

INFORMATION PAPER

SUBJECT: Responding to Subpoenas and Other Requests for Official Information and/or Testimony from Department of the Army (DA) Personnel in Private Litigation

1. Purpose. To inform DA personnel of regulatory requirements applicable when subpoenaed to testify in court or otherwise requested to provide information for the purpose of private litigation.

2. Reference. AR 27-40, *Litigation*, chapter 7; DA Pam 37-2, *Time and Attendance Reporting for Standard Army Civilian Payroll System (STARCIIPS)*, paragraph 4-7.

3. Discussion.

a. AR 27-40, *Litigation*, chapter 7, governs the release of information and appearance of present and former DA personnel as witnesses in interviews, depositions and subpoenas associated with private litigation. "Private litigation" is litigation in which the United States does not have an interest; i.e., civil litigation between private parties, state and local criminal proceedings, etc. "DA personnel" includes military and civilian employees of DA, Reserve and National Guard soldiers when in "Title 10" status, and DoD Contractors.

b. Present and former DA personnel will not disclose official information, in any form, in response to subpoenas, court orders, requests for production of documents or other requests, without first obtaining written authorization from the Office of the Staff Judge Advocate (OSJA) or other appropriate legal advisor. "Official information" is any information in DA custody or control, or that was acquired by DA personnel as part of their official duties or by virtue of their official status within DA. No authorization from the OSJA is required if the subpoena, court order or other request does not require disclosure of official information.

4. Obtaining Written Authorization. A subpoena, court order or other request for official information should never be ignored. Personnel who receive subpoenas, court orders, requests for production of documents or other requests for official information in connection with private litigation must inform their supervisors and immediately contact the OSJA at 526-0618 for written authorization to release documents or appear and testify as requested.

5. Expert Testimony. Generally, present and former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information in private litigation. However, the following exceptions may apply:

a. In unique circumstances or where exceptional need is shown, the U.S. Army Legal Services Agency, Litigation Division (Litigation Division), may grant special written

INFORMATION PAPER

SUBJECT: Responding to Subpoenas and Other Requests for Official Information and/or Testimony from Department of the Army (DA) Personnel in Private Litigation

authorization for present and former DA personnel to testify as expert or opinion witnesses at no expense to the United States.

b. Members of the Army Medical Department (AMEDD) or other qualified specialists may testify in private litigation with the following limitations:

(1) The litigation involves patients they have treated, investigations they have made, laboratory tests they have conducted or other actions they have taken in the regular course of their duties.

(2) They limit their testimony to factual matters such as: their observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment.

(3) Their testimony may not otherwise extend to expert or opinion testimony, to hypothetical questions or to a prognosis.

c. If a court orders expert or opinion testimony, the witness must notify the servicing OSJA immediately, who will notify the Litigation Division. If the Litigation Division determines not to challenge the order, the witness will comply with the order. If directed by the Litigation Division, the witness will decline respectfully to comply with the order.

6. Witness Expenses.

a. Soldier Witnesses. Soldiers authorized to testify concerning official information will attend in permissive TDY status. Soldiers may not retain witness fees, but may accept travel, meals and lodging expense money from the requesting party. Witness fees received by the soldier, to the extent they exceed actual expenses of the soldier, will be remitted to the U.S. Treasury.

b. DA civilian personnel authorized to testify concerning official information will attend in an official duty status. "Court leave" is not authorized for this purpose. DA civilian personnel may accept witness fees, in addition to any allowance for travel and subsistence, and make disposition of the witness fees as directed by the Civilian Personnel Advisory Center (CPAC).

7. Point of Contact. Please contact the OSJA, Administrative and Civil Law Division, at 526-0618 if you have any questions concerning subpoenas or other requests for official information and/or testimony.