

Official Federal Representation Against State Restraining Orders Following the Armed Forces Domestic Security Act of 2002

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Any man is educated who knows where to get knowledge when he needs it, and how to organize that knowledge into definite plans of action.¹

Introduction

Captain (CPT) Samuel Adams concludes the final pre-deployment formation for Headquarters and Headquarters Company (HHC) at 1530 on Thursday and heads to his office. Before reaching it, he notices a military policeman (MP) and a deputy from the sheriff's office coming up the sidewalk. Judging by their demeanor, it is obvious this is not a social visit. The deputy informs CPT Adams that he is being served with a temporary restraining order (TRO) from the local county court. Captain Adams reads the TRO which clearly states that he cannot disregard the order until the county court modifies or revokes it. The order also states there is a hearing at the local courthouse tomorrow, Friday, at 0900. The order specifically prohibits CPT Adams from contacting or approaching Private (PVT) Norman Bates, the protected party, or being within 500 feet of PVT Bates's residence or place of employment. Private Bates is assigned to the HHC and works in the supply room adjacent to CPT Adam's office; and PVT Bates lives in the barracks directly above CPT Adam's office.

Private Bates alleges several things in the request for the order: CPT Adams is stalking PVT Bates both on and off-post; CPT Adams is having third persons harass PVT Bates; CPT Adams is repeatedly visiting PVT Bates's place of employment without being invited; CPT Adams has verbally harassed and threatened PVT Bates in the presence of others; and CPT Adams has access to firearms. The TRO was sworn out today, which was the first day PVT Bates was allowed to use pass privileges in nearly a month. Private Bates had recently received both a company grade and a field grade Article 15 based on various acts of misconduct.²

The MP assures CPT Adams that the TRO is not a joke and then escorts him 500 feet away from the HHC, even though the company will be deploying at 0600 on Saturday, less than 40 hours away. As the MP and deputy leave, a bewildered CPT Adams calls the installation's office of the staff judge advocate (OSJA). When the non-commissioned officer in charge (NCOIC) of legal assistance answers the phone, CPT Adams hurriedly relays that he has been served with a county court TRO ordering him to stay away from one of his Soldiers, PVT Bates. Before CPT Adams can explain that PVT Bates is a disgruntled Soldier, the NCOIC interrupts. The NCOIC tells CPT Adams that state orders are not valid on federal installations, but if CPT Adams is worried about it, he will have to hire a civilian attorney because it is a state court issue on what appears to be a personal matter.

The NCOIC gives CPT Adams the telephone number for Chris Cox, a former Army judge advocate who has a civilian law office across from the county courthouse. Captain Adams makes the call and Mr. Cox patiently listens to all the details. Mr. Cox tells CPT Adams to bring his checkbook, the TRO, and PVT Bates's performances files, and come down to his office immediately. At the hearing the next morning, Mr. Cox argues that the allegations are unsubstantiated; CPT Adams has broad discretion "to maintain the order, security, and discipline"³ in his unit; and that even federal judges are hesitant to interfere⁴ with official military functions⁵ as seen in this case. The judge rescinds the TRO, ruling that the basis of the TRO

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¹ NAPOLEON HILL, *THINK AND GROW RICH* 76-77 (Ballentine Books 1983) (1960).

² MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 2, § 815, at A2-4 (2005) [hereinafter MCM]; *see also* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE ch. 3 (16 Nov. 2005).

³ *See generally* Jennifer Heintz, *Safe at Home Base? A Look at the Military's New Approach to Dealing with Domestic Violence on Military Installations*, 48 ST. LOUIS L.J. 277, 281 (2003) (referencing commander's authority to exclude persons from military installations under *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973)).

⁴ Directing the court's attention to *Orloff v. Willoughby*, 345 U.S. 83 (1953), which held:

We know that from top to bottom of the Army the complaint is often made . . . that there is . . . objectionable handling of men. But judges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

was unfounded and CPT Adams was performing official duties. Captain Adams deploys the next morning, but eventually hears that he may have been entitled to official representation because of the official nature of the circumstances surrounding the TRO. Regrettably, after numerous memorandums, requests, faxes, e-mails and phone calls, CPT Adams learns that he will not be reimbursed for his legal fees.

This article presents three issues relating to TROs: (1) Do state-issued protection orders have any force or effect on a military installation or upon official military functions performed off the installation?; (2) How do commanders, leaders, or supervisors get official Federal legal representation?; and (3) What must judge advocates (JAs) do to determine the scope of employment and assist in the request for representation process? A recent case addressed these issues when a company commander paid \$1,000 to a civilian attorney to quash a TRO.⁶ The commander later sought reimbursement from the U.S. Department of Justice (DoJ).⁷ Since state protection orders must be enforced on military installations and may impact official duties off the installation, it is crucial for JAs to be familiar with the request for representation process.⁸ As seen in the opening quote, the purpose here is to educate readers on the issue and mark the trail to the relevant regulations in order to prepare JAs for when these issues arise on the installation.

Background on Protection Orders

The Violence Against Women Act (VAWA)⁹ requires states to give full faith and credit to all valid state protection orders, both civil and criminal, no matter where the order was issued. The rationale behind the VAWA was that persons who cross jurisdictions to pursue their victims are more likely to engage in violent behavior.¹⁰ Congress, therefore, felt it was imperative that such persons would be arrested for violating the terms or conditions of a protection order anywhere in the United States. Protection orders are defined as “any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person.”¹¹ These orders can be obtained ex parte in most jurisdictions and remain in effect until they are modified by the court or expire.¹² However, the VAWA, did not encompass the entire United States because many military bases fall under exclusive federal jurisdiction,¹³ and therefore do not have the same enforcement obligations regarding state protection orders.¹⁴

Id. at 93-94.

⁵ The United States and its agents or officials, if working within the scope of employment or their official capacity, are immune to suit unless Congress consents. *See generally* *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963).

⁶ *Phelps v. Sabo* J-0205-CV-002003-0920 (Ariz. Justice Ct., 29 July 2003).

⁷ *See* Information Paper, Major (MAJ) Louis Birdsong, Judge Advocate, Military Personnel Section, Litigation Division, U.S. Army, Arlington, Virginia, subject: Request for Representation Update (29 Sept. 2003) [hereinafter Information Paper] (on file with the author). The court determined the TRO claim was without merit but did not address whether the commander was acting in her official capacity. *Id.*

⁸ In the actual case described herein, both the trial counsel and legal assistance attorney neglected to categorize the commander’s actions as within the scope, and failed to pursue official representation. *See id.* Without addressing whether such omissions are legal or professional malpractice, the attorneys’ actions should garner the reader’s attention that such a claim may originate. *See generally* U.S. DEP’T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS paras. 7(c), (f) (1 May 1992). More importantly, whenever JAs shoot from the hip and guess because they do not know or do not properly research responses, such actions undermine the confidence in that individual attorney and in the Judge Advocate General’s Corps as a whole. Colonel Sharon E. Riley, Director Combat Developments Directorate, The Judge Advocate General’s Legal Center & School, U.S. Army, Remarks during Mentor Group Session (25 Oct. 2006). Individual JAs must recognize that “[d]uty extends beyond everything required by law, regulation, and orders” because “Army leaders commit to excellence in all aspects of their professional responsibility.” U.S. DEP’T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE para. 4-15 (Oct. 2006) [hereinafter FM 6-22]. Likewise supervisors need to remember that inculcating a sense of duty, or any of the other Army Values, requires commitment, not mere compliance. E-mail from Lieutenant Colonel (LTC) (Ret.) Maurice A. Lescault, Assoc. Dean and Dir. of the Professionalism Development Program, The Judge Advocate General’s Legal Center & School, U.S. Army (4 Dec. 2006) (on file with author). Since “[c]ommitment-focused influence generally produces longer lasting and broader effects. Whereas compliance only changes a follower’s behavior, commitment reaches deeper—changing attitudes and beliefs, as well as behavior.” FM 6-22, *supra*, para. 7-6.

⁹ Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, § 40001, 108 Stat. 1902; 18 U.S.C. §§ 2265-66 (LEXIS 2007).

¹⁰ PROTECTING VICTIMS OF DOMESTIC VIOLENCE: A LAW ENFORCEMENT OFFICER’S GUIDE TO ENFORCING ORDERS OF PROTECTION NATIONWIDE 3, INT’L ASS’N OF CHIEFS OF POLICE (2002).

¹¹ 18 U.S.C. § 2266(5).

¹² *See, e.g.*, GA. CODE ANN. § 19-13-3 (2007). To justify the court issuing an order without notice to the defendant, the plaintiff must allege reasonable evidence of harassment and that serious harm may occur if the order is not issued immediately. *Id.* § 19-13-3(b). Temporary orders may last up to thirty days. *Id.* § 19-13-3(c).

¹³ Major Stephen E. Castlen & LTC Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 116 (1997) (describing background, analysis and provisions of federal exclusive jurisdiction). *See also* U.S. DEP’T OF ARMY, REG. 608-18, PERSONAL AFFAIRS: THE ARMY FAMILY ADVOCACY PROGRAM app. D (30 May 2006) [hereinafter AR 608-18].

This jurisdictional gap, and several highly publicized instances of domestic violence and murder by military personnel,¹⁵ led to the Armed Forces Domestic Security Act (AFDSA) of 2002.¹⁶ The AFDSA mandated that: “[a] civilian order of protection shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order.”¹⁷ Preventing domestic violence within the military became an even higher priority.¹⁸ The Department of Defense (DoD) issued clear guidance that “Commanders and installation law enforcement personnel shall take all reasonable measures” to meet the mandate of the AFDSA on all DoD installations.¹⁹ Further, no discretion or military necessity exception exists to ignore such orders because “[a]ll persons who are subject to a civilian order of protection shall comply with the provisions and requirements of such order whenever present on a military installation.”²⁰ Lastly, *Army Regulation 27-40* rules that Army officials will not prevent or evade the service of restraining orders arising from their official duties.²¹ In other words, even if service of the TRO was not proper, the terms and conditions²² of the order are valid²³ by virtue of its existence.

The likelihood and potential impact²⁴ of these protection orders is significant because many state laws for harassment²⁵ or stalking²⁶ could easily be manipulated to encompass official duties. Recognizing there may be valid protection orders

¹⁴ Armed Forces Domestic Security Act of 2002, 148 CONG. REC. H7,917-20 (2002) (statement of Rep. John M. McHugh, Member, Subcomm. on Military Personnel, House Comm. on Armed Serv.).

The Members have heard about the loophole. I happen to have been here in 1994 when I think the Congress took a very necessary, very bold, and a very appropriate step in passage of the Violence Against Women Act; but it did, as the speaker heard, create I think an unintentional, certainly a very unnecessary and very unworthy loophole, that of enforcement of civilian protection orders as issued outside the bases and their applicability on those military installations.

Id. at 7,919.

¹⁵ See CBS WORLDWIDE INC., *4 Wives Slain In 6 Weeks At Fort Bragg*, CBS NEWS, July 26, 2002, <http://www.cbsnews.com/stories/2002/07/31/national/main517033.shtml>. Although these murders were the impetus for the Armed Forces Domestic Security Act (AFDSA) all four cases the spouses were murdered at their off-post residences. *Id.* See also Heintz, *supra* note 3, at 277 (citing Ron Martz, *Lawmakers Study Abuse in Military; Fatal Violence Spurs Search for Solutions*, ATL. J.-CONST., Oct. 1, 2002, at A3).

¹⁶ Pub. L. No. 107-311, § 2, 116 Stat. 2455 (2002); 10 U.S.C. § 1561a.

¹⁷ 10 U.S.C. § 1561a(a); see also 10 U.S.C. § 1561a(b) (defining that a civilian order of protection is the same as the term “protection order” under 18 U.S.C. § 2266(5)).

¹⁸ See, e.g., National Center on Domestic and Sexual Violence (NCDV), *The Military’s Response to Domestic and Sexual Violence*, http://www.ncdsv.org/ncd_militaryresponse.html (last visited 22 May 2007) (providing an overview of Department of Defense (DoD) domestic violence and sexual assault programs with links to policies, initiatives, and statistics).

¹⁹ Memorandum, The Under Secretary of Defense, U.S. Dep’t of Defense, for Secretaries of the Military Departments, subject: Implementation of the Armed Forces Domestic Security Act (10 Nov. 2003).

²⁰ *Id.* The memorandum directs the Secretaries of the Military Departments to issue regulations that state:

[P]ersons subject to the [Uniform Code of Military Justice (UCMJ)] shall comply with civilian and military orders of protection and that failure to comply with either may be prosecuted under Article 92, UCMJ A DoD civilian employee who violates a civilian order of protection while on a military installation is subject to appropriate administrative or disciplinary action

Id. Army regulations require unit commanders to “[p]rovide written military no-contact orders, as appropriate; counsel [S]oldiers; and take other actions, as appropriate, regarding compliance with civilian orders of protection for victims of spouse abuse.” AR 608-18, *supra* note 13, para. 1-8b(8).

²¹ U.S. DEP’T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION para. 2-3a (19 Sept. 1994) [hereinafter AR 27-40].

²² Recognizing the uniqueness of military life, courts may try to balance the need for protection with the need for military personnel to perform military duties. The result may be vague and confusing orders which commanders interpret at their own peril. See, e.g., *Phelps v. Sabo* J-0205-CV-002003-0920 (Ariz. Justice Ct., 29 July 2003). An actual example of such dangerously vague terms appears in the Injunction Against Harassment issued prior to the in-court hearing. *Id.* (ordering the commander not to go near the Plaintiff’s residence “except for military purposes.”)

²³ Violating TROs could lead to arrest and prosecution for obstruction of justice because only the court can modify the order and nothing the plaintiff does can stop, change, or rescind the TRO. See, e.g., *Phelps*, J-0205-CV-002003-0920 (appearing in the Notice portion of the Injunction Against Harassment).

²⁴ Plaintiffs seeking TROs are instructed to contact law enforcement personnel, not the court, if the order is violated. Consequently, the police are likely to arrest first and let the court sort out the matter. *Id.* (appearing in the Orders portion of the Injunction Against Harassment).

²⁵ As traditional marital relationships changed in society, domestic violence state laws were revised to encompass a wider range of recognized relationships. See, e.g., N.C. GEN. STAT. § 50C-6 (LEXIS 2007) (Temporary Civil No-Contact Order). This order can apply to an acquaintance, as opposed to the personal relationship required for the domestic violence orders, and prohibits contact with the requester or entry into the requester’s place of employment. See also *WomensLaw.org*, <http://www.womenslaw.org> (last visited 22 May 2007) (providing state-by-state legal information and resources for domestic violence).

²⁶ Just as societal relationships changed, technological advances had to be acknowledged to ensure the effectiveness of protection orders. See also GA. CODE ANN. § 16-5-90 (LEXIS 2007) (Stalking). A stalking protection order issues when someone—other than a relative or household member—allegedly conducts surveillance or harasses and intimidates another. *Id.* at (a)(1). Georgia recognizes stalking can occur by personal contact, or via numerous means of communication including computer or telephone. *Id.* Further, the increased frequency of stalking, once viewed as a problem solely for the rich and famous, forced states to draft appropriate anti-stalking laws. See generally United States Department of Justice, National Institute of Justice, *Domestic*

arising from actual instances of unofficial²⁷ and purely private stalking,²⁸ this note focuses solely on those orders originating from a commander's official duties.

Official Legal Representation to Quash a Protection Order

Before receiving official representation, a determination must be made that the TRO arises from actions encompassed within the individual's scope of employment.²⁹ Chapter 4 of *Army Regulation 27-40*,³⁰ provides clear and specific guidance on this point. After making the "official duty" determination, the servicing staff judge advocate (SJA) should forward the request to the Litigation Division, Office of the Judge Advocate General (LitDiv) for processing with DoJ. Simultaneously, the servicing Special Assistant U.S. Attorney³¹ should contact the local U.S. Attorney's Office to apprise it of the situation and obtain its involvement as early as possible. As a matter of policy, DoJ will defend litigation against Department of the Army (DA) employees arising from official conduct.³² Even though JAs are generally prohibited from directly contacting the main DoJ about legal proceedings,³³ "an installation SJA or legal advisor is expected to maintain a working relationship" and liaison with the local U.S. Attorney's Office.³⁴

Thorough requests for legal representation are preferred, but vigilance and a sense of urgency are more essential than completeness in making the request. Since "[i]mmediate notice is particularly important when litigation involves . . . a lawsuit against an employee in his or her individual capacity . . . [or] a motion for a temporary restraining order . . .,"³⁵ the following steps below should be implemented expeditiously:

- Any person served with a TRO in which the United States has an interest³⁶ will provide copies to their supervisor.³⁷

Violence, Stalking and Anti-Stalking Legislation, Annual Report to Congress under the Violence Against Women Act NCJ-160943 (Apr. 1996) (referencing government stalking statistics from the bulletin *The Crime of Stalking: How Big is the Problem?* and detailing history of Model Anti-Stalking Code); National Center for Victims of Crime, Stalking Resource Center, <http://www.ncvc.org/src/Main.aspx> (last visited Mar. 6, 2007) (providing links to state anti-stalking legislation).

²⁷ See, e.g., CNN.com, *Astronaut Arrested on Attempted Kidnapping Charges*, <http://www.cnn.com/2007/US/02/05/space.love/index.html> (Feb. 6, 2007, 12:11 EST) (detailing the arrest of a U.S. Navy officer on battery and attempted kidnapping charges after allegedly trying to subdue a romantic rival of a fellow Navy commander with pepper spray and abduct her from a parking lot at Orlando International Airport).

²⁸ Potentially all such personal acts may be punishable under federal law. See MCM, *supra* note 2, UCMJ art. 120a (defining stalking as two or more occasions of repeated visual or physical proximity to a person or repeated conveyance of verbal, written or implied threats; where such conduct would cause a reasonable person to fear death or bodily harm, including sexual assault, to themselves or to an immediate family member); 18 U.S.C. § 2261(a) (LEXIS 2007) (Interstate Domestic Violence) (criminalizing travel across state, tribal, or international lines to stalk someone, where the stalker has the intent to kill, injure, harass, or intimidate the victim, the victim's family members, spouse, or intimate partners, who must be placed in reasonable fear of death or serious bodily injury).

²⁹ 28 U.S.C. § 2679(d) (LEXIS 2007). See generally ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 200, DEFENSIVE FEDERAL LITIGATION 1-2 (Jan. 2001) [hereinafter JA 200] (providing general overview of representation of government defendants). See also U.S. DEP'T OF JUSTICE, U.S. ATTY MAN. § 4 (2007).

³⁰ AR 27-40, *supra* note 21, at 9-11.

³¹ *Id.* para. 1-4e(1). Army JAs and civilian attorneys appointed as Special Assistant U.S. Attorneys under 28 U.S.C. § 543 "will represent the Army's interests in either criminal or civil matters in Federal court" in specific circumstances. *Id.*

³² *Id.* paras. 1-4a, 4-2b. See also 28 C.F.R. § 50.15(a) (2007). Federal employees may be provided representation in civil or criminal proceedings when sued or charged in their official capacity, "when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General . . . determines that providing representation would otherwise be in the interest of the United States." *Id.*

³³ AR 27-40, *supra* note 21, para. 1-5a. Other than a few exceptions the rule is that, "no Army personnel will confer or correspond with DOJ concerning legal proceedings in which the Army has an interest." *Id.* Generally, only attorneys from the LitDiv are authorized to appear with the DoJ on behalf of the U.S. Army. See *id.* para. 1-6a(4). See also 28 U.S.C. § 516 (LEXIS 2007) (stating that litigation in which agencies or officers of the United States are a party, or in which the United States has an interest, are reserved to the DoJ). Moreover, the Attorney General will supervise all litigation and direct all U.S. Attorneys, Assistant U.S. Attorneys, and Special Assistants in performance of their duties. 28 U.S.C. § 519.

³⁴ AR 27-40, *supra* note 21, para. 1-5b. When there is limited time to respond to the litigation, the local SJA may ask the local U.S. Attorney's Office to seek an extension or to provide representation until formal approval is obtained. *Id.* para. 4-4a(1).

³⁵ *Id.* para. 3-3a (emphasis added).

³⁶ *Id.* para. 3-1a. Such cases include: "[s]uits for damages, injunctive relief, or other action filed against the Government or against DA personnel in their official capacity," *id.* para. 3-1(a)(1); "[s]uits . . . arising from performance of official duties by DA personnel," *id.* para. 3-1(a)(2); or "[a]ctions affecting DA operations or activities or which may require official action by DA personnel," *id.* para. 3-1(a)(3).

³⁷ *Id.* para. 3-2a.

- The supervisor will ensure the defendant receives the original TRO and will forward a copy of the TRO and “other readily available information” to the SJA or legal adviser.³⁸
- The legal adviser will telephonically notify the LitDiv of the TRO.³⁹
- The legal adviser will use express mail or overnight delivery to expedite transmission of complete copies of “all process, pleadings, and related papers.”⁴⁰
- The legal adviser will investigate the actions surrounding the TRO and obtain statements if possible.⁴¹
- The legal adviser will advise individual defendants of the rights and conditions of representation,⁴² and that if they desire representation, they should make a written request.⁴³
- The legal adviser will assist the supervisor in completing a scope of employment declaration for the defendant.⁴⁴
- The legal adviser will prepare a memorandum detailing their conclusions and a recommendation concerning representation to assist the LitDiv in making a proper representation determination.⁴⁵

Like preparing a litigation report,⁴⁶ the legal adviser’s investigation and memorandum will clarify the important facts.⁴⁷ The DoJ will not represent federal employees if: (1) “the conduct . . . does not reasonably appear to have been performed within the scope of [their] employment; or (2) “[i]t is otherwise determined . . . that it is not in the interest of the United States to provide representation to the employee.”⁴⁸ The types of information that should be provided to assist in the “scope” or “interests” determination are not always obvious.⁴⁹ Therefore, legal advisers should focus on the “scope” issue because sometimes it is not “clear-cut; [and] the perimeters of official duties are often difficult to determine.”⁵⁰

The Chief, LitDiv, after reviewing the report and evidence, will forward a recommendation to the appropriate U.S. Attorney or the DoJ.⁵¹ The default position is that the employee was acting within the scope of employment, but the DoJ uses the following criteria⁵² to make representation decisions:

³⁸ *Id.* para. 3-2b.

³⁹ *Id.* para. 3-3a (stating proper notice includes: “(1) Title or style of the proceeding; (2) Full names and address of the parties; (3) Tribunal in which the action is filed, date filed, docket number, when and on whom service of process was made, and date by which pleading or response is required; (4) Nature of the action, amount claimed, or relief sought; and (5) Reasons for immediate action.”). *See also* 28 C.F.R. § 50.15(a)(1) (2007). “In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency.” *Id.* *See, e.g., infra* App. B (providing sample DoJ agency report for pending or threatened litigation).

⁴⁰ AR 27-40, *supra* note 21, para. 3-3b.

⁴¹ *Id.* para. 4-4(a)(2).

⁴² *Id.* para. 4-4(a)(3) (referencing 28 C.F.R. § 50.15).

⁴³ *Id.* para. 4-4(a)(4), fig. 4-1. *See infra* App. A.

⁴⁴ AR 27-40, *supra* note 21, para. 4-4(a)(4), fig. 4-2. *See infra* App. A.

⁴⁵ *Id.* para. 4-4(a)(5).

⁴⁶ *Id.* para. 3-9 (providing detailed guidance on the composition of a thorough litigation report). Analogous to the official representation request, litigation reports require a statement of facts, a memorandum of the local law, a proposed response, and compilation of exhibits and witness information. *Id.*

⁴⁷ The LitDiv has sample requests, declarations, memorandums, and recommendations on file for assistance which could be requested in advance to prepare the installation to respond to such actions. Interview with MAJ Louis Birdsong, Administrative and Civil Law Department (Admin. Law), The Judge Advocate General’s Legal Center and School (TJAGLCS), U.S. Army, in Charlottesville, Virginia (4 Jan. 2007).

⁴⁸ 28 C.F.R. § 50.15(b) (1)-(2) (2007).

⁴⁹ *See generally* JA 200, *supra* note 29, at 1-12 (noting that “[w]hat the ‘interests’ of the United States is unclear.”). The background facts must be gathered quickly because the DoJ will not represent individual employees in an otherwise valid case if the case has progressed too far. *Id.*

⁵⁰ *Id.* at 9-40, para. 9.3b. Legal advisers should begin by examining the relief sought and the characterization of the defendant’s actions. *Id.* at 9-2, para. 9.1c.

⁵¹ AR 27-40, *supra* note 21, para. 4-4b.

⁵² *See generally* 28 C.F.R. § 50.15.

1. Employee of the Federal government at the time of incident (current or former).
2. Acting within scope of office or employment at the time of the alleged incident.
3. The alleged incident is not related to any federal criminal proceeding or agency disciplinary action.
4. Representation is in the best interests of the United States.

If representation is approved but a U.S. attorney or a DoJ representative is unavailable, the DoJ may provide government personnel with private counsel at government expense;⁵³ however, this rarely occurs,⁵⁴

Requests to employ private counsel are similar to requests for official representation, except the individual defendant must acknowledge they may have to pay the costs incurred “prior to proper authorization.”⁵⁵ The regulations do not contemplate ex post facto repayment for private counsel and legal advisers should not assume the reimbursement obtained in the aforementioned case establishes any precedent.⁵⁶ Other costs associated with defeating the TRO, separate from any lawyer fees, may not be reimbursable either.⁵⁷ In any event, a federal employee seeking later reimbursement must prove they were acting in their official capacity and the representation by a private counsel would have been in the interests of the United States, as well as justify this exception “where overriding considerations of justice call for such [payment].”⁵⁸

Conclusion

It is important to raise awareness of the AFDSA’s legitimate purpose. However, that purpose should not be lessened by upset, angry, disgruntled, or deceitful Soldiers and civilian Federal employees. When someone attempts to use a TRO to retaliate, frustrate administrative and disciplinary proceedings, or to avoid mobilization or deployment, government representation should be sought from the outset.⁵⁹ Pre-command and mobilization legal training⁶⁰ is a good starting point⁶¹ to address the AFDSA and the process for requesting official legal representation. Likewise, installation legal advisers must clarify jurisdictional issues⁶² and emplace systems to properly screen TROs and determine if official representation is appropriate.⁶³ Commanders, leaders, and supervisors should be advised that they have to abide by valid orders until such

⁵³ *Id.* § 50.16(a); *see also* AR 27-40, *supra* note 21, para. 4-5. Private counsel is usually provided where there are several employee defendants, a conflict exists between the interests of the United States and a defendant, or professional ethics may preclude government representation. *See* JA 200, *supra* note 29, at 1-13 (explaining 28 C.F.R. § 50.15(a)(2) and § 50.16(a)).

⁵⁴ *Id.* § 50.16(a). Private counsel is provided subject to the availability of funds and under the criteria stated in 28 C.F.R. section 50.15. *Id.*

⁵⁵ *Id.* para. 4-5b. A defendant has no right to expect reimbursement when employing private sector counsel. *Id.* para. 4-5a.

⁵⁶ *See* 28 C.F.R. § 50.16(c)(1). The DoJ “must approve in advance any private counsel to be retained.” *Id.* In order “[t]o ensure uniformity in retention and reimbursement procedures” the DoJ Civil Division establishes these procedures to include the fee schedules. *Id.* § 50.16(b). Also, reimbursement is limited to only legal work related to official duties. *Id.* § 50.16(d)(1)-(2).

⁵⁷ *See generally* JA 200, *supra* note 29, at 10.7, para 10.3 (explaining costs are paid under authority of various provisions of Title 28 U.S. Code). *Id.*

⁵⁸ *See id.* at 10-11 (describing exceptions to costs for civil litigation and the corresponding case law, statutes and Federal Rules of Civil Procedure).

⁵⁹ As a consequence of continued mobilizations and deployments, it is possible that more Reserve component Soldiers may seek TROs alleging that repeated contacts from their alerted units constitute harassment. Especially, if the Soldier is pursuing conscientious objector status, medical disqualification, or challenging their “STOP-LOSS” status by seeking release from active duty, voluntary separation, approval of a hardship exception to mobilization. *See generally* Message, 210002Z Nov 02, Headquarters, U.S. Dep’t of Army, subject: Stop Loss-New Reserve Component (RC) Unit Stop Loss Policy.

⁶⁰ Training packet is on file with the author and is available upon request at Joshua.M.Toman@us.army.mil. Packet addresses the AFDSA and provides an overview of federal litigation and official representation; along with relevant Rules of Professional Conduct. This multifunctional packet can be used as part of pre-command, leadership development, and ethics training programs, or alternatively as part of the Family Advocacy Program.

⁶¹ Active duty and reserve component officers attending the Judge Advocate Officer Basic Course and Graduate Course, at TJAGLCS, U.S. Army, Charlottesville, Virginia, have only recently begun to receive instruction on the AFDSA. The Senior Officer Legal Orientation Course and the General Officers Legal Orientation Course have also recently incorporated this instruction. Interview with MAJ John Frost, Admin. Law, TJAGLCS, U.S. Army, in Charlottesville, Virginia (6 Mar. 2007); interview with MAJ Louis Birdsong, Admin. Law, TJAGLCS, U.S. Army, in Charlottesville, Virginia (27 Feb. 2007).

⁶² *See* Law Enforcement Reporting: Establishing domestic violence Memoranda of Understanding, 32 C.F.R. § 635.29(a) (2007) (emphasizing that coordination between military and local civilian law enforcement is essential and directing Provost Marshals to establish formal Memorandums of Understanding (MOU) with their civilian counterparts to clarify jurisdictional issues). Subsection (b) specifically directs that these MOUs should address procedures, “when a civilian order of protection is violated on military property (see 10 U.S.C. 1561a).” *Id.* § 635.29(b)(2).

time as the TRO is quashed or modified by the court. Moreover, they may have to attend a court hearing to quash the TRO even if the order expires shortly.⁶⁴ At the unit level, brigade combat team JAs must educate command teams to reflexively bring any such orders to their legal representative immediately. Potentially, if the commander violates the TRO by ignoring or incorrectly interpreting it, they may be led away in handcuffs. If JAs know where to find the process for requesting official legal representation when needed, and how to organize that knowledge into a plan of action, JAs will keep their commanders in the field and out of the courtroom.⁶⁵

⁶³ A likely provision for the MOU would be official civilian notification to the Administrative Law or Military Justice sections upon the issuance of a protection order. *See* 32 C.F.R. § 635.29(b)(5) (stating MOUs should address the “[p]rocedures for transmitting civilian protection orders (CPOs) issued by civilian courts or magistrates involving active duty service members from local law enforcement agencies to the installation law enforcement office.”). *See also* Memorandum, The Under Secretary of Defense, U.S. Dep’t of Defense, for Secretaries of the Military Departments, subject: Establishing Domestic Violence Memoranda of Understanding Between Military and Local Civilian Officials (29 Jan. 2004) (providing sample MOU).

⁶⁴ Staff judge advocates may also encourage their Victim Witness Liaisons (VWL) to educate local courts about the military protective order (MPO) and its use, applicability, and limitations. *See* U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE ch. 18 (16 Nov. 2005) (stating that the VWL program is primarily a military justice function); U.S. Department of Defense, DD Form 2873, Military Protective Order (July 2004). The specific parameters of the MPO may provide more protection for victims, thereby causing courts to refrain from ex parte hearings in cases that may involve official duties. *See* AR 608-18, *supra* note 13, paras. 3-21, 3-22.

⁶⁵ *See* Litigation Division Mission Statement, <https://jagcnet.army.mil> (follow “US Army Legal Services Agency (USALSA)” hyperlink; then follow “Litigation Division” hyperlink). “To provide world-class, non-bureaucratic representation of the Army in all civil litigation; to creatively dispose of litigation at the earliest possible stage freeing the Army for warfighting; and to live Army values and do what is right.” *Id.*

Appendix A

Sample Requests for Legal Representation

REQUEST FOR REPRESENTATION⁶⁶

I request that the Attorney General of the United States, or his or her agent, designate counsel to defend me in my official and individual capacities in the case of *John Doe v. Private Paul Jones*, now pending in the U.S. District Court for the Eastern District of North Carolina. I have read the complaint filed in this case and I declare that all my actions were performed in my official capacity, within the scope of my official duties, and in a good faith belief that my actions conformed to the law. I am not aware of any pending related criminal investigation.

I understand the following: if my request for representation is approved, I will be represented by a U.S. Department of Justice attorney; that the United States is not required to pay any final adverse money judgment rendered against me personally, although I can request indemnification; that I am entitled to retain private counsel at my own expense; and, that the Army expresses no opinion whether I should or should not retain private counsel.

I declare under penalty of perjury that the foregoing is true and correct. (See 28 USC § 1746.)

Executed on: *(Date)*

(Signature)
PAUL JONES
PRIVATE, U.S. ARMY

Figure 4-1. Format for a request for representation using an unsworn declaration under penalty of perjury executed within the United States.

⁶⁶ AR 27-40, *supra* note 21, at fig. 4-1.

DECLARATION⁶⁷

I am currently the Commander of HHC, 6th Armored Division, Bad Vilbel, Germany. I have read the allegations concerning Private Paul Jones in the complaint of *John Doe v. Private Paul Jones*, now pending in the U.S. District Court of the Eastern District of North Carolina.

At all times relevant to the complaint, I was Private Jones' company commander. His actions relevant to this case were performed within the scope of his official duties as Assistant Charge of Quarters, Company B, 4th Battalion, 325th Parachute Infantry Regiment, Fort Bragg, North Carolina.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. (28 USC § 1746.)

Executed on: *(Date)*

(Signature)
John Smith
Captain, Infantry

Figure 4-2. Format for scope of employment statement using an unsworn declaration under penalty of perjury executed outside the United States.

REQUEST FOR REPRESENTATION⁶⁸

I am the President of the XYZ Corporation. I request the Attorney General of the United States designate counsel to defend me and my company in *Doe v. XYZ, Inc.*, now pending in the U.S. District Court for the Eastern District of North Carolina.

I understand that the assumption by the Attorney General of the defense of this case does not alter or increase the obligations of the United States under U.S. Contract No. WP-70-660415.

I further agree that such representation will not be construed as waiver or estoppel to assert any rights which any interested party may have under said contract.

Executed on: *(Date)*

(Signature)
D.D. TANGO
PRESIDENT, XYZ, INC.

Figure 4-3. Format for contractor request for representation

⁶⁷ *Id.* at fig. 4-2.

⁶⁸ *Id.* at fig. 4-3.

Appendix B

DoJ Legal Representation Request Form⁶⁹

PENDING OR THREATENED LITIGATION

AGENCY/COMPONENT: _____

AGENCY'S MATERIALITY LEVEL FOR REPORTING: _____

(This is your agency threshold for materiality)

1. **Case Name.** *(Include Case Citation, Case Number, and other names by which the case or group of cases is commonly known.)*
2. **Nature of Matter.** *(Include a description of the case or cases and amount claimed, if specified.)*
3. **Progress of the Case to Date.**
4. **The Government's Response or Planned Response.** *(For example, to contest the case vigorously or to seek an out-of-court settlement.)*
5. **An Evaluation of the likelihood of Unfavorable Outcome.** *(Choose one.)*

_____ PROBABLE (An unfavorable outcome is likely to occur.)

_____ REASONABLY POSSIBLE (The chance of an unfavorable outcome is less than probable but more than remote.)

_____ REMOTE (The chance of an unfavorable outcome is slight.)

6. **An Estimate of the Amount or Range of Potential Loss.** *(For probable and reasonably possible complete one.)*

Estimated amount of potential loss: \$ _____
Estimated range of potential loss: \$ _____ - \$ _____
Estimated amount or range of potential loss is unknown: _____

7. **The Name and Phone Number of the Agency and DOJ Attorneys Handling the Case.** *(Also include any outside legal counsel/other lawyers representing or advising the government in the matter.)*
8. **The Sequence Number.** *(Based on the total number of Pending or Threatened cases your agency/component is submitting. e.g. Number ____ of ____.)*
(#) (total)

Attorney-Client Agency Work Product Privilege

⁶⁹ Department of Justice, Civil Division Forms, <http://www.usdoj.gov/civil/forms/forms.htm> (last visited 24 May 2007) (follow hyperlink to "Form for Pending or Threatened Litigation").