Army Regulation 27–40

Legal Services

Litigation

Headquarters
Department of the Army
Washington, DC
19 September 1994

Unclassified

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SUMMARY of CHANGE

AR 27-40
Litigation

This revision--

- o Devotes a separate chapter to service of process (chap 2).
- o Replaces "investigative report" with "litigation report" reflecting current usage (chap 3).
- o Devotes a separate chapter to individual liability (chap 4).
- o Treats environmental litigation (chap 6).
- o Deletes coverage of criminal prosecutions in U.S. Magistrate and District Courts (see AR 27-10).
- o Delegates more authority to the installation level to determine release of information and appearance of witnesses (chap 7).
- o Updates procedures to obtain release from local or State jury duty (chap 10).

Headquarters
Department of the Army
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19 September 1994

*Army Regulation 27–40

Effective 19 October 1994

Legal Services

Litigation

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the Secretary of the Army

History. This printing publishes a complete revision of this Army regulation. Because the publication has been revised extensively, the changed portions have not been highlighted.

Summary. This regulation prescribes policy and procedures for litigation in civilian court proceedings, including the following: providing representation of the Army and its personnel in Federal and State court proceedings; remedies for procurement fraud; environmental litigation; bankruptcy; release of information and appearance of witnesses in criminal and civil court actions; procedures to follow when soldiers are summoned for jury duty; and, procedures for cooperation with the Office of Special Counsel.

Applicability. This regulation applies to all DA personnel (see glossary), including the Active Army, the Army National Guard, and the U.S. Army Reserve. This regulation applies during partial and full mobilization.

Proponent and exception authority. The proponent of this regulation is The Judge Advocate General. The proponent has the authority to approve exceptions to this regulation that are consistent with controlling law and regulation. Proponents may delegate the approval authority, in writing, to a division chief under their supervision within the proponent agency who holds the grade of colonel or the civilian equivalent.

Army management control process. This regulation is not subject to the requirements of AR 11–2. It does not contain internal control provisions.

Supplementation. Supplementation of this regulation and establishment of command and local forms are prohibited without prior approval from the Office of The Judge Advocate General, ATTN: Litigation Division (DAJA–LT), 901 North Stuart Street, Arlington, VA 22203–1837.

Interim changes. Interim changes to this regulation are not official unless authenticated by the Administrative Assistant to the Secretary of the Army. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. Users are invited to send comments and suggestions to Office of The Judge Advocate General, ATTN: Litigation Division (DAJA–LT), 901 North Stuart Street, Arlington, VA 22203–1837.

Distribution. Distribution of this publication is made in accordance with DA Form 12–09–E, block number 2040, intended for command levels B,C,D, and E for Active Army, Army National Guard, and U.S. Army Reserve.

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*This regulation supersedes AR 27–40, 2 December 1987, and rescinds DA Form 2135, May 1973.

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Chapter 1
General

1–1. Purpose

a. This regulation prescribes policies and procedures for the following:

(1) Defensive and affirmative litigation in Federal and State civilian courts where the Army or Department of Defense (DOD) has an interest in the matter.

(2) Proceedings before Federal or State administrative bodies, such as utility rate commissions.

(3) Release of official information and testimony by Department of the Army (DA) personnel with regard to litigation.

(4) Remedies for procurement fraud and corruption.

(5) Environmental civil litigation and administrative proceedings.

(6) Proceedings before the Office of Special Counsel.

b. This regulation does not apply to Department of the Army (DA) or DOD proceedings such as courts-martial or administrative boards.

1–2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and terms used in the regulation are explained in the glossary.

1–4. Responsibilities

a. United States Department of Justice (DOJ). DOJ will defend litigation in domestic and foreign courts, against the United States, its agencies and instrumentalities, and employees whose official conduct is involved. The various U.S. Attorney Offices, under the oversight of the Attorney General, will conduct much of the representation.

b. The Judge Advocate General (TJAG). Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General Counsel, TJAG is responsible for litigation in which the Army has an interest. Except with respect to proceedings addressed in subparagraph *i* below, only TJAG (or a designee) will communicate to DOJ the Army's position with regard to settlement of a case.

c. Assistant Judge Advocate General For Civil Law and Litigation (AJAG–CL). Responsible to TJAG for litigation issues; supervises Chief, Litigation Division.

d. Chief, Litigation Division. Reports to AJAG–CL and is responsible for the following:

(1) Supervising litigation in which the Army has an interest.

(2) Acting for TJAG and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases, subject to the supervision of TJAG and AJAG–CL.

(3) Delegating responsibility for cases if appropriate.

(4) Serving as primary contact with DOJ on litigation.

(5) Accepting service of process for DA and for the Secretary of the Army in his or her official capacity. (See 32 CFR 257.5.)

e. Special Assistant U.S. Attorneys (SAUSAs) and DOJ special attorneys. Army judge advocates and civilian attorneys, when appointed as SAUSAs under 28 USC 543, will represent the Army's interests in either criminal or civil matters in Federal court under the following circumstances:

(1) *Felony and misdemeanor prosecutions in Federal court.* Army attorneys, at the installation level, after being duly appointed (see AR 27–10), will prosecute cases, in which the Army has an interest, in Federal court. Army attorneys who prosecute criminal cases will not represent the United States in civil litigation without authorization from the Chief, Litigation Division.

(2) *SAUSAs for civil litigation.* By assignment of TJAG and upon the approval of the U.S. Attorney, judge advocates will serve within a U.S. Attorney's office to represent the Government in litigation in which the Army or DOD has an interest. These judge advocates have the same general authority and responsibility as an Assistant U.S. Attorney.

(3) *Special Attorneys assigned to DOJ.* By assignment of TJAG and with the concurrence of the appropriate DOJ official, judge advocates will work as Special Attorneys for DOJ. Special Attorneys are authorized to represent the United States in civil litigation in which the Army or DOD has an interest.

f. Attorneys at Army activities or commands. Staff judge advocates (SJAs) or legal advisers, or attorneys assigned to them, will represent the United States in litigation only if authorized by this regulation or delegated authority in individual cases by the Chief, Litigation Division.

g. Commander, U.S. Army Claims Service (USARCS). The Commander, USARCS, and USARCS attorneys, subject to AR 27–20, chapter 4, will maintain direct liaison with DOJ in regard to administrative settlement of claims under the Federal Tort Claims Act.

h. Chief, Contract Law Division, OTJAG. The Chief, Contract Law Division, attorneys assigned to the Contract Law Division, and other attorneys designated by the Chief, Contract Law Division, in litigation involving taxation, will represent DA in negotiation, administrative proceedings, and litigation, and maintain liaison with DOJ and other Governmental authorities.

i. Legal Representatives of the Chief of Engineers. The Office of Chief Counsel, attorneys assigned thereto, and other attorneys designated by the Chief Counsel will maintain direct liaison with DOJ and represent DA in litigation and administrative proceedings arising from the navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, and real property functions of the U.S. Army Corps of Engineers (COE).

j. Chief Trial Attorney, Contract Appeals Division,USALSA. The Chief Trial Attorney, attorneys assigned to the Contract Appeals Division, and attorneys designated by the Chief Trial Attorney, will represent the Government before the Armed Services Board of Contract Appeals (ASBCA) and the General Services Board of Contract Appeals (GSBCA). They will maintain direct liaison with DOJ concerning appeals from ASBCA and GSBCA decisions. The Chief Trial Attorney has designated COE attorneys to act as trial attorneys in connection with COE contract appeals.

k. Chief, Regulatory Law Office, USALSA. The Chief, Regulatory Law Office, attorneys assigned to the Regulatory Law Office, and other attorneys designated by the Chief, will represent DA consumer interests in regulatory matters before State and Federal administrative agencies and commissions, including but not limited to proceedings involving rates and conditions for the purchase of services for communications (except long-distance telephone), transportation, and utilities (gas, electric, water and sewer). They will maintain direct liaison with DOJ for communications, transportation, and utilities litigation.

l. Chief, Intellectual Property Law Division, USALSA. The Chief, Intellectual Property Law Division, and the attorneys assigned thereto, will represent DA in matters pertaining to patents, copyrights, and trademarks. They will maintain direct liaison with DOJ and represent the DA in intellectual property issues.

m. Chief, Labor and Employment Law Office,OTJAG. The Chief, Labor and Employment Law Office, attorneys assigned thereto, and attorneys identified as labor counselors will represent DA in matters pertaining to labor relations, civilian personnel, and Federal labor standards enforcement before the following: Federal Labor Relations Authority; Merit Systems Protection Board; Equal Employment Opportunity Commission; Department of Labor; National Labor Relations Board; and, State workmen's compensation commissions. In the event any individual mentioned in this subparagraph intends to make a recommendation to DOJ concerning an appeal of any case to a U.S. Court of Appeals, such recommendation will first be coordinated with Litigation Division.

n. Chief, Procurement Fraud Division, USALSA. The Chief, Procurement Fraud Division, attorneys assigned thereto, and other attorneys designated by the Chief, will represent DA in all procurement fraud and corruption matters before the Army suspension and debarment authority and before any civil fraud recovery administrative

records privileged from release should be retained by the custodian pending the court's ruling upon the Government's motion.

(2) When a motion to quash or for a protective order is not filed, or the motion is unsuccessful, and the appropriate DA official has determined that no further efforts will be made to protect the records, copies of the records (authenticated if necessary) will be submitted to the court (or to the clerk of court) in response to the subpoena or order.

d. Classified and privileged materials. Requests from DOJ, U.S. Attorneys, or attorneys for other Governmental entities for records that are classified or otherwise privileged from release will be referred to the Litigation Division. (See para 7–2*g*.)

Section III
DA Personnel as Witnesses in Private Litigation

7–8. Response to subpoenas, orders, or requests for witnesses

a. Policy. The involvement of present or former DA personnel in private litigation is solely a personal matter between the witness and the requesting party, unless one or more of the following conditions apply:

(1) The testimony involves official information.(See glossary.)

(2) The witness is to testify as an expert.

(3) The absence of the witness from duty will interfere seriously with the accomplishment of a military mission.

b. Former DA personnel. Former DA personnel may freely respond to requests for interviews and subpoenas except in instances involving official information (*a*(1) above) or concerning expert testimony prohibited by paragraph 7–10 below. In those instances, the subject of the request or subpoena should take the action specified in paragraphs 7–2*c* and 7–3 of this regulation.

c. Present DA personnel. Present DA personnel will refer all requests for interviews and subpoenas for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser.

d. Discretion to testify. Any individual not wishing to grant an interview or to testify concerning private litigation may seek the advice of an Army attorney concerning the consequences, if any, of refusal. Any individual not authorized to consult with Army counsel should consult with private counsel, at no expense to the Government.

7–9. Official information

a. In instances involving paragraph 7–8*a*(1) above, the matter will be referred to the SJA or legal adviser serving the organization of the individual whose testimony is requested, or to HQDA pursuant to paragraph 7–3*a* above. The deciding official will determine whether to release the information sought under the principles established in paragraph 7–5 above. If funding by the United States is requested, see paragraph 7–16*d* of this regulation.

b. If the deciding official determines that the information may be released, the individual will be permitted to be interviewed, deposed, or to appear as a witness in court provided such interview or appearance is consistent with the requirements of paragraphs 7–10 and 7–11 below. (See, for example, fig 7–2.) A JA or DA civilian attorney should be present during any interview or testimony to act as legal representative of the Army. If a question seeks information not previously authorized for release, the legal representative will advise the witness not to answer. If necessary to avoid release of the information, the legal representative will advise the witness to terminate the interview or deposition, or in the case of testimony in court, advise the judge that DOD directives and Army regulations preclude the witness from answering without HQDA approval. Every effort should be made, however, to substitute releasable information and to continue the interview or testimony.

7–10. Expert witnesses

a. General rule. Present DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States. Former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities either in private litigation or in litigation in which the United States has an interest for a party other than the United States. (See fig 7–3.) An SJA or legal adviser is authorized to deny a request for expert testimony, which decision may be appealed to the Litigation Division.

b. Exception to the general prohibition. If a requester can show exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States, the Litigation Division may grant special written authorization for present or former DA personnel to testify as expert or opinion witnesses at no expense to the United States. In no event, may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

c. Exception for AMEDD personnel. Members of the Army medical department or other qualified specialists may testify in private litigation with the following limitations (see fig 7–4):

(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 the following: 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 extend to expert or opinion testimony, to hypothetical questions, or to a prognosis.

d. Court-ordered expert or opinion testimony. If a court or other appropriate authority orders expert or opinion testimony, the witness will notify the Litigation Division immediately. If the Litigation Division determines it will not challenge the subpoena or order, the witness will comply with the subpoena or order. If directed by the Litigation Division, however, the witness will decline respectfully to comply with the subpoena or order. (See *United States ex. rel. Touhy v. Ragen,* 340 U.S. 462 (1951).)

e. Expert witness fees. All fees tendered to present DA personnel as an expert or opinion witness, to the extent they exceed actual travel, meals, and lodging expenses of the witness, will be remitted to the Treasurer of the United States.

7–11. Interference with mission

If the absence of a witness from duty will interfere seriously with the accomplishment of a military mission, the SJA or legal adviser will advise the requesting party and attempt to make alternative arrangements. If these efforts fail, the SJA or legal adviser will refer the matter to the Litigation Division.

Section IV
Litigation in Which the United States Has an Interest

7–12. Response to subpoenas, orders, or requests for witnesses

a. Referral to a deciding official. Requests, subpoenas, or orders for official information, interviews, or testimony of present or former DA personnel in litigation or potential litigation in which the United States has an interest, including requests from DOJ, will be resolved by the SJA or legal adviser pursuant to the principles of this chapter. The Litigation Division will be consulted on issues that cannot be resolved by the SJA or legal adviser.

b. Reassignment of witnesses. When requested by the U.S. Attorney, the SJA or legal adviser will ensure that no witnesses are reassigned from the judicial district without advising the DOJ attorney. If a witness is vital to the Government's case and trial is imminent, the SJA or legal adviser should make informal arrangements to retain the witness in the command until trial. If this is not feasible, or if a satisfactory arrangement cannot be reached with the

DOJ attorney, the SJA or legal adviser should notify the Litigation Division.

7–13. Expert witnesses

Requests for present or former DA personnel as expert or opinion witnesses from DOJ or other attorneys representing the United States will be referred to the Litigation Division unless the request involves a matter that has been delegated by the Litigation Division to an SJA or legal adviser. In no event, may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

7–14. News media and other inquiries

News media inquiries regarding litigation or potential litigation will be referred to the appropriate public affairs office. DA personnel will not comment on any matter presently or potentially in litigation without proper clearance. Local public affairs officers will refer press inquiries to HQDA (SAPA), WASH DC 20310–1500, with appropriate recommendations for review and approval by the Office of the Chief of Public Affairs. All releases of information regarding actual or potential litigation will be coordinated with the Litigation Division prior to release.

Section V
Status, Travel, and Expenses of Witnesses

7–15. Witnesses for the United States

a. Status of witness. A soldier authorized to appear as a witness for the United States, including those authorized to appear under paragraph 7–16*d* below, will be placed on temporary duty. If USAR or NG personnel are requested as witnesses for the United States, and if their testimony arises from their active duty service, they should be placed on active duty to testify. The status of a civilian employee will be determined under Federal Personnel Manual 630, subchapter 10. DA personnel who appear as necessary witnesses for a party asserting the Government's claim for medical care expenses are witnesses for the United States.

b. Travel arrangements. Travel arrangements for witnesses for the United States normally are made by DOJ through the Litigation Division for other than local travel. The Litigation Division will issue instructions for this travel, including fund citation, to the appropriate commander. A U.S. Attorney, or an attorney asserting the Government's medical care claim under chapter 5 of this regulation, may make arrangements for local travel through the SJA or legal adviser for attendance of a witness who is stationed at an installation within the same judicial district, or not more than 100 miles from the place where testifying. Other requests, including those under paragraph 7–16*d* below, will be referred to the Litigation Division. The instructions from the Litigation Division, or the request from the U.S. Attorney or the attorney asserting the Government's claim, will serve as a basis for the issuance of appropriate travel orders by the local commander.

c. Travel and per diem expenses. The witness' commander or supervisor should ensure that the witness has sufficient funds to defray expenses. The SJA or legal adviser will provide assistance.

(1) Where local travel is performed at the request of a U.S. Attorney and the testimony does not involve information acquired in the performance of duties, transportation arrangements (costs) and any per diem expenses are the responsibility of the U.S. Attorney.

(2) An attorney asserting the Government's medical care or property claim may be required to advance local travel expense money to the witness requested and to include these in recoverable costs where the Government's claim is not large enough to justify expenditures of Government travel funds.

(3) Other local travel and per diem expenses for cases involving Army activities or claims are proper expenses of the command issuing the orders.

(4) Litigation Division will furnish travel expense and per diem funds for other than local travel and will receive reimbursement from DOJ or other Government agencies as appropriate.

7–16. Witnesses for a State or private litigant

a. Status of witness. If authorized to appear as a witness for a State or private litigant, and the testimony to be given relates to information obtained in the performance of official duties, a soldier will attend in a permissive TDY status. If authorized to appear as a witness, but the testimony does not relate to information obtained in the performance of official duties, a soldier may be granted a pass or permissive TDY under AR 630–5, or be required to take ordinary leave. The status of a civilian employee will be determined under Federal Personnel Manual 630, subchapter 10.

b. Travel arrangements. The requesting party or State agency will make all travel arrangements for attendance of DA personnel authorized to appear as witnesses for a State or private litigant. The local commander may issue appropriate orders when necessary.

c. Travel expenses. The United States may not pay travel, meals, and lodging expenses of the witness, other than normal allowances for subsistence pursuant to the DOD Military Pay and Allowances Entitlements Manual. These expenses are solely a matter between the witness and the party seeking his or her appearance. Witnesses ordinarily should be advised to require advance payment of such expenses. Soldiers authorized to appear in a pass or permissive TDY status are not entitled to receive witness attendance fees, but may accept travel, meals, and lodging expense money from the requesting litigant. All witness fees tendered the soldier, to the extent they exceed such actual expenses of the member, will be remitted to the Treasurer of the United States. A civilian employee authorized to appear in his or her official capacity will accept the authorized witness fees, in addition to the allowance for travel and subsistence, and make disposition of the witness fees as instructed by his or her personnel office.

d. Funding by the United States. Requests for DA personnel to appear at Government expense as witnesses in State or local proceedings for a party other than the United States, including cases involving domestic violence or child abuse, will be referred to the Litigation Division. The Litigation Division may authorize travel and per diem expenses under paragraph 7–15 above when the case is one in which the United States has a significant interest.

7–17. Witnesses before foreign tribunals

a. Referral to the SJA. Requests or subpoenas from a foreign Government or tribunal for present DA personnel stationed or employed within that country to be interviewed or to appear as witnesses will be forwarded to the SJA of the command exercising general court-martial jurisdiction over the unit to which the individual is assigned, attached, or employed. The SJA will determine the following:

(1) Whether a consideration listed in paragraph 7–8*a*(1) through (3) above applies.

(2) Whether the information requested is releasable under the principles established in section II of this chapter.

(3) Whether the approval of the American Embassy should be obtained because the person is attached to the Embassy staff or a question of diplomatic immunity may be involved.

b. United States has an interest in the litigation. If the SJA determines that the United States has an interest in the litigation, the commander may authorize the interview or order the individual's attendance in a temporary duty status. The United States will be deemed to have an interest in the litigation if it is bound by treaty or other international agreement to ensure the attendance of such personnel.

c. United States has no interest in the litigation. If the SJA determines that the United States does not have an interest in the litigation, the commander may authorize the interview or the appearance of the witness under the principles established in section III of this chapter.

d. Witnesses located outside the requester's country. If the requested witness is stationed in a country other than the requester's, the matter will be referred to the Litigation Division.