



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
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WASHINGTON DC 20310-0111



March 26, 2003

MEMORANDUM FOR GENERAL COUNSEL

SUBJECT: Legal Function Exemption

Reference memorandum, General Counsel of the U.S. Army, 18 October 2002,
Subject: Request for Exemption – Non-Core Competency Working Group – Legal
Function.

Function. Personnel in the Office of the General Counsel and personnel working in the offices under the qualifying authority of The Judge Advocate General, the Chief Counsel of the Corps of Engineers, and the Command Counsel of the US Army Materiel Command.

Decision. The following categories of personnel working in the legal functional area will be exempt from the Non-Core Competency Working Group Review:

Performance of certain legal functions in the operating forces, constitute a core war-fighting capability that is intimately related to command and control of the force and may not be outsourced. Furthermore, these functions are, by statute, required to be filled by commissioned officers and members of the Judge Advocate General's Corps. These include, military judges at all levels of the Army court system, trial and defense counsel, and military appellate counsel. These may not be converted to civilian performance or outsourced.

Attorneys in all offices responsible for providing legal advice to decision makers exercising discretion are exempt as exercising a function that is inherently Governmental in nature. Legal advice is substantively different from other advice. Only a licensed attorney is authorized to render "legal" advice, and only attorneys specifically authorized to practice law within the Department of the Army may do so. This distinguishes attorneys from those providing advice to decision makers (such as consultants and experts) that are normally not inherently Governmental in nature. As such I find that all attorneys except those engaged in personal representation of clients are exempt from outsourcing.

Attorneys providing legal assistance provide a personal legal service that could be performed by a private attorney. The provision of legal assistance is discretionary. Heretofore, the Secretary of the Army has determined that a wide range of Legal Assistance services would be provided to soldiers, family members, retirees, and in some cases, DA Civilians as a morale and readiness support program. Legal Assistance represents a valuable program in support of readiness and quality of life. As a matter of policy, the program should not be outsourced. Army lawyers provide

services to soldiers from all 50 states. Under ordinary law regulating attorney practice, only an attorney licensed to practice the law of a particular state may advise on the law of that state. Government attorneys working in Legal Assistance, however fall within the safe-harbor provision of 10 U.S. Code, Section 1044 and 10 U.S. Code, Section 3013. These statutes, and the regulations promulgated pursuant to them, allow government attorneys in legal assistance to give advice, and to prepare legally effective documents for eligible clients from any state in the nation. Therefore, it is not possible to outsource legal assistance. Some aspects of legal assistance are subject to review to determine the level and scope of services provided. All of legal assistance is subject to review to determine the appropriate military and civilian mixture.

Certain personnel working in support of attorneys are exempt from outsourcing due to the restrictions on establishing personal services contracts. This flows from the unique aspects of the lawyer and non-lawyer assistant relationship established by military and civilian attorney ethics regulations. Legal Support personnel work in legal offices performing a range of tasks. Some of the tasks include direct support of attorney functions, such as paralegals, confidential secretaries, and claims examiners. Others perform tasks with little or no direct support to the provision of legal advice. Army Rule (and corresponding American Bar Association Rule) of Professional Conduct 5.3 requires attorneys closely supervise the work of non-attorney personnel working under their supervision. This requires close, personal, direct control and supervision of daily work product and as such implicates a relationship that would, if contracted, create an impermissible personal services contract. Certain legal support personnel provide support services in the forward operating areas subject to hostile fire. Others provide the same services in the generating force. Those subject to hostile fire are exempt from military to civilian conversion as well.

Military and Civilian career progression and rotational issues are dealt with in separate exemptions submitted by the Deputy Chief of Staff (DCS), G-1 and will not be specifically addressed here. However, I note that the military component of the legal function, The Judge Advocate General's Corps, is a very small branch that must maintain a base of developmental assignments large enough to provide diversely trained judge advocates able to support commanders across the operational spectrum.

Requestor's Position on Issues. The General Counsel requested an exemption for the entire legal function, including attorneys and support staff that perform functions that are required by statute and inherently Governmental in nature.

Standard of Review. The senior HQDA functional official for a function must describe and substantiate specifically how preparation and implementation of a Third Wave implementation plan for each course of action poses substantial and specific risks to a core war-fighting mission of the Army (i.e., a core competency) or violates a statutory requirement affecting a function. The following are the risk factors to evaluate this request: force management risk; operational risk; future challenges; and institutional risk. How these risk criteria are applied may vary based on each course of

action evaluated (i.e., A-76; alternatives to A-76; military conversions; transfer to another agency; divestiture). Therefore, exemption requests and decisions must assess the potentially adverse impact of each course of action.

Core Competency Relevant to Risk Issue. Legal advice to commanders in the operating forces is a core war-fighting competency of the Army. The legal function directly falls within most of the six recognized core competencies of the Army, as provided for in Army Field Manual 1 and The Army Plan: Shape the Security Environment (Deter Forward); Prompt Response; Forcible Entry Operations; Mobilize the Army; Sustained Land Dominance; or Support Civil Authority. The command and control functions in the operating forces rely heavily on legal advice to administer the UCMJ and on Operational Legal Advice including interpreting and applying the Law of War, administrative law relevant to deployed forces, forward battle area contracting and combat claims. Lack of timely and accurate legal advice in these areas would pose substantial risk to the mission.

Statutory or Legal Requirement Relevant to Divestiture Issue. Certain attorneys performing military justice functions are required by statute to be commissioned officers of the Judge Advocate Generals Corps. These include 10 U.S. Code, Section 826(b) requiring that the Military Judge for a court-martial must be a commissioned member of the Judge Advocate General's Corps, and 10 U.S. Code, Section 827(B)(1) requiring that the Trial and Defense Counsel detailed to a General Court Martial must be commissioned officers, and members of the Judge Advocate General's Corps. Other statutes require The Judge Advocate General to establish and man the Army Court of Criminal Appeals (10 U.S. Code, Section 866) and provide commissioned appellate counsel (10 U.S. Code, Section 870) or require review of certain courts-martial by a judge advocate (10 U.S. Code, Section 864).

Inherently Governmental Relevant to Outsourcing Issue. An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. An inherently governmental function is so intimately related to the public interest as to require performance by Federal Government employees. Attorneys providing legal advice to Army decision makers, attorneys engaged in litigation on behalf of the United States, and attorneys processing claims against the United States are all exercising an inherently Governmental function. Legal advice is substantively different from other advice. The Department of Justice Office of Legal Counsel has repeatedly held that legal advice to Government agencies and officials must be provided by Government lawyers. Specific OLC opinions have held that all litigation support must come from Government counsel; that Government Counsel must provide all claims and administrative law support; and that Government counsel must provide general legal advice. The opinions have all noted that absent a specific statutory statement by Congress to the contrary, only Government lawyers may provide legal advice and services including claims processing and litigation support, to government agencies and officials within the scope of their

official duties. The opinions have carefully distinguished the provision of authoritative and precedent setting legal advice from the summarization of legal advice, previously given by Government lawyers, in reports by outside consultants. Thus a consultant may report on previously issued advice, but is barred from providing authoritative and precedent setting advice.

It has been suggested that the following language from Office of Federal Procurement Policy Letter 92-1 establishes a benchmark that makes legal advice not inherently Governmental. "The following list is of services and actions that are not considered to be inherently Governmental functions...[c]ontractors' providing legal advice and interpretations of regulations and statutes to Government officials. OFPP Letter 92-1, Appendix B. This conclusion, however, is unwarranted. First, OFPP 92-1 specifically states ..."this policy letter does not purport to specify which functions are, as a legal matter inherently governmental, or to define the factors used in making such legal determination." OFPP Letter 92-1, para 4. Second, the letter states "[I]ts purpose is to assist Executive Branch officers and employees in avoiding an unacceptable transfer of official responsibility to Government contractors." OFPP Letter 92-1, para 1. Paragraph 5 of the letter (later codified almost verbatim in the Federal Activities Inventory Reform Act) states:

An inherently Governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

- (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (c) significantly affect the life, liberty, or property of private persons;
- (d) commission, appoint, direct, or control officers or employees of the United States; or
- (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

The provision of legal advice includes actions in all five of the listed categories. Legal advice to Government officials generally is based upon an initial analysis of the applicable laws relating to the Department function in question. Rendering legal advice always includes review of the statute, decision, regulation or policy in question and the application of the law to the proposed course of action. The actions of any federal agency are inextricably bound up in the interpretation of, and application of, law to agency missions. Proposed actions of agencies, the pursuit of agency positions in civil and criminal proceedings, agency actions impacting on citizens, appointments of employees and officials, and the acquisition of services are all closely regulated by law. The final agency position is, in many ways, firmly delineated by law. The OFPP 92-1 statement that contractors may provide legal advice thus is limited to the repetition of previously issued (Government attorney provided) legal opinions. Authoritative and

precedent setting legal advice, litigation support and claims processing can only be accomplished by Government lawyers .

Statutes Relevant to Sourcing Decision. In addition to the statutes referenced above requiring military judges and prosecutors, the legal assistance function would be impossible to perform using local outside counsel because only through the operation of 10 U.S. Code, Section 3013 and 1044 and regulations promulgated pursuant to these statutes may government lawyers practice the law of foreign states (states other than the state of licensing of the providing attorney) and thus render legal assistance to soldiers in the deployed Army or the generating force. The claims function must also remain in house pursuant to the prohibitions in 28 U.S. Code, Section 514, and 5 U.S. Code, Section 3106. 28 U.S. Code, Section 514 has been interpreted to bar the various agencies from independently hiring outside counsel to process or investigate claims or other administrative matters pending before the agency. 5 U.S. Code, Section 3106 has been interpreted to state that only the Attorney General and attorneys appointed by him may represent the United States in any litigation. Agencies may not hire outside counsel for representation in litigation unless specifically granted Congressional authorization such as that granted to the Department of Defense for very limited purposes in 10 U.S. Code, Section 1037 (hiring outside counsel for appearance before foreign tribunals). There are no other explicit grants to the Army. This does not limit the study of the appropriate level and scope of service that should be provided to civil litigation by Army attorneys as opposed to Department of Justice attorneys. Nor does this limit the study of the appropriate mix of military and civilian attorneys providing this service for the Army.

Personal Services. Where supervision by an official required by statute is required for effective performance of an activity in support of that official, there is a basis for exempting that activity, whether advisory or clerical support, to avoid an inappropriate personal services contract, as mentioned above in the case of legal support services. In addition, if persons supervised by an official in turn must supervise individuals supporting them in order to effectively perform the activity, a further extension of this exemption may be warranted. In addition, as noted above, attorneys are personally, professionally responsible for the actions of non-lawyer assistants. This implicates a direct supervisory relationship that may be a violation of the personal services contract limitation. In the case of contractors accompanying the operating forces, there also may be a legitimate basis for exempting the function from contractor performance. Exemption is necessary in the legal services area to avoid inappropriate personal services arrangements.

Conflicts of Interest. The hiring of outside counsel, even if otherwise permitted under federal law, presents a not insignificant risk of conflicts of interest. An attorney may only ethically represent one side in a dispute or matter. (The American Bar Association and Army Rule of Professional Conduct 1.7, 1.8, 1.9.) An Army lawyer represents the Army itself through its designated agents. (Army Rule of Conduct 1.13.) As such, the Army lawyer must keep the interests of the Army foremost in the

representation. Army lawyers have no other client than the Army, unless designated to represent an individual member of the Army. Outside counsel typically represent numerous clients. Private counsel must employ significant safeguards to avoid engaging in representation actions for one client that could cause a conflict with another present, or past client's interest. Private outside counsel facing conflicts must decline or withdraw from representation. In addition, if one lawyer in a private law firm has a conflict of interest, the entire law firm is conflicted in the representation and must typically withdraw. In-house Government lawyers, having only one client, face fewer opportunities for conflicts of interest.

Military Conversions. Military lawyers are required by statute in the administration of courts martial as well as in more specialized areas like procurement, administrative law, and fiscal law, when deployed to operational areas. In addition, military support personnel must be provided to military attorneys when deployed to operational areas. However, civilian personnel may provide these legal services when not mandated by statute, when not engaged in support of operations in forward areas, or when recent military experience is not required to perform the task. Prior to any conversions, however, the appropriate mix of military and civilian personnel in these remaining functional areas should be determined.

To the extent that military attorneys carry out their duties in sustainment areas rather than in the actual area of engagement, civilian government attorneys may, in some circumstances, carry out these functions. Indeed, non-military personnel are currently doing many jobs in areas close to the battlefield. The DoD Inventory of Commercial and Inherently Governmental Activities Guide to Inventory Submission (Inventory Guide), Enclosure 6, page 6-3 provides guidance regarding manpower mix criteria. “[Manpower] that perform duties and responsibilities that are integral to military command and control of combat and crisis situations” shall be designated as Military Operations (Code A). See Enclosure 6, page 6-3, paragraph 1. Components that perform combat and service support functions shall be designated Code A only if there is such a high likelihood of hostile fire or collateral damage that: 1) military authority, discipline, and training are needed to maintain control and, if necessary, reconstitute the unit, and 2) use of civilians or contract support constitutes an inappropriate or unacceptable risk.

Enclosure 8 of the Guide contains guidance for risk assessment. Applying the guidelines on p.8, paragraph 1-1, use of non-military personnel in combat support roles must be assessed in terms of risk to “the support mission and the missions dependent on that support.” Combat mission failure or loss of life are severe risks, while “loss of support elements that augment or enhance operations in theatre during a conflict often have minor impact on combat operations.” When a person is deployed forward of a division, where refusal to obey a commander’s orders would create a risk of loss of life or mission failure, UCMJ authority will be needed in order to compel performance, so that person must be military. Otherwise, civilian employees or contractors may perform this function. (Although UCMJ jurisdiction applies to civilians accompanying the

operating forces, which could include contractors, that jurisdiction only applies during a "declared war," and most military operations augmented by civilians are operations other than war.

Outside of military theater operational areas the central issue concerns whether adequate performance of the legal function in the infrastructure requires military unique knowledge and skills. According to Office of Secretary of Defense Guidance for compiling the Inventory of Commercial and Inherently Governmental Activities, military unique knowledge and experience can only be derived from recent first-hand involvement in military activities – i.e., through commanding military forces or conducting or participating in military operations or exercises. This knowledge and experience must be more substantial than familiarity with doctrine, tactics, operations, or regulations; capabilities that can be developed by civilians; or, advice military retirees can provide based on their knowledge and experiences.



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Enclosures

CODING RULES for General Counsel and Legal Functions

Include all personnel in the following units:

- Office of the General Counsel
- Office of the Judge Advocate General
- US Army Legal Services Agency
- US Army JAG School
- US Army Claims Service

Also include all personnel in TDA paragraphs that contain at least one legal functional:

- Officer 55A/B – Judge Advocate/Military Judge
- Warrant 550A – Legal Administrator
- Enlisted 27D – Paralegal Specialist
- Civilian in GS-900 series – Legal and Kindred
- Civilian GS-1222 – Patent Attorney

1. Administration of Military Justice

- a. Military attorneys (Officers 55A/55B)
- b. Civilian attorneys (GS-905)
- c. Military and Civilian Court Reporters
- d. All other personnel

Code F – Military Unique Skills and Knowledge
Code E – Civilian Decision and Control
Code G – Exemption for Military Support
Code L – Protected by law, statute, treaty or agreement

2. Operational Law

- a. All military (Attorneys and staff personnel)
- b. Civilian attorneys
- c. All other civilian personnel

Code F – Military Unique Skills and Knowledge
Code E – Civilian Decision and Control
Code L – Protected by law, statute, treaty or agreement

3. Administrative Law, Claims, and Legal Assistance

- a. Military and Civilian attorneys
- b. All other personnel

Code P – Pending Restructuring
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