

# The Expanded Legal Assistance Program

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## I. Introduction

Military legal assistance offices provide servicemembers and their families an important resource to handle the unique and often complex set of legal problems they encounter as a result of military service. Unfortunately, many legal assistance attorneys are hamstrung in their ability to effectively represent military personnel and family members because state bar licensure rules prohibit out-of-state judge advocates from enforcing the client's rights by bringing suit or providing representation in local courts. Concomitantly, many servicemembers do not earn enough money to pay for civilian legal representation, yet their income level precludes them from formal legal aid programs.<sup>2</sup> Further compounding this problem is the fact that civilian attorneys are often unfamiliar with the federal statutes that give rise to many of servicemembers' most important rights.<sup>3</sup>

For these reasons and others, the Department of Defense, working in close coordination with local and national bar associations, instituted policies to allow judge advocates to represent servicemembers in state court, regardless of the attorneys' state of licensure.<sup>4</sup> This program, known generally as the Expanded Legal Assistance Program (ELAP), has enjoyed success in several jurisdictions. Unfortunately, however, most states still do not allow the military legal assistance practitioner access to their courts absent state licensure. Additionally, the military services have only adopted ELAP programs on a limited basis.

This article outlines the applicable statutes, rules, and policies governing ELAP practice, while emphasizing the benefits of a robust expanded legal assistance program. First, the article traces the development of the military's ELAP policies and programs, beginning with the genesis of modern day legal services. Further, it surveys the rules in a number of different states that allow, in one form or another, military judge advocates to represent legal assistance clients in state court. Additionally, this article analyzes and compares current regulatory ELAP guidance across the

different military services. Finally, the article discusses ELAP in practice on select military installations.

## II. Expanded Legal Assistance Program Defined

Although the term ELAP has come into common usage within the military legal assistance community and, to a lesser extent, various state and national bar associations, the meaning of the term may vary depending on context. The meaning of ELAP in military regulations and the way in which it is used in the context of national and state bars differs slightly. Generally, the defining characteristic of ELAP in military regulations is in-court representation of a legal assistance client.<sup>5</sup> In this regard, ELAP applies to judge advocates as well as civilian legal assistance attorneys employed by the Armed Forces.<sup>6</sup> Further, it encompasses situations where the attorney appears in court as a member of the state bar association in which the court is located, as well as situations when the lawyer appears pursuant to a special rule granting military attorneys limited access to state courts.<sup>7</sup>

Contrarily, the use of the term ELAP by the American Bar Association (ABA) does not include representation by civilian attorneys and is limited to in-court representation by judge advocates.<sup>8</sup> Additionally, ABA and state ELAP rules are written to allow judge advocates to practice in state courts from which they would otherwise be precluded because of state licensure rules.<sup>9</sup> Thus, unlike military regulations, the term ELAP as used by state and national bar associations would not encompass a judge advocate who appears in a state court as an active member of that particular state's bar association.<sup>10</sup> This article contemplates the more expansive definition of ELAP found in the military regulations.

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<sup>2</sup> *Informational Report of the Standing Committee on Legal Assistance for Military Personnel*, 129 No. 1 ANN. REP. AM. BAR ASS'N 104 (2004).

<sup>3</sup> Kevin Patrick Flood, *Expanded Legal Assistance Revisited*, DIALOGUE, Spring 2007, at 23.

<sup>4</sup> See generally Raymond Marks, *Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma*, 56 MIL. L. REV. 1, 8 (1972).

<sup>5</sup> U.S. DEP'T OF NAVY, JAG INSTR. 5800.7E, MANUAL OF THE JUDGE ADVOCATE GENERAL para. 0711 (20 June 2007) [hereinafter JAGMAN] describes ELAP as "designated legal assistance attorneys" providing "in-court representation to certain categories of clients." Similarly, U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-7g(1) (21 Feb. 1996) [hereinafter AR 27-3] provides for in-court representation by an "attorney providing legal assistance," and para. 2-2a generally authorizes both Army judge advocates and "[Department of the Army] civilian attorneys" to provide legal assistance.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> The MODEL EXPANDED LEGAL ASSISTANCE PROGRAM RULE FOR MILITARY PERS. § (1) (2003) [hereinafter MODEL ELAP RULE] permits in-court-representation by a "lawyer . . . who is a full-time active duty military officer serving in the office of a Staff Judge Advocate."

<sup>9</sup> See *infra* Part VI discussion.

<sup>10</sup> *Id.*

### III. History of Expanded Legal Assistance Programs

Modern day legal services in the military have come a long way since their relatively recent historical beginnings. Military legal services trace their history to the World War II era, when, in 1940, the Armed Forces, working in cooperation with the American Bar Association, began to provide basic legal assistance to servicemembers.<sup>11</sup> These services began, in part, in response to the increased demand created by the wartime induction of millions of citizens into the military.<sup>12</sup> Further adding to the demand for legal services during this era was the Soldiers' and Sailors' Civil Relief Act, which Congress passed in 1940 to provide legal remedies and relief to military members.<sup>13</sup> Initially, the legal services provided were somewhat limited to assistance during induction, as servicemembers were referred to the civilian bar for legal problems arising later.<sup>14</sup> However, in recognition of the need for a more comprehensive approach, in 1943, the Army and the Navy adopted a uniform plan to provide legal services to servicemembers and their dependents.<sup>15</sup> This plan marks the official beginning of military legal services, and, following WWII, the military and the ABA decided that legal assistance should continue as a permanent activity.<sup>16</sup>

Following the formal establishment of a military legal assistance program in 1943, the Army began providing varied and often limited legal services to its Soldiers and dependent family members.<sup>17</sup> In 1969, expanded legal services got a jump-start when Congress passed the Carey Amendment to the Economic Opportunity Act.<sup>18</sup> This Amendment made certain military members and their families eligible to receive legal services from civilian attorneys working in the Office of Economic Opportunity (OEO), subject to the Defense Department assuming the cost of these services.<sup>19</sup> Though the Carey Amendment implied that the military "could not or should not 'take care of its

own,"<sup>20</sup> the Department of Defense's initial reaction was to take no steps to implement the law.<sup>21</sup> Instead, it formed a committee to study the applicability of the amendment, as well as other alternatives to funding legal services through the OEO.<sup>22</sup>

Following four months of study, the committee, known as the McCartin Committee, made three recommendations: (1) that the existing legal assistance program be expanded; (2) that the expanded services only be provided to those servicemembers and dependents who could not afford to pay; and (3) that a pilot or test program be instituted to develop those proposals.<sup>23</sup> The proposed expansion of existing legal services clearly contemplated in-court representation in civilian court by judge advocates, which prompted the Secretary of Defense to seek—and ultimately obtain—ABA approval for the pilot program.<sup>24</sup> The Army implemented the pilot program at several installations, and by 1973, nineteen states had granted some form of permission for out-of-state judge advocates to represent their clients in civil court.<sup>25</sup> Also in 1973, the Secretary of Defense adopted the pilot project (termed the Expanded Legal Assistance Program) permanently into the military legal services program.<sup>26</sup>

Amidst insufficient personnel and funding as well as continued pockets of resistance by local bar associations, support for the ELAP programs steadily declined following its peak in the early 70s.<sup>27</sup> In response, the ABA's Standing Committee on Legal Assistance for Servicemen sought legislation to provide a statutory entitlement for military legal assistance programs as a way to ensure the continuation of ELAP.<sup>28</sup> Ultimately, in 1984, Congress passed 10 U.S.C. § 1044, which provided specific authorization for military legal assistance programs.<sup>29</sup>

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<sup>11</sup> Colonel Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 4.

<sup>12</sup> MILTON J. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN: A REPORT OF THE SURVEY OF THE LEGAL PROFESSION 9 (1951).

<sup>13</sup> *Id.*

<sup>14</sup> Arquilla, *supra* note 11, at 4.

<sup>15</sup> BLAKE, *supra* note 12, at 21. The Army adopted its plan pursuant to War Dep't Circular No. 74, *Legal Advice and Assistance for Military Personnel* (16 Mar. 1943). The Navy's implementation is located in U.S. DEP'T OF NAVY, NAVY BULL. R-1164, LEGAL ASSISTANCE FOR NAVAL PERSONNEL (26 June 1943).

<sup>16</sup> Arquilla, *supra* note 11, at 5.

<sup>17</sup> *Id.*

<sup>18</sup> S. 3016, 91st Cong., 1st Sess. (1969) (Carey Amendment) amending § 222(a)(3) of the Economic Opportunity Act of 1964.

<sup>19</sup> Mack Borgen, *The Proper Role of the Military Legal Assistance Officer in the Rendition of Estate Planning Services*, 73 MIL. L. REV. 65, 78 (1976).

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<sup>20</sup> Raymond Marks, *Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma*, 56 MIL. L. REV. 1, 8 (1972).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.* The study was known as the Department of Defense Military Working Group on Expansion of Legal Assistance Programs. *Id.*

<sup>23</sup> Borgen, *supra* note 19, at 79 (citing REPORT OF DEPARTMENT OF DEFENSE MILITARY WORKING GROUP ON EXPANSION OF LEGAL ASSISTANCE PROGRAMS § III (1970)).

<sup>24</sup> *Id.* (citing Letter from Melvin Laird, Sec'y of Def., to Bernard Segal, President of the Am. Bar Ass'n (May 1970)).

<sup>25</sup> *Annual Report of the Standing Committee on Legal Assistance for Servicemen*, 100 ANN. REP. AM. BAR ASS'N 801 (1975).

<sup>26</sup> *Id.* at 801.

<sup>27</sup> *Id.* at 804.

<sup>28</sup> *Id.* at 802.

<sup>29</sup> Prior to this statute, the legal basis for military legal assistance rested on the Secretary of the Army's authority under 10 U.S.C. § 3013(g) to prescribe the duties of Army personnel and promulgate regulations to carry out his statutory duties. Arquilla, *supra* note 11, at 6.

However, the law fell short of the ABA's efforts to create a statutory entitlement to legal services because it only authorized such programs "[s]ubject to the availability of legal staff resources."<sup>30</sup>

The next significant ABA action with respect to ELAP occurred in 2003, when the House of Delegates adopted the Black Letter Model Expanded Legal Assistance Program Rule for Military Personnel (Model Rule or Model ELAP Rule).<sup>31</sup> Unfortunately, this ABA initiative did not have its desired effect, as very few states adopted the Model ELAP Rule or some form of an ELAP rule in response.<sup>32</sup>

Since the ELAP's inception under the Army Pilot Program in 1971, two major issues have limited the program's implementation. The first issue, typically raised by civilian bar associations, reflects a concern that the ELAP will take away revenue-generating clients from the local bar.<sup>33</sup> In part to address this concern, military regulations restrict eligibility for ELAP to servicemembers and dependents that are unable to pay legal fees to civilian counsel.<sup>34</sup> Most state ELAP rules also contain eligibility restrictions that require, in one form or another, a showing of financial hardship.<sup>35</sup> The second issue that has limited more widespread implementation of ELAP in the military is the lack of personnel and funds.<sup>36</sup>

#### IV. Current Regulatory Guidelines

After the Secretary of Defense formally adopted the pilot program in 1973, service regulations implemented regulatory guidance governing ELAP. The following section examines ELAP regulations in the Army, Navy, Marine Corps, and Air Force.

#### A. Army Policy

Army regulations authorize, but do not require, legal assistance attorneys to represent clients in civil courts, subject to a number of limitations.<sup>37</sup> In particular, paragraph 3-7g of Army Regulation (AR) 27-3, *The Army Legal Assistance Program*, allows an "attorney providing legal assistance," which is defined as a judge advocate or civilian attorney employed by the Army, to provide in-court representation to certain clients.<sup>38</sup> The regulation further requires a supervising attorney to approve the in-court representation on a case-by-case basis, while considering such factors as potential conflicts of interest and the in-court representation's impact on the quality or availability of other services.<sup>39</sup> Further, in-court representation is restricted to clients who would experience substantial financial hardship in hiring a civilian lawyer, though the regulation states that servicemembers in the pay grade of E-4 and below ordinarily qualify for such representation.<sup>40</sup> Finally, the regulation contains subject matter restrictions by prohibiting in-court representation for all military justice proceedings and all civilian criminal proceedings, with the exception of cases before a U.S. Magistrate on a military installation.<sup>41</sup>

#### B. Navy and Marine Corps Policy

The Navy JAG Instruction 5800.7E, *Manual of the Judge Advocate General (JAGMAN)*, and JAG Instruction 5801.2A, *Legal Assistance Manual*, contain the regulations governing ELAP for the Navy and the Marine Corps.<sup>42</sup> Similar to Army policy, these instructions permit, but do not require, legal assistance attorneys to represent qualified clients in civil court.<sup>43</sup> Also mirroring the Army regulation, the Navy instructions only allow for military representation for clients who cannot afford a private attorney; the JAGMAN describes these potential clients as servicemembers in the rank of E-3 and below, or E-4 and below with family members.<sup>44</sup> Those who do not meet this rank requirement may still be eligible for ELAP representation upon a showing of financial hardship and with the approval of The Judge Advocate General or his designee.<sup>45</sup>

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<sup>30</sup> 10 U.S.C. § 1044(a) (2006). Making legal services a statutory entitlement for servicemembers is a frequently recurring issue that the ABA has continued to support. The Legal Assistance for Military Personnel Committee's most recent efforts to make legal assistance a statutory entitlement is contained in its proposed revision to 10 U.S.C. § 1044, which can be found on its website at <http://www.abanet.org/legalservices/lamp/>.

<sup>31</sup> *Informational Report of the Standing Committee on Legal Assistance for Military Personnel*, 129 No. 1 ANN. REP. AM. BAR ASS'N 104 (2004).

<sup>32</sup> Letter from William H. Neukom, President, Am. Bar Ass'n, & Earl E. Anderson, Chair, Standing Comm. of Legal Assistance for Military Pers., to Colleagues (May 20, 2008) (on file with author).

<sup>33</sup> See generally *Annual Report of the Standing Committee on Legal Assistance for Servicemen*, *supra* note 25; Borgen, *supra* note 19, at 82; Marks, *supra* note 20.

<sup>34</sup> AR 27-10, *supra* note 5, para. 3-7g(3); JAGMAN 0711a, *supra* note 5.

<sup>35</sup> See *infra* Part VI discussion.

<sup>36</sup> See generally Borgen, *supra* note 19, at 81-82; *Report of the Standing Committee on Legal Assistance for Servicemen*, 99 ANN. REP. AM. BAR ASS'N 723 (1974).

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<sup>37</sup> AR 27-3, *supra* note 5, para. 3-7.

<sup>38</sup> *Id.* para. 3-7g; *id.* para. 2-2a.

<sup>39</sup> *Id.* para. 3-7g(1).

<sup>40</sup> *Id.* para. 3-7g(3).

<sup>41</sup> *Id.*

<sup>42</sup> JAGMAN, *supra* note 5, para. 0711.

<sup>43</sup> *Id.*

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

<sup>45</sup> *Id.* para. 0711b(4).

This policy is more expansive than the Army's in that it adds a provision allowing for in-court representation, absent a showing of financial hardship, for "cases that involve a significant issue that affects other servicemembers."<sup>46</sup> In a similar vein, the only subject matter restriction on ELAP representation in the Navy and Marine Corps rules is a prohibition against in-court representation for marital dissolutions.<sup>47</sup> Finally, Navy regulations make clear that ELAP is secondary to normal legal assistance services, and JAGINST 5801.2A further requires Judge Advocate General approval for legal assistance offices seeking to establish an expanded program.<sup>48</sup>

### C. Air Force Policy

Air Force Instruction 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, is the governing regulation for legal assistance in the Air Force. Although ELAPs are not specifically addressed in the regulation, Air Force legal assistance attorneys are prohibited from representing clients in a "court or administrative proceeding."<sup>49</sup> This would clearly preclude implementation of an ELAP.

### V. The ABA's Model ELAP Rule

Although some states already had ELAP rules on their books, the ABA promulgated and passed a Black Letter Model ELAP Rule for Military Personnel (Model Rule or Model ELAP Rule) in 2003.<sup>50</sup> This rule is by no means the most expansive rule in the ELAP context, and three key provisions limit its utility. First, the only clients authorized to receive military in-court representation under the Model Rule are enlisted personnel experiencing substantial financial hardship in the pay grades of E-1 to E-4, and their dependents.<sup>51</sup> Any other client seeking representation pursuant to the Model Rule must be approved by their respective Judge Advocate General.<sup>52</sup>

The second important limitation imposed under the Model ELAP Rule is a restriction on the subject matter of

the representation. Specifically, the rule limits representation to civil matters.<sup>53</sup>

The final, and perhaps most significant, limiting provision of the Model Rule is a requirement for judge advocates to obtain and complete fifteen hours of state-specific approved continuing legal education (CLE) before they may be permitted to practice under the rule.<sup>54</sup> Overall, the ABA Model ELAP Rule offers reasonable utility to judge advocates seeking to represent legal assistance clients in state courts, though a number of states have much more expansive ELAP rules.<sup>55</sup>

### VI. Survey of State ELAP Rules

A number of different jurisdictions allow military legal assistance attorneys to represent servicemembers in their courts. These rules vary greatly in many respects, and while some states offer very useful guidelines for military attorneys, others impose restrictions that render the rule virtually unworkable. In this context, the three main limitations to military representation in state courts are restrictions on client eligibility, which is usually based on military rank; training and fee requirements for the attorney; and subject matter limitations. The following section examines existing state ELAP rules, comparing their relative utility for judge advocates, in order of most to least permissive.

#### A. Alaska

The Alaska ELAP rule is an example of the most permissive rule allowing military judge advocates to represent clients in state court. Under the rule, active duty military judge advocates may apply to the Alaska Bar Association for a waiver to practice law in the state.<sup>56</sup> Once the waiver is approved, a judge advocate may represent military clients and dependents on any matter and may accept any case under the Alaska Pro Bono Program for a period of two years.<sup>57</sup> There are no further limitations on the scope or subject matter of representation; there are no fees or CLE requirements; and there is no requirement to show financial hardship on the part of the client.<sup>58</sup> To qualify for the waiver, an applicant need only provide proof of graduation from an accredited law school, a certificate of good standing from another state bar, proof of active duty

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<sup>46</sup> *Id.* para. 0711b(5).

<sup>47</sup> U.S. DEP'T OF NAVY, JAG INSTR. 5801.2A, LEGAL ASSISTANCE MANUAL sec. 8-1c (26 Oct 2005) [hereinafter NAVY LEGAL ASSISTANCE MANUAL].

<sup>48</sup> *Id.* sec. 8-1a.

<sup>49</sup> U.S. DEP'T OF AIR FORCE, INSTR. 51-104, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS sec. 1.2.9 (27 Oct. 2003) [hereinafter AFI 51-104].

<sup>50</sup> See *infra* Part VI discussion; *Informational Report of the Standing Committee on Legal Assistance for Military Personnel*, *supra* note 31.

<sup>51</sup> MODEL ELAP RULE, *supra* note 8.

<sup>52</sup> *Id.*

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See *infra* Part VI discussion.

<sup>56</sup> ALASKA BAR R. 43.1 (1999) (Waivers to Practice Law under a U.S. Armed Forces Expanded Legal Assistance Program).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

status and assignment to the Judge Advocate General's Corps of one of the Armed Forces, and an affidavit that the applicant has never failed the Alaska bar examination.<sup>59</sup> The most recent Alaska Supreme Court order amending the rule became effective on 15 January 1999, well prior to the ABA's adoption of the Model ELAP Rule. The text of the Alaska rule also bears no relation to the Model ELAP Rule.

## B. Mississippi

Mississippi's ELAP rule is also streamlined and receptive to military representation. Pursuant to the rule, any military lawyer stationed or employed in Mississippi serving as a judge advocate or employed by the Armed Forces may apply to the state Supreme Court for a certificate to practice as a "Registered Military Legal Assistance Attorney" in the state.<sup>60</sup> Lawyers practicing under the rule are limited by 10 U.S.C. § 1044 and applicable service regulations, and the scope of representation is restricted to certain enumerated subject matter areas, although a final catchall provision allows other matters or cases to be heard at the discretion of the court or tribunal.<sup>61</sup>

Lawyers practicing in Mississippi state courts as a Registered Military Legal Assistance Attorneys are considered active members of the Mississippi Bar for the purposes of disciplinary procedures, although the rule expressly exempts military attorneys from paying bar dues and CLE requirements.<sup>62</sup> The Supreme Court of Mississippi adopted Rule 46(e) in January 2005, subsequent to the ABA Model ELAP Rule.<sup>63</sup> There is little resemblance between the two rules however, and Mississippi's ELAP rule is far more permissive and useful for the military practitioner.

## C. Colorado

In a scheme similar to the Alaska rule, active duty military attorneys stationed in Colorado may apply for temporary admission to the Colorado bar and may represent

clients in their capacity as judge advocates.<sup>64</sup> The Colorado rule does not limit the scope or subject matter of the representation, nor does it require the lawyer to take any CLE courses.<sup>65</sup> Furthermore, military clients do not have to show financial hardship in obtaining civilian counsel, but attorney-applicants must pay a substantial annual fee of \$225 for the first calendar year and \$180 every year thereafter that the attorney seeks to practice in state courts.<sup>66</sup> These rules were amended to allow judge advocates to practice in court even before the ELAP movement gained momentum and before the writing of the ABA Model Rule.<sup>67</sup>

## D. Rhode Island

The distinguishing characteristic of Rhode Island's ELAP rule is its simplicity. Pursuant to the Rhode Island Rules of the Supreme Court, active duty judge advocates may appear in any Rhode Island court to represent junior noncommissioned officers and enlisted personnel "who might not otherwise be able to afford proper legal assistance."<sup>68</sup> The only other requirement is that the rule requires the senior active duty legal officer in the State of Rhode Island of the judge advocate's particular service to provide written authorization for the attorney seeking to practice under this rule.<sup>69</sup> Unlike most other states with ELAP rules, Rhode Island allows judge advocates to represent military clients—but not dependent family members—on criminal matters.<sup>70</sup> There also do not appear to be any CLE or fee requirements, although the rule is not entirely clear on these matters.<sup>71</sup>

## E. Utah

The Utah Supreme Court Rules of Professional Practice mirror the Model ELAP Rule and allow active duty judge advocates stationed in Utah to represent certain clients on civil matters in state courts.<sup>72</sup> In-court representation is limited to enlisted personnel under substantial financial hardship in grades E-1 to E-4 and their dependents.<sup>73</sup> Other

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<sup>59</sup> *Id.*

<sup>60</sup> MISSISSIPPI RULES OF APPELLATE PROCEDURE R. 46(e) (2005) (Military Legal Assistance Program).

<sup>61</sup> *Id.* Specifically, the subject matter limitations are the following: adoptions, guardianships, name changes, divorces, paternity matters, child custody, visitation, child and spousal support, landlord-tenant disputes on behalf of tenants, certain consumer advocacy cases, garnishment defenses, probate, matters arising under the Servicemember's Civil Relief Act (SCRA), and enforcement of rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The SCRA can be found at 50 U.S.C. § 501, the USERRA at 38 U.S.C. § 4301.

<sup>62</sup> MISSISSIPPI RULES OF APPELLATE PROCEDURE R, *supra* note 60, 46(e)(8).

<sup>63</sup> Supreme Court of Mississippi Order No. 86-R-99027 SCT.

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<sup>64</sup> COLORADO RULES OF CIVIL PROCEDURE R. 201.3 (2007) (Classification of Applicants).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* R. 227A(1)(a) (Registration Fee).

<sup>67</sup> *Id.*

<sup>68</sup> RHODE ISLAND R. 2(f) (1989).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> UTAH SUPREME COURT RULES OF PROFESSIONAL PRACTICE R. 14-804(a) (2004) (Special Admission Exception for Military Lawyers).

<sup>73</sup> *Id.* R. 14-804(e).

active duty military personnel may also qualify for representation with express, written approval from a service Judge Advocate General.<sup>74</sup> In a departure from the Model ELAP Rule, Utah does not impose any training requirements, although a \$10 fee must be submitted with every application to practice under the rule.<sup>75</sup>

#### F. Washington

Similar to Utah, Washington uses the language from the ABA Model ELAP Rule to implement its ELAP guidelines, which results in a somewhat permissive rule.<sup>76</sup> However, unlike Utah, which does not impose CLE requirements, Washington fully adopted the Model ELAP Rule's recommendation to require fifteen credit hours of state-specific CLE prior to admission to appear in court in the state.<sup>77</sup> Washington also limits legal assistance clients to active duty enlisted personnel in grades E-1 to E-4 and their dependents, and other servicemembers upon approval by the service Judge Advocate General. The subject matter of representation is restricted to noncriminal matters and may be further limited to the extent that representation is permitted by the supervisory service staff judge advocate.<sup>78</sup>

#### G. Hawaii

The Rules of the Supreme Court of Hawaii allow active duty judge advocates stationed in Hawaii to apply for a license to engage in "limited military practice" in state courts for a period of four years.<sup>79</sup> Though there is no subject matter limitation placed on the representation, only enlisted personnel in the grades of E-1 to E-4 and their dependents may be represented.<sup>80</sup> The Hawaii rules also prohibit military attorneys from demanding or receiving compensation from clients for their services.<sup>81</sup> In addition to the client eligibility requirements, Rule 1.7 of the Supreme Court of Hawaii drastically diminishes the rule's utility by requiring judge advocates to pay annual state bar membership dues, currently ranging from \$341 to \$501, depending on the year the attorney was admitted to

practice.<sup>82</sup> The Hawaii rule does not impose any CLE or other training requirements.<sup>83</sup>

#### H. Pennsylvania

Similar to Mississippi, Pennsylvania's ELAP rule was adopted after the ABA approved the Model ELAP Rule.<sup>84</sup> The Pennsylvania rule, which was adopted by the state supreme court on 2 June 2004, gives active and Reserve component judge advocates the limited ability to practice law in Pennsylvania while operating under the aegis of an established expanded legal assistance program.<sup>85</sup> Lawyers practicing under this limited license may represent certain active duty enlisted personnel and their dependents in civil matters and administrative proceedings, to the extent such representation is permitted by the attorney's supervising staff judge advocate or commanding officer.<sup>86</sup> Generally, clients must be enlisted members in the grade of E-1 to E-4, or their dependents, although any active duty servicemember, or his dependents, may receive representation under the rule upon a showing of substantial financial hardship.<sup>87</sup> Lawyers practicing under the limited license are bound by the Pennsylvania Rules of Professional Conduct but are not required to pay the annual attorney bar fee.<sup>88</sup> Unfortunately, Pennsylvania does not relax the normal continuing legal education requirement and mandates fifteen credit hours of Pennsylvania-specific, approved CLE prior to admission to practice.<sup>89</sup>

#### I. Virginia

Virginia's ELAP rules offer a mixed bag for military legal assistance attorneys. On one hand, they contain fairly expansive eligibility rules for attorneys and clients. In particular, Virginia is one of the few states to allow both judge advocates and civilian legal assistance attorneys to

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* R. 14-804 (b)(4).

<sup>76</sup> WASHINGTON STATE COURTS ADMISSION TO PRACTICE RULES R. 8(g) (2002) (Exception for Military Lawyers).

<sup>77</sup> *Id.* R. 8(g)(1).

<sup>78</sup> *Id.* R. 8(g)(4).

<sup>79</sup> RULES OF THE SUPREME COURT OF THE STATE OF HAWAII R. 1.7 (1984) (Limited Admission of Military Attorneys).

<sup>80</sup> *Id.* R. 1.7(c).

<sup>81</sup> *Id.*

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<sup>82</sup> *Id.* R. 1.7(d). Government attorneys, to include judge advocates, are exempt from paying the "Lawyers' Fund for Client Protection" fee, but must pay all other bar membership fees. The 2009 fees are published on the Hawaii State Bar Association website at [www.hsba.org/resources/1/2009\\_Renewal/2009-DUES.pdf](http://www.hsba.org/resources/1/2009_Renewal/2009-DUES.pdf), although the 2010 fee schedule has not yet been published.

<sup>83</sup> RULES OF THE SUPREME COURT OF THE STATE OF HAWAII R. 1.7 (1984) (Limited Admission of Military Attorneys).

<sup>84</sup> Supreme Court of Pennsylvania Docket No. 1, Order No. 336, 34 PA. BULL. 3102, June 2004.

<sup>85</sup> PENNSYLVANIA BAR ADMISSION R. 303A (2004) (Limited Admission of Military Attorneys).

<sup>86</sup> *Id.* R. 303D.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* R. 303F.

<sup>89</sup> *Id.* R. 303B3.

practice under the ELAP rules.<sup>90</sup> Similarly, the only requirement for clients is that they be eligible legal assistance clients that would experience substantial financial hardship by hiring private counsel.<sup>91</sup> However, Virginia requires that military legal assistance attorneys pay the same bar dues as regularly admitted active members,<sup>92</sup> as well as complete the required professionalism course and mandatory CLE requirements.<sup>93</sup> Finally, in the same manner and language as the Mississippi rule, Virginia limits the subject matter of the representation to twelve enumerated areas, although a catchall provision gives the court discretion to allow for other cases.<sup>94</sup>

## J. Florida

The Florida rules governing the practice of law by military legal assistance attorneys are the most extensive in the ELAP context. These rules expressly define “authorized legal assistance attorney,” “legal assistance supervisory attorney,” and “legal assistance client.” Furthermore, the rules specifically list attorneys’ permitted activities and the civil matters for which they may provide representation.<sup>95</sup>

The Florida rules contain the usual requirements for military judge advocates seeking admission to practice in court, with some key exceptions. First, the rules require a member of the Florida Bar to act as a “supervising attorney” and assume professional responsibility for all of the legal assistance attorney’s activities.<sup>96</sup> The impact of this requirement is tempered by a provision that allows a reserve judge advocate volunteering at a legal assistance office to serve as a supervising attorney.<sup>97</sup> Rule 18-1.2(a)(4) further requires judge advocate practitioners to attend a course entitled “Practicing with Professionalism” through the Florida Bar Young Lawyers Division.<sup>98</sup>

The rules also limit the eligibility of legal assistance clients and the subject matter of representation in other ways. In accordance with Rule 18-1.2(d), active duty servicemembers, retirees, and military dependents seeking

legal assistance representation must meet the income eligibility guidelines of the Legal Services Corporation to be considered “[a]uthorized” legal assistance clients within the meaning of the statute.<sup>99</sup> Additionally, in-court representation is restricted to the following seven “issues”: landlord/tenant disputes, small claims court actions, domestic relations matters, routine or statutory probate matters, actions arising the Florida Consumer Collection Practices Act, actions arising under the Florida Motor Vehicle Repair Act, and proceedings permitted by applicable law regarding appearances by foreign attorneys.<sup>100</sup> As a practical matter, these subject matter limitations would not preclude legal assistance attorneys from representing clients in the vast majority of cases they would likely encounter.<sup>101</sup>

In contrast to other states’ rules, the Florida guidelines explicitly list the permissible activities allowable under its expanded military rule.<sup>102</sup> These activities include appearing in court or before any administrative tribunal, and preparing pleadings and other court documents; a catch-all provision covers any other necessary preparatory activities.<sup>103</sup> Similarly, the rules contain express provisions requiring military attorneys to submit to the jurisdiction of the Supreme Court of Florida for disciplinary purposes, and further allow the state supreme court to withdraw, with or without cause, an attorney’s certification under the rule.<sup>104</sup>

## K. California

California has perhaps the most restrictive rule, and military judge advocates seeking to practice in California will find themselves severely limited. Specifically, the California Rules of Court permit military counsel to represent a “person in the military service” in state court, but only for a cause arising under the Servicemember’s Civil Relief Act.<sup>105</sup> Further, judge advocates must be appointed by the court, which can only approve the appointment upon a finding that retaining civilian counsel would likely cause substantial hardship for the servicemember or his family.<sup>106</sup> Finally, the California rule prohibits any court from determining the availability of a judge advocate and requires that the judge advocate be made available by the appropriate Judge Advocate General or duly designated

<sup>90</sup> VIRGINIA SUPREME COURT R. 1A:6(a) (2003) (Foreign Attorneys—Registered Military Legal Assistance Attorneys). The lawyer seeking admission under the rule must also be employed, stationed, or assigned in the Commonwealth of Virginia.

<sup>91</sup> *Id.* R. 1A:6(f).

<sup>92</sup> *Id.* R. 1A:6(d). This requirement may be waived for two years following the initial issue of a certificate to practice under the rule.

<sup>93</sup> *Id.* R. 1A:6(i).

<sup>94</sup> *Id.* R. 1A:6(e).

<sup>95</sup> RULES REGULATING THE FLORIDA BAR ch. 18 (1996) (Military Legal Assistance Counsel Rule).

<sup>96</sup> *Id.* R. 18-1.4(a), R. 18-1.2(c).

<sup>97</sup> *Id.* R. 1.2(c)(1).

<sup>98</sup> *Id.* R. 18-2.1(a)(4).

<sup>99</sup> *Id.* R. 18-1.2(d).

<sup>100</sup> *Id.* R. 18-1.4(c).

<sup>101</sup> See *infra* Part IV.

<sup>102</sup> RULES REGULATING THE FLORIDA BAR R. 18-1.3 (1996).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* R. 18-1.5, R. 18-1.7(a)(2).

<sup>105</sup> CALIFORNIA RULES OF COURT R. 9.41(a) (2007) (Appearances by military counsel).

<sup>106</sup> *Id.* R. 9.41(a)(2) – 9.41(a)(3).

representative.<sup>107</sup> There is no formal application process, and the rule does not impose CLE or fee requirements. The California Supreme Court most recently amended the rules effective 1 January 2007.

## VII. ELAP in Practice

Despite the fact that Army Regulations permit in-court representation in certain cases and that a handful of states have some form of an ELAP rule, the majority of legal assistance offices at Army installations do not have an ELAP.<sup>108</sup> Army-wide, legal assistance offices reported 622 cases of ELAP representation in state court during FY 2009, though the legal assistance office at Fort Lee, Virginia, accounts for 510 of those.<sup>109</sup> Two of the Army's largest installations, Fort Bragg, North Carolina, and Fort Hood, Texas, each reported no ELAP cases.<sup>110</sup> The only other installations with a significant number of reported ELAP cases were Fort Drum, New York (43), and Fort Bliss, Texas (44).<sup>111</sup>

Though not many Army legal assistance offices have implemented an ELAP, a number of success stories illustrate the benefits of a robust program. For example, until recently, the XVIII Airborne Corps legal assistance office at Fort Bragg had one of the most active ELAP programs in the Army.<sup>112</sup> As a part of its program, the office regularly represented both plaintiffs and defendants in consumer law

matters.<sup>113</sup> Additionally, the Fort Bragg office defended Soldiers and their families in landlord-tenant cases, as well as home foreclosures.<sup>114</sup> The program achieved many successful outcomes for clients, including the award of monetary damages, stays on home foreclosures, the halting of evictions, and the erasure of debts.<sup>115</sup>

The Navy has also achieved success with an ELAP. In one particular legal assistance office, the ELAP was able to reopen twelve separate default adjudications of paternity that were held in violation of the Soldiers' and Sailors' Civil Relief Act.<sup>116</sup> Judge advocates appeared in court to vacate these default judgments, and through court-ordered DNA testing, nine of the cases resulted in the exclusion of the client and putative father.<sup>117</sup>

## VIII. Conclusion

Expanded Legal Assistance Programs represent a great tool for enforcing the rights of military servicemembers and their dependents who would otherwise not be able to afford private representation. A growing number of states now have rules that allow military attorneys to represent their clients in state court, even absent local licensure. However, state ELAP rules vary significantly in their utility, from virtually unworkable to extremely useful. Presently, few Army legal assistance offices have implemented an ELAP, though Army policy has allowed for in-court representation of legal assistance clients since 1973. Despite the challenges of ELAP, installations that have a robust program have enjoyed considerable success in obtaining favorable results for their clients.

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<sup>107</sup> *Id.* R. 9.41(a).

<sup>108</sup> Telephone Interview with Mr. John Meixell, Chief, Legal Assistance Policy Div., Office of The Judge Advocate Gen., U.S. Army, in Rosslyn, Va. (Apr. 8, 2010) [hereinafter Meixell Telephone Interview].

<sup>109</sup> *Id.* The vast majority of the Fort Lee in-court representations involve filing pleadings, motions, and other documents with the local courts. Actual in-court appearances requiring litigation before a Judge occur much less frequently. Telephone interview with Ms. Rhonda Mitchell, Chief, Legal Assistance Div., Office of the Staff Judge Advocate, Fort Lee, Va. at Fort Lee, Va. (Apr. 13, 2010). The Fort Lee legal assistance office represents Soldiers and their families primarily in domestic, landlord/tenant, and consumer law matters. *Id.* This office is staffed with three civilian attorneys who are licensed in Virginia and one Army judge advocate. *Id.*

<sup>110</sup> Meixell Telephone Interview, *supra* note 108.

<sup>111</sup> *Id.* The Navy also performs a small number of ELAP representations each year. As with the Army, some Navy legal assistance offices are staffed with locally-licensed civilian attorneys who are able to appear in court notwithstanding the existence of a state ELAP rule. Telephone Interview with Commander Steven Haycock, Deputy Assistant Judge Advocate Gen. (Legal Assistance), U.S. Navy, in Wash., D.C. (Mar. 10, 2009). As discussed *infra* Part IV, Air Force regulations prohibit legal assistance attorneys from representing clients in court or an administrative proceeding, and ELAP has not been implemented in the Air Force. Telephone Interview with Lieutenant Colonel Lance Matthews, Deputy Commandant, Air Force Judge Advocate Gen.'s Sch. at Maxwell Air Force Base, Ala. (Mar. 12, 2009).

<sup>112</sup> Telephone Interview with Ms. Angela Martin, former Deputy Chief, Legal Assistance Div., Office of the Staff Judge Advocate, XVIII Airborne Corps, Fort Bragg, N.C., in Cumberland County, N.C. (Mar. 13, 2009).

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Flood, *supra* note 3.

<sup>117</sup> *Id.*