

SILENT PARTNER

LAWYER RESOURCES AND REFERRAL

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about legal assistance duties. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

The legal assistance attorney (LAA) is, in reality, a general practitioner. Knowledge of such substantive areas as divorce, landlord-tenant law, immigration and naturalization, consumer protection and bankruptcy is vital in the competent counseling of each day's clients. But lawyer referral and knowledge of resources are often covered too briefly in the training that LAA's receive.

Overview of Resources

Referral to an attorney should not be the first step for the LAA who cannot handle the case. There are several other steps in the process of counseling and advising the client which come first. Even AR 27-3, "The Army Legal Assistance Program," directs that "[c]lients should be assisted whenever possible without referral." AR 27-3, para. 3-7h(1). You might, for example, examine whether the client has a "real case" or not. You might see if research or negotiation with opposing counsel can solve the problem. And if none of these work, you might investigate other possible avenues of help, such as court-sponsored mediation, victim advocate programs, legal aid, public defender or the child support enforcement agency.

In advising legal assistance clients, keep in mind that many of the people who visit your office are claim-rich but cash-poor. They may have "a great case," but these cases do not try themselves or settle without help. And often the one who'll do the trying or the settling is a civilian lawyer.

When there is a medical malpractice claim involving wrongful death of a family member, your client will have no problem in finding civilian counsel to take the case. But how about a consumer protection problem? A retaliatory eviction? A custody trial? Sometimes the legal assistance client has "too much case for his pocketbook." That's where the counsel, judgment and advice of the LAA are needed most. Is it a real case? Is it a meritorious one that a lawyer will take? Are there recoverable damages or a recognized remedy? Should we wait for a better opportunity than right now?

Is It a Real Problem?

Let's look at the first question—"Is it a real problem?" Assume that dad is trying to get visitation with his children. He's in Germany, they're in Idaho. And mom adamantly refuses to allow the visitation to take place -- "no way, nohow!" What should you do?

Some might say, "Let's call the judge!" This would be a grave mistake for at least two reasons. First of all, the LAA is probably not licensed in Idaho and this communication might be construed as an appearance on behalf of the soldier. Second, this one-sided communication with the judge is *ex parte* and this is forbidden by all state codes of ethics except under extreme circumstances, such as emergencies involving physical abuse or parental kidnapping.

The first question by an astute LAA might be, "What financial arrangements have you made for visitation?" If the answer comes out that no arrangements have been made and that the client is broke, then a different course of action might reveal itself. This is not a "real case." This is not a true problem where the LAA's assistance can produce any results, since dad cannot afford the visitation even if it were offered to him on a silver platter! Given these facts, the LAA should probably invite the soldier to wait for a better opportunity – when he has the money to arrange visitation – before starting a fight with his ex-wife.

The point to be made here is: Sort out the frivolous cases and move on to the meritorious ones. No legal assistance regulation requires you to take on every case that walks in the door. In fact, you have a professional obligation not to press frivolous matters or support spurious claims. Use your judgment and common sense. Get rid of worthless claims and futile issues by giving the client honest advice that the case lacks merit.

The Research Option

Some cases can be resolved short of representation and court appearances by conducting some basic research. If you can do the research to show the client that there's little likelihood that he will prevail on the merits because statutory or decisional law is against him, you will probably save him a pile of money and a lot of frustration.

For example, suppose he wants to find out if his ex-wife's moving far away can be brought to the Idaho court's attention so that he can be compensated for his visitation travel. If you can do some research into Idaho law to show him that such a factor cannot be used by the judge in charging mom the costs of the airline tickets, then you've saved his hiring a lawyer and going to court... just to find out that he cannot win on this issue. [Note: See the "Visitation Travel Costs" SILENT PARTNER for an extended discussion of this problem]

Suppose that your client wants to get a reduction in child support. She says that she's paying \$200 a month under a separation agreement, which was incorporated into the Ohio divorce decree, but that in the five years since the divorce she's incurred a lot of debts and she is no longer drawing "jump pay." Can she apply to the court for a reduction? More importantly, can she hope to get one? Here is a case where a basic input of time into research – go to www.supportguidelines.com – can result in lots of saved money for the client. It may be that, when you look at the Ohio guidelines, you'll find that (even without jump pay), she should be paying \$500 a month for the kids and that the court doesn't take into account the debts of the noncustodial parent. If this is the case, your advice can avoid an unnecessary court fight that would probably lead to an *increase in child support*.

Let's try a final example: Your client's plea is, "My ex-wife's remarried. And her new husband makes \$100,000 a year. Can't I use that to get a reduction in child support?" With some basic research in the applicable state law, you can find out whether the new husband's contributions to household expenses are – or are not – a basis for the court's modifying child support. If the grounds are non-existent, then your advice will save him the time and money involved in going to court. If the facts *are* grounds for modification of child support, then you can go ahead and refer him to an attorney.

There are lots of great websites where you can do this research. For example, at www.divorcesource.com/info/divorcelaws/states.html you can find a summary of the divorce laws of all fifty states and the District of Columbia compiled from the most recent statutes and case updates. The information provided includes residency requirements, where to file, grounds for divorce, title of divorce action, names to be used for the parties (petitioner, plaintiff, etc.), divorce procedures, mediation or counseling requirements, alimony, custody and child support. In addition, the ABA Family Law Section has posted several charts on the Internet that cover alimony, custody criteria, child support guidelines, grounds for divorce and residency requirements, property division and third-party visitation. Just go to www.abanet.org/familylaw/tables.html.

Negotiations

Another approach might be to contact the opposing attorney and start negotiating with him or her on how to resolve the dispute. This is recommended in AR 27-3, para. 3-7*d* as a useful option for legal assistance attorneys. If you know who the other attorney is (in the case of a lawsuit, just look at the pleadings), then you can pick up the phone and see if there's an amicable way to settle the matter. If there is no lawsuit, why not ask the other party who his or her attorney is?

Negotiations can open up the strengths and weaknesses of the other side. They might "tip their hand" and let you know the cards they're holding. And negotiating can also let you know whether the

other side wants to settle or is only interested in trial.

Pro Se Appearance

Can your client “go it alone?” Sometimes this is a very cost-effective way of participating in a hearing. Is your client involved in an uncontested divorce with no support, custody or property issues at stake? What about a case involving modification of visitation? Or a contempt of court case involving child support or alimony where the defense is “a pay problem” that’s verifiable? These are situations where the client’s representing herself may be a reasonable alternative, and this is recognized at AR 27-3, para. 3-7f(2). When the stakes are relatively low, the issues are not complex or the outcome (in the case of uncontested divorce) is predictable, then the client can probably take the case to court herself. The client may need some coaching in order to understand what happens in a courtroom, how to proceed or defend, what documents to bring, and so on. If your client needs to take leave to appear in court because it is some distance away, see if you can arrange a peremptory (or priority) setting of the hearing so that it will *have to be reached*.

Can your client do it by herself? That’s a good question. Although many cases do not require the assistance of a lawyer, there’s a limit to what a non-lawyer can do. Don’t recommend *pro se* representation when it’s a complex case. Custody cases, fair trade practices issues and the like are not for the non-lawyer. This would be a lot like “do-it-yourself brain surgery.” There’s no law against it, but it would be foolish to try without professional help.

Other Representation or Assistance

There are many situations involving LAA’s where the client needs help but it’s not necessary for a lawyer to be that helper. Consider the following examples:

- ◆ Your client was struck by her soldier-husband. Does she need the help of an LAA? No – she needs to talk with the company commander so that he can prefer charges under the UCMJ. Suppose your client’s car was damaged by a military vehicle. A case for the LAA? Definitely not – this needs to be handled by the claims office. Suppose your client was served with a subpoena to testify about her duties as a nurse in a military medical malpractice case? This belongs in the administrative law division of the staff judge advocate’s office. In each of these cases, another division of the SJA office will be handling the case. See AR 27-3, para. 3-7h(1), (3) regarding referral to other military legal offices.
- ◆ Your client wants help with a motion to reduce the child support she’s paying to dad, the custodial parent, who is in another state. Under UIFSA, the Uniform Interstate Family Support Act, the child support enforcement agency must give the mother assistance. This also applies when dad wants help in establishing (or challenging) paternity.
- ◆ A civilian neighbor assaulted your client. Now she has to go to court to be a witness and she wants you to go with her. Why not see if there is a victim advocate or witness coordination program at the local court that can assist her?
- ◆ Your client is involved in a custody battle, and he knows that it’s going to cost him a bundle to fight mom in court. Check with the court to see if there is voluntary or mandatory mediation of custody disputes. Mediation is a “method of settling disputes outside a court setting by using a neutral third party to act as a link between the parties” that is recognized and recommended by AR 27-3, para. 3-7j. “Divorce negotiations, contract negotiations, and litigation can seem to go on forever,” writes Pat Estess in the January/February 2000 issue of *Family Money* magazine. “Sometimes, dueling attorneys spark more fireworks (and billable hours) than a divorcing couple do. A mediator could help a couple reach a settlement that the attorneys would need only to review.”

- ◆ Your client doesn't know how to file a petition for custody. See if there is a "friend of the court" office that will help her. Or perhaps the people in the clerk's office can be of assistance. "I have found some personnel who work in the court clerk's office are also helpful and can get folks steered on the right direction," says Tony Tempesta, the Legal Assistance Chief in Vicenza, Italy. "They're hit-or-miss, though. For example, in Virginia the personnel in Fairfax County bend over backward to help, while those in Prince William County are the proverbial Grinches."
- ◆ Your client needs assistance in a theft charge that was taken out by a neighbor. Is there a public defender available? How about assigned criminal defense counsel?
- ◆ Your client needs to sue the landlord for wrongful withholding of her property when he had her evicted. Why not check to see if there is a volunteer lawyer program available through the local bar association? Or if the legal aid organization can provide a lawyer or give a referral? Don't be afraid to ask questions. The only stupid question is the one you didn't ask.

The Importance of Lawyer Referral

Lawyer referral is a primary function of the LAA. Members of the civilian bar across the nation receive thousands of client referrals every day from military legal assistance offices. Every branch of military service has a provision in its legal assistance regulation regarding lawyer referral, and every installation providing legal assistance services must also provide lawyer referral for clients. At most military legal offices, lawyer referral is big business.

It is also good business. Everyone benefits when the LAA properly and competently refers clients to civilian counsel. The LAA gains an ally who can proceed to court, if necessary, to assert or defend the rights of the client. The civilian attorney receives a new source of business and a fresh case for representation, counseling, and assistance. Finally and most important, the client gains an advocate, in trial or negotiation, to handle matters that are outside the mandate of the LAA or beyond his level of skill and expertise.

Problems and Pitfalls

A broad overview of legal assistance offices reveals that -- most of the time -- lawyer referral is handled competently, courteously, and professionally. But major problems are occasionally present. These must be identified and avoided at every opportunity by the alert staff judge advocate or chief of legal assistance. Here are some typical problems encountered:

- Appearance of favoritism. "I think you need a civilian attorney, Mrs. Gray. I recommend you go see Bill Black, a lawyer downtown who's one of our assigned Reservists here at Fort Swampy. I always refer divorce cases to him."
- Insufficient follow-through. "You need a civilian lawyer to handle this interstate child-snatching case, Mrs. White. I can't do anything further for you. Lawyer referral? Sure we have a lawyer referral system here in the office -- just call this toll-free number to the bar association and they'll give the names of some lawyers who can help you. I wish I could help more, but there's nothing further to do when we make a referral out of this office."
- Lack of background and experience. "I sure wish I could name some lawyers for you that take bankruptcy cases, Sergeant Jones, but I've only been stationed here a year. I really don't know any civilian lawyers. I haven't been to any of the local bar association meetings yet."
- Lack of a system at all. "Well, Sergeant Brown, it looks like you need a lawyer from downtown to help you fight this eviction notice. Who ya gonna call? No, we can't give out specific names here -- might

look bad, you know. However, there's a telephone directory over at the front desk if you want to look at the Yellow Pages."

Good lawyer referral avoids these mistakes. It is professionally done with courtesy and concern. It is the province of the LAA who needs to engage an ally, a co-counsel, to assist a client--not to get rid of a client that can't be helped in the JAG office. It is, in short, lawyer referral with a heart.

Let's Talk Money

When referring a client to a private attorney who may charge for her services, you should have a frank discussion with the client about how lawyers set fees. The fee can be set in a number of ways. The major types of fees are flat rates, contingency fees and hourly billing.

Lawyers may use a flat fee in handling certain civil and criminal cases where the work involved is usually straightforward, predictable and routine. Thus many lawyers use a set fee in uncontested divorces, simple wills, traffic tickets and misdemeanors, adoptions and name changes. Court costs (filing fees, witness fees and sheriff's costs) are usually not included in the flat fee. A flat fee is one, which is paid in advance (ordinarily) and does not vary depending on the amount of time or work involved. No refund is due if the work takes less time than expected and no additional charge is made if the case is longer or more complex than usual.

A contingency fee (or contingent fee or percentage) is one which is paid by the client only if the lawyer is successful. It is paid out of the sum of money that is collected by the lawyer and thus is available only in civil lawsuits which involve suing for a sum of money, such as auto accident cases and malpractice claims.

A typical fee charged by a lawyer might be one figure (25-33%) if the case is settled without trial and another (33-40%) if it is necessary to go to court. On the other hand, some lawyers charge a single percentage regardless of whether trial is necessary or not. Since the lawyer collects no fee if the case is lost, you will usually need to have a case with clear liability, substantial damages and a "deep pocket" before a lawyer will agree to a contingency fee in handling the case.

An hourly rate is most common when the client's work will be substantial but it is difficult to estimate how much time it will take. Thus, for example, a lawyer might charge on an hourly rate for a contested custody or contract case, or for the preparation of a family trust document. It is fairly common for the lawyer to require a retainer to be paid before starting on the case. This amounts to a deposit or downpayment to make sure that the client is serious about the case and is financially prepared to cover the costs that may be incurred. The size of the retainer and whether any part of it is refundable will vary from case to case and lawyer to lawyer.

Attorney's Fees Awards

The court will sometimes award attorney's fees. Below are some general examples of situations when this might occur. Remember that these rules vary from state to state.

- When the attorney acts as a trustee or agent for the court to manage money, property or other assets, the court can usually grant the lawyer a fee to be paid out of the assets managed. Thus, a lawyer who acts as the executor or administrator of an estate, or who is the trustee for the bank in a foreclosure sale, can ask the court to award him or her a fee based on the price obtained in the foreclosure sale or the value of the debts paid and the personal property in the estate.
- In certain family law cases, the court may order one party to pay some or all of the other's legal expenses. The court can make such an award in cases involving alimony, child support, custody and paternity, by way of example. It is important to remember, however, that the award of attorney's fees in such cases is not mandatory or automatic. It depends on a variety of factors, such as good faith, need, lack of adequate support, and so on. The courts see these awards of attorney's fees as a way to pay back or reimburse people for attorney's fees already paid or presently due. They are seldom given as punishment. It is very difficult to retain an attorney from the outset based on the promise or

hope of court-awarded attorney's fees at a later date. This is especially true because many times a person will not obey the court's order to pay the other party's attorney fee and so *further court work* may be necessary.

- In some cases, a contract provides for payment of attorney's fees by one who breaks the contract. In such a case, the court will enforce the contract (if it is valid) and can award attorney's fees to the winning party from the breaching party if such a clause was in the contract.
- A final example of court-awarded attorney's fees is the "nuisance lawsuit" -- one that has no basis or justification. If the judge finds that a lawsuit is frivolous, groundless and without justification, an award of attorney's fees may be made by some state courts against the person bringing the suit. The same is true if it is a defense, counterclaim or answer that is frivolous.

Free Help

Don't expect too many attorneys to give your client a "free initial consultation." Outside the area of personal injury work, there are not many lawyers who want to give away their time, although this might be available or in a locale where there are too many lawyers and the competition is stiff. You can always ask when you call the lawyer's office, but don't be offended if the answer is "No." Do you know any dentists who give free initial consultations? Any internists?

If you do decide to ask for a free initial interview because your client wants to shop around, here's how to do it. Inform the attorney that the client is interested in meeting with several attorneys before deciding on the right one for this case. Ask about the attorney's experience – he or she will probably not be offended if you start with, "My client wanted to know..." when you ask your questions of the attorney. Then request that he or she give your client a 15-minute initial meeting at no charge just so they can get to know each other. Believe it or not, some initial interviews can last for *hours*, and setting a quarter-hour time limit should be acceptable to most lawyers who are interested in new business.

A Reservist can do a case "for points only." See AR 27-3, para. 2-2*b*. How do you get one to help with your next case? First of all, make sure it's a good case, that there is a meritorious claim or defense. Second, try to choose a case where the client is truly indigent. It's not likely that a Reservist will take on a tough case where the client who's asking for "free service" is a major or a senior NCO. Next, be sure that the case is a manageable one. Few Reserve attorneys have the time, freedom and flexibility in their schedules to take on an open-ended nightmare of a case, such as a class action lawsuit or a full-blown custody or alimony trial, on the basis of "points only." Finally, play up the sympathy factor when talking to the Reservist. Referring a case that "demands justice," one that can tug at the heartstrings of the Reserve attorney, is a lot easier than one which has no sympathy factors involved. Try to get the Reservist to identify with your client's position in order to get him or her to accept the case.

Most legal services organizations are underpaid and over-committed in their resources. It's usually difficult to find one that will accept the routine cases that come through the LAA's door, although there's a better chance if it is a case that could set a precedent or make some headlines. If the legal aid organization can take on the case, fine; if not, then ask for a referral to a "modest means panel" or a volunteer lawyer program (if one exists).

Negotiating Fees with the Lawyer

If you cannot get a free option for referral, then try negotiating with the private attorney who may be handling the case. See AR 27-3, para. 3-7*h*(3)(e). Maybe you can get her to accept the case on the following basis:

- 1) No fee is due but the client will pay the costs. The client will be responsible for the charges for filing the suit, serving papers on the other side, transcribing and printing depositions and hiring expert witnesses (such as property appraisers, custody evaluation experts, etc.).

- 2) The case is taken on a reduced fee basis. Thus if the attorney usually charges \$150 an hour for contract cases, perhaps you could get her to take this one for \$110 an hour.
- 3) The matter is accepted on a flat fee basis. This would be possible in a criminal case or a contempt citation, as well as preparation of a simple separation agreement, a divorce petition and judgment or an annulment that will be uncontested. It is usually used when there is a simple issue and a known quantity of time involved.
- 4) A percentage fee is charged. As explained above, this type of fee is used when there is a corpus available from which the fee can be collected, such as a personal injury award or, in North Carolina, an equitable distribution case. It could also include a case involving fraud (which is a tort), a deceptive trade practices case, or perhaps a wrongful eviction matter.
- 5) As the last resort, talk about a retainer when the case is open-ended and the results uncertain. Ask about the hourly rate and whether any part of the retainer is nonrefundable. Make sure the fee is reasonable for the locale in which she practices. AR 27-3, para. 3-7h(8). If a substantial part is nonrefundable, be sure to check around to see if this is routine and reasonable. Try to get as much *held in the trust account* as possible.
- 6) Sometimes there's a hybrid fee arrangement that takes part of the percentage method and combines it with the hourly rate: a low hourly charge plus a small contingent percentage in the outcome of the case. You might ask about this also.

Let's Talk Money (Continued)

When referring a client to a private attorney who may charge for her services, you should also have a frank discussion with the client about how to pay for a lawyer's services. The single most important point – for most legal cases – is that *you don't pay for it out of your paycheck*. Except for a routine traffic ticket or similar matter, most legal work is expensive. While defending an eviction might cost \$750 in one community, it might run \$1,500 in another. And custody fights can cost *many* thousands of dollars no matter where they occur. In fact, if the retainer that is quoted sounds *too inexpensive*, you might want to check out the credentials of the lawyer to see if she is really competent and experienced in this area. After all, you don't want the attorney to be "cutting her teeth" in trial skills on your client. AR 27-3, para. 3-7h(8) requires that referrals, "whenever possible, should be based on a knowledge of the particular lawyer's skill and expertise, normal fee arrangements, and ability to meet the specific legal needs of the client."

As a practical matter, clients go to the bank when they want to hire a lawyer. If there isn't money there, then they ask for a loan and, if necessary, use collateral to secure one. If no loan is available, a credit card may be used to purchase the lawyer's services or to obtain loans with which the lawyer is paid regularly while the case is proceeding. There may, of course be relatives who can assist in the financing; quite often, a contested custody fight requires a client's parents to put up a "war chest" of \$5-10,000 for the anticipated lawyer's expenses.

The point is, don't go to court if you cannot afford it. Sometimes a client just can't afford the contest that she or he wants to have. PFC Smith can no more afford an alimony suit against her husband *from her paycheck* than she can afford a new car's full payment from the same source. And car dealers don't take "pay as you go" plans any more than most attorneys do. The car dealer will, however, help the client in locating a bank or finance company which will put up the money for the car. Likewise, a bank or other lender may be the only source of funds for a court fight.

Doing the Referral – a "How-To" Guide

When you've decided that lawyer referral is necessary, how do you do it? This is one area where the regulation, other than some broad guidance, really doesn't get down to specifics. Here are some precepts for the practitioner in uniform:

1. Know the rules. Read AR 27-3, para. 3-7h, to refresh your memory on how to refer, when to refer, and what to avoid in referrals. Competent and ethical referral is the duty of the LAA. LAA's should make a referral whenever this is in the client's best interest or when it is required by a specific section of the Regulation. Consider your workload, your knowledge (or lack of familiarity) regarding the problem area, the goals of the client and the cost and convenience to him or her. Paragraph 3-7h(6) tells how to make a referral, and Paragraph 3-7h(7) shows the order of preference in making referrals.
2. Don't be evasive. Tell the client as soon as possible if you cannot handle the problem and cite the reason, such as--
 - ◆ outside the scope of your assigned duties (representation of a client at a crash investigation board or before a disability review panel),
 - ◆ barred by local directive (preparation of complex trusts) or
 - ◆ by service regulations (criminal charges in civilian court, fee-generating cases, or private business matters) or
 - ◆ beyond the scope of your expertise (such as complex wills and estate planning).

Clients respect the straightforward approach. They will appreciate your efforts to make a referral all the more if you are forthright and to-the-point.

3. Avoid unnecessary referrals. Always ask questions:
 - ◆ Does your client already have a lawyer?
 - ◆ Or did she or he have one from the local community on some prior occasion? Does she have one in mind already that she plans to visit?
 - ◆ Does he know of one who helped his neighbor on a similar case last year? There is nothing wrong with "word-of-mouth" referral when it originates with the client. Many times the best lawyer for *this* eviction client is the one that helped his co-worker, Sergeant Green, with a landlord problem just recently. Use "blind referrals" only as a last resort.
 - ◆ Tony Tempesta advises: "I ask my clients up front, 'Does your family know about this? If so, are they willing to help you?'" Having someone there on the spot to "do the legwork" is infinitely better than trying to conduct business by phone/fax/email. "The family members can get the inside scoop on Attorney Green," says Tempesta, "that'll never appear in the full-page ad with mug shot in the Yellow Pages."
4. Go the extra mile. If Mrs. White needs a civilian attorney and doesn't know where to go, it is entirely proper and ethical for the LAA to help her select an attorney instead of just handing her the phone book, giving her a toll-free number to call, or providing the next three lawyers' names from the referral list. Help her pick out the name of a lawyer to contact and then... pick up the phone! Why not call that attorney and find out if he or she:
 - ◆ Will handle this type of case?
 - ◆ Charges an initial consultation fee?
 - ◆ Will take the case on a contingent fee arrangement, for a flat fee or at an hourly rate?
 - ◆ Is available for an interview at a time convenient to your client?
 - ◆ Has handled cases like this before?
 - ◆ Can quote an approximate cost to the client for the work to be performed?

Lawyers love to get new clients, but they also love to talk attorney-to-attorney to the LAA who is doing the referring. This is the best way for them to find out, in the LAA's own opinion, what is involved in the case, how cooperative the client is, and what are the problems and deadlines. Don't be afraid to do a direct referral--some clients need a little (or a lot of) "handholding" in the process of selecting a lawyer. As a trained lawyer yourself, you can vastly improve the likelihood of Mrs. White's choosing a good lawyer, the right lawyer for her case, by using this technique.

5. Don't pick favorites. Trying to help Sergeant Jones with her bankruptcy case does not mean sending her to the same lawyer in town that handles all other bankruptcy referrals from the base. Favoritism, gratuities, and the appearance of impropriety must be avoided in every lawyer referral system, civilian as well as military. AR 27-3 forbids the consistent singling out of one lawyer for specific referrals, regardless of motive or intent. AR 27-3, para. 3-7h(8). A broad base of civilian practitioners is essential to a lawyer referral system that is run ethically and openly.
6. Get out and meet the local bar. How will you ever know that Lawyer Janet Wilson only does criminal defense work or Attorney Elmore Smith doesn't do divorces if you don't get out of your office occasionally? Find out when the local bar meets and talk to your SJA or chief of legal assistance about attending a meeting. In most cases you will receive the go-ahead and will be surprised at how enjoyable the company is when you attend that first meeting. Many civilian lawyers near military bases have prior JAG experience themselves and will welcome the presence of an active duty judge advocate. Civilian attorneys also need help with problems that involve the military community and can readily use your advice, resources, and contacts. And where else can you pick up those gems of wisdom that will help your legal assistance clients such as the ones below?

--"Here in Apex County, the first continuance request by an attorney in a speeding case is usually granted; if you don't have a lawyer, you must be present personally to make the request. A spouse, friend or relative can't do it for you."

--"Judge Williams doesn't usually give custody to fathers on the theory that '*Daddies don't make good mommies,*' and Judge Barnes will deny custody or visitation rights to dad if there is any evidence of a live-in girlfriend."

--"The district attorney doesn't negotiate pleas on second-offense drunk driving."

--"Even if you get evicted in magistrate's court, you can still postpone the eviction by taking an appeal to district court."

The truth is that very little of what matters to the legal assistance client in court comes out of books; most of it will be found by observing what goes on in the courtroom or talking to other lawyers. Your referral will always be better informed if you meet regularly with members of the local bar.

7. Be creative. Sometimes a local bar connection won't solve your problems because your clients need a lawyer in Tulsa or Tucson--what then? Let's assume your client does not know any lawyers in that locale. Locating a lawyer for, say, a divorce case involves more than just reaching for the Oklahoma volume of *Martindale-Hubbell*, or finding the phone number of Tucson Lawyer Referral. Here are some creative methods of referral:
 - ◆ Call a local base or installation SJA office and ask for several lawyers' names and phone numbers for a family law referral in the particular subject area involved.
 - ◆ Get a copy of the Navy Reserve's *Directory of Drilling Naval Reservists*, the Judge Advocate Association directory, or the Army's JAGC Reserve Officer Legal Assistance Attorney Directory to find an initial lawyer contact in the locale. Then get that attorney's counsel and advice on some specific lawyers for this domestic referral.
 - ◆ Get the name of the chair or vice-chair of the family law section of the state bar or bar association from that organization in the state capital. Most states have substantive law sections (bankruptcy, criminal law, etc.) of the appropriate organization. Then call and ask that officer to recommend a family law attorney in the locale involved. Many times there will be a personal friend or professional contact in that vicinity who can help out.
 - ◆ Try to get a Reservist who practices in the field of family law as your attorney. Members of the Reserves are frequently the ones who are the most "up to speed" on current law and regulations in this area.

- ◆ Find out from the state bar or bar association if there are "certified specialists" in family law in your state. A majority of states have "specialty" designations for lawyers who concentrate their practices in a particular field, and these lawyers (although charging a premium for their services) will be more likely to be able to handle your case competently than a general practitioner.
 - ◆ Contact the family law section of your state's bar association or the American Bar Association to see if they can recommend the names of some attorneys who have spoken or written in the area of military divorce law.
 - ◆ You can now use the Internet for referrals using your computer and a modem. To connect to the *Attorney Referral Network Internet Index of Legal Professionals with Websites*, type on your browser www.attorneyreferral.net/att.htm. Select the state in which you need to find an attorney.
 - ◆ For the *American Bar Association*, use www.lawyers.martindale.com/aba and then enter the required information needed, which includes location of desired attorney, type of practice or by corporation. After entering the information press "Search" and the information is sent to the database.
 - ◆ For family law cases, use "Operation Stand-By" at JAGCNET Databases; it's a list of over 100 domestic lawyers in almost every state who've agreed to accept calls, answer e-mails, respond to questions and take referrals from JAGs with family law cases. Or, to get a specific family law attorney in the city and state of your choice, why not use the ABA Family Law Section's membership list? It's found easily by typing "family law section directory" at the Search JAGCNET link, and it contains over 8,000 attorneys in every state.
 - ◆ *Martindale-Hubbell* has to be the most popular Internet attorney referral source available. The way to get there is to go to www.lawyers.com on the Internet browser. After the web page appears, click on SEARCH. When the next page is loaded, enter the information needed and click Enter.
 - ◆ *West Legal Directory* is also a popular tool. Enter www.lawoffice.com/ and then enter the information and click on "Go." You can enter the information by *lawyer's name and location* or by *firm and location*.
 - ◆ For help with tough family law problems, take a look at the membership directory of the American Academy of Matrimonial Lawyers at www.aaml.org/directory.htm.
 - ◆ Sheree Swetin of the ABA's Standing Committee on Legal Assistance for Military Personnel, says, "Try the ABA's on-line list of local lawyer referral programs, many of which have family law panels and modest means panels. It's a great way to tap into local lawyer referral networks. Check out the site, which is open to all, at www.abanet.org/referral/home.html."
 - ◆ Finally, you can find a lot of divorce-related information on the web by trying a simple technique. Just decide what state's divorce law you want to search, then take the two letter abbreviation for the state (AK for Alaska, AL for Alabama, and so on) and insert it where the "xx" appears in either of the following URL's: www.xxfamilylaw.com or www.xxdivorce.com. Most of the time you'll reach a really useful resource. For example, www.codivorce.com is the website of Steve Harhai, a Denver divorce lawyer who has published a "Colorado Divorce Handbook" on-line. Go to www.nhdivorce.com and you'll find the website of New Hampshire practitioner Honey Hastings. If you go to www.jerseydivorce.com, you'll find the website of attorney William Leininger of Staten Island, New York. At his website are a number of useful handouts that can be downloaded, such as "Tips to Clients on How to Save on Legal Fees," a guide to how to protect your rights and assets when considering separation, "A Sensible Approach to Child Custody Disputes, and "How to Select a Divorce Attorney." And if you go to www.ncfamilylaw.com you'll see the author's website, which features a number of helpful client information pamphlets. These are really good tools to help you understand the unique aspects of family law in a particular jurisdiction.
8. Shop around. Selecting the right lawyer is like a lesson in consumer protection; it involves a balance among availability, price and quality. You can truly assist your clients in this choice, especially if you are stationed far from the location of the forum, if you know how to shop for attorneys to help the client. How to do this? Don't start writing form letters to attorneys. Most of the time they'll just get

tossed into the trash can. The right way to refer is to pick up the phone so you can make that vital connection for your client from the start. Try the following “telephone etiquette” protocol:

First of all, identify yourself as a JAG Officer. Most attorneys today, due to television and movie exposure, know that “JAG” is synonymous with “military attorney.”

Next, ask if that attorney is available for help with a case in that particular area. This will let you find out if the lawyer practices in that area and, just as important, if he or she has the time and interest for the case. If you’re catching an attorney who is already late in leaving for the courthouse, you won’t get much of an answer for your questions, so be sure to ask if this is a convenient time to talk about a case. If it isn’t, then speak to the secretary about when might be a better time.

Third, ask if you can give a brief description of the problem. If the attorney is too busy, you can arrange to call later or write to him or her (fax or e-mail preferred). If there’s time, however, this opportunity for a “nutshell view” of the case is invaluable. When the client outlines the case, it can literally take hours to get the important info, but you can summarize the salient points in a few minutes. This is very useful to the lawyer in analyzing the problem and seeking solutions.

Be sure to offer your help. Lawyer referral doesn’t mean a quick and easy way of backing out of a case. Mention the ways you can assist as part of the referral pitch. You can interview witnesses and prepare affidavits. You can do research. You can prepare briefs. And you can do all of these at no cost to the client and at a considerable savings over what the civilian attorney would charge.

Ask about outcomes and fees. Some of the most important information for the client is contained in the answers to the following questions:

- ◆ What is the likely result in a case such as this? What are the local courts doing in these cases? What is the judge like?
- ◆ How does the attorney charge? What is the initial retainer?
- ◆ Is it non-refundable, or a deposit toward future work?
- ◆ Or is it at a flat fee?
- ◆ Are there any provisions in the law for recovery of attorney’s fees for the other side?

See if the lawyer has any ideas about strategy that might be helpful. “A lot of lawyers take a case without a sense of how they’re going to get from point A to point B,” says Ken Menendez, the author of *Taming the Lawyers*. He suggests asking the attorney what she plans to do and how much time and money it will take to get there. Pressing the lawyer to focus on this case and to think critically from the start will show that the client is not disinterested, overly compliant or heedless of the money being spent.

Having said all the above, a special note is needed on use of the phone. If you are within 5-6 hours of the local attorney’s time zone, then you can easily use the telephone. But what if you’re in the Far East, where there’s 14 hours time difference between your office and “Heartland USA”? In this situation, a letter (or, better yet, e-mail) should be used. John Dykstra, the Chief of Legal Assistance at Camp Zama, Japan, notes that this prevents attorneys having to stay up till midnight or wake up at 0400 hours. It also permits both attorneys more time to consider the referral. “Playing telephone tag internationally can be expensive,” says Dykstra, “and often telephone calls come at inopportune times when the attorney is busy and has little time to talk or think about the referral. With e-mail the attorney can wait until he or she can sit back with a cup of coffee and browse the messages, and respond after performing a preliminary analysis of the type or complexity of the case and a check of the calendar.”

A special note is in order for military domestic matters. Shopping around for a lawyer with sufficient knowledge to handle a “military divorce case” may take a little more work than usual. There are lots of military cases where rights and advantages have been lost because the attorney’s ignorance of the subject matter. As a practical matter, there are very few attorneys in any given state (and even fewer overseas) who know much about little-known corners of the law, such as USFSPA, military child support,

the Survivor Benefit Plan and dividing of military retirement benefits. And since you only get one chance to do it right, it makes sense to find the right lawyer right from the start! Here are a couple of tips to give a client who requires special help. Tell your client to do the following:

Advice for the Client

- ◆ Ask a friend who's been through this already; if he or she has had a good attorney, this kind of "word-of-mouth" advertising may help you to contact the right attorney.
- ◆ If you already have a lawyer, ask him (or her) how much experience he has in the area of military pension division. A good lawyer should never hesitate to answer a question like this; an honest attorney will not flinch at giving you a straightforward answer. Be careful if your lawyer is "offended" or becomes defensive, however.
- ◆ If you're generally satisfied with your current lawyer but she needs some subject-matter help, don't hesitate to suggest that another attorney be hired *to act as co-counsel* in the area of USFSPA and military pension division. The code of ethics in virtually every state requires attorneys to be competent in the area in which they practice or else to associate competent co-counsel. Maybe if your lawyer has a "silent partner" to help out when the going gets rough, your case will be settled (or tried) more effectively and fairly.
- ◆ Know what happens after the referral, i.e., when the LAA bows out. Tony Tempesta of Vicenza, Italy, tells his clients that he is more than willing to assist their stateside attorney with questions on military issues and regulations, but he doesn't want to second-guess the state-side attorney and give opinions on what the attorney should or shouldn't be doing. Says Tempesta, "I tell them that if they do not understand something, such as what the term "show cause" means, I can provide clarification. But I won't sharpshoot the retained attorney -- with the possible exception of telling the client to consider changing attorneys if she or he is seriously dissatisfied with the present lawyer."

Questions for the Prospective Civilian Attorney

Ed Schilling, a retired Air Force JAG and currently a consultant in Aurora, Colorado, on military divorce cases, offers the following advice (at <http://www.divorcenet.com/military/milart-05.html>) on choosing an attorney:

In selecting an attorney one should not make the mistake of assuming that an attorney is knowledgeable about the USFSPA just because he or she is a retired officer or judge advocate. It is also a mistake to assume that all legal assistance officers are familiar with the law. As the former director of the Air Force legal assistance program, I would like to think that all legal assistance officers are equipped to counsel members on the ins and outs of the Former Spouses' Protection Act. But this is absolutely not true. I won't give a litany of horror stories, but there are many.

Many people facing divorce choose to retain an expert as a resource to fill in the gaps of the knowledge of their domestic relations attorney.

For those who do not, here is checklist of questions to use to evaluate the divorce attorney who says that he or she is knowledgeable in the USFSPA. It is not intended to be all-inclusive, but it is a good place to start. The client should not hesitate to ask such questions, and if the lawyer is offended or defensive, the client should continue the search. I can assure you that if the lawyer's child needs brain surgery, the surgeon is going to be scrutinized very carefully by the lawyer. To continue the analogy, the lawyer is not going to be satisfied with the family doctor that treats the family's colds and flu.

How many cases have you handled in the past year that involved military retired pay?

How many of these cases went to trial and how many were settled?

In how many did you represent the member and in how many did you represent the non-member spouse?

What articles or publications have you read on the subject in the past year?

How many hours of Continuing Legal Education do you have on this subject?

When was the last time that you read the federal statute that covers the division of military retired pay?

Please explain to me the highlights of the amendments to the Act that were passed in 1990.

What is the Code of Federal Regulations?

Does it have anything in it that deals with military divorces?

What is the Soldiers' and Sailors' Civil Relief Act and how does it relate to this action?

What are the limitations on obtaining direct payment from the pay center?

How long does a spouse have to be married to a member in order for there to be an award of part of retired pay as property?

How are maintenance and child support treated differently under the Act from an award of retired pay as property?

Please explain the term "disposable retired pay".

The Act contains a special jurisdictional limitation on the power of a state court to divide retirement. Please explain it?

(If there is a VA disability.) Explain how the division of retired pay will be affected by a VA disability.

Explain to me how the division of retired pay would be affected if the member goes to work for civil service?

What happens to the payments to the former spouse if she/he dies before the member?

What is the Survivor Benefit Plan?

Can a court order a member to provide SBP protection for the former spouse?

Who will pay the premiums of the SBP after the divorce?

What is the income tax consequence of a division of retired pay as property and payments of maintenance out of retired pay?

How does this state divide the retirement when the member is still on active duty?

If the attorney cannot answer all of these questions, it is not necessarily a sign of incompetence. However the lawyer should understand why the questions are relevant, and it should not be necessary for the attorney to run up a large bill to learn the answers.

And as if that's not enough, Mr. Schilling also outlines the most common pitfalls encountered by civilian counsel in the military divorce case. According to him, these are the most frequent mistakes:

Not studying the Act and the regulation.

Not understanding the special jurisdictional requirements of the Act in Section 1408(c)(4).

Not understanding the rules on reopening divorces before June 21, 1981.

Not understanding the "10 year" rule found in Section 1408(d)(2).

Not understanding the special protections of the Soldiers' and Sailors' Civil Relief Act.

Preparing a Qualified Domestic Relations Order to effect the division of military retired pay.

Not following the regulation when sending the application to the finance center is complete.

Not ensuring that the order is clear as to the portion of the retirement that the former spouse is to receive.

Not considering the rules about the effect of the death of the military member on the payments to the former spouse.

9. Use handouts for guidance. Use client handouts such as the Legal Eagle on "You and Your Lawyer." Such pamphlets can answer additional questions that the client might forget to ask at the legal assistance office. Use that handout (from JAGCNET) as a template for your own office's client handout on "Choosing a Lawyer."
10. Use the phone for best results. Once you have found an attorney in the geographic locale where the lawsuit's pending or where you need to file suit, follow these steps:
 - ◆ Get the attorney on the phone. If she's not there, talk to the secretary and arrange a time for your next call. Ask the secretary to "book the call" as if it were an appointment so that it gets on the attorney's calendar. Don't expect a lawyer who doesn't know you to call back long-distance. And don't use mail or e-mail for initial contact; the personal touch is what's needed here!
 - ◆ At the outset, ask if the attorney handles "X type of problems." Maybe she doesn't do that kind of work, or she's recently stopped taking cases in this area, or she's swamped and she never wants to see another case in this area!
 - ◆ Describe the problem quickly but in an interesting way so that you attract the attorney's attention re this case. This is the time for an overview, a summary. She can ask you questions if she needs details. And remember, it's not every day that a call comes in from an Army JAG in Japan, Georgia or Germany, so use that to your advantage!
 - ◆ Don't send cases out for "free work" if the client could pay for a lawyer's help (i.e., warrant officer in need of help in a routine visitation case – vs. a PFC who needs help in this area). Offer to help. You can do the research, get copies of cases, prepare briefs or memoranda, interview witnesses and prepare affidavits. These can cut down significantly on costs for your client, make it more attractive for the civilian lawyer to take the case (knowing that she'll have co-counsel with whom to share the work), and it'll be interesting for you too to be part of the team!
 - ◆ You can also help by using the government phone (and your e-mail) as appropriate on behalf of your client to cut down on costs when putting the client in touch with the civilian attorney. This will also cut down on her costs if you initiate the phone calls that are required, phone charges that are typically passed on through to the client.
 - ◆ If the attorney can take the case, fine. Get the documents, if any, to her pronto and put her in touch with the client. If she can't, ask for the names of three other attorneys who might be able to help. This takes advantage of that attorney's knowledge of local legal talent in this field of law, rather than "pulling out the Yellow Pages."

11. Educate the client on what to expect. Now that you've helped Mrs. Brown select a civilian lawyer, don't just send her on her way. The courteous and competent LAA will want his client to know some important facts about private counsel. Consider giving her some general advice and pointers about civilian attorneys. The following is an example taken from Florida's "Statement of Clients' Rights":

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights:

- *The client has the right to discuss and bargain about the proposed fee and the rate or percentage of fees. No law states that a lawyer must charge a set fee or a percentage of money recovered in a case.*
- *Contingent fee contracts must be in writing, and clients have three business days to reconsider or cancel the contract.*
- *Before the contingent fee contract is signed, the lawyer must tell the client if he plans to handle the case alone or with the help of other lawyers. If the case is referred, the lawyer must inform the client of the fee-sharing arrangement. If lawyers from different firms handle the case, a lawyer from each firm must sign the contract.*
- *The lawyer must tell the client at the beginning if he plans to refer to or use other counsel in the case. A new contract must be written if the referral happens at a later date. The client has the right to consult with all lawyers working on the case, and the lawyers are legally responsible for representing the interests of the client and for the acts of other lawyers handling the case.*
- *The client has the right to know at the beginning the arrangements for payment of expenses and legal fees. If a deposit is required, the client must be told how the money will be spent. The lawyer should offer an estimate of future costs. The client is entitled to know how and how much money has been spent.*
- *The lawyer should tell the client about possible adverse consequences if the case is lost, i.e., money for costs or liability for fees for opposing counsel.*
- *Before paying a bill, the client is entitled to a closing statement, listing all financial details of the case.*
- *At reasonable intervals, the client can ask the lawyer about the progress of the case.*
- *The client has the sole right to make final decisions on settlement of a case.*
- *The client has the right to contact The Florida Bar or a local bar association if he believes the fees charged are excessive or illegal.*

12. Read 'em their rights. The following ten commandments are taken from an article in the ABA's **Bar Leader** (January-February 1988) on lawyer-client relationships. It is an excellent expression of the client's rights and the lawyer's responsibilities. Have your clerk or secretary make a copy to pass out to each client who is referred to civilian counsel.

When I retain a lawyer, I am entitled to one who:

1. *Will be capable of handling my case.*

2. *Will represent me zealously and seek any lawful means to present or defend my case.*
3. *Will preserve my confidences, secrets or statements, which I reveal in the course of our relationship.*
4. *Will give me the right to make the ultimate decision on the objectives to be pursued in my case.*
5. *Will charge me a reasonable fee and tell me, in advance of being hired and upon my request, the basis of that fee.*
6. *Will show me courtesy and consideration at all times.*
7. *Will exercise independent professional judgment in my behalf, free from compromising influences.*
8. *Will inform me periodically about the status of my case, and, at my request, give me copies of documents prepared.*
9. *Will exhibit the highest degree of ethical conduct.*
10. *Will refer me to other legal counsel, if he or she cannot properly represent me.*

Conclusion

Lawyer referral really helps everyone involved. It should be accomplished in a kind and competent manner when the situation requires sending the client elsewhere for legal help. Properly done, this service guides clients in the right direction for help from a qualified professional, complies with ethical requirements for competent practice and is the first key to avoiding malpractice.

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