

Colonel Linda Strite Murnane

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February 24, 2004

The Honorable Robinson O. Everett  
P.O. Box 586  
Durham, NC 27702

Dear Judge Everett

It was a pleasure to see you at the mid-year meeting of the American Bar Association.

During our brief visit at the San Antonio airport, as we were departing, you asked me to send you a copy of my essay submitted to the Legal Assistance for Military Personnel (LAMP) contest. I have enclosed the essay, titled "The Prickly Problem of Privatization, Legal Assistance Fraught with Peril". It netted first place honors in this year's contest.

You mentioned that you might be interested in having me discuss this issue at the annual Legal Assistance symposium you sponsor. I would be happy to further explore that opportunity at your convenience.

Thank you again for your interest in the essay and I hope to see you again soon.

Sincerely,



LINDA STRITE MURNANE  
Chief Circuit Military Judge, Eastern Circuit

Enclosure: Murnane 2003 LAMP Essay

LAMPOL

THE PRICKLY PROBLEM OF PRIVATIZATION  
LEGAL ASSISTANCE FRAUGHT WITH PERIL

It's early Monday morning. You are assigned to provide legal assistance this morning. The first client in the door tells you he has a landlord-tenant issue. You are off to a roaring start.

Soldier Smith tells you that the house he is leasing was apparently constructed with substandard materials. Yesterday, his six-year-old son was in the laundry room of their leased house when the cabinetry fell off the wall, injuring his son seriously. He is furious, and wants someone to pay, and he wants your advice on what he should do.

You launch into a summary of the rights Smith has against his property owner. You recite the warranty of habitability. You tell him about products liability. You discuss the concept of special damages, pain and suffering, and ask him how long his son will be hospitalized. It is then that Smith first tells you, "You know, what really upsets me is that I wanted to reside off-post when I got here, but they made me take one of those privatized government houses that were just built on the installation. I have been forced to give up all of my housing allowance, and the cabinets don't even stay on the wall."

As you reach for the Extra Strength Excedrin, you realize that the problem is now larger than just having to tell Smith that he will have to hire a civilian attorney to get the lawsuit filed. In fact, maybe now you can't even tell him that. You remember something about your service's General Counsel having given guidance about advice given free to the contractor who built those privatized houses.

The greatest challenge facing legal assistance today is the blurring of the once clear

distinctions that enabled the legal assistance officer to know from the time of client intake that the client in the waiting room was a conflict-free client, or to at least have sufficient information to make that determination at intake. Gone, perhaps forever, are the days when a general receptionist under the civil service classification system can effectively do the triage or screening of legal assistance clients. As the Armed Forces have turned to novel and unique means to privatize services and property acquisition, the legal conflict issues for legal assistance attorneys have become more and more complex.

Nowhere is this problem more clearly demonstrated than in the area of creditors rights, identity theft, and credit card fraud.

Once a bread and butter topic for legal assistance, the attorney today who takes in a client who says he or she has a creditors rights problem, or an issue under the *Fair Debt Collection Practices Act* (15 U.S.C. §1692, et. seq.) , or *Fair Credit Reporting Act* (15 U.S.C.S. §1681, et. seq.), or an issue pertaining to identity theft, had best ask first to see the credit card before dispensing a single word of advice.

The reason for such caution, of course, lies in the Government Travel Card or Government Purchase Card program.

Following enactment of the *Travel and Transportation Reform Act of 1998* (P.L. 105-264, Oct. 19, 1998, 5 U.S.C. §5701), the Government Services Agency issued regulations which outlined the procedures implementing the mandatory use of credit cards for services once provided through military accounting and finance offices. The program has been incredibly unpopular with military personnel and civil servants alike, and has

suffered from delinquency rates well above those generally found in the public sector. However, the real concern from a legal assistance officer's perspective is the perilous determination of the question of conflict of interest. When can the legal assistance officer provide assistance to a person using the government cards pursuant to the "mandatory use" order, and when does such assistance exceed the authorized bounds. It is even more difficult for the legal assistance officer to determine if the military agency has also been advising the creditor with respect to a particular question pertaining to the government card program, thereby creating a conflict of interest.

By way of example, if Seaman Jones loses the government travel card, and receives a bill for purchases he or she did not make, can the legal assistance officer advise Seaman Jones? At the Department of Defense level, is the Defense Finance and Accounting Service attempting to offset the disputed debt against Seaman Jones' pay? Is the base legal office advising the agency point of contact as well on the procedures to obtain garnishment of Seaman Jones' wages to collect the government card debt? As is the case in many such cases, is the criminal law or military justice section advising the Office of Special Investigations or Criminal Investigative Service on a potential criminal case against Seaman Jones for dishonorable failure to pay the credit card and possibly misuse of the government card?

What about Seaman Jones' rights? Isn't he or she a crime victim, and therefore entitled to advice and assistance under the *Victim and Witness Assistance Act*? (*Victim and Witness Protection Act of 1982, 18 U.S.C. § 1503, et seq.*; *Victims of Crime Act of 1984, 42 U.S.C. §§10601 – 10603*; *Victims' Rights and Restitution Act of 1990, 42 U.S.C.*

§§10606-10607)

The complexity of the issues surrounding the privatization of the cash advance system using the government travel card has led some services to issue letters attempting to delineate when a service member is entitled to legal assistance concerning the government credit card, and when they are not. (See *TJAG Special Subject Letter 2002-01: Providing Legal Assistance in Bank of America Travel Card Debt Cases, United States Air Force, 28 January 2002*). A careful reading of these policy letters demonstrates the difficulty in resolving the conflict of interest questions which arise from the use of these mandatory cards.

Is there a solution to this dilemma? If so, it certainly cannot be found in turning back the hands of time to when housing was housing, leases were leases, and pay advances came from Finance Offices. Have we abandoned our airmen, soldiers, sailors and marines in the area of credit card theft, fraud and fair debt collection practices when they need us most? Is the military member really expected to pay a civilian lawyer to advise them on how to pursue a fair debt collection practices act remedy against the government travel card provider? Is the military member entitled to file a claim against the government if he or she prevails in such a claim for damage to his or her credit rating? Is the military member entitled to be reimbursed for civilian counsel fees and costs if they prevail against the government's contractor for the credit card?

Is the military member now required to hire civilian counsel to address issues pertaining to landlord tenant disputes if they reside in privatized housing on the base or

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post? Does that make legal sense if the same service member would be entitled to free advice under legal assistance if the member lived in a leased house on the local economy?

## **A SOLUTION**

The resolution clearly does not lie in turning back the hands of time and returning to the costly and inefficient use of pay advances or the abandonment of housing privatization, or other innovations currently being used by the military services. These are important innovations which are providing our military forces with more efficient and less costly means of providing for the defense of the nation. Dollars saved by these efficiencies can be turned around and used for weapons systems, training and personnel programs which are critical for our high-technology armed forces.

The resolution lies in rediscovering who is the military client – not just the legal assistance client, but the real client who can best be served by lawyers employed by the Department of Defense.

In deciding who is the “real client”, it ought to be a significant consideration that the Department of Defense includes its free legal services as part of its “total compensation package” when it issues the annual “Personal Statement of Military Compensation.” This document, mailed to each active duty member early in the calendar year, lists the value of salary and benefits provided to the service member. Designed in part as a service retention tool, the annual statements include free legal counseling and assistance as a compensable benefit which the service member is encouraged to include in determining their overall compensation from the services.

Corporations endeavoring to profit from business with the U.S. government aren't, or ought not be, entitled to free legal services from the armed forces. If the contractors require legal advice, it is they who should obtain the services of private sector counsel, rather than the airmen, soldiers, sailors and marines whose deployments, operations tempo and income levels place them in the most vulnerable position. Some service members would be unable to obtain civilian counsel, as the experts on U.S. law outside of the Department of Defense are few and far between in places like Kuwait, Saudi Arabia, Iraq, and other deployed locations.

Is it likely that the military service branches will stop providing free legal services to contractors? That depends on how badly the services feel they want or need to privatize the process. However, if the availability of legal assistance advice is made a statutory authorization for service members, then once and for all, the entitlement of the service member to the legal assistance advice of Department of Defense lawyers will be shielded from its present state of erosion.

Congress has enacted many laws dealing with provisions of benefits, most recently Tri-Care (10 U.S.C. §1071, et. seq., 38 U.S.C. §8111). The time has come to codify the legal services plan for service members and to clearly prohibit legal services at taxpayer expense to the private entities and corporations who are seeking to engage in business with the Department of Defense.

If privatization is really good for the services, and good for private business, then the free legal services of military acquisitions and procurement attorneys to advise agency points of contact on collections practices against the service member for the benefit of the

contractor should not be required.

Today, a service member can expect to spend at least one quarter of each year deployed, usually to a high threat area, and possibly to a war zone. They do not have the luxury of even making telephone contact with civilian counsel from these locations. The use of the expeditionary military for warfighting mandates the creation of a permanent, statutory entitlement to legal assistance as a critical component of readiness in the armed forces. The warfighter whose credit card has been stolen or whose family's issues with privatized housing are unresolved when he or she leaves home for 90 days or a year, is not the most effective warfighter.

It is time to recognize the connection between legal readiness and military readiness, and to, once and for all, send the private sector competitors back to their private sector lawyers.

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