

# USALSA Report

*United States Army Legal Services Agency*

## *Clerk of Court Notes*

### **Courts-Martial Processing Times**

The tables below reflect the average pretrial and post-trial processing times of general, special and summary courts-martial for the fiscal years 1993 through 1996.

#### **General Courts-Martial**

	FY 1993	FY 1994	FY 1995	FY 1996
Records received by Clerk of Court	1035	789	827	793
Days fr chgs or restnt to sentence	54	53	58	62
Days from sentence to action	66	70	78	86
Days from action to dispatch	7	8	7	9
Days enroute to Clerk of Court	8	9	8	9

#### **BCD Special Courts-Martial**

	FY 1993	FY 1994	FY 1995	FY 1996
Records received by Clerk of Court	174	150	161	167
Days fr chgs or restnt to sentence	38	37	35	45
Days from sentence to action	59	58	63	85
Days from action to dispatch	7	7	6	6
Days enroute to Clerk of Court	7	9	8	8

### Non BCD Special Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996
Records reviewed by SJA	65	53	46	57
Days from charging or restraint to restraint	35	33	44	50
Days from sentence to action	66	28	32	44

### Summary Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996
Records reviewed by SJA	353	335	297	226
Days from charging or restraint to restraint	14	14	16	22
Days from sentence to action	8	8	8	7

### ***Litigation Division Note***

#### **Witnesses: The Rules for Army Health Care Providers**

Frequently, a private attorney will attempt to obtain an Army health care provider (HCP) to serve as a witness in litigation. This article will examine the rules governing whether an Army HCP may serve as a witness, and in what capacity. For purposes of this article, "litigation" is broadly defined as "[a]ll pre-trial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards . . . or other tribunals, foreign and domestic."<sup>1</sup> This broad definition also includes "responses to discovery requests, depositions, and other pretrial proceedings, as well as

responses to formal or informal requests by attorneys or others in situations involving litigation."<sup>2</sup>

Two factors determine whether an Army HCP may serve as a witness in litigation: (1) the nature of the litigation involved; and (2) the type of testimony sought. For purposes of determining if an Army HCP may serve as a witness, litigation is divided into two categories. The first category is litigation in which the United States has an interest.<sup>3</sup> This includes cases in which the United States is either a named party or has an official interest in the outcome of the litigation. Examples of this category are medical malpractice complaints brought under the Federal Tort Claims Act<sup>4</sup> and cases in which the government, pursuant to the Medical Care Recovery Act,<sup>5</sup> attempts to recover the cost of providing medical care.

1. DEPARTMENT OF DEFENSE, DIR. 5405.2, para. C.3 (23 July 1985), *reprinted in* DEP'T OF ARMY, REG. 27-40, LITIGATION, Appendix C (19 Sept. 1994) [hereinafter AR 27-40].

2. *Id.*

3. For a detailed definition of this term, *see* AR 27-40, Glossary, *supra* note 1.

4. 28 U.S.C. §§ 2671-2680 and 1346(b) (1982 & Supp. 1993).

5. 42 U.S.C.A. § 2651 (West 1997).

The second litigation category is so-called private litigation. "Private" litigation is defined as a case in which the government is not a party and has no official interest in the outcome of the litigation.<sup>6</sup> This category encompasses both civil and criminal proceedings. Examples include some personal injury cases in which the Army provided medical care, some medical malpractice cases, divorce proceedings, child abuse hearings, and competency hearings of a retiree or dependent.

The second factor governing whether an Army HCP may serve as a witness in litigation is the type of testimony sought. For purposes of determining whether an Army HCP may serve as a witness, testimony is categorized as expert testimony or factual testimony. Expert testimony involves an Army HCP testifying solely as an "expert" witness for the litigant. That is, the litigant is seeking a professional opinion from an Army witness. Factual testimony, on the other hand, involves the facts concerning medical care provided to one of the parties.

When the United States is a party or has an interest in the litigation, there is generally only one restriction on the testimony of Army health care providers: they may not provide opinion or expert testimony for a party whose interests are adverse to those of the United States.<sup>7</sup> Requests for an Army HCP to serve as an expert or opinion witness for the United States will be referred to Litigation Division unless the request involves a matter that has been delegated to an SJA or legal advisor.<sup>8</sup>

A request for an interview or a subpoena for the testimony of an Army HCP will be referred to the Staff Judge Advocate or legal adviser serving the provider's Military Treatment Facility (MTF).<sup>9</sup> Travel arrangements for witnesses for the United States normally are made by the Department of Justice through the Litigation Division. Litigation Division will issue instruc-

tions for the witness' travel, to include a fund citation, to the appropriate commander. An SJA or legal advisor may make arrangements for the local travel of Army health care providers requested by a United States Attorney, or by an attorney representing the government's interests in an action brought under the Medical Care Recovery Act, provided the health care provider is stationed at an installation within the same judicial district or not more than 100 miles from the place of testimony.<sup>10</sup> All fees provided to Army health care providers for their testimony as an expert or opinion witness which exceed their actual travel, meal, and lodging expenses, will be remitted to the Treasurer of the United States.<sup>11</sup>

In private litigation, Army HCP's may not provide expert or opinion testimony.<sup>12</sup> That restriction applies even if the HCP is to testify without compensation.<sup>13</sup> Moreover, although certain exceptions apply to other Department of the Army personnel,<sup>14</sup> Army Medical Department (AMEDD) personnel are strictly prohibited from providing expert or opinion testimony in private litigation.<sup>15</sup> If a court or other appropriate authority orders an Army HCP to provide expert or opinion testimony, the witness must immediately notify Litigation Division. Litigation Division will determine whether to challenge the subpoena or order and will direct the witness either to testify or to respectfully decline to comply with the subpoena or order.<sup>16</sup>

Although Army health care providers may not provide expert or opinion testimony in private litigation, they may provide factual testimony in private litigation concerning patients they have treated, investigations they have made, or laboratory tests they have conducted.<sup>17</sup> In such cases, the health care provider's testimony must be limited to factual matters<sup>18</sup> and may not extend to hypothetical questions or to a prognosis.<sup>19</sup> Similarly, if, because of off-duty employment, an Army HCP is

6. See *supra* note 1, AR 27-40, Glossary.

7. *Id.* paras. 7-10a & 7-13; 32 C.F.R. §§ 516.49(a), 516.52 (1996). Other restrictions or privileges may also restrict the health care provider's testimony; e.g., non-disclosure of drug and alcohol treatment records and classified information.

8. See *supra* note 1, AR 27-40, paras. 7-10a & 7-13; 32 C.F.R. § 516.52 (1996).

9. 32 C.F.R. § 516.51 (1996).

10. See *supra* note 1, AR 27-40, para. 7-15b. See also 32 C.F.R. § 516.54(b) (1996).

11. See *supra* note 1, AR 27-40, para. 7-10e; 32 C.F.R. § 516.49(e) (1996).

12. See *supra* note 1, AR 27-40, para. 7-10a; 32 C.F.R. § 516.49(a) (1996).

13. See *supra* note 1, AR 27-40, para. 7-10a; 32 C.F.R. § 516.49(a) (1996).

14. See *supra* note 1, AR 27-40, para. 7-10b.

15. *Id.* para. 7-10c.

16. *Id.* para. 7-10d; 32 C.F.R. § 516.49(d) (1996).

17. See *supra* note 1, AR 27-40, para. 7-10c(1); 32 C.F.R. § 516.49(c)(1) (1996).

18. For example, observations of the patient; the treatment prescribed or corrective action taken; the course of recovery or steps required for repair of the patient's injuries; and contemplated future treatment. See *supra* note 1, AR 27-40, para. 7-10c(2); 32 C.F.R. § 516.49(c)(2) (1996).

## Editor's Note

required to participate in private litigation as either a defendant or as a treating physician, any testimony provided must be limited to factual matters. This limitation helps ensure that no government imprimatur is given to the health care provider's testimony. Under no circumstances are AMEDD personnel allowed to "moonlight" as expert witnesses.<sup>20</sup>

Despite the regulatory restrictions against expert testimony, frequently at a deposition or at trial counsel will ask a treating physician to provide expert or opinion testimony. Consequently, a judge advocate or Army civilian attorney "should be present during any interview or testimony to act as legal representative of the Army."<sup>21</sup> If a question seeks expert or opinion testimony, the legal representative should advise the Army HCP not to answer the question. In the case of court testimony, the legal representative should advise the judge that Department of Defense directives and Army regulations prohibit the witness from answering the question without the approval of Headquarters, Department of the Army.<sup>22</sup>

In conclusion, the rules governing when an Army HCP may serve as a witness in litigation, and in what capacity, are clear. All too often, however, an attorney will attempt to obtain the services of an Army HCP as an expert witness in violation of the regulatory provisions discussed above. Consequently, Department of the Army attorneys must be familiar with the rules governing the use of Army health care providers as witnesses in litigation and must ensure those rules are followed. Major Smith.

## Environmental Law Division Notes

### Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference and the Environmental Law Forum of the Legal Automated Army-wide Systems (LAAWS) Bulletin Board Service (BBS). The issue, volume 4, number 5 is reproduced below.

Spaces are still available to attend the United States Air Force's Basic Environmental Law course. The course will be held in Montgomery, Alabama, from 5 through 9 May 1997. There is no tuition; however, participants are responsible for their travel and per diem costs. If you would like to attend, please send a facsimile with your name, rank or grade, installation, and telephone number to the attention of SSG Stannard of the Environmental Law Division. The facsimile number is (703) 696-2940 or DSN 426-2940.

Beginning with the March edition of the Environmental Law Division Bulletin, CPT Silas DeRoma will take over as the *Bulletin's* editor. Any inquiries regarding the *Bulletin* should be addressed to CPT DeRoma at (703) 696-1230 or DSN 426-1230, or electronic mail address deromasi@otjag.army.mil. Thank you for the support and cooperation that you have shown in helping us to bring the *Bulletin* to you via electronic mail. Ms. Fedel.

### Environmental Structured Settlements

Structured settlements have been used for a number of years to spread out payments in personal injury and medical malpractice cases, but only recently have they been applied to environmental cleanup cases. Structured settlements can take a number of forms and can be tailored to meet a variety of different situations. A common manner of setting up such a settlement involves the creation of a reversionary trust, where a trustee manages the corpus of the trust, the United States retains ownership, and any reversion left in the trust is returned to the United States Treasury after the obligation has been satisfied. Not only does this allow the trustee to invest the money not yet paid out of the trust to the benefit of the United States, but the beneficiary may avoid significant tax liability by not realizing the full amount of the settlement in the first year.

Structured settlement payments can be made according to a pre-determined schedule, or they may be used to pay a percentage of cleanup costs on an ongoing basis. For example, in one rather complex structured settlement, the private potentially responsible parties (PRPs) have agreed to perform the cleanup (using their own contractors) while the United States has agreed to fund a percentage of cleanup costs. Under this arrangement, the private PRPs will submit bills to the United States' trustee, and will receive reimbursement for costs that the trustee determines are "allowable." In addition, the trust will hire (1) an investment manager in order to leverage the maximum possible

19. See *supra* note 1, AR 27-40, para. 7-10c(3); 32 C.F.R. § 516.49(c)(3) (1996). Despite those regulatory restrictions, however, the courts have not always upheld the regulations under challenge by a plaintiff seeking an Army HCP's expert testimony against the United States. See, e.g., *Romero v. United States*, 153 F.R.D. 649 (D. Colo. 1994).

20. See *supra* note 1, AR 27-40, para. 7-10c.

21. *Id.* para. 7-9; 32 C.F.R. § 516.48(b) (1996).

22. See *supra* note 1, AR 27-40, para. 7-9; 32 C.F.R. § 516.48(b) (1996).

amount of time-value out of the funds in the trust, (2) an accounting firm to conduct periodic audits, and (3) an environmental consulting firm to act as a technical advisor. The cost savings in such a case can be considerable, and in this example, where cleanup costs may run as high as \$300 million, savings to the United States are estimated to be more than \$20 million. Captain Stanton.

**Did you know? . . . Road traffic kills an average of forty-five endangered Key Deer in Florida annually and is the subspecies' single largest cause of death. Average annual mortality is 63 deer from a total population of approximately 300.**

### **RCRA General Permit To Be Proposed In Upcoming Rulemaking**

The U.S. Environmental Protection Agency (USEPA) is nearing completion of a plan for a streamlined permitting process that will allow some generators and recyclers to qualify for a general permit rather than the more complex individual permit. The agency's Permit Improvement Team (PIT) has been working on improving and streamlining the permitting process for the past two years. The PIT recommendations for a general permit will be included in an upcoming rulemaking that will amend the definition of solid waste and modify the current recycling program.

Through this new initiative, the general permit would be available to off-site recyclers and to hazardous waste generators who accumulate their wastes in tanks or containers on-site for more than 90 days. The USEPA would formulate technical and management standards for a general permit that would be applicable to facilities nationwide. Under the general permit, the RCRA requirements would remain the same; however, the USEPA would require much less information for permit approval.

Under the new scheme, a facility interested in a general permit would first hold a public meeting to discuss the planned waste management activities. In place of filing a Part A application, the facility would file with the permitting agency a notice of intent to be covered by a general permit. The notice of intent includes a summary of the public meeting and information on waste streams, management practices, and volumes of waste managed. Based on this information, the permitting agency would make the initial determination whether the facility meets the scope of the general permit. If necessary, site-specific conditions are added to the general permit and public notice of the tentative decision is provided. On the request of a stakeholder, a public hearing and public comment period of forty-five days follows the notice of the tentative decision. After considering the public comments, the agency would make

the final decision on the permit; the permit is effective after thirty days.

In addition to streamlining the review of the initial application, any modifications to the permit would also be expedited. Changes such as an addition of new waste streams or increases in capacity would require only the submission of the information, not agency oversight or approval. The USEPA plans to formally propose the rule in April 1997. Major Anderson-Lloyd.

**Did you know? . . . Radial tires can boost your gas mileage by as much as 10%.**

### **New Ozone and Particulate Matter Standards**

The United States Environmental Protection Agency (USEPA) published new proposed National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter on 13 December 1996.<sup>23</sup> The USEPA proposed these new standards because it is believed that the current standards inadequately protect the public from the adverse health effects caused by ozone and particulate matter. These new standards will likely have an adverse effect on military operations.

One of the standards involves ozone. Ozone is used as an indicator of photochemical smog and is caused by the chemical reaction of ozone precursors in the atmosphere. Exposure to ambient ozone concentrations has been linked to increased hospital admissions for respiratory causes such as asthma and is associated with ten to twenty percent of all of the summertime respiratory-related hospital admissions. Repeated exposure to ozone increases the susceptibility to respiratory infection and lung inflammation, and can aggravate preexisting respiratory diseases. Long-term exposures to ozone can cause repeated inflammation of the lung, impairment of lung defense mechanisms, and irreversible changes in lung structure which could lead to chronic respiratory illnesses such as emphysema, chronic bronchitis, or premature aging of the lungs.

Mobile and stationary combustion sources are the primary source of ozone precursors. The primary stationary source of ozone precursors on Army installations is fossil fuel boilers.

The USEPA projects that a number of counties that are currently in attainment for either ozone or particulate matter will be in nonattainment under the proposed standards. Based on these projections, the new standards will place thirteen Army installations that are currently located in ozone attainment areas into ozone nonattainment areas. These installations include Forts Bragg, Gordon, and Jackson.

The United States Army Center for Health Promotion and Preventive Medicine (USACHPPM) evaluated the costs of

23. 61 Fed. Reg. 65,638-65,872 (1996).

meeting the new ozone standards. Their study indicates it will cost installations currently in attainment areas, and that will be placed in nonattainment areas, from one to five million dollars to comply with the new standards. Installations that are currently in nonattainment areas may also incur additional costs if regulators impose additional control measures on sources.

The other standard involves particulate matter. Particulate matter refers to solid or liquid material that is suspended in the atmosphere. It includes materials of both organic and inorganic chemicals, and is divided into primary and secondary components. Primary particulate matter consists of solid particles, aerosols, and fumes emitted directly as particles or condensed droplets from various sources. Secondary particulate matter is produced from gaseous pollutants that react with one another and with oxygen and water in the atmosphere to form new chemicals that are particles or condensable compounds.

The current particulate matter program is designed to protect the public from the effects of "coarse" particulate matter of ten microns or smaller (PM10). Coarse particles affect the respiratory system and contribute to health effects such as aggravation of asthma. PM10 at military installations primarily consists of dust kicked up on unpaved roads from vehicular traffic or from soldier training activities. The USEPA proposed minor changes to the PM10 standard, and these changes will not adversely affect Army operations.

A number of recently published community epidemiological studies indicate that "fine" particulate matter of 2.5 microns or smaller (PM2.5) are more likely than coarse particles to adversely affect health (e.g., premature mortality and increased hospital admissions). As a result, the USEPA proposed PM2.5 standards. The new annual PM2.5 standard is set at 15 micrograms per cubic meter, and a new 24-hour PM2.5 standard is set at 50 micrograms per cubic meter.

PM2.5 is generally emitted from activities such as industrial and residential combustion and vehicle exhaust. PM2.5 also is formed in the atmosphere from gases and volatile organic compounds that are emitted from combustion activities and become particles as a result of chemical transformations in the ambient air. Dust is also a major contributor to PM2.5.

The new PM2.5 standards will have a major adverse affect on obscurant training (smoke consists of particulates of 0.5 - 1 microns), open burning, open burning/open detonation operations, troop training exercises that produce a large amount of dust, and Army Materiel Command (AMC) installations with industrial activities. Using the USEPA's projections, twenty-two Army installations will be in PM2.5 nonattainment areas.

The USEPA has solicited comments regarding the impact of the new proposals, as well as the impact of several other possible standards to better control ozone and particulate matter. It

should be noted that industry, many state regulators, and some members of Congress have been very critical of these proposed rules, asserting that they are both unnecessary and too costly. Lieutenant Colonel Olmscheid.

**Did you know? . . . Environmentalists refer to Theodore Roosevelt's presidency as the "Golden Age of Conservation."**

### **Environmental Law Division On Line**

The Environmental Law Division's Environmental Law Link pages are up and running. The pages may be reached by the link off of the Judge Advocate General's (JAG) Corps home page at <http://www.jagc.army.mil/jagc2.htm>, or by going to <http://160.147.194.12/eld/eldlinks.htm> directly. The site is designed to be used as a starting point for environmental and general law research. The pages contain links to the following areas: DOD environmental sites, DA environmental sites, environmental regulations, environmental legislation, environmental statutes, courts, case law, United States Government environmental departments and agencies, environmental interest groups, international environmental sites, search engines, general law sites, and general points of contact in the armed forces. You may also view an e-mail listing of personnel in the Environmental Law Division. Please enjoy the site and e-mail us your comments. Captain DeRoma.

**Did you know? . . . The Snowy Owl weighs 4 to 6 pounds and has a wing span of 5 feet.**

### **Ninth Circuit Rules on Natural Resource Damages**

The United States Court of Appeals for the Ninth Circuit has held in favor of Federal natural resource trustees on two important issues concerning natural resource damage (NRD) recoveries.<sup>24</sup> The Ninth Circuit decision overrules a district court decision holding that the Trustees' action was barred by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) statute of limitations.<sup>25</sup> Section 113(g)(1) provides that an action for NRDs must be commenced within three years of the later of (A) the date of discovery of the loss and its connection with the release in question, or (B) the date on which regulations are promulgated under CERCLA section 301(c).<sup>26</sup> Section 301(c) instructs the United States Department of Interior (DOI) to promulgate two types of regulations governing NRDs--"Type A" and "Type B" regulations. The district court had held that the statute of limitations

24. U.S. v. Montrose Chemical Corp., et al., No. CV-90-03122-AAH, 1997 U.S. App. LEXIS 704 (9th Cir. Jan. 17, 1997).

25. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 113(g)(1), 42 U.S.C. § 9613(g)(1) (1986).

began to run when the Type B regulations were promulgated in 1986, and since the Trustees had filed the complaint in 1990, the action was time barred. The Trustees argued that the statute of limitations did not begin to run until the Type A regulations were promulgated in 1987. The Ninth Circuit agreed with the Trustees, stating that:

[T]he phrase in section 9613(g)(1)(B) that triggers the statute of limitations on the 'date on which regulations are promulgated under section 9651(c)' should also be interpreted as referring to 'regulations' as used by section 9651(c)--including both Type A and Type B regulations.<sup>27</sup>

The court also reversed the district court's ruling that the Montrose defendants' liability was capped at \$50,000,000 pursuant to CERCLA section 107(c)(1).<sup>28</sup> Section 107(c) limits each owner's and operator's liability for "each release of a hazardous substance or incident involving release of a hazardous substance" to the costs of response plus \$50,000,000. The

Montrose defendants had argued successfully to the district court that the legislative history of CERCLA demonstrates that the term "incident" is a term of art synonymous with "contaminated site," and that the complaint had alleged only one "incident involving release."<sup>29</sup> The Ninth Circuit disagreed, holding that the term "incident involving release" should be interpreted in accord with its common definition and the legislative history to mean an "occurrence" or "event." As stated by the court, "a series of events that lead up to a spill of hazardous substance would be considered an incident involving release; however, a series of releases over a long period of time might or might not."<sup>30</sup> Therefore, the record was insufficient to support the district court's conclusion that the complaint only alleged one "incident involving release." The court reversed the district court's holding and remanded the case for further determination of whether the Montrose defendants' liability was capped at \$50,000,000. Ms Fedel.

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26. 42 U.S.C. § 9651(c) (1986).

27. *Montrose*, 1997 U.S. App. LEXIS 704, at \*13. Therefore, the statute of limitations did not begin to run until all of the regulations contemplated in the statute had been promulgated.

28. 42 U.S.C. § 9607(c)(1) (1994).

29. *Montrose*, 1997 U.S. App. LEXIS 704, at \*33.

30. *Id.* at \*35.