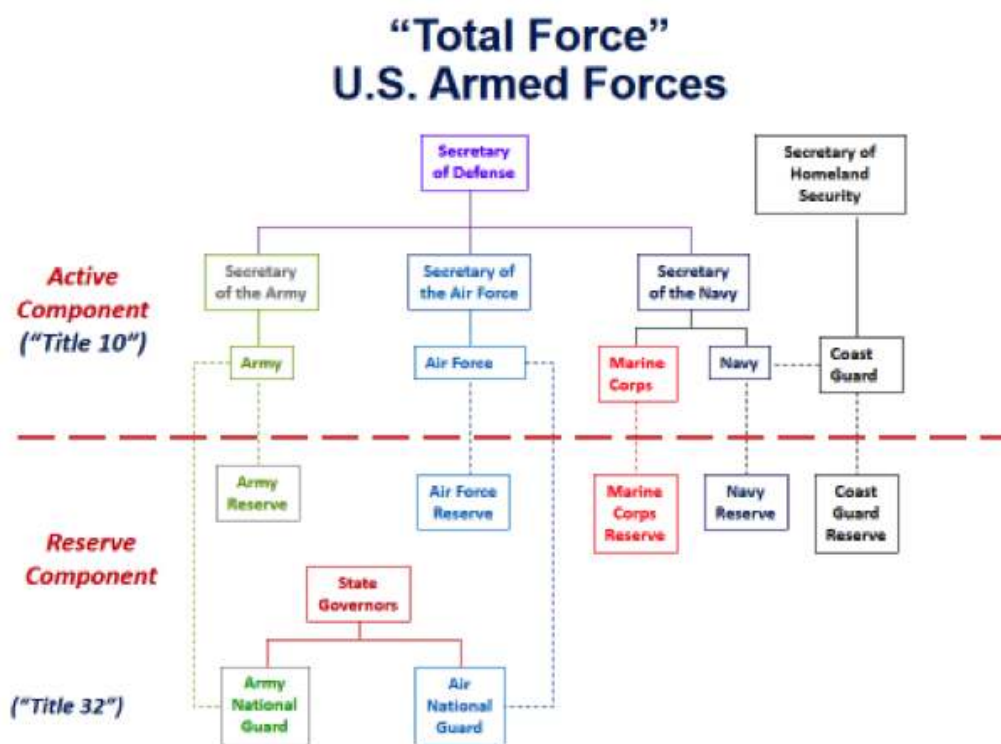
CHAPTER 2

Understanding the Military

For attorneys who are unfamiliar with the military world, gaining a basic understanding of the military is a critical step toward effective representation of a client connected with that world. The military ethos and world-view may not be one with which you agree, but it is extremely useful to have a general understanding of its basic premises, structure, and culture.

Military Structure

The military is divided into five separate branches (Army, Navy, Marines, Air Force and Coast Guard), and two separate components (Active Duty and Reserve). The chart below is a schematic of this structure.⁹



The Army, Navy, Marines and Air Force are under the Department of Defense (DoD). Currently, the Coast Guard is under the Department of Homeland Security. The reserve forces have a federal mission and may be activated by the Commander in Chief under Title 10 to meet the needs of the federal military. The Army and Air National Guards are under the control of each state’s governor and may be activated to assist in meeting statewide needs, such as disaster relief. The National Guard may, however, also be activated by the Commander in Chief under Title 10 for federal disaster relief or to supplement active component troops. Over the past 11 years, there have been numerous, repeated deployments of Guard and Reserve troops to

⁹ Department of Defense, Family Advocacy Program, *Webinar: The National Guard and Reserves and Intimate Partner Violence*, Battered Women’s Justice Project (May 24, 2011). http://www.bwjp.org/webinar_recordings_military.aspx

combat theaters in Iraq and Afghanistan. This has resulted in many more people in communities throughout the country coming to civilian attorneys with legal questions relating to those deployments – before, during, and after.

Each military service has some unique features, yet all are similar in many ways as well. It is important not to assume that you understand everything about other services simply because you have knowledge of one. For instance, although each rank structure is very similar, the ranks are named differently within the different services. As an example, even though the Marines are part of the Department of the Navy, their rank system is almost identical with that of the Army. The highest ranking officers in the Marines are generals, rather than admirals. However, the pay grades (E1 – E9, W1 – W5, and O1 – O10) remain the same throughout the military services and apply to similar ranks throughout. Each service has a somewhat different culture, including language, traditions, training, and attitudes toward other services, and members of each service are almost always convinced that their service is just a bit better than the others!

“However, you are far more likely to be successful if you truly understand the mission and ethos of the military and can frame the case in a way that will allow the person you are speaking with to clearly see why the request is reasonable.”

The military is a hierarchical system in which lines of command and authority are not only clear and understood by everyone in the system but also one in which a person’s status within the hierarchy is physically evident via uniform and insignia. Rank and respect are two critical concepts to understand in seeking to accomplish things for your clients. The system of rank is reinforced by the requirement that lower ranking service members salute those of higher rank. In addition, all those of higher rank, as well as all civilians, are generally referred to as “Sir” or “Ma’am” in conversation.

Different levels of rank come not only with different levels of compensation but also different levels of responsibility and different abilities to make things happen – for good or ill. Commanding officers have tremendous discretion in all things relating to service members under their command and may sometimes be able to provide assistance if you are in need of some quick intervention. Such things as removal of an abusive service member from a housing unit, issuance of a military protective order (MPO), or prohibiting an abusive civilian spouse from entering a military installation are all things within a commanding officer’s discretion and can be acted upon very quickly.

Getting help for a client partnered with a service member can sometimes be accomplished simply by having a conversation with the abuser’s commanding officer (CO). However, this will be made significantly easier if a civilian is willing to ask what form of address the military person prefers. It is considered very disrespectful to call someone by her/his first name unless s/he tells

you that is the preferred form of address though most service members are well aware that civilians may be clueless about military rank and appreciate being asked how they wish to be addressed. Since attorneys are likely to be trying to gain some cooperation and assistance for their clients, starting respectfully and acknowledging ignorance could go a long way toward gaining that assistance.

It is also important to remember that there is, in fact, a command *structure*. Everyone in the military has someone with command authority above them, up to the Commander in Chief, who still has to answer to Congress on some matters. This is helpful to know because if one person in the command structure is not willing or able to assist, an attorney may be able to get somewhere by going up the chain of command. However, you are far more likely to be successful if you truly understand the mission and ethos of the military and can frame the case in a way that will allow the person you are speaking with to clearly see why the request is reasonable.

Military Ethos

The military has responsibility for fighting wars, maintaining peace, and for providing humanitarian/disaster relief. These missions can only be accomplished effectively when troops are fully trained and able to deploy when and where necessary. The effectiveness of the entire force is what is important, and individual issues are only relevant as they affect the readiness of the unit. Good order and discipline is, therefore, of the highest military value and is the basis for virtually everything – from leave schedules to individual work assignments to the disciplinary and justice systems. Individuals give up certain rights upon entering the military, and can be told what to wear, when and where to work, sleep, and eat, how to cut their hair and how often, and may be subject to other restrictions that would never be tolerated or allowed in most parts of the civilian world.

This ethos may sometimes give rise to actions that are not as helpful to survivors as we might wish. When good order and discipline are the first order of business, service member *survivors'* messy lives may be seen as (or actually be) a problem for the group, and this can have an impact on their military careers. For this reason, it is always important to have a discussion with your service member clients about any potential fallout for their careers and what might be done to mitigate such fallout.

This also applies, of course, to service member abusers. Although in the civilian world, actually being incarcerated is likely to have an impact on an abuser's employment, for most civilians a misdemeanor assault conviction or being subject to a protective order usually does not. In the military, as we will discuss later, convictions and protective orders are likely to have a detrimental impact on a service member's career – and could include discharge from the military with loss of all pay and benefits. An understanding of these possibilities can allow an attorney to

have a much more thorough and nuanced discussion with clients regarding the likely impact of specific courses of action, which is an important piece of safety planning.

Understanding this ethos can also make you a more effective advocate for your clients because you can couch requests in ways that emphasize the positive effect on good order and discipline. Your request that a CO issue an MPO is more likely to have a successful outcome if you are able to explain why issuing the MPO will promote good order and discipline. No CO wants to have a service member under her/his command facing criminal charges, and if intervention early on might help prevent that from happening, a CO will often be cooperative.

Of course, COs are men and women with their own perspectives and beliefs. A CO may be reluctant to believe that one of his/her troops would harm family members. While a great many officers in command positions are very savvy about these issues and address them quickly and appropriately, you cannot always rely on this. That, however, is one of the beauties of the command structure – there is always someone higher up you can go to if you are not accomplishing what you need by talking to one person.

To recap, there are both advantages and disadvantages to operating within the military. You will be the most effective advocate for your client if you are knowledgeable and willing to ask questions about what you do not know. By understanding and working within the limitations of the military system, you may be able to provide quick and effective assistance to clients. You may also find strong, effective allies in helping to keep your client safe and holding the abuser accountable.



CHAPTER 3

Military Response to Intimate Partner Violence

Barriers to Military Response to IPV

In the past few years, the military, as an institution, has made tremendous strides in addressing the problems of IPV and sexual assault. These have been major issues in the military for various reasons over the years. The military's trouble dealing with IPV and sexual assault issues arises from several philosophical and practical reasons. The military's focus on readiness of the entire unit, rather than on the individual, has often created a lack of motivation to address what are seen as individual problems. One of the sea changes in DoD's approach to domestic abuse (DoD's terminology) is to define it as an issue that affects readiness by harming the family, which is seen as playing an integral part in the overall readiness of the military. As such, DoD's position is that domestic abuse will not be tolerated.

Another problem historically affecting the military’s response to IPV is that the military is, for the most part, still a masculine, even macho, world. The characteristics and actions that often get people recognized and promoted within the military can sometimes be exactly the characteristics that minimize or excuse IPV and/or sexual assault. Since COs have a tremendous amount of discretion in both what they feel must be addressed and in how to address it, COs who are dismissive of IPV may, in fact, find that they never need to deal with it within their own commands. To them, it simply may not exist. Consistently, what one sees in DoD reports on domestic abuse and sexual assault is that uneven command buy-in is an ongoing problem. This may change if the military holds commanders accountable by promoting officers because they understand and appropriately address the problems of domestic abuse and sexual assault, in addition to all the other characteristics and actions for which they may be recognized for promotion.

An additional institutional barrier to a strong, unequivocal response to IPV is Military Rule of Evidence 404(a)(1), which allows for mitigation of both actual criminal culpability and punishment received due to “good military character.” In the guilt/acquittal phase of a court martial, this may actually be used to argue that a service member’s good military character is such that s/he could not have committed the crime.

The problem with this particular rule in the context of IPV is that we know abusers are very cognizant of power – particularly who has it and who does not. In fact, they are very capable of regulating their behavior toward those who have power over them. They also understand that when they abuse the power they have over family members, there may be no real consequences for their actions. They may be excellent soldiers, sailors, airmen or Marines, yet still be abusers who use violence to gain or retain coercive control over their partners and children. The fact that they are savvy enough not to use that violence against people who have power over them – those of higher ranks – does not make them any less guilty, except under the Military Rules of Evidence.

Some of the practicalities that have an impact on both the incidence and the reporting of IPV in the military are similar to those that have an impact on incidence and reporting of IPV in the civilian world. Victims are afraid of increased violence or retaliation if they report, a fear that is

“Another problem historically affecting the military’s response to IPV is that the military is, for the most part, still a masculine, even macho, world. The characteristics and actions that often get people recognized and promoted within the military can sometimes be exactly the characteristics that minimize or excuse IPV and/or sexual assault.”

validated by data on separation violence.¹⁰ Victims fear losing their children, their status, and/or their financial support, and they fear the responses of their families and/or social groups. Victims also have feelings of love and connection with their abusive partners, feelings that are encouraged and supported by the abusers. After all, if it were always ugly and bad, most people would easily recognize the problem and figure out how to respond.

One of the things that may be different for IPV victims in the military is that families are often very far from home and support networks. The isolation that many abusers work so hard to create may have already been substantially completed simply by virtue of the service member's assignment that may be in an entirely different country. Secondly, service members may face adverse career consequences – including discharge from the military – whether they are victims or abusers. Therefore, it may become even harder for victims to come forward, knowing they may be causing an adverse impact on their families' financial well-being. Even though there are programs such as transitional compensation to assist families whose service member breadwinner has been discharged and lost income due to abuse, there are still lots of pressures on victims to maintain silence in order to protect the abusers' careers, or their own.

Finally, many service member abusers have access to firearms, which always increases the potential for lethality. A conviction for a misdemeanor crime of domestic violence (MCDV) will affect a service member's ability to do most jobs in the military because the service member will be prohibited from possessing or using a firearm under federal law.¹¹ Most service members are well aware of this and often use this argument to convince victims not to report IPV.

Military Reporting

The military's reporting system for domestic abuse and sexual assault has changed over the past years. In the past, any report received in any way was officially acted upon, no matter the victims' wishes. Given the extent to which the military functions like a very small town, and information (or gossip) spreads very rapidly, this was a significant disincentive for reporting, and also made victims reluctant to obtain medical treatment, or to seek counseling. In 2006, the military instituted a two-tiered system – restricted and unrestricted reporting. An *unrestricted* report can be made through any avenue – law enforcement, command, medical, victim advocates – and will be investigated and dealt with as appropriate, as was the former practice for all reports.¹²

The new option is a *restricted* report,¹³ which may only be made to a victim advocate, the advocate's supervisor, or a healthcare provider. Reports made to chaplains are also confidential

¹⁰ See Note 4, *supra*.

¹¹ See Chapter 6, *infra*.

¹² DoDI 6400.06 E3.5.1

¹³ DoDI 6400.06 E3.5.2

under the general rubric of confidences shared with clergy.¹⁴ If a restricted report is made to one of the authorized people, and the victim wishes, it can be kept confidential. Command will not be informed, there will be no law enforcement investigation, and the Family Advocacy Program (discussed later) will not be involved except to offer advocacy and counseling to the victim. However, the victim will be able to obtain medical treatment and counseling, as well as receive information about unrestricted reporting. A restricted report can be changed to unrestricted at the victim's request.

There are also some circumstances under which a restricted report might be changed to unrestricted, or made unrestricted from the outset, regardless of the wishes of the victim.¹⁵ There are exceptions to restricted reports that are intended to prevent immediate and serious harm to the victim or other person. Exceptions include upon "reasonable belief" that there is child abuse going on; where some court order, federal or state statute, or a treaty, requires disclosure; or disclosure to a Disability Retirement Board (DRB) when that information is necessary for the DRB to make a disability retirement determination.

Further, if the report is made to anyone else within the military, that person would have a duty to report to command, and that report would be unrestricted. If working with a client who is connected with the military, it is critical to assess the victim's wishes regarding confidentiality; and if the wish is for the information to remain confidential, find out in great detail about any persons to whom the victim has made a disclosure. If a victim has told her/his best friend about an IPV incident, and that best friend is a service member, the report will not be able to remain restricted.

Therefore, while the two-tiered reporting system is a significant improvement, there are still circumstances under which victims' wishes for confidentiality may not be honored. For this reason, sometimes victims connected with the military choose to seek medical treatment and/or counseling at civilian facilities. Although virtually all state laws provide for some exceptions to medical and counseling privilege or confidentiality for cases where there is evidence of child abuse, the other exceptions will likely not be a problem in a civilian setting.

The Family Advocacy Program (FAP)¹⁶ is another innovation in the military response to IPV. FAPs are designed to both assist in investigating allegations of domestic abuse and provide services to abusers who demonstrate a need for treatment such as substance abuse treatment, anger management, or mental health counseling. FAPs are created with the purpose of enhancing victim safety and offender accountability. They can provide victim advocacy services for victims and can provide full services to any victim who is eligible to receive military medical treatment. Those not eligible for military medical treatment will be offered FAP assessment and safety planning and then referred to civilian organizations for subsequent services.

¹⁴ DoDI 6400.06.6.7

¹⁵ DoDI 6400.06 E3.5.3

¹⁶ DoDI 6400.06.6.6 (Sept 2011); DoDD 6400.1 (Aug. 2004)

When a report of domestic abuse comes to a FAP, a Case Review Committee or Incident Determination Committee investigates the report to make a determination whether the incident fits the DoD definition of domestic abuse, which is broad: “Domestic violence or a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person who is: a) a current or former spouse; b) a person with whom the abuser shares a child in common; or c) a current or former intimate partner with whom the abuser shares or has shared a common domicile.”¹⁷ Domestic violence is defined as “An offense under the U.S. Code, the Uniform Code of Military Justice (UCMJ), or state law: 1) involving the use, attempted use, or threatened use of force or violence against a person, or 2) a violation of a lawful order issued for the protection of a person who is: a) a current or former spouse; b) a person with whom the abuser shares a child in common; or c) a current or former intimate partner with whom the abuser shares or has shared a common domicile.”¹⁸

Although FAP has no disciplinary authority, command is kept informed about an abuser’s response (or lack thereof) to treatment, as well as his/her follow-through (or lack thereof). When command receives a report that someone who received, or is receiving services through the FAP, has been violent again, or has failed to follow through as directed, the command’s disciplinary authority is likely to be the next tool used to try to address the abusive behavior. It is also possible that the CO will go forward with disciplinary action – whether punitive or not -- at the same time a service member is undergoing treatment/services through the FAP. FAPs exist on every military installation that has command-sponsored family members.

For civilian practitioners, it is very useful to make good connections with your local FAP on nearby installations. They can be of real assistance in cases involving service members, even if the victim may not be eligible to receive their services. If the case is eligible for services through the FAP, then the FAP will provide ongoing case management and other services. If not, FAP members often have good working relationships with civilian advocates who may be able to assist and who will have a clear sense of the interplay between military and civilian issues.

Transitional Compensation

It is possible for a service member disciplined for abusing his/her family members to be discharged or separated from the military. When that happens, the service member and family may be entirely without income. The Transitional Compensation for Abused Family Members (TCAFAM – shortened herein to TC) program was created by Congress to provide some resources for these victims of family abuse.¹⁹ TC is applied for through the command structure, but the

¹⁷ DoDI 6400.06 E2.13 (Sept. 2011)

¹⁸ DoDI 6400.06 E2.14 (Sept. 2011)

¹⁹ 10 U.S.C. § 1059 (2013); DoD 7000.14-R Financial Management Regulation Volume 7B, Chapter 60 (September, 2012)

FAP is the best place to begin the process. FAP personnel know the ins and outs of TC and the application process.

The following are the eligibility criteria for TC benefits:

- A service member must have been separated from service through a court martial or by an administrative action for an offense against the spouse and/or children.²⁰
- The service member must have been on active duty more than 30 days.²¹
- The family members must not be residing with the service member.²²
- The spouse cannot have been an active participant if the offense was a child abuse offense.²³
- A spouse cannot remarry and continue receiving benefits.²⁴
- Dependent children in these family circumstances who are not residing with either parent, (i.e., are in foster care or kinship foster care, etc.) are eligible to receive benefits independently of the parents.²⁵
- The spouse or a guardian receiving benefits for children must do an annual certification of continuing eligibility, which is done through the Defense Finance and Accounting Service (DFAS)

The benefits are cash benefits, paid on the first of each month to the spouse and/or children. The DoD program provides for a minimum of 12 months of payments, and a maximum of 36 months.²⁶ The Army has recently moved to having all TC payments last for a period of 36 months.²⁷ Yearly cost of living allowance (COLA) increases are also applied. In addition, the spouse and children receive medical benefits as if the service member were still on active duty, dental benefits on a “space available” basis,²⁸ and commissary and exchange privileges.²⁹ They will also remain eligible for legal assistance through any local installation’s Legal Assistance Office.

TC benefits will be terminated if the spouse and children return to living with the abusive spouse or if the spouse receiving benefits remarries. Further, if for some reason the conviction is overturned or the matter is expunged from the service member’s record, TC payments will stop.³⁰

TC is potentially a life-saving program for victims in the difficult position of losing their family’s economic support as a result of the abuser being separated from the service due to the abuse. If

²⁰ 10 U.S.C. §1059 (b) (2013)

²¹ *Id.*

²² 10 U.S.C. §1059 (g)(2) (2013)

²³ 10 U.S.C. §1059(g)(3) (2013)

²⁴ 10 U.S.C. §1059(g)(1) (2013)

²⁵ 10 U.S.C. §1059(d)(3) (2013)

²⁶ 10 U.S.C. §1059(e)(2) (2013)

²⁷ Army Regulations AR 608-1 § 4-12 (2013)

²⁸ 10 U.S.C. § 1076(e) (2013)

²⁹ 10 U.S.C. §1059(j) (2013)

³⁰ 10 U.S.C. §1059(e)(3)(A) (2013)

you ever have a client in this situation, it would be valuable to get in touch with your local FAP to see whether it can help.

Web Resources:

Understanding the Military Response to Domestic Violence: Tools for Civilian Advocates

http://www.bwjp.org/files/bwjp/articles/BWJP_Military_Part1.pdf

Military OneSource: Domestic Abuse Reporting Options

http://www.militaryonesource.mil/abuse?content_id=266707

Military OneSource: The Family Advocacy Program

http://www.militaryonesource.mil/phases-military-leadership?content_id=266712

Commander Navy Installations Command: Family Advocacy Program

http://www.cnic.navy.mil/ffr/family_readiness/fleet_and_family_support_program/family_advocacy.html

Military OneSource: Transitional Compensation

http://www.militaryonesource.mil/abuse?content_id=266715



CHAPTER 4

Accountability for Military Offenders

It is useful for civilian attorneys who are handling military-related IPV cases to have at least some familiarity with the military discipline/justice system, just as it is helpful for civil attorneys to have familiarity with criminal law and procedure.

The entire system of military discipline is based on the concept of good order and discipline so that the unit retains cohesion and is mission-ready at all times. Because this is the purpose of the system, COs are given a high degree of discretion regarding what level and form of discipline to use. COs are expected to use the least severe discipline they deem necessary to achieve good order and discipline. The levels of potential disciplinary actions run from administrative or “non-punitive” through punitive but non-judicial options to punitive judicial options under the Uniform Code of Military Justice (UCMJ), as discussed in detail below.³¹

³¹ 10 U.S.C. Chapter 47 (2013)

Administrative Options

Administrative (non-punitive) options allow COs to deal with minor disciplinary matters without actually punishing a service member. They may be done in conjunction with punitive options under the UCMJ where deemed appropriate. The lowest level of administrative options is counseling, which can be either formal or informal, and in verbal or written form. A slightly higher level of discipline is admonitions and reprimands. Admonitions are less severe than reprimands. Both of these usually take the form of a letter to the service member's personnel file. The service member has the right to make a written response if he or she wishes.

Another non-punitive option for discipline is extra-military instruction (EMI) or extra training. This interesting option allows a CO to make a service member do some kind of specific extra training for the purpose of remedying a deficiency in that service member's performance. It is not legal to use EMI punitively, and it is supposed to be used to correct a deficiency of character or personality rather than to correct a behavior or action. So, a CO could use EMI to try to correct the character trait of forgetfulness but not simply to punish for having forgotten to do something important. Any EMI must have a valid training purpose and relate directly to resolving the deficiency of character or personality.

Separations/Discharges

Discharges (or separations) bridge the gap between non-punitive and punitive disciplinary actions, as they may be either administrative OR punitive. Punitive discharges must be done through the UCMJ and a judicial process (court martial). A veteran's discharge status is an extremely important piece of information in determining the benefits and services to which that veteran will be entitled.

Administrative separations can be "honorable," "general under honorable conditions," or "general under other than honorable conditions." There is discretion regarding what kind of discharge can be given under some circumstances, and to an outsider it is not always clear precisely why one would be given rather than another. As someone looking at this from the outside, it appears that a general discharge under honorable conditions may be given when something seen as outside the control of the service member results in the inability to remain in the service – such as a medical condition or an unrecognized physical or mental disability. Such discharges are usually given when someone has not had a long history in the military but served as well as possible while in the military service. The factor that prohibits them from remaining in the service is something over which they have no control.

On the other hand, an other than honorable general discharge is used for circumstances in which a service member has committed one or more infractions that may not rise to the level of court martial, but are seen as both incompatible with further military service and within the control of the service member. For example, it could include a pattern of low-level infractions for drugs,

excessive uncontrolled use of alcohol, or other such problems. Discharges characterized as other than honorable will prevent a veteran from receiving certain benefits and services through the Department of Veterans Affairs (VA).

Punitive discharges are classified as either “bad-conduct” or “dishonorable,” and as stated above, can only be imposed through a judicial process after conviction for a crime or offense.

Non-Judicial Punishment

Every service has some type of non-judicial punishment option. Different services call them by different names – Office Hours, Article 15, Captain’s Mast, Mast – but they all are used for minor offenses. The CO is the one who determines which offenses are minor, as well as what punishment is appropriate. Minor offenses generally would be those for which no more than 30 days of confinement would be possible after a court martial.

Judicial Punishment

All judicial punishment comes through the UCMJ and the courts martial process. There are some general things to understand about the UCMJ. It is the basic criminal code of the military, containing both the usual kinds of offenses seen in other criminal codes (homicide, sex crimes, drug offenses, etc.) and uniquely military offenses such as failure to obey a direct order, being absent without leave, dereliction of duty, and others. This code applies to all active-duty service members at all places at all times. It does not apply to inactive reservists or to civilian military employees or government contractors, except in situations specifically set forth in the UCMJ or other statutes. Because the United States and any state are separate sovereignties, service members MAY be punished under both state law and the UCMJ for offenses committed in the state’s jurisdiction. Offenses committed by service members on installations, or portions of installations that are exclusively federal will be dealt with under the UCMJ. Any civilian who commits a crime in federal jurisdiction, even on a military installation, would be subject to prosecution under federal criminal statutes but not under the UCMJ.

There are no standing courts martial. Instead, the military uses a Convening Authority (CA) process. The CA has the authority to convene a court martial when a crime is alleged to have been committed. The CA is an officer in command who has dispositional authority regarding violations of the UCMJ. High-ranking officers (flag and general) usually have authority to convene general courts martial (felony level), while lower-ranking officers (O-5 and O-6) may be designated as CAs for special courts-martial (misdemeanor level offenses).³²

³² Thanks to CDR Andrew House, JAGC, USN, Deputy Judge Advocate General for Legal Assistance for this information.

The UCMJ contains full rights and protections for the accused, such as the right to counsel, the right to a jury trial, the right to confront witnesses, and the right to appeal. There is no right to a grand jury, as the UCMJ contains an alternative procedure for determining whether there is reasonable cause to hold someone over for prosecution. That procedure is the Article 32 investigation. Like a grand jury, this procedure may be waived by the accused, so long as the waiver is knowing and intelligent.

The UCMJ has no sentencing guidelines. Offenses carry maximum sentences but no minimums. Under the UCMJ, sentences will include some or all of the following: 1) confinement; 2) reduction in rank; 3) fines and or forfeitures; and 4) discharge. Forfeiture of pay – all or some portion – is quite regularly a part of military sentences, creating some difficult issues for military families in which one partner is charged with a crime. In addition, convictions for many offenses may result in discharge. In the civilian world, a criminal conviction might result in a hefty fine or, ultimately, loss of a job, but a civilian sentence will not require forfeiture of pay or loss of employment. Because this sometimes results in harsh circumstances for victims of domestic violence or child abuse, the military has developed the Transitional Compensation Program to provide income to families whose military breadwinner has been convicted for those crimes and/or separated from the military resulting in loss of income (discussed in more detail in Chapter 3).

There are three types of courts martial (CM) – Summary, Special, and General. *Summary courts martial* are for minor offenses committed by enlisted personnel (not by officers). The maximum punishments allowed under a summary CM are 1) 30 days of confinement; 2) forfeiture of 2/3 pay for one month; and/or 3) reduction in rank to E-1. A summary CM uses a panel (jury) of one active duty, commissioned officer.

Special courts martial are for any military personnel charged with UCMJ violations that would subject the accused to up to one year of confinement (roughly equivalent to misdemeanors in the civilian world). Maximum punishments under a special court martial, in addition to 12 months of confinement, are forfeiture of 2/3 of pay for 12 months, reduction in rank to E-1, and/or a bad conduct discharge. The accused is entitled to an attorney.

General courts martial are equivalent to civilian felony trials. There must be an Article 32 investigation or a knowing and intelligent waiver of that right by the accused. The case will be heard by a military judge, and there will be a panel (jury) of at least five members. These members will be commissioned officers, unless the accused requests that there be an enlisted person on the panel. The accused is entitled to a military attorney to represent him/her, and the possible punishments are any authorized under the Manual for Courts Martial, up to and including the death penalty in certain kinds of cases. Service members discharged after a general court martial proceeding will receive either a bad conduct discharge or a dishonorable discharge. General courts martial are open to the public and media and are matters of public

record. Appeals of military trial convictions are handled through the Military Appellate Court system.

An interesting facet of the Military Rules of Evidence is Rule 404(a)(1) regarding evidence of good military character. The rules are written so that such evidence may, in and of itself, be considered in determining guilt or innocence. The idea is that someone of excellent military character could not be guilty of whatever charges she/he is facing. In IPV cases, this is not a sensible conclusion. Abusers who exercise coercive control over intimate partners are VERY cognizant of power – who has it and who does not. Most would never behave inappropriately or disrespectfully to someone who outranks them. Because of their deep understanding of power dynamics, such abusers might be excellent, trouble-free service members, and therefore be deemed to have demonstrated good military character. This certainly does not mean they are not guilty of IPV.

Military prosecutors say that it is actually rare for this rule of evidence to be used in this particular way – to argue that the accused must not be guilty because of good military character. The reason for this is that using such evidence opens the door for the prosecution to bring in evidence of bad character, and that’s usually something defense counsel would want to avoid. However, this rule of evidence is apparently used quite often in presenting evidence intended to mitigate a sentence after a conviction. It is an interesting rule and bears keeping in mind when representing a client whose abusive partner is being prosecuted in a military court.

Knowing some of the ins and outs of the military justice/disciplinary system may pay dividends in future advocacy with clients. The following resources provide additional information.

Web Resources:

Uniform Code of Military Justice

<http://www.ucmj.us/>

Manual for Courts-Martial

http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf

American Bar Association: Balancing Order and Justice: The Court-Martial Process

http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/01-1_court_martial_process.authcheckdam.pdf

Military.com: Courts-Martial Explained

<http://www.military.com/benefits/military-legal-matters/courts-martial-explained.html>

Non-Deployable: The Court-Martial System in Combat from 2001 to 2009: Page 22

http://www.law.yale.edu/Court_Martial_System_in_Combat.pdf

This article defines “good military character defense” and explains how it can be used in a court-martial.

Military Justice Army Regulation 27-10: 3-4. Personal exercise of discretion
http://www.apd.army.mil/jw2/xmldemo/r27_10/main.asp

Project to Enforce the Geneva Conventions: 2001 Judge Advocate Officer Advanced Course: Chapter 12: Unlawful Command Influence: Part II: Independent Discretion Vested in Each Commander: Page 12-2
http://www.pegc.us/LAW/unlawful_command_influence.pdf

The Commander's Role in the Military Justice System
http://library.enlisted.info/field-manuals/series-2/FM8_10_5/APPB.PDF

This article discusses the command's discretion in the military justice system in both the active and reserve components. It describes the commander's role, command's influence, and the options available to the commander in the active component.

This document lays out the different nonpunitive actions that may be taken against a soldier and what the process and consequences of such actions can be.

GlobalSecurity.org: Nonpunitive Disciplinary Measures
<http://www.globalsecurity.org/military/library/policy/army/fm/27-1/Ch7.htm>

This website discusses the guidelines for corrective actions and what types of administrative actions are available for minor offenses.

U.S. Military Lawyer: Non-Judicial Punishment (NJP)
<http://www.usmilitarylawyer.com/military-non-judicial-punishment.asp>

This website discusses the different non-judicial punishments, from minor offenses to Article 15, UCMJ, and regulations, as well as the process of non-judicial punishments.

About.com: US Military: Nonjudicial Punishment
<http://usmilitary.about.com/od/justicelawlegislation/a/article15.htm>

This website discusses the terms used in the different services of the Armed Forces regarding nonjudicial punishments, offenses that are punishable under Article 15, the determination of nature of the offense, and circumstances regarding the incident.

Fort Hood Sentinel: "Leaving on good terms: Types of discharges, their consequences"
<http://www.forthoodsentinel.com/story.php?id=8539>

Army Regulation 635-200: Active Duty Enlistment Administrative Separations:
http://www.apd.army.mil/pdf/files/r635_200.pdf

VA Health Care: Other Than Honorable Discharges; Impact on Eligibility for VA Health Care Benefits
http://www.va.gov/healthbenefits/resources/publications/IB10-448_other_than_honorable_discharges_0613.pdf



CHAPTER 5

Protective Orders

Protection Orders, Orders of Protection, Protection from Abuse Orders, Restraining Orders, or whatever they may be called in your jurisdiction, are useful tools in helping to enhance an IPV victim's safety. There are some particular things to understand about how these civilian orders fit into a military setting, and it is also useful to understand how military protective orders (MPOs) may be utilized in protecting victims.

Civilian Protective Orders & Full Faith and Credit

Civilian protective orders are enforceable on military installations under the Armed Forces Domestic Security Act, 10 U.S.C §1561a. Under the Full Faith and Credit provisions of the U.S. Constitution, and the mandates of the Violence Against Women Act regarding enforcement of protective orders, as long as you have a valid protective order from any state, Indian tribe, or territory, you will be able to get it enforced on a military installation as if it were a valid order of the jurisdiction in which you seek enforcement. Each installation is likely to have slightly different procedures for dealing with civilian protective orders, so as with many things discussed in this handbook, a good place to start in getting a civilian protective order enforced is to speak with the installation's Judge Advocate General (JAG) or Legal Assistance Office.

It is also important to understand that any order containing language protecting one party from the other may be enforced as a protective order. There are requirements of due process, of course, but a custody order or divorce judgment that contains language prohibiting one party from harming the other, or requires one party to stay away from the other, may be enforced just as if it were a stand-alone protective order. Consent orders are also enforceable because the restrained party had the opportunity to be heard, even if s/he chose to consent to the order instead of fighting it. So long as the court issuing the order had jurisdiction over the subject matter and the parties, consent orders are enforceable.

There are specific things to be known about the full faith and credit (FF&C) implications of tribal and mutual protection orders as well. For assistance with these matters, the primary source is the National Center on Protection Orders and Full Faith & Credit (www.fullfaithandcredit.org), a program of the Battered Women's Justice Project. The attorneys there know the myriad details of FF&C and can provide guidance on enforceability of protective orders in various case scenarios.

Military Protective Orders

As discussed in previous chapters, the basis of the military discipline and justice system is good order and discipline, which puts the interests and functioning of the unit as a whole above the interests of individuals. The military system gives COs the right to issue any lawful order, requires that orders are presumed to be lawful, and allows for punishment of service members who disobey a lawful order under Article 90 of the Uniform Code of Military Justice (UCMJ). Military Protective Orders (MPOs) fall under these requirements and may be issued by the CO when s/he feels they are necessary to uphold good order and discipline. The DoD Instruction regarding these orders states that commanders are authorized to issue MPOs to safeguard victims, quell disturbances, and maintain good order and discipline, and to allow victims to seek

a civilian protective order.³³ As such, there are no due process requirements. The CO simply issues the order, which may be either verbal, or on form DD 2873, “Military Protective Order.”

MPOs can be an effective adjunct to a civilian protective order. In some circumstances, it may be easier and quicker to have an MPO issued than to get a civilian order. They may be issued even when there is already a civilian protective order in place. In that situation, they are not allowed to contradict the civilian order, but they may be even more restrictive if the commander believes that to be necessary. They can be tailored to meet the needs of any specific situation, as long as it is the service member who is the abusive partner. A commander has no disciplinary authority over civilian family members, so an MPO has no effect in that situation. An installation commander may bar a civilian from coming onto the installation, but an MPO will not be a useful tool where the victim is the service member and the abusive partner a civilian.

MPOs have some shortcomings as well. For one thing, they do not follow a service member who is transferred to another command. They are an order issued by a specific CO and are only valid while the service member is under that commander. Another downside: although, as a lawful order, they apply to the service member at all times, everywhere, legal mechanisms available in the civilian world, like mandatory arrest and full faith and credit, do not apply because an MPO may be issued without due process.

“As with so many things, firearms restrictions may be a double-edged sword, sometimes causing victims to refrain from reporting or taking legal action for fear that abusers may lose their jobs by being discharged from the military for not being able to use a weapon.”

Further, MPOs are not enforceable off the installation in the same way that civilian protective orders are enforceable on the installation. However, most large military installations have Memoranda of Understanding (MOUs) with civilian law enforcement that provide for two-way communication regarding MPOs. The command lets the civilian agency know when an MPO is issued, and if the civilian law enforcement agency receives information indicating that a

service member has in some way violated the provisions of the MPO, that agency notifies the military installation. The commander can then take whatever steps deemed necessary to enforce the provisions of the MPO.

As a matter of practice, it may be useful to seek both types of protective orders for clients with significant safety concerns. Some abusers may be more worried about the possibility of military discipline than of civilian enforcement actions. Of course, there are cases in which it is

³³ DoDI 6400.06.6.1.2 (2011)

impossible to convince a judge that violations of a protective order were important enough to be addressed. In such circumstances, it may be easier to have an MPO enforced by the commander than to get a judicial finding that the abuser has violated a civilian protective order.

The flip side of that though is that COs are individual human beings, just like judges, with their own particular beliefs or prejudices about IPV, and they have a lot of discretion regarding what actions to take, or whether to take any action at all. Some COs may be reluctant to issue MPOs to begin with, or to enforce them. Fortunately, all service members, whatever their ranks, have someone with command authority over them, and in the right circumstances, it is possible to go up the chain of command to find someone who will assist.

One other thing to know about MPOs is that they do not trigger the provisions of the firearms statutes discussed in a subsequent chapter. Although a CO could order a service member to turn in a service weapon at the end of a work shift and not carry it with him/her, it would likely not be within command purview to require a service member to surrender a personal weapon or weapons. As with so many things, firearms restrictions may be a double-edged sword, sometimes causing victims to refrain from reporting or taking legal action for fear that abusers may lose their jobs by being discharged from the military for not being able to use a weapon. As a result, a victim may prefer an MPO in order to not trigger firearms provisions. Of course, a CO who has had to issue an MPO due to acts of domestic abuse by a service member may decide that the service member is no longer fit for duty anyway. Sometimes there are simply no easy formulas for how to handle these cases.

For a Quick Reference: Protective Orders and the Military, see Appendix C.

Web Resources:

USC § 1561a: Civilian orders of protection: force and effect on military installations
<http://www.law.cornell.edu/uscode/text/10/1561a>

North Carolina State Bar: Domestic Violence; Military Response and Regulations
http://www.ncbar.com/lamp/2010%20CLE/Domestic_Violence_Military_Response_and_Regulations%201.pdf

DoD Live: Know the Facts—The Military Protective Order
<http://www.dodlive.mil/index.php/2011/10/know-the-facts-the-military-protective-order/>

WomensLaw.org: Military Protective Orders
http://www.womenslaw.org/laws_state_type.php?id=10866&state_code=US

National Center on Protection Orders and Full Faith and Credit
www.fullfaithandcredit.org



CHAPTER 6

Federal Domestic Violence Firearm Prohibitions and the Military

There is often confusion about federal firearms laws and how they apply to the military. Clients frequently come in and say their abusive partners have told them if there is a protective order or an arrest, the abusive partner will be “kicked out” of the military. Many, if not most, victims do not want to be seen as having been responsible for their partners’ discharge from the military, nor are they happy about the loss of economic stability that would ensue. Whether these service members are simply ignorant about the laws regarding firearms, have been given bad information, or are purposefully misrepresenting the law to their partners in an attempt to keep

from being subject to court-ordered limits on their behaviors, clients are often deeply conflicted about whether to seek court protection because they believe this to be true. Firearms prohibitions are indeed implicated in domestic violence cases, but it is important that clients understand exactly how, so they can make safe decisions for themselves.

The Gun Control Act of 1968 established the proposition that convicted felons, as well as other classes of people, should not be allowed to possess firearms.³⁴ At that time, however, the law exempted members of the military from this prohibition. The 1996 Lautenberg Amendment to the Gun Control Act prohibited the possession of firearms by anyone with a conviction for a misdemeanor crime of domestic violence (MCDV).³⁵ This is a lifetime prohibition, and notably, this prohibition contains *no such exemption* for an MCDV conviction.

This created the somewhat bizarre situation that members of the military are statutorily allowed to possess and use a firearm if they have a felony conviction, but not if they have a conviction for an MCDV. However, the military determined that this does not make a lot of sense and decided that felony domestic violence convictions would also require prohibiting a service member from possessing and using a firearm.³⁶ Since the distinctions between felonies and misdemeanors are not the same in the military as in some civilian codes, (not surprising, since many states have very different ideas about what constitutes a felony or a misdemeanor), the military uses the general rule that a special or general court martial conviction for a domestic violence crime will result in a firearms prohibition³⁷ but a summary court martial will not.³⁸ The firearms restrictions do not apply to “crew-served” weapons such as artillery, which makes some sense – an abuser is not likely to harm a victim with artillery or any other kind of weapon that requires a team or crew to fire it.³⁹

The prohibitions that attach to domestic violence protection orders are distinct, and clients need to understand this distinction. In regards to protective orders, 18 U.S.C. §922(g)(8), enacted in 1994, made it illegal for a person to purchase or possess firearms or ammunition while subject to a “qualifying” protection order. The protection order must be in effect (i.e., not expired) for the firearms prohibition to apply. A limited exemption to the prohibition *does exist* for government employees who are required to use firearms in their official duty. This provision, also known as the “official use exemption,” allows military personnel who are subject to an order of protection to possess their service weapons while on duty.⁴⁰ Use or possession of personal firearms, including hunting weapons, is still prohibited.

³⁴ 18 U.S.C. § 922(g)(1) (2013)

³⁵ 18 U.S.C. § 922(g)(9) (2013)

³⁶ DoDI 6400.06 §6.1.4 (2011)

³⁷ DoDI 6400.06 §6.1.4.3 (2011)

³⁸ DoDI 6400.06 §6.1.4.3.2 (2011)

³⁹ DoDI 6400.06 §6.1.4.4 (2011)

⁴⁰ 18 U.S.C. §925(a)(1) (2013)

Due to the official use exemption, a service member who is subject to a protective order will probably be allowed to remain in the military. The service member will be permitted use of a firearm during her/his duty shift, but not to possess or carry a firearm while off duty. Of course, depending on the circumstances, a CO could determine that good order and discipline require that the service member be separated from the military. In such a case, the official use exemption might not matter.

When representing clients whose partners are deployed with Guard or Reserve units to combat zones, it is always somewhat of a balancing act to decide what to do about requesting a protective order. Once subject to a protective order, a service member has an obligation to inform his/her command. Usually, but not always, the existence of the order may have an effect on the service member's deployment. Consequently, clients often end up balancing whether it would be better to obtain the protective order or let the abuser be deployed to Iraq or Afghanistan, which would also provide physical protection for a time. However, while the danger of physical harm is contained, harassing communication is certainly still a possibility.

Everything is quite different if a service member gets a conviction for an MCDV, as there is no official use exemption. An MCDV is defined in the statutes as a crime that 1) has an element of use or attempted use of physical force; or 2) threatened use of a deadly weapon; and 3) was committed by a spouse, parent, guardian, person with child in common, cohabiting with or who has cohabited with the victim as a spouse, parent or guardian or anyone similarly situated.⁴¹

Further, the conviction must have been while the service member was represented by counsel or knowingly and intelligently waived the right to counsel, and the conviction must have been the result of a jury trial or a proceeding in which the right to trial by jury was knowingly and intelligently waived. The conviction must not have been expunged, deferred, set aside, or otherwise disposed of.⁴²

A person with an MCDV conviction will almost certainly not be able to stay in the military. Although some branches of the service have slightly more flexibility regarding jobs that do not require carrying a weapon, it is much more likely that the service member would be administratively or even punitively separated from service. Ultimately, the military is an occupation of arms, and being prohibited from carrying a personal weapon is almost always seen as rendering someone unfit to serve.

A difficulty with the statutory definition of an MCDV is that it doesn't necessarily fit neatly into the penal code definitions of crimes in all states. In some states, offenses may be defined in such a way that a conviction is clearly a qualifying MCDV. In other states, penal code offenses may have different sub-sections containing different elements, so it may not be immediately obvious whether a conviction is an MCDV under the statutes. Determining whether a conviction

⁴¹ 18 U.S.C. § 921(a)(33)(A)(ii) (2013)

⁴² 18 U.S.C. § 921(a)(33)(B) (2013)

is for an MCDV often requires a much deeper dive into the statutes and the specific sub-sections under which a conviction was gained in these states. This is an obstacle to having good records regarding those people convicted of MCDVs and, therefore, federally prohibited from possessing firearms.

Another problem that arises in this context is a conflict between state and federal laws. In New York, the definition of “firearm” only applies to handguns.⁴³ When someone becomes subject to an Order of Protection in New York, there are situations in which removal of weapons and pulling of pistol permits is required.⁴⁴ There are other situations in which such removal is allowable, but not mandatory.⁴⁵ None of the New York laws, however, require that someone surrender long guns – rifles and shotguns. In fact, in upstate New York where deer hunting season is as eagerly awaited by many as Christmas, quite often town judges say that they will not take away a person’s hunting rifle. As a result, the person subject to the protective order is placed in direct violation of federal law. Judges in states with conflicting statutes need to be carefully trained about the federal restrictions and understand that they have no jurisdiction to determine whether someone needs a hunting rifle.

Another issue is a judge who orders a person subject to an Order of Protection to surrender firearms,⁴⁶ but allows the defendant/respondent to determine where, when, and how the surrender will take place. Often, the defendant/respondent asks if the firearms may be given to a parent, sibling, or to a friend. Surrenders to the defendant/respondent’s relatives or friends are simply not acceptable. The prohibited person might be determined to be in constructive possession of the weapons because it may be very simple for the defendant/respondent to get the firearms back. It is always good practice to make sure that an order for surrender is written clearly – including a date and time for the surrender – and that a law enforcement agency is set forth as the entity to which the surrender will be made.

“Due to the extreme danger in IPV when firearms are present, it is important to know your state’s laws and be familiar with these federal statutes.”

It is vital that firearms issues are dealt with as the statutes provide. Due to the extreme danger in IPV when firearms are present, it is important to know your state’s laws and be familiar with these federal statutes. There may be opportunities for advocacy with prosecutors regarding what crimes may be pled to in satisfaction of criminal charges so that a plea to an MCDV would

⁴³ NY Pen. Law Definitions § 265.00(3)

⁴⁴ NY Fam. Ct. Act Family Ct. § 842-a(1)(a)

⁴⁵ NY Fam. Ct. Act Family Ct. § 842-a(1)(b)

⁴⁶ NY Fam. Ct. Act Family Ct. § 842-a(5)

result. On the other hand, when the survivor does not want to risk the abuser's separation from the military, a better option may be a plea to a non-MCDV crime. Of course, any time there is a conviction, it is possible that the commander will decide that good order and discipline require discharge. That is out of the hands of the attorney representing the victim.

For a Quick Reference: Federal Domestic Violence Firearm Prohibitions and the Military, see Appendix D.

Web Resources:

Protection Orders and Federal Firearms Prohibitions

<https://www.atf.gov/files/publications/download/i/atf-i-3310-2.pdf>

Cornell University Law School: 18 USC § 922 (g)(8)- Unlawful acts

<http://www.law.cornell.edu/uscode/text/18/922>

National Center on Protection Orders and Full Faith and Credit

www.fullfaithandcredit.org



CHAPTER 7

Service of Process Issues in Military-Related Cases

Serving legal papers to active duty service members can be an exercise in frustration. However, it can also go quite smoothly, depending on several factors. Although this chapter will contain general information and tips, there is really no way to cover every situation and every military installation. There is no substitute for getting information directly from a JAG or legal assistance officer regarding the specific installation. Most of them will be quite helpful if approached directly and respectfully.

A good starting point, before even commencing a case in which a service member would have to be served with legal process, is to read the appropriate service branch's regulations regarding service of legal papers. The regulations for the Army appear at 32 C.F.R. §516. For Navy and Marine Corps, including ships in U.S. waters, the regulations are located at 32 C.F.R. §720.20. You can also do an Internet search for the Manual of the Judge Advocate General, where the Navy regulations appear in Chapter 6. Apparently, there are no specific regulations regarding service on Air Force service members, but there is a "Talking Paper on Service of Process on Air

Force Installations” that appears as Appendix 1-A in Mark Sullivan’s “Military Divorce Handbook.”⁴⁷ The Coast Guard has guidelines set forth in Chapter 7 of the Coast Guard Military Justice Manual.⁴⁸ However, if after reading the relevant regulations, there is still a lack of clarity, a call (or a series of calls) to the JAG or Legal Assistance Office may be helpful.

“Sometimes you may have to get very creative, very persistent, or simply wait until the service member is back on U.S. soil to serve the papers.”

The first issue to address in trying to effectuate service is the jurisdictional issue of what rules to follow. If serving in-state papers on someone who resides off base, simply serve that person using the rules of the state originating the papers. Keep in mind that the service members Civil Relief Act⁴⁹ does not prohibit serving papers on an active duty service member, but rather provides an opportunity for that service member to seek a stay of proceedings where her/his military duty materially affects the ability to appear. The attorney will also need to find out specifically where the service member is located. If the service member is located at some U.S.-based installation, it is likely that the papers will be able to be served. If,

however, the service member is at an overseas installation, on a ship, or in a combat deployment, options are far more limited. Sometimes you may have to get very creative, very persistent, or simply wait until the service member is back on U.S. soil to serve the papers.

Serving in-state papers to a service member who resides on base is a little bit more complicated. First, determine the jurisdiction of the housing in which the service member resides. Very little military family housing remains in strictly federal jurisdiction due to increasing privatization of base housing. Such public-private venture housing usually is under either state jurisdiction or concurrent federal and state. In either case, an attorney would get in touch with the local sheriff in order to serve papers. Most large installations have an agreement with the local sheriff’s department regarding service of state papers, and it will be relatively easy to accomplish, as long as the service member is available.

In situations in which the installation is under exclusively federal jurisdiction, or in which the on-base housing is federal housing, state law enforcement does not have jurisdiction to serve papers as only the military can do that. However, as long as the papers are from the state the installation is in, service will still be possible. In such a circumstance, service would be facilitated by getting in touch with the installation police or security to set up a place and time for them to arrange to have the service member available to receive the papers. Of course, if there is a

⁴⁷ *Supra*

⁴⁸ U.S. Coast Guard COMDTINST M5810.1D (2000).

⁴⁹ 50 U.S.C. App. §§ 501 et seq. (2013). See 50 U.S.C. App. §§ 521-527 (2013).

reason that the service member's military mission has resulted in absence from the installation – for a short or long period of time – another plan of action may be in order. That might mean waiting until the service member returns, or it might involve substituted service, depending on what your state allows in that regard.

When the papers being served originate in the courts of a state other than where the service member's military installation is located, there are likely to be more problems than with in-state papers. Service members will not be required to accept service of out-of-state papers. However, if the respondent/defendant service member resides off base, you should be able to serve just as if the person were not in the military service. Always make sure there is a basis for personal jurisdiction, of course. If personal jurisdiction exists, you can still get the sheriff to effectuate service when the service member is at home or elsewhere off base.

When the service member lives on base in housing that is state or concurrent jurisdiction, the sheriff may still serve the papers under whatever agreement the local sheriff's department has with the installation. This is where it is important to know the practice on the particular installation. Experience has shown that it may take several phone calls to find the necessary information. Starting with the installation's JAG or Legal Assistance Office is helpful, but it is quite likely that a chain of several other phone calls will be needed before getting the information needed. Where the papers originate in a different state and the service member resides in housing that is under federal jurisdiction, service will depend on whether the service member wishes to accept the papers. The recommended process is to get in touch with the local sheriff's department, which then contacts the installation's law enforcement body, which then connects with the service member's command and the service member. The command will notify the service member that there is pending legal paperwork to be served and ask about whether the service member is willing to accept the papers. If so, the papers will be delivered. If not, the command will notify the sheriff that the service member does not wish to accept process. In that case, you are left with little more to do than wait to see if the service member leaves the base or attempt service by certified mail or substituted service, if allowable in your state's rules.

Real problems may arise when trying to serve someone in a time-sensitive matter, but like so many other things involving the military – the mission of the military is viewed as far more important than individual legal issues. In cases where the papers being served are for family support, it may be wise to seek another remedy until service can be effectuated; read the subsequent chapter on family support for some ideas. Although it may be temporarily impossible to serve the respondent service member, you will not necessarily be completely out of luck in obtaining some support for your client.

Web Resources:

Cornell University Law School: 32 CFR 516.10 - Service of civil process within the United States (Department of the Army)

<http://www.law.cornell.edu/cfr/text/32/516.10>

Cornell University Law School: 32 CFR 516.12 - Service of civil process outside the United States
(Department of the Army)

<http://www.law.cornell.edu/cfr/text/32/516.12>

Cornell University Law School: 32 CFR 720.20 - Service of process upon personnel (Department of the
Navy)

<http://www.law.cornell.edu/cfr/text/32/720.20>

American Bar Association: GPSolo Magazine-January February 2005: Military Family Law

http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/militaryfamlaw.html



CHAPTER 8

Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act (SCRA)⁵⁰ is not nearly as well understood as it ought to be, resulting in problems that could be avoided. While the statute (and the state statutes that are designed to accomplish the same purposes) has a worthy purpose, rampant misunderstanding about its application creates many issues for judges and attorneys, as well as parties. Originally the Soldiers and Sailors Civil Relief Act of 1940, the current iteration was significantly amended in 2003 to include several kinds of consumer protections, to incorporate important case law, and to make the name more inclusive. Its purpose is to prevent service members who are on active duty, and thus have little control over their abilities to appear in court, from having default

⁵⁰ 50 U.S.C App. §§ 501 et seq. (2013)

judgments entered against them or from other legal consequences due to their service.⁵¹ It applies to civil matters only, as the name states.

In the world of representing IPV survivors, an attorney will discover that abusers will attempt to use everything they can think of to get what they want. If they don't want a court proceeding to go forward, they may claim that the SCRA prohibits the matter from being decided while they are in the military. First, the SCRA applies only to active-duty service members,⁵² members of the Guard and Reserve who are federally activated under Title 10,⁵³ and commissioned officers of the Public Health Service and National Oceanic and Atmospheric Administration, active service.⁵⁴ Each state also has its own version of this law, and it is important to be familiar with the local version, because state laws may cover state-activated National Guard troops or others not covered under the federal statute. However, the mere fact that someone is in the Guard or Reserve, as long as s/he has not been activated, is not enough to bring him/her under the protection of the SCRA. It is also true that even those active duty or Title 10 activated Guard and Reserve troops do not simply get a blanket adjournment until it is convenient for them to appear. The statute requires certain showings (described below) in order for a service member to be entitled to a stay.

“In the world of representing IPV survivors, an attorney will discover that abusers will attempt to use everything they can think of to get what they want.”

For an initial 90-day stay, the service member must present (1) a statement detailing how current military duties *materially affect* the ability to appear and a date by which an appearance would be possible; AND 2) a statement from the commanding officer that the service member's current military duty prevents appearance and that the service member does not have military leave authorized at the time of the statement.⁵⁵ In essence, this is a four-part showing that must be made, but in statements from both the service member and the commanding officer, that could be done in person or in writing. Once this showing is made, the first 90-day stay is mandatory.⁵⁶

If a defendant/respondent has not appeared, but the judge has reason to believe the defendant/respondent is an active-duty service member, and if there may be a defense to the

⁵¹ 50 U.S.C. App. § 502 (2013)

⁵² 50 U.S.C. App. §511(2)(A)(i) (2013)

⁵³ 50 U.S.C. App. §511(2)(A)(ii) (2013)

⁵⁴ 50 U.S.C. App. §511(2)(B)

⁵⁵ 50 U.S.C. App. §522(b)(2) (2013)

⁵⁶ 50 U.S.C. App. §522(b)(1) (2013)

action, a judge has discretion to grant a stay.⁵⁷ The Defense Manpower Data Center website, <https://www.dmdc.osd.mil/appj/dwp/index.jsp>, provides information on how to determine whether a given person is an active-duty service member.

After this initial stay, each additional stay is discretionary. When representing a non-service member against a service member, you may find that requests for additional stays may be opposed. Each additional stay requested may only be granted after the same showing as set forth above.⁵⁸ If each of the four pieces is not there, you may be able to convince the judge that a stay is not justified or necessary. Each request must detail the length of the additional stay requested and why a stay is needed. One of the things a court must consider is whether testimony is required, and if so, whether it must be in person. In some kinds of legal matters, particularly child support, testimony other than in-person testimony is contemplated and allowed by the statutes. Therefore, telephonic, electronic, or even Skype testimony could be utilized in order to allow a court to make a support order in a timely manner. In other types of matters, this might also be a reasonable way to resolve a time-sensitive issue that might otherwise languish due to the material effect of the service member's service.

The SCRA also provides that if a service member is not represented and requests a stay, but the stay is denied, the court must appoint an attorney to represent the service member. The statute does not address who pays for the attorney, nor precisely what the attorney's role is to be.⁵⁹

Under the SCRA, default judgments may not be taken against a service member in the service member's absence⁶⁰ unless the court follows the procedures set forth in the SCRA. Even if those procedures have been followed, a service member may open a default judgment that was entered while s/he was on active duty or within 60 days after return from active duty. The service member must apply to the court where the judgment was entered while still on active duty or within 90 days after return.⁶¹ The service member will need to show that at the time the default judgment was entered, s/he was prejudiced in her/his ability to defend the case due to the military service and that there is a meritorious or legal defense to the action.⁶²

Consumer protections under the SCRA provide service members with the ability to terminate certain leases and contracts, such as for apartments, automobiles, and cell phones, which were entered into prior to military service, within certain limits.⁶³ Highly relevant in today's economy are foreclosure protections also set forth in the SCRA. The protections apply where the security interest originated prior to active-duty service, the property was owned by the service member or dependents prior to the service, and the property continues to be owned by the service

⁵⁷ 50 U.S.C. App. §521(d) (2013)

⁵⁸ 50 U.S.C. App. §522(d)(1) (2013)

⁵⁹ 50 U.S.C. App. §522(d)(2) (2013)

⁶⁰ 50 U.S.C. App. §521(a) (2013)

⁶¹ 50 U.S.C. App. §521(g)(2) (2013)

⁶² 50 U.S.C. App. §521(g)(1) (2013)

⁶³ 50 U.S.C. App. §§ 532, 535, 535a (2013)

member or dependents at the time the relief is sought.⁶⁴ The service member has the burden of showing how her/his ability to meet the financial obligations for the property was materially affected by active duty.⁶⁵

Once such showing is made, a court has some options under the statute. First, a court can stay proceedings until such time as the service member is available to answer the papers.⁶⁶ Alternatively, a court can extend the mortgage maturity date to allow for a reduced payment or make any other adjustment to the obligation to preserve the interests of all parties.⁶⁷ These provisions can prevent some gross unfairness resulting from a service member's overseas duty. This statute also provides a criminal penalty (misdemeanor) for anyone who does a foreclosure or seizure of property in violation of the SCRA.⁶⁸

Generally, it is good to keep in mind that stays under the SCRA are not supposed to be indefinite. They should last only as long as the material effect on the service member's ability to appear lasts. Stays are only supposed to apply to contested claims, so in a situation in which the service member, for instance, does not want to contest a divorce action, the service member can consent to allow the matter to move forward. In such a case, the service member should execute an affidavit clearly stating that s/he is aware of the provisions of the SCRA and knowingly waives those provisions, specifically asking that the matter proceed without the service member's presence.⁶⁹

The SCRA is also not supposed to be used to delay an inevitable, if distasteful, outcome. Although service member abusers may attempt to use the SCRA as a method of control and manipulation, doing so can sometimes cause the service member significant trouble.⁷⁰ For example, a service member convinced a judge who did not understand the SCRA to stay a child support proceeding during the service member's entire four-year stint in the service. The judge entered a temporary order, which apparently was never sent for garnishment due to the "stay," resulting in over \$10,000 of arrears. Obviously, whatever this service member thought he might be accomplishing by requesting this stay, it was not particularly helpful in the end.

Further, a service member must exercise due diligence and good faith in trying to appear. Notifying the court when leave is available and being in town and available to appear would be actions a service member could take to make sure that a legal matter could get resolved within the parameters of the SCRA. Courts should be willing to work within a service member's limitations regarding leave time, job duties, etc. in setting up appearances and hearings. If a

⁶⁴ 50 U.S.C. App. §533(a) (2013)

⁶⁵ 50 U.S.C. App. §533(b) (2013)

⁶⁶ 50 U.S.C. App. §533(b)(1) (2013)

⁶⁷ 50 U.S.C. App. §533(b)(2) (2013)

⁶⁸ 50 U.S.C. App. §533(d) (2013)

⁶⁹ 50 U.S.C. App. §517 (2013)

⁷⁰ 50 U.S.C. App. §581 (2013)

court has reason to believe that a service member is acting in bad faith, the court can refuse to grant additional 90-day stays beyond the first, mandatory stay.

Web Resources:

American Bar Association: A Judge's Guide to the Servicemembers Civil Relief Act

<http://apps.americanbar.org/family/military/scrajudgesguidecklist.pdf>

Servicemembers Civil Relief Act Guide

<http://www.americanbar.org/content/dam/aba/migrated/legalservices/lamp/downloads/SCRAguide.authcheckdam.pdf>

Military.com Benefits: Servicemembers Civil Relief Act Overview

<http://www.military.com/benefits/military-legal-matters/scra/servicemembers-civil-relief-act-overview.html>

The United States Department of Justice: Servicemembers Civil Relief Act

http://www.justice.gov/crt/spec_topics/military/scratext.pdf

Military OneSource: The Servicemembers Civil Relief Act

http://www.militaryonesource.mil/legal?content_id=267394



CHAPTER 9

Child Custody

Parents who are in the military have to carry the tremendous burden of being forced to separate from their children during deployments because a deployed parent cannot be a custodial parent. Some states, recognizing the fundamental unfairness of this, have enacted statutes protecting the service member custodial parents' rights to maintain custody. These statutes may sometimes protect IPV survivors who have custody of their children, but at the same time may work against survivors whose children are in the abuser's custody prior to the abuser's deployment.

Custody laws are so state specific that it is difficult to make any blanket statements at all. It is quite likely that your state has a law, or laws, that address the issue of custody and military

deployment. These laws tend to fall into a couple of different patterns. Many simply provide that only temporary orders modifying custody arrangements may be made, and many also provide for some kind of reversion to the previous custody order upon return of the deployed parent, whether that is an automatic reversion or accomplished through an expedited hearing process.

For instance, Kentucky’s law allows only temporary custody orders to be entered when a parent’s military deployment is part of the reason for a modification and requires return of custody to the pre-deployment arrangement upon return of the deployed parent unless the deployed parent agrees otherwise.⁷¹ Arizona⁷² and Wisconsin have similar statutes.⁷³

Some states, such as Maine⁷⁴ and South Dakota⁷⁵, provide that temporary custody may be given to someone with a “close relationship” with the parent and child for the duration of the parent’s deployment. Some states, including North Carolina⁷⁶ and Alaska⁷⁷, allow a deploying parent to designate a close family member to receive at least some of the deployed parent’s custodial time with the children. Texas⁷⁸ actually allows a non-custodial parent (“conservator without the exclusive right to designate the primary residence of the child”) to seek make-up time for time missed due to a deployment.

Other states, such as New York⁷⁹ and Florida,⁸⁰ have bills that apply a higher standard of proof for modifications based on a parent’s military deployment. New York’s current statute does allow for a final modification to be made upon clear and convincing evidence, but Florida’s only provides for temporary orders in such situations. Both of these statutes also require that modified orders contain provisions for visitation when the deployed parent is on leave, and for other meaningful contact via telephone, email, Skype, etc. between the deployed parent and the child[ren]. New York⁸¹ also provides that return from deployment automatically constitutes a change in circumstances so that modification may be sought to have the previous custodial arrangement reinstated. Florida⁸² provides that the court “shall” reinstate the previous order upon the parent’s return from deployment. Neither of these statutes applies to permanent changes of duty station.

⁷¹ Ky. Rev. Stat. Ann. Custody §403.340(5) (2013)

⁷² Ariz. Rev. Stat. §25-411

⁷³ Wis. Stat. §§ 767.24 and 767.325

⁷⁴ 18-A M.R.S.A. § 5-104 (2013)

⁷⁵ S.D. Codified L. § 33-6-10 (2013)

⁷⁶ N.C. Gen. Stat. § 50-13.7A (2013)

⁷⁷ Alaska Stat. §25.20.110; §25.20.095(2012)

⁷⁸ Tex. Fam. Code §§ 153.709 (2012)

⁷⁹ N.Y. DRL § 75-L (2012); N.Y. DRL § 240(a-2) (2012)

⁸⁰ Fla. Stat. Ann. §61.13002 (2011)

⁸¹ N.Y. DRL §75-L(3) (2012)

⁸² Fla. Stat. Ann. §61.13002(4) (2011)

Some states limit these sorts of protections to their own National Guard troops and to Reservists.⁸³ The justification for this may be that active-duty service members know they are signing up to be sent wherever they are needed, whereas Guard and Reserve troops generally are expected (at least prior to the Global War on Terror) to remain in their home states, except for their annual two-week training periods.

The SCRA also provides some protections for service members facing custody proceedings, but courts may be reluctant to delay decisions while a parent is deployed, particularly for a long deployment. Such a delay may be seen by a court as not in the best interests of children. All of the requirements for receiving a stay under the SCRA discussed in a previous chapter are fully applicable in custody cases, so all arguments, for or against, that fit with a particular case may be made.

The Uniform Law Commission has approved the Deployed Parents Custody and Visitation Act. The Commission will be urging states to adopt this law, as they have done with other laws such as the Uniform Child Custody Jurisdiction and Enforcement Act, to bring consistency to custody determinations and jurisdictional issues involving military parents. At this time, the Uniform Law Commission's website (www.uniformlaws.org) indicates that one state, North Dakota, has adopted the new uniform law, while three other states (Colorado, Nevada, and North Carolina) and the District of Columbia have introduced it. As uniform laws tend to be far more complex than most current states' statutes, it will be interesting to see whether it becomes widely adopted.

When representing military-related IPV victims who have children, it is vital to understand local laws regarding deployed parents and modifications of custody.

Web Resources:

National Military Family Association: Custody + Child Support
<http://www.militaryfamily.org/your-benefits/marriage-divorce/divorce/custody-child-support.html>

Military OneSource: Map of states that ensure deployment separation does not determine child custody decisions
<http://www.militaryonesource.mil/12038/Project%20Documents/USA4%20Military%20Families/Custody%20Map.pdf>

Stateside Legal: Child Custody and Military Service
<http://statesidelegal.org/military-service-and-child-custody>

Congressional Research Service: Military Parents and Child Custody: State and Federal Issues
<https://www.fas.org/sgp/crs/misc/R43091.pdf>

⁸³ See e.g., Colo. Rev. Stat. 14-10-131.3(2) (2008) and Wis. Stat. 767.41(2)(e) (2013)



CHAPTER 10

Family Support

IPV survivors who are connected with the military often need information and assistance with family support issues. Whether the survivor is a service member or a military family member, this issue can be critical. This chapter will address topics relating to family support where there is no court order in existence, as well as provide some information and tips on how to obtain a fair support order through a court proceeding and enforce that order after it is entered.

Actually, the last issue is the easiest to cover. All services require their members to abide by any and all obligations for family support that are in the form of a valid order from a civilian court or a validly executed agreement between the parents. Military pay may be garnished pursuant to a valid court order. Military regulations are clear that the services prefer their members to get

court orders or execute valid agreements, because then COs do not have to be involved in the process. Court orders for family support are filed with the appropriate office of the Defense Finance and Accounting Service (DFAS). The DFAS website (<http://www.dfas.mil/garnishment.html>) has useful information regarding garnishment of pay.

For you to do a good job representing someone seeking family support from a service member, it is useful to understand how military pay works. Service members receive base pay, based on their ranks and grades. For enlisted personnel, this rate may be quite low. However, service members may also receive different kinds of allowances, which are added in to their base pay, such as for meals, housing, or dependent support, as well as other kinds of pay, such as incentives, special pay, and combat pay. A common allowance for housing costs is the Basic Allowance for Housing (BAH), which is based on the ZIP code in which a service member is stationed. The BAH II is an allowance provided without regard for the location of the service member's duty station. Each of these may be "with" (dependents) or "without" depending upon the service member's individual family circumstances. Some service members receive a Basic Allowance for Subsistence (food). The services differ as to whether this amount is to be included in "income" for purposes of determining family support.

At the same time, service members may have some of their pay withheld (allotments) to pay off debts, for payments on insurance policies, for savings, and other reasons. Some of these may be excludable from income, while some are not.

The most important tool for understanding the service member's pay is the Leave and Earnings Statement (LES). This is the service member's pay stub and shows not only the basic pay rate but also all other entitlements, deductions, and allotments, the domicile state for tax purposes (which may be important for some jurisdictional purposes), years of service, and leave balances. This is, obviously, a critical document in a support proceeding against a service member. Service members may gain access to their LES via a website, using a PIN.

Do not believe a service member who says s/he is unable to get a copy of the LES. In cases where the service member is the abusive partner, it is quite usual for the abuser to refuse to provide documentation. In a worst-case scenario, the court could be asked to order the service member to either provide the LES or to provide a PIN, so it can be retrieved from the website and then to change the PIN immediately after retrieval.

However, even if the service member is attempting to delay the support proceeding by refusing to provide the LES or other financial documents, you may be able to go into a support proceeding with a pretty good idea of how much pay the service member receives. Almost all of the information regarding military pay is available over the Internet, with most provided on the DFAS website. By searching "military pay tables" the basic rates of pay may be found. A search for "BAH rates" or "military housing allowances" will provide information regarding those rates. With some effort, an attorney will be able to go into a court appearance with a good idea of how much the service member makes.

Another thing to keep in mind is that some kinds of pay are non-taxable. Combat pay is one of these. Non-taxable income is more valuable than taxable income, so some attention should be paid to this issue to avoid the two kinds of income being treated equally.

What constitutes “income” is mostly a function of support definitions in state statutes. The issue of disability payments is one of the most confusing ways in which state statutes and federal statutes and regulations may interact. In some states, some kinds of disability pay are considered “income” while in other states, such pay is not “income.” There are different ways that service members or veterans may receive disability pay, and it is important to understand precisely what kind of pay they are receiving.

As covered in the following chapter on divorce, retirement disability pay is not divisible for equitable distribution purposes, but may be includable in income for support purposes. Some disability pay is not includable. Further, there are statutes being introduced in many states to prevent any disability pay a veteran receives from being accessible for purposes of support or maintenance payments. This is a very complex area, and it would be advisable to consult *The Military Divorce Handbook*,⁸⁴ or some similar authoritative source, if you are dealing with a case involving military VA disability or disability retirement pay.

Frequently, clients who do not have current support orders will approach attorneys regarding family support matters. In these cases, especially if there is some reason that getting a court order may be difficult or impractical, there may still be recourse. Each service has its own regulation regarding such circumstances.⁸⁵ In all services, COs are granted the authority and responsibility to respond to complaints of non-support received from family members of service members (or their legal representatives). Each service’s regulations refer to the fact that failing to support one’s family is not consistent with military values. In fact, the Navy, Marine Corps, and Coast Guard regulations all state that each service will not be “a haven for personnel” who do not support their families.

Each set of regulations also sets forth a table for how much support a service member is expected to provide dependents in the absence of a civilian court order. Each is somewhat different, so it is important to look them up. Citations are provided in footnote 86, and it is relatively easy to find these regulations online.

COs are required to investigate complaints of non-support they receive about service members in their commands. Although they do not have the authority to issue a direct order to a service

⁸⁴ Mark E. Sullivan, *Military Divorce Handbook: A Practical Guide to Representing Military Personnel and their Families*, (2nd Ed. Am. Bar 2011).

⁸⁵ Air Force Instruction 36-2906, Personal Financial Responsibility (2013)
 Army Regulation 608-99, Family Support, Child Custody, and Paternity (2003)
 Coast Guard COMDTINST M1600.2 Support of Dependents (2011)
 Marine Corps MC LEGADMINMAN Chapter 15 Financial Support of Family Members
 Navy MILPERSMAN 1754-030, Support of Family Members (2006)

member to pay support, they are required to counsel service members regarding their obligations to support their families, as well as the ways in which failing to provide adequate support reflects badly on the military and is seen as incompatible with continued military service. In certain circumstances, continued failure to pay support may result in disciplinary charges under the Uniform Code of Military Justice or an administrative separation. COs do not have authority to order that such support be paid through involuntary allotment (taken directly out of the service member's pay).

Each regulation also provides a description of some situations under which a CO may find that the duty to support the family adequately may be waived. Common situations are those in which the dependent spouse has more income than the service member, where a dependent child is no longer residing with the family member seeking support, or where there is documented abuse by the spouse seeking support against the service member spouse. COs are required to investigate such situations thoroughly and to consult with legal personnel before issuing such waivers. This may be helpful in the event that a client is the victim/service member from whom the abusive partner is seeking support payments. Advocacy with the CO might allow such clients to avoid this kind of financial abuse.

Each service has slightly different timelines and procedures COs are to follow regarding non-support complaints, but there is no service that officially condones its members' failures to support their families. Therefore, if representing a client who is not receiving adequate support, taking the time to get information about the service member's CO and writing a letter on the client's behalf may be a very beneficial exercise. Most large military installations have a website, and it is generally easy to find at least a number for the installation JAG or the Legal Assistance Office, and either one of those is likely to let you know how to get in touch with the service member's CO. Regulations also require COs who receive a non-support complaint regarding someone not in their command to forward the complaint to the appropriate CO, so if a letter does not get to the correct person right away, it should get there eventually.

As with most matters, providing more details in the letter complaining of non-support (name and SSN of service member, how much, if any, support has been received, when, how it was paid, or how long it has not been paid) will improve the chance that the CO will be able to address the problem more appropriately. It will also be taken more seriously if it is made clear that you are familiar with the relevant regulations and are asking the CO to counsel the service member to provide support pursuant to those regulations. It is likely to be seen as particularly incompatible with good order and discipline if a military family member has needed to seek some form of public assistance, or is in danger of having to do so, as this may be seen as tarnishing the image of the military.

In some cases, the amount provided for in the military regulations MAY be more than what an application of a state's law might provide. You should be able to make a rough estimate of these figures using the table in the appropriate service's regulations and comparing it to the result of a

calculation under your own state's statute. However, enforcement remedies are far better under a court order than in a situation in which the CO has counseled a service member to abide by his/her obligations to provide adequate support. Wage garnishment is available for a court order, and the military is not going to be complicit in an abuser's attempts to avoid garnishment, unlike some private employers. Further, service members who fail to obey court orders are not likely to do so with impunity.

All in all, getting a support order from your state court and sending it to the DFAS for garnishment is a far preferable method for obtaining family support. As stated above, military regulations, and military commanders, have a strong preference that support matters are dealt with by court orders or agreements between the parties, but where such things are not possible or cannot be done quickly enough, attempts to deal with the matter through the service member's CO may be a good course of action.

Web Resources:

Army Publishing Directorate: Army Regulation 608-99, Family Support, Child Custody, and Paternity
http://www.apd.army.mil/pdffiles/r608_99.pdf

Naval Inspector General: Spousal/Dependent Support
<http://www.secnav.navy.mil/jg/Lists/Complaints/AllItems.aspx>

Financial Support for Military Dependents: Service Regulations
<http://www.nclamp.gov/2011%20CLE/Archer%20Joiner%20%20Military%20Dependent%20Support.pdf>

American Bar Association : Section of Family Law—Military Committee: Fact Sheets—V.A. Payments and Family Support
http://www.americanbar.org/content/dam/aba/administrative/family_law/201109_flmc_vapaymentfacts.authcheckdam.pdf

Military.com: Military Taxes: Figuring Gross Income
<http://www.military.com/money/personal-finance/taxes/military-taxes-figuring-gross-income.html>

Defense Finance and Accounting Services: Leave and Earnings Statement
<http://www.dfas.mil/civilianemployees/understandingyourcivilianpay/LES.html>

This website provides a link to an interactive PDF version of a Leave and Earnings Statement which allows one to understand each section of an LES.

Defense Finance and Accounting Service
<http://www.dfas.mil/garnishment/usfspa/faqs.html>

U.S. Navy Judge Advocate General's Corps: Garnishment and Involuntary Allotment
http://www.jag.navy.mil/legal_services/documents/nlso_pacific/nlso_pacific_Garnishment%20and%20Involuntary%20Allotment.pdf



CHAPTER 11

Divorce Matters and Military Retirement Benefits Division

Divorces involving service members can be quite complicated. In no way should this chapter be considered a comprehensive discussion of the issues involved and how to deal with them. Instead, the goal is to present some of the broad strokes of which attorneys need to be aware in order to anticipate problems. The best lawyers are keenly aware of the things they do not know. This chapter is designed to give an overview of areas of potential difficulty and to provide resources from which attorneys may obtain more detailed information when needed.

Some of the previous chapters contain information that will be helpful in a divorce case. The chapters on Service of Process, Custody, Family Support, and the Servicemembers Civil Relief Act all have useful tips and information for your cases, though there are some very specific things relating to divorces that follow.

First, jurisdiction can be a tricky matter in military-related cases. For a state court to divide military retirement pay it must have jurisdiction to do so, which means the state must either be the domicile of the service member or the service member must consent to jurisdiction. Service members may be domiciled in one state and be stationed in yet another. They may have been at several duty stations in different states, but none of those may be the domicile. Knowing the state where the service member pays taxes (information found on the LES), registers an automobile, is registered to vote, or other similar facts will help you figure out the service member's domicile.

It is important to understand that state courts have the authority to divide and distribute disposable military retirement pay pursuant to divorce, just like any other asset of the marriage. This was established by the Uniformed Services Former Spouses' Protection Act of 1981 (USFSPA).⁸⁶ Whether your state is an equitable distribution state or a community property state, those are the laws that will govern the distribution of this marital asset. The USFSPA sets out some rules that apply to division of military retirement benefits, but none of them direct the distribution of these benefits. It is a common misperception that the 10/10 rule⁸⁷ and the 20/20/20 rule⁸⁸ are rules about distribution of military retirement.

The 10/10 rule relates to whether the distributive share of the retirement going to the former spouse may be paid directly to that spouse by the Defense Finance and Accounting Services (DFAS). This requires that spouses be married for at least 10 years, overlapping 10 years of qualifying military service by the service member spouse. Once this benchmark has been met, DFAS will be able to make direct payments to the non-service member former spouse. However, courts dissolving marriages that do not reach this benchmark may still distribute the retirement benefits pursuant to their own states' laws, but the retired service member will be responsible for making the payments directly to the former spouse. Obviously, particularly in an IPV case, this is not an ideal arrangement for the former spouse, as it gives the abusive service member a very large financial weapon to wield. In such cases, it might be reasonable to do something like offset the potential retirement distribution against some other asset (where there are such assets) and have the victim receive a lump sum distribution, rather than having a client have to rely on an abusive ex-spouse's willingness to cooperate.

⁸⁶ 10 U.S.C. § 1408 (2013)

⁸⁷ 10 U.S.C. § 1408(d)(2) (2013)

⁸⁸ 10 U.S.C. § 1072(2)(F) (2013)

Another rule that applies to military retirement is the so-called 20/20/20 rule.⁸⁹ This rule provides the basis under which a former spouse may be eligible for full health benefits, as well as commissary and military exchange access. If the parties have been married for 20 years, and the service member spouse has 20 years of qualifying military service, and there are also 20 years of those two things that overlap⁹⁰, then the former spouse will be eligible for what is termed “full benefits.”⁹¹ If spouses have been married 20 years and the service member spouse has 20 years of qualifying military service, but there are only 15 years of overlap, the divorced spouse is eligible to receive one year of full health coverage.⁹²

The Employee Retirement Income Security Act (ERISA)⁹³ specifically exempts government retirement benefits (including military plans) from the requirements of the statute,⁹⁴ including the need to do a Qualified Domestic Relations Order or QDRO. There must, however, still be a clear, detailed court order that precisely establishes either a sum certain that is to be received or a percentage of the retirement payments. In addition, any entitlement to a Survivor Benefit Plan (SBP) must be fully, separately, and carefully detailed in the judgment.

“In certain situations, even if the abusive former spouse becomes separated from the military due to domestic abuse and therefore becomes ineligible to receive retirement pay, the USFSPA¹ may allow the survivor to receive her/his share of the retirement benefits.”

Another issue of which to be aware is the possibility of a retired service member’s income being converted to disability retirement if the retired service member becomes partially or fully disabled. As discussed above, in the Family Support chapter, disability pay is quite a complicated issue, in no small part because there are different ways of receiving it. The point to remember in a divorce proceeding, though, is that a retiree who becomes disabled may have his/her pay changed to disability retirement. Once that happens, the percentage of the retirement pay that has been converted to disability payment is not distributable because it is defined as not being part of the “disposable” retirement pay that may be distributed. If representing the non-military spouse, it is important to make plans to address this possibility. The *Military Divorce Handbook*

⁸⁹ Id.

⁹⁰ Id.

⁹¹ 10 U.S.C. §1062 (2013)

⁹² 10 U.S.C. §1072(2)(G) (2013)

⁹³ 29 U.S.C. §§ 1001 et seq. (2013)

⁹⁴ 29 U.S.C. §1003(b)(1) (2013)

discusses several different options that may be used to achieve this purpose.⁹⁵ Again, in IPV cases it is entirely foreseeable to the knowledgeable practitioner that the abusive former spouse might try to establish disability in order to remove a portion of his/her retirement pay from the reach of the victim. Knowing this possibility, the savvy practitioner can strive to address it in advance.

In certain situations, even if the abusive former spouse becomes separated from the military due to domestic abuse and therefore becomes ineligible to receive retirement pay, the USFSPA⁹⁶ may allow the survivor to receive her/his share of the retirement benefits. The specific circumstances under which this will be true are when 1) the survivor has a Judgment of Divorce that grants her/him some portion of the abusive service member spouse's military retirement, 2) the abusive spouse is eligible to receive full retirement, and, 3) the abusive spouse is separated from the military due to domestic abuse or child abuse before beginning to receive retirement payments. In these situations, even though the abusive service member will lose his/her right to receive the retirement pay, the spouse and/or children will be entitled to receive the amount of that pay awarded under the judgment. The Order or Judgment specifying the distribution of disposable retired pay needs to be properly served upon the military, as set out in the statute, before any such payments may be made.⁹⁷ This pay will begin as soon as the Order or Judgment has been properly served and certified. The date used for retirement will be the date upon which the sentence resulting in termination of the retirement benefits has been approved under Article 60(c) of the Uniform Code of Military Justice.⁹⁸

This is the retirement pay version of transitional compensation, which was discussed in the chapter on the military response to IPV. While receiving these benefits, just as in transitional compensation, the former spouse and/or children will also be eligible for full health insurance benefits, as well as for exchange and commissary privileges.⁹⁹ In addition, like transitional compensation, these payments will end if the former spouse remarries¹⁰⁰ or if the service member has the conviction overturned, expunged, or otherwise pardoned.¹⁰¹ While this is likely to be a small subset of victims, this would be extremely helpful for those in that situation.

Web Resources

Military.com: Military Divorce: Why Where You File Matters

<http://www.military.com/spouse/relationships/military-divorce/military-divorce-where-you-file-matters.html>

⁹⁵ Chapter 8, Pension and Property Distribution

⁹⁶ 10 U.S.C. §1408(h) (2013)

⁹⁷ 10 U.S.C. 1408(b) (2013)

⁹⁸ 10 U.S.C. §1408(h)(10)(A) (2013)

⁹⁹ 10 U.S.C. §1408(h)(9) (2013)

¹⁰⁰ 10 U.S.C. §1408(h)(7) (2013)

¹⁰¹ 10 U.S.C. §1408(h)(10)(B) (2013)

American Bar Association: Practical Aspects of Military Divorce

https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/07_latefall_family_browning_baker.html

NBI CLE Blog: Military Divorce: “Must Have” Documents Checklist

<http://cleblog.nbi-sems.com/2012/12/military-divorce-must-have-documents-checklist/>

DoD Financial Management Regulation, Volume 7B, Chapter 29: Former Spouse Payment From Retired Pay

http://comptroller.defense.gov/Portals/45/documents/fmr/archive/07barch/07b_29_Jul05.pdf

This Financial Management Regulation discusses former spouse payment from retired pay from definitions to payment amounts.

DivorceNet.com: The Disability Issue in the Distribution of Military Retirement Benefits

http://www.divorcenet.com/states/nationwide/the_disability_issue_in_the_distribution_of_military_retirement_benefits

Military.com: Uniformed Services Former Spouse Protection Overview

<http://www.military.com/benefits/military-legal-matters/uniformed-services-former-spouse-protection-overview.html>

Offutt Air Force Base: Divorce and Military Benefits

<http://www.offutt.af.mil/shared/media/document/AFD-081001-043.pdf>

Defense Finance and Accounting Services

<http://www.dfas.mil/>

DFAS provides finance and accounting services for the civil and military members of the Department of Defense. This is DFAS' main website.

Military One Source: Legal Information

<http://www.militaryonesource.mil/legal>

APPENDIX A

Guide to Common Abbreviations & Acronyms

DoD	Department of Defense
BAH	Basic Allowance for Housing
BAS	Basic Allowance for Subsistence
DFAS	Defense Finance & Accounting Service
VA	Department of Veterans Affairs
LES	Leave and Earnings Statement
SBP	Survivor Benefit Plan
UCMJ	Uniform Code of Military Justice
FAP	Family Advocacy Program
SCRA	Service Members Civil Relief Act
USFSPA	Uniformed Services Former Spouses' Protection Act
MPO	Military Protective Order
OP	Order of Protection (called by different names in different jurisdictions)
CO	Commanding Officer
VA	Victim Advocate

Web Resources:

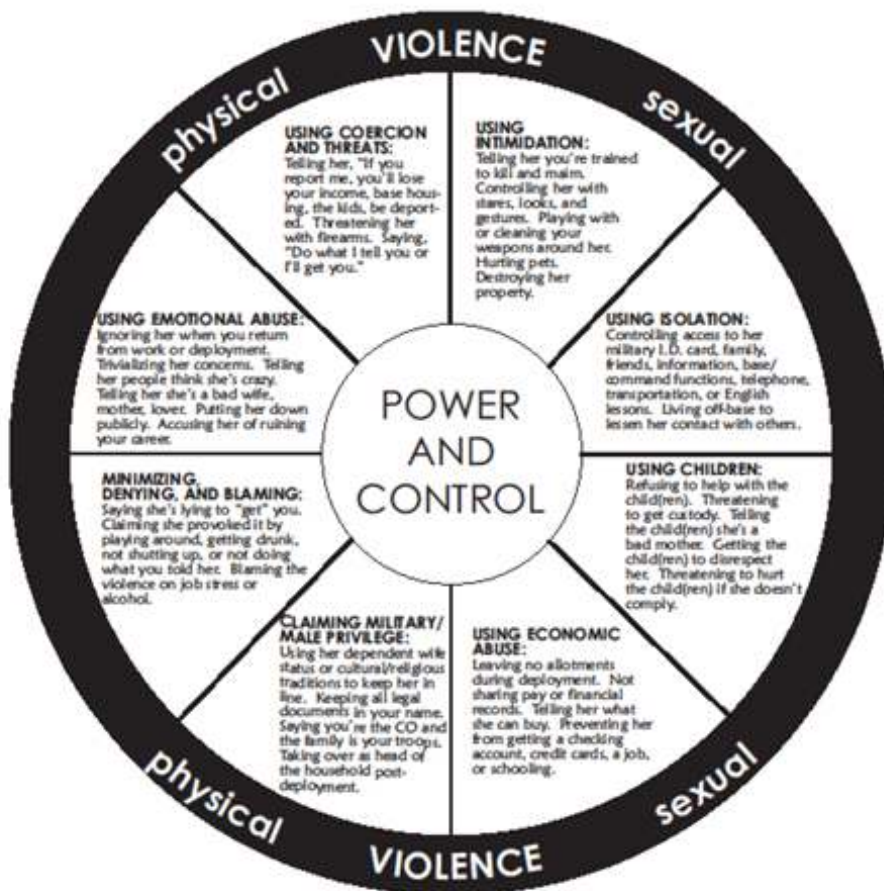
The DOD Dictionary of Military Terms: http://www.dtic.mil/doctrine/dod_dictionary/

The DOD Dictionary is managed by the Joint Education and Doctrine Division, J-7, Joint Staff. All approved joint definitions, acronyms, and abbreviations are contained in this dictionary.

Military Abbreviations
<http://www.abbreviations.com/acronyms/MILITARY>

APPENDIX B

MILITARY POWER AND CONTROL WHEEL



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APPENDIX C

National Center on Protection Orders and Full Faith & Credit

Quick Reference: Protective Orders and the Military

The military has provisions in place to protect victims of domestic violence in the form of a protection order. A military protection order is a direct order issued by a commanding officer to an active duty service member to safeguard a victim, quell a disturbance, and maintain order and discipline. A victim, victim advocate, family advocacy personnel, or installation law enforcement may request command issue a military protection order. Issuance and enforcement of military protection orders are by and at the discretion of the service member's commanding officer.

The commander should tailor the military protection order to meet the needs of the victim.¹⁰² The order can be either verbal, or written. A commander may use DD Form 2873 "Military Protective Order" when issuing an order. If the order is written, the victim should receive a copy. The order may include, stay away, no contact, and vacate (military housing) provisions. For example, the order may prohibit the service member from contacting or communicating with the protected party, and any household or family members. The commander may direct the service member to take specific actions in support of and in furtherance of the prohibitions.

If the victim already has a civilian protection order, a commander can still issue a military protection order. The terms of the order may be more restrictive, but should not contradict a civilian protection order.¹⁰³ A victim may wish to notify command of their intentions to obtain a civilian order or of any existing order and its terms.

Service members subject to a military protection order must comply with the provisions at all times. A commander has the authority to enforce violations of a military protection order that occur on or off base.¹⁰⁴ If a service member violates the order, he or she can be disciplined under the Uniform Code of Military Justice (UCMJ).

¹⁰² DoDI 6400.06.6.1.2.4 (2011)

¹⁰³ DoDI 6400.06.6.1.2.5.2 (2011)

¹⁰⁴ DoDI 6400.06.6.1.2.6 (2011)

A military protection order is only enforceable while the service member is under the authority of the commander that issued the order. If the service member transfers to a new command, the order is no longer valid. The gaining command may issue a new order in the event a protection order is still necessary after the service member transfers to a new command.¹⁰⁵

Inter-jurisdictional Enforcement of Protection Orders

The full faith and credit provision of the Violence Against Women Act (VAWA), 18 U.S.C. § 2265, requires states, tribes, and territories to honor and enforce protection orders issued by other jurisdictions. The protection order must meet the statute's jurisdictional and due process requirements. The issuing court must have personal and subject matter jurisdiction to issue the order. The respondent must have notice and an opportunity to be heard within the time required by the law of the issuing jurisdiction.¹⁰⁶ Orders meeting these requirements are entitled to enforcement across jurisdictional lines.

Military protection orders are generally not enforceable by states, territories, and tribes. These orders are routinely issued without providing service members notice or an opportunity to be heard. They do not meet the due process requirements for full faith and credit. However, some states have enacted laws that allow enforcement of military orders in their jurisdictions under certain circumstances. If that language is not present, then states, tribes and territories are not required to afford military protection orders full faith and credit.

Enforcement of Civilian Protection Orders on the Installation

Civilian protection orders are entitled to enforcement both on and off a military installation base. The Armed Forces Domestic Security Act provides that civilian protection orders issued by states, tribes or territories are entitled to the "same force and effect on a military installation as such order has within the jurisdiction of the court that issued the order."¹⁰⁷ Violations of a civil protection order may subject the service member to administrative and/or disciplinary action under the UCMJ.¹⁰⁸ A victim may also pursue legal remedies with the state, tribal or territorial courts that issued the order.

Military police may detain civilians who commit offenses on base until released to the appropriate federal, state, or local law enforcement agency. Additionally, civilians and civilian DoD personnel who fail to comply with a condition of a civil protection order are subject to

¹⁰⁵ DoDI 6400.06.6.1.2.7 (2011)

¹⁰⁶ 18 U.S.C. § 2265(b) (2013)

¹⁰⁷ 10 U.S.C. § 1561a (a) (2013)

¹⁰⁸ DoDI 6400.06.6.1.3.3 (2011)

administrative and disciplinary action in certain circumstances. The military also has the authority to bar civilians who fail to comply with a civil protection order.¹⁰⁹

There are distinct differences between civilian and military protection orders. A victim of intimate partner violence whose abuser is a service member may need information on whether a civilian or military protection order or both would be appropriate. Advocates play an important role in helping victims of intimate partner violence understand the process. It is, therefore, critical for advocates to understand the process for issuance and enforcement of both civil and military protection orders when assisting victims of domestic violence.

¹⁰⁹ DoDI 6400.6.6.1.3.3.2 (2011)

APPENDIX D

National Center on Protection Orders and Full Faith & Credit

Quick Reference: Federal Domestic Violence Firearm Prohibitions and the Military

In 1968, Congress passed comprehensive legislation regulating the purchase and possession of firearms. This legislation is known as the Gun Control Act. The Act was amended in 1994 and again in 1996 creating two domestic violence-related firearm prohibitions. These prohibitions restrict firearm access to abusers and seek to enhance survivor safety.

Prohibition while Subject to a Protection Order

Enacted in 1994, 18 U.S.C. §922(g)(8) makes it illegal for a person to purchase or possess firearms or ammunition while subject to a “qualifying” protection order. The protection order must be current for the firearms prohibition to apply. To trigger the prohibition, the protection order must meet certain elements.

Only orders issued to people in specific relationships will trigger the prohibition. The person protected under the order must be the current or former spouse, live together or have lived together previously in a sexual/romantic relationship, have a child with or be the child of the respondent. The statute does not cover dating partners who do not live together, platonic roommates, elder abuse, and other non-intimate partners.

Various types of courts (e.g., criminal, family, divorce, courts of general jurisdiction, magistrate courts) may issue qualifying orders. The title (e.g., injunction, restraining order, protection order) of the order does not matter so long as it meets the criteria under section 922(g)(8). Further, the court does not need to issue a specific prohibition against use or possession of a firearm in the order. As long as the order contains the qualifying language, the federal firearm prohibition will apply.

A “qualifying” order must prevent the respondent from harassing, stalking, threatening, or engaging in other conduct that would place an intimate partner or child in reasonable fear of bodily harm. Additionally, the court must include either a written finding in the order that the respondent is a credible threat to the physical safety of the intimate partner or child, or an

express prohibition against the respondent engaging in conduct that would place the intimate partner or child in reasonable fear of bodily injury.

The Gun Control Act requires that the respondent receive actual notice and an opportunity to respond to the allegations in the protection order petition prior to the attachment of the prohibition on firearms. Ex parte (i.e., temporary or emergency) orders generally do not “qualify” because the respondent has not yet received notice and has not had an opportunity to participate. If the respondent is served with the order and fails to appear, consents, agrees, or stipulates to the entrance of a final order, the firearm prohibition will attach. The prohibition ends upon dismissal or expiration of the order.

Official Use Exemption

A limited exemption to the prohibition exists for government employees who are required to use firearms in their official duty. This provision, also known as the “official use exemption,” allows military personnel who are subject to an order of protection to possess their service weapon while on duty.¹¹⁰ Use or possession of personal firearms, including hunting weapons, is still prohibited. Departmental policies and protocols may be more restrictive than the federal provisions. For example, a commanding officer may prohibit an officer from possessing a firearm even though federal law allows possession under the exemption.

Misdemeanor Crimes of Domestic Violence

Enacted on September 30, 1996, 18 U.S.C §.922(g)(9), makes it illegal for a person to possess or purchase firearms or ammunition if convicted of a “qualifying” misdemeanor crime of domestic violence. This prohibition applies to all “qualifying” misdemeanor convictions that occurred at any time, even if the conviction occurred *prior* to the law’s effective date.

Certain requirements must be met for the misdemeanor conviction to meet the elements of 18 U.S.C. §922(g)(9). A “qualifying” misdemeanor crime of domestic violence is defined as a misdemeanor under federal, state, or tribal law. The misdemeanor must include as an element the use or attempted use of physical force or the threatened use of a deadly weapon.

Only certain relationships meet the criteria of the prohibition. A protected party must be in one of the defined relationships with the defendant. The defendant must be the current or former

¹¹⁰ 18 U.S.C. §925(a)(1) (2013)

spouse, parent, or guardian of the victim, have a child with the victim, have lived together, or be a person similarly situated to a spouse, parent, or guardian of the victim.¹¹¹

A conviction is determined by the jurisdiction in which the proceedings are held. If the jurisdiction does not consider a deferred adjudication, or similar alternative dispositions to be a conviction (e.g., pretrial diversion, adjournment in contemplation of dismissal, probation before judgment) then the prohibition does not attach. The military considers any felony or misdemeanor crime of domestic violence, and general or special court-martial conviction that meets the elements of a crime of domestic violence, as a conviction even if it is not classified as a misdemeanor or felony.¹¹² However, DoD policy excludes summary courts-martial convictions, and imposition of non-judicial punishment under Article 15 of the Uniform Code of Military Justice as “a qualifying conviction.”¹¹³

Federal law affords the defendant certain due process rights for the misdemeanor conviction to qualify under §922(g)(9). The defendant must have had a right to counsel and, if applicable, under state law, a right to a jury trial. If the defendant chose to decline these options, the defendant must have made a knowing and intelligent waiver. A conviction lacking these due process rights would not qualify for purposes of this prohibition.

There is no official use exemption for §922(g)(9). A person convicted of a “qualifying” misdemeanor crime of domestic violence cannot legally possess or purchase firearms or ammunition. Therefore, military personnel may not possess or purchase firearms for any purpose. This prohibition does not apply to major military weapon systems or “crew served” military weapons and ammunition (e.g., tanks, missiles, aircraft).¹¹⁴

The Gun Control Act has certain exceptions to the prohibition. A person is not considered prohibited if the conviction is expunged, set aside, the person is pardoned, or has his or her civil rights restored (i.e., right to sit on a jury, vote, hold a public office, if the applicable law provides for loss of civil rights). This exception does not lift the federal firearm prohibition if the terms of the expungement, pardon, or restoration of civil rights, expressly prohibits the defendant from purchasing or possessing firearms. Likewise, if the laws of the jurisdiction in which the proceedings were held prohibit the defendant from possessing or receiving firearms or ammunition, then the prohibition still applies.

¹¹¹ 18 U.S.C. §921(a)(3) (2013)

¹¹² DoDI 6400.06.6.1.4.3 (2011)

¹¹³ DoDI 6400.06.6.1.4.3.2

¹¹⁴ DoDI 6400.06.6.1.4.4

Individuals seeking admission into the armed services may not have a qualifying conviction.¹¹⁵ Service members have a continuing affirmative duty to notify command of qualifying convictions.¹¹⁶ Personnel with qualifying convictions may not be assigned or detailed to covered positions. They may not possess or have access to firearms and ammunition.

Federal and State Firearms Laws

In addition to the federal domestic violence firearm laws discussed, many state, tribal and territorial jurisdictions have enacted their own firearm prohibitions to protect victims of domestic violence. These laws can be similarly, or more or less restrictive than the federal firearm laws. The federal firearm prohibition still applies even if a state law allows a person to possess firearms while subject to a protection order or after conviction of a misdemeanor crime of domestic violence.

Firearms and domestic violence are a deadly combination. It is important that advocates understand their state and federal firearms laws to assist survivors. The National Center on Protection Orders and Full Faith and Credit provides training, resources, and tools to assist advocates and survivors on firearms use, possession, and removal. For additional information and resources on federal or state firearm prohibitions or protection orders, please contact the National Center on Protection Orders and Full Faith and Credit at (800) 903-0111, prompt 2, or email: ncffc@bwjp.org.

¹¹⁵ DoDI 6400.6.1.4.5.1

¹¹⁶ DoDI 6400.06.6.2.4.5.1.1