

**GET BACK IN LINE: HOW MINOR REVISIONS TO AR
600-8-4 WOULD REJUVENATE SUICIDE LINE OF DUTY
INVESTIGATIONS**

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I hear you, judge. What he did disgusts me and if he was alive, I'd expect you to put him in jail for a long time. But if I don't find him in the line of duty, then the family gets upset and it draws the attention of higher ups. If I do find him in the line of duty, nobody gives it a second thought.¹

I. Introduction

In 2009, a master sergeant (MSG Bank) is under investigation for sexual harassment in Afghanistan.² He is in good spirits and tells others he is sure the investigation will be over soon. A few days into the sexual-harassment investigation, a search and seizure authorization is issued for MSG Bank's computer and electronic devices.

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¹ A student of the 62d Judge Advocate Officer Graduate Course shared this paraphrased quote with the author. According to the judge advocate, he received the response from the appointing authority of a suicide line of duty (LOD) investigation after the judge advocate recommended that the deceased Soldier be found not in the line of duty [hereinafter Appointing Authority Quote].

² This example is loosely based on the author's recent professional experience as an administrative law attorney in 2009. Information may have been added or deleted for the purposes of this article. Specific names, units, and locations have been changed or withheld to protect the privacy of the military personnel involved, as well as the surviving family members [hereinafter Professional Experience, Bank suicide].

When MSG Bank learns that all of the devices will be searched, his mood immediately changes because he knows what the search will uncover—proof of adulterous affairs with multiple civilian and military women (including one subordinate claiming it was against her will) and thousands of pornographic images and videos of female Soldiers. A few hours later, he tells some junior Soldiers that he cannot handle being court-martialed and going to prison, as well as having to explain everything to his wife. Master Sergeant Bank says he would rather be dead. A few hours later, he puts his pistol in his mouth and kills himself.³

In 2011, Captain (CPT) Wills finds out that his thirteen-year-old step-daughter just told his wife that he has been sexually molesting her since she was ten.⁴ His wife has proof and is going to the police. Captain Wills hangs up on his wife, gets into his car, and drives off post. As friends and other members of his unit are looking for him, CPT Wills sits in the parking lot of a vacated department store, posting a Facebook message apologizing to his step-daughter and family for the pain he has caused them. “I cannot live with what I have done” is the last line of the post. Captain Wills then pulls a handgun out of the glove box and shoots himself in the head.⁵

Pursuant to Army Regulation (AR) 600-8-4, line of duty (LOD) investigations were conducted in both cases to examine the circumstances surrounding the deaths.⁶ The two investigations shared much in common. First, neither of the individuals had a documented history of mental issues before their suicides. Second, substantial evidence in both cases indicated that MSG Bank and CPT Wills committed the wrongful acts of which they were accused.⁷ Further, both decedents communicated in some way that they realized the finality of

³ *Id.*

⁴ This example is also loosely based on the author’s recent professional experience as a Battalion Judge Advocate in 2012. Information may have been added or deleted for the purposes of this article. Specific names, units, and locations have been changed or withheld to protect the privacy of the military personnel involved, as well as the surviving family members [hereinafter Professional Experience, Wills suicide].

⁵ *Id.*

⁶ U.S. DEP’T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 2-3c(3) (4 Sept. 2008) [hereinafter AR 600-8-4]. The author has personal knowledge that suicide LOD investigations were conducted for Master Sergeant (MSG Bank) and Captain (CPT) Wills.

⁷ See generally Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

the acts they were about to commit.⁸ Finally, MSG Bank and CPT Wills both had a “motive for self-destruction,”⁹ which was to avoid the personal and criminal consequences of their misconduct.

For these reasons and in accordance with regulatory guidance, both investigating officers (IOs) recommended the deceased be found “not in the line of duty—due to misconduct.”¹⁰ The judge advocates who conducted the legal reviews found the investigations sufficient. But in both cases, the approving authorities disapproved the IOs’ recommendations and determined the deceased was “in the line of duty.”¹¹ Their justification was that the deceased was mentally unsound when he committed the suicidal act.¹² However, the unspoken reason was that MSG Bank and CPT Wills had wives and children they left behind to fend for themselves and the command desired to ensure they received as much support from the Army as possible.¹³ Consequently, based on the LOD determinations, both families were eligible to receive their full contingent of death benefits.¹⁴

Though understandable from an emotional standpoint, that approach is problematic for judge advocates charged with upholding the integrity, intent, and purpose of laws, regulations, and investigations. The purpose of AR 600-8-4, for example, is to investigate “the circumstances of disease, injury, or death of a soldier”¹⁵ and not to simply find a way to ensure surviving family members receive as many posthumous benefits

⁸ See *supra* note 7. Master Sergeant Bank told others he specifically could not deal with the embarrassment of a court-martial, going to prison, and having to face his wife. Captain Wills never made an attempt to deny his thirteen-year-old step-daughter’s allegations and instead posted a public apology to her for what he had done.

⁹ U.S. DEP’T OF ARMY, REG. 600-10, THE ARMY CASUALTY SYSTEM para. 5-18d(3) (30 June 1966) [hereinafter AR 600-10]. Based on the evidence against them, both MSG Bank and CPT Wills would have likely faced significant adverse action for their misconduct.

¹⁰ AR 600-8-4, *supra* note 6, para. 2-6.

¹¹ See Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

¹² See *supra* note 7.

¹³ In a survey conducted by the author, 12 out of 17 (70.6%) current suicide LOD appointing authorities (future approving authorities) stated that making sure the surviving family is taken care of was the most important thing to them when one of their Soldiers committed suicide. Only one was most concerned with determining the Soldier’s line of duty status.

¹⁴ *Id.* Part III of this article examines how suicide LOD determinations impact surviving family benefits.

¹⁵ AR 600-8-4, *supra* note 6, para. 1-1.

as possible. Additionally, a finding that suicides like the above are “in the line of duty” is concerning because it fails to distinguish those cases from the cases of Soldiers who took their lives but were not under a cloud of criminal suspicion.

While highlighting this problematic practice of commanders undermining the regulatory framework, the purpose of this article is to propose revisions to AR 600-8-4 that resolve the approving authority’s concerns about benefits for the surviving families and also protect the credibility of suicide LOD investigations. This article analyzes the history, current law, and problem areas of the regulation before proposing a solution for those issues. The proposed remedy provides approving authorities a more concrete legal and moral basis to make the difficult determination of finding suicides committed to avoid the consequences of alleged misconduct “not in the line of duty.” At the very least, the suggested changes will allow a commander who feels sorry for a surviving family to more easily make the legally correct decision of finding a non-qualifying suicide not in the line of duty.

II. The Status Quo

Starting in 1966, LOD investigations were required for self-inflicted death, injury, or disease.¹⁶ Little has changed from a procedural standpoint in the past 47 years. To begin a LOD investigation, “[a]n officer exercising special court-martial jurisdiction will appoint a disinterested commissioned officer as an investigating officer.”¹⁷ The IO must first obtain a Department of the Army (DA) Form 2173 and ensure that the Medical Treatment Facility (MTF) completes section I while the unit commander completes section II.¹⁸ Once the form is completed, the IO begins collecting evidence for his suicide LOD investigation.

¹⁶ AR 600-10, *supra* note 9, para. 5-7a(2)(b).

¹⁷ *Id.* para. 5-8; *see also* AR 600-8-4, *supra* note 6, para. 3-6 (“The LD appointing authority is normally the SPCMCA.”).

¹⁸ AR 600-8-4, *supra* note 6, para. 3-8c. A Department of the Army Form 2173 (DA Form 2173) is the Statement of Medical Examination and Duty Status. Section I is filled out by the attending physician or hospital patient administrator. It asks for time of arrival, nature of injury, alcohol or drug use, and solicits an opinion as to whether the injured or deceased Soldier was “in the line of duty.” Section II is completed by the unit commander who must provide the duty status of the individual along with accident details before providing his or her line-of-duty recommendation. *See* U.S. Dep’t of the Army, DA Form 2173, Statement of Medical Examination and Duty Status (Oct. 1972).

For LOD investigations into suicides across all of the services, the IO must obtain “all possible evidence bearing on the mental condition of the deceased.”¹⁹ The type of evidence the IO is looking for in these cases includes the deceased’s actions and moods immediately before the suicide, and any issues that might have motivated the deceased to kill himself.²⁰ Notably, IOs in 1966 were advised that “[i]n a case of self-destruction . . . the investigating officer will obtain the opinion of a psychiatrist as to the mental condition of the individual.”²¹ Currently, suicide LOD IOs are still required to have a mental-health professional posthumously review the evidence to determine the bio-psychological factors that may have contributed to the Soldier’s suicide.²² The mental health officer’s recommendation is reflected in a block check on Department of Defense (DD) Form 261, Report of Investigation Line of Duty Misconduct Status.²³

If after collecting the evidence and required forms the IO finds that the death was “proximately caused by the soldier’s intentional misconduct,” the IO should recommend that that the decedent is “not in the [Line of Duty]—due to own misconduct.”²⁴ Because many IOs struggle with the meaning of proximate cause, the regulation sheds some light on how to interpret this standard:

A proximate cause is a cause which, in a natural and continuous sequence, unbroken by a new cause, produces an injury, illness, disease, or death and without

¹⁹ AR 600-8-4, *supra* note 6, para. 3-8e(2)(h); *see also* U.S. DEP’T OF NAVY, JAG INSTR. 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) para. 0231(i) (26 June 2012) [hereinafter JAGMAN]. “In all cases of suicide or attempted suicide, evidence bearing on the mental condition of the deceased or injured person shall be obtained.” *Id.* *See also* U.S. DEP’T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION para. A5.12 (4 Oct. 2002) [hereinafter AFMAN]. “Consider all evidence bearing on suicide attempt or suicidal gesture and any problem that might serve as motivation for the incident.” *Id.*

²⁰ AR 600-8-4, *supra* note 6, para. 3-8e(2)(a) (“Personal notes or diaries of the deceased are valuable evidence.”).

²¹ AR 600-10, *supra* note 9, para. 5-9h(1).

²² AR 600-8-4, *supra* note 6, para. 4-11b. After the review, the mental-health officer will render an opinion as to the probable causes of the suicide and whether the deceased was mentally sound at the time of the incident. *Id.*

²³ *Id.* para. 2-5.

²⁴ AR 600-8-4, *supra* note 6, para. 2-6a (“Injury, disease, or death proximately caused by the soldier’s intentional misconduct or willful negligence is ‘not in LD—due to own misconduct.’ Simple or ordinary negligence or carelessness, standing alone, does not constitute misconduct.”).

which the injury, illness, disease, or death would not have occurred. A proximate cause is a primary moving or predominating cause and is the connecting relationship between the intentional misconduct or willful negligence of the member and the injury, illness, disease, or death that results as a natural consequence that supports a “not line of duty—due to own misconduct” determination.²⁵

If, however, the decedent’s death was due to simple or ordinary negligence, carelessness, or unsound mind, the IO will recommend that the decedent be found “in the line of duty,”²⁶ which is recorded on the DD Form 261.²⁷

At this point, the appointing authority receives the investigation and conducts a review to determine whether all pertinent regulatory instructions have been followed. If something is missing or has been performed incorrectly, the appointing authority either ensures the issue is fixed or finds that there is a valid reason for noncompliance.²⁸ Once the investigation is complete, a judge advocate drafts a legal review to ensure regulatory compliance as well.²⁹ Then the appointing authority approves or disapproves the IO’s LOD recommendation.³⁰ If the appointing authority disapproves the IO’s recommendation, the appointing authority must specify, in writing, the reasons for that disapproval.³¹

Now, the entire investigation packet is elevated to the final approving authority—the General Court-Martial Convening Authority (GCMCA).³² The GCMCA (or his delegated officer)³³ “approve[s] or

²⁵ *Id.* glossary.

²⁶ *Id.* para. 2-6a.

²⁷ *Id.* para. 3-8f(7).

²⁸ *Id.* para. 3-9a.

²⁹ *Id.* para. 3-9b. The judge advocate will: (1) determine whether legal requirements are in compliance, (2) ascertain if any errors exist and if so, whether such error has a material or adverse effect on any individual’s rights, (3) determine whether the determination of the investigation is supported by substantial evidence or lack of evidence, and (4) examine the investigation to see if potential claims may be involved. *Id.*

³⁰ *Id.* para. 3-11b.

³¹ *Id.*

³² *Id.* para. 3-11a.

³³ *See generally id.* para. 3-11b.

disapprove[s] the determination of the lower headquarters.”³⁴ For death cases, Headquarters Department of the Army (HQDA) receives a copy of the completed LOD investigation, which the Department of Veterans Affairs uses when making its own LOD determination to decide Veterans-Affairs benefits eligibility.³⁵ Arguably, much rides on the decision of the approving authority, but few commanders know exactly how much or how little difference their LOD decisions make in terms of benefits for the Families. The following section examines those death benefits and the impact of a “not in the line of duty” determination.

III. Inside the Numbers

Despite every suicide having its own unique set of circumstances and potential motive, an unsupported majority are found “in the line of duty.”³⁶ This section presents statistical data underscoring that assertion and then proffers a likely reason why such a high percentage of suicides are found “in the line of duty.”

Between 2005 and 2012,³⁷ a total of 1,107 active-duty Soldiers committed suicide.³⁸ As section II of this paper discusses, each of those suicides required a suicide-LOD investigation. And based on statistics provided by the Developing Center on Interventions for the Prevention of Suicide (DCIPS), a staggering 1,011 of those suicides (91 percent) were determined to be “in the line of duty.”³⁹ Appendix A contains a graphical chart illustrating an annual breakdown of these statistics from 2005 to 2012.

Informal statistics maintained by the DCIPS suggest further that of the 96 suicides determined to be “not in the line of duty,” several such

³⁴ *Id.*

³⁵ *Id.* para. 3-12a; *see also generally id.* para. 2-2f. Though the Department of Veterans Affairs (DVA) make its own LOD determination, the determination rests upon the “facts that have been officially recorded and are on file with the DA.” *Id.*

³⁶ *See infra* notes 37–44 and accompanying text.

³⁷ Because today’s AR 600-8-4 mirrors the April 15, 2004 version with respect to investigating suicides, the statistics analyzed in Part III are based on data from 2005–2012.

³⁸ E-mail from Charlotte D. Brough, Data Mgmt. Specialist, Developing Ctrs. on Interventions for the Preventions of Suicide (DCIPS), to Captain Marcus L. Misinec, Student, 62d Judge Advocate Officer Course, The Judge Advocate Gen.’s Sch. (26 Nov. 2013, 11:15 EST) [hereinafter Brough e-mail] (on file with author).

³⁹ *Id.*

findings were most likely due to the decedent being absent without leave (AWOL) at the time of the suicide.⁴⁰ Pursuant to AR 600-8-4, “[a]ny injury or disease incurred while the soldier is AWOL will be handled as ‘not in the line of duty’ unless the soldier was mentally unsound at the inception of the unauthorized absence.”⁴¹ Thus, if it were not for these mandatory “not in the line of duty” determinations, the 91-percent figure would likely be even higher.

A. The One-Question “Investigation”

Every suicide has its own set of circumstances, but it appears that those factual circumstances are trumped by one commonality.⁴² These cases all involve a family being left behind.⁴³ These “survivors of suicide”⁴⁴ are what compel appointing and approving authorities to pause as they make the difficult LOD determination.⁴⁵ So influential is the existence of these individuals⁴⁶ that even though the word “family” is only mentioned once in the thirty-five pages of AR 600-8-4,⁴⁷ often the IO is more concerned with *who* the deceased left behind rather than *what* motivated the suicide⁴⁸

Understandably, taking care of Soldiers’ Families is a valid concern for every military leader. However, it cannot undermine the intent and purpose of a regulation or the integrity of an investigation. Nor should it cause an appointing or approving authority to ignore the fact that in some cases, the family is broken only because of the deceased’s actions. It is important to remember that in a case like that of MSG Bank or CPT

⁴⁰ Telephone Interview with Charlotte D. Brough, Data Mgmt. Specialist, Developing Ctrs. on Interventions for the Preventions of Suicide (DCIPS) (Nov. 26, 2013) [hereinafter Brough Interview].

⁴¹ AR 600-8-4, *supra* note 6, para. 4-7.

⁴² See Misinec LOD Survey, *supra* note 12.

⁴³ See generally Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

⁴⁴ A “survivor of suicide” is not an individual who failed in the attempt to commit suicide. Rather, “the term describes loved ones left behind to mourn after the tragedy of suicide.” Christa Scales, *See 25 Tips for Survivors of Suicide Loss*, GIGGLE ON (Mar. 5, 2009), <http://giggleon.com/tips-suicide-survivors/>.

⁴⁵ See Misinec LOD Survey, *supra* note 12.

⁴⁶ *Id.*

⁴⁷ AR 600-8-4, *supra* note 6.

⁴⁸ See generally Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

Wills, the misconduct that motivated the suicide would have most likely led to criminal prosecution or adverse separation proceedings had they remained alive. In that instance, the family would have received far less financial assistance from the Army while MSG Bank or CPT Wills were imprisoned or unemployed due to separation.⁴⁹

B. Effect of a Not in the Line of Duty Determination: Reality Revealed

Imagine a judge advocate asking an approving authority the following question: “Sir, we have a two-time drug user with no deployments and a three-time deployer who is a stellar Soldier and just wants to ETS and start a different life. Do you want to give them both Honorable Discharges?” First, he is likely going to answer “no.” Second, he is probably going to call the Staff Judge Advocate for a new attorney. The reason is that he is well-versed in discharge characterizations⁵⁰ and knows how to distinguish one Soldier from another when it comes time to make those decisions.

Some appointing and approving authorities lack the same savvy when it comes to a LOD determination’s effects on surviving family benefits. Consequently, commanders and IOs might make recommendations or determinations that are not congruent with their personal morals or command styles. With that in mind, the remainder of this section addresses benefits as they apply to completed suicides to educate the reader as to what benefits are affected or lost in a negative LOD determination.

First and foremost, regardless of what LOD determination is made, the surviving family members receive Servicemembers Group Life

⁴⁹ See generally U.S. DEP’T OF DEF., INSTR. 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS (23 May 1995). The purpose of the instruction is to implement the policies and procedures described under 10 U.S.C. § 1059 for the payment of monthly transitional compensation to dependents of members separated for dependent abuse. Under this program, family members of a Soldier who is either separated by court-martial or administrative proceedings can receive monthly government compensation for up to thirty-six months. However, the offense that led to the separation must be a dependent-abuse offense. A dependent-abuse offense is conduct by a service member on active duty and involves the abuse of a spouse or a dependent child of the servicemember and is a criminal offense under the Uniform Code of Military Justice (UCMJ), federal criminal law, or state criminal law. See 10 U.S.C. § 1059 (2006).

⁵⁰ See generally THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER’S LEGAL HANDBOOK 162–66 (June 2013).

Insurance (SGLI), which is a \$400,000 payout unless the member elected a lesser amount or declined coverage in writing or the service member was absent without leave for more than 30 days.⁵¹ The family also receives the Death Gratuity lump sum payment of \$100,000,⁵² as well as any Unpaid Pay and Allowances.⁵³ Additionally, monthly Social Security benefits are paid to spouses (regardless of age) with children of the deceased under age sixteen.⁵⁴ Those payments continue until the youngest child reaches eighteen.⁵⁵

However, families of Soldiers found “not in the line of duty” will not receive a Survivor Benefit Plan (SBP) payment. The SBP is a monthly annuity paid by the military to the surviving spouse or, in some cases, children of the deceased Soldier when he dies in the line of duty while on active duty.⁵⁶ The initial annuity amount is 55 percent of the retired pay that the member would have been entitled to based on years of service, had he retired on the date of his death.⁵⁷ When the surviving spouse reaches age 62, the annuity is reduced to 35 percent.⁵⁸ Admittedly, because of the longevity of the payout, this is a sizeable amount of money. Using as an example a captain with eight years of active-duty service, the initial annuity amount is \$921 per month. If his wife was thirty-two-years old when he committed suicide and then lived to age seventy-five, she would receive \$422,976 over the course of forty-three years.⁵⁹ Approving authorities may point to the SBP’s potentially high

⁵¹ 38 U.S.C.A. §§ 1967, 1968(a)(b)(i) (West 2014); *see also* Interview with Major Candace Besherse, Assoc. Professor., Tax and Estate Planning, The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va., in Charlottesville, Va. (Nov. 20, 2013) [hereinafter Besherse Interview] (Major Besherse discussed the block of instruction she gives to senior officers and sergeants major about death benefits.)

⁵² 10 U.S.C.A. § 1478(a) (West 2014).

⁵³ 37 U.S.C.A. § 501 (West 2014). Unpaid allowances may include, but are not limited to, unpaid basic pay, payment for up to 60 days of accrued leave, and unpaid installments of variable reenlistment bonuses.

⁵⁴ 42 U.S.C.A. § 402 (West 2014).

⁵⁵ *Id.*

⁵⁶ 10 U.S.C.A. § 1448d (West 2014).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ This hypothetical is based on CPT Wills who had approximately eight years of active-duty service on the date of his death. Fifty-five percent of his retirement entitlement would be \$921. That amount was multiplied by 12 to determine an annual amount (\$11,052), which was then multiplied by 30 to take CPT Wills’s wife to age sixty-two (\$331,560). The amount was then reduced to 35 percent (\$586) and once again multiplied by 12 to determine an annual amount (\$7032), which was multiplied by 13 (\$91,416).

value as a reason to support finding as many suicides “in the line of duty” as possible. However, the intent and purpose of AR 600-8-4 is to determine why a Soldier committed suicide, not to justify the potential expenditure of close to half a million government dollars over four decades when the Soldier’s actions—not the Army’s—are responsible for his family’s plight.

IV. The Mentally “Unsound” Presumption

Part III examined *why* so many suicides are found “in the line of duty.” This section of the article explores *how* appointing and approving authorities are able to make those recommendations and determinations without anyone likely giving it a second thought.

A. In the Beginning: Motive Trumped Money

Suicide LOD investigation guidelines did not always presume that a Soldier who committed suicide was mentally unsound. In 1966, the original LOD investigation guidelines stated as follows:

Although the mere fact of self-destruction is not alone sufficient to overcome the *legal presumption that every person is sane and intends the natural and probabl[e] consequences of his acts*, any affirmative evidence that the member was so mentally unsound as to be unable to refrain from the act overcomes the presumption. In cases where no *reasonably adequate motive for self-destruction is supplied by the evidence*, a finding of mental unsoundness will be made.⁶⁰

In 1971, the Army implemented AR 600-33 “to render faster and more accurate investigations” for line-of-duty determinations.⁶¹ This version maintained the position that Soldiers can understand the consequences of their suicidal actions and retained the presumption that a suicide was “not in the line of duty.”⁶² Then in 1980, the sanity presumption started

⁶⁰ AR 600-10, *supra* note 9 (emphasis added).

⁶¹ U.S. DEP’T OF ARMY, REG. 600-33, LINE OF DUTY INVESTIGATIONS (11 Oct. 1971) [hereinafter AR 600-33].

⁶² *Id.* para. 2-3b.

to change due to a cultural shift that placed more importance on “the welfare of the family . . . than the strict application of hard to apply retrospective standards of ‘soundness’ to a decedent.”⁶³ The 1980 revision of AR 600-33 stated that “[i]n suicide cases, mental unsoundness should be presumed unless there is positive evidence of mental soundness.”⁶⁴ That change was a complete reversal from the guidelines contained in the original and 1971 LOD regulations.

The 1980 regulation further directed, “When the evidence does not adequately show a motive for suicide, a determination of accidental self-destruction will be found.”⁶⁵ Consequently, had MSG Bank and CPT Wills committed suicide in 1981, the IOs, for the first time, would be charged with finding enough evidence to overcome mental unsoundness in order to support a “not in the line of duty” recommendation.

Also noteworthy from the 1980 version is the introduction of Rule 10 in AR 600-33—the legal presumption of mental unsoundness rule.⁶⁶ Rule 10 remained intact when, in 1986, AR 600-33 was eliminated and LOD investigation guidance once again became part of the much broader Army Casualty Program regulation.⁶⁷ It is similar to today’s Rule 10 except for the following additional language from the 1986 regulation: “Suicide is the deliberate and intentional destruction of one’s own life by a person of years of discretion and a sound mind.”⁶⁸ This language

⁶³ E-mail from Colonel (Retired) David T. Orman, M.D., Chief, Behavioral Health Serv. Line Integration Office, Behavioral Health Div., HQ, MEDCOM, to Captain Marcus L. Misinec, Student, 62d Judge Advocate Officer Course, The Judge Advocate Gen.’s Sch. (Dec. 3, 2013, 15:52 EST) [hereinafter Orman e-mail] (notes on file with author). Colonel Orman retired in 2007 after thirty years of active-duty service and immediately began his civil service. He has authored or co-authored fifteen professional publications and has had several positions within the military mental health field, to include being the Director of Psychiatry Graduate Medical Education at Tripler Army Medical Center. While on active-duty, he held several positions including Division Psychiatrist at 1st Calvary Division, Ft. Hood, Texas, and Psychiatry Consultant to the U.S. Army Surgeon General. According to COL Orman, he has “seen more patients than any other DoD psychiatrist alive.”

⁶⁴ U.S. DEP’T OF ARMY, REG. 600-33, LINE OF DUTY INVESTIGATIONS para. 2-6b (15 July 1980) [hereinafter AR 600-33].

⁶⁵ *Id.*

⁶⁶ *Id.* app., R. 10.

⁶⁷ Army Regulation 600-33 became Part Five of AR 600-8-1, *Army Casualty and Memorial Affairs and Line of Duty Investigations*. U.S. DEP’T OF ARMY, REG. 600-8-1, ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986) [hereinafter AR 600-8-1].

⁶⁸ *See id.* app. F, R. 10. The rule described the standard necessary to overcome the presumption that a sane person would not commit suicide and thus should be found in the

directly conflicts with the very next sentence: “The law presumes that a sane man will not commit suicide.”⁶⁹ Understandably then, the language “by a person of years of discretion and a sound mind” was subsequently removed between 1986 and 2004 and no longer exists in Rule 10 today.⁷⁰ This is further evidence of how the suicide LOD investigation regulation underwent continuous modification until an overwhelming number of suicides would be found to be “in the line of duty.”

That brings the LOD regulatory standard evolution to the present day. Today’s IOs are instructed to “never begin the investigation with predetermined ideas as to the cause of the injury, disease, or death.”⁷¹ Interestingly, before collecting the first piece of evidence, the same regulation expressly instructs the IO: (1) to operate under the legal presumption that a mentally sound person will not commit suicide,⁷² (2) that a death “is presumed to be in (the line of duty) unless refuted by

line of duty. “The law presumes a sane person will not commit suicide. This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion.” *Id.*

⁶⁹ *Id.*

⁷⁰ Rule 10 is the current rule that guides IOs through the process of determining whether there is enough evidence to overcome the mentally unsound presumption. It reads as follows:

A wound or other injury deliberately self-inflicted by a soldier who is mentally sound is not in line of duty. It is due to misconduct. Suicide is the deliberate and intentional destruction of one’s own life. The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion. Evidence that merely establishes the possibility of suicide, or merely raises a suspicion that death is due to suicide, is not enough to overcome the in line of duty presumption. However, in some cases, a determination that death was caused by a deliberately self-inflicted wound or injury may be based on circumstances surrounding the finding of a body. These circumstances should be clear and unmistakable, and there should be no evidence to the contrary.

AR 600-8-4, *supra* note 6, app. B-10, R. 10.

⁷¹ *Id.* para. 3-8b.

⁷² *Id.* app. B-10, R. 10; *see also generally* JAGMAN, *supra* note 18, para. 0218c. “In view of the strong human instinct for self-preservation, suicide and a bona fide suicide attempt, as distinguished from a suicidal gesture, creates a strong inference of lack of mental responsibility.” *Id.* *See also generally* AFMAN, *supra* note 18, para. A5.12.1. “A bona fide suicide attempt . . . raises a strong inference of lack of mental responsibility because of the instinct for self-preservation.” *Id.*

substantial evidence contained in the investigation,”⁷³ and (3) to be sure about finding a deceased “not in the line of duty” because “such a person (or his surviving family) stands to lose substantial benefits as a consequences of his or her actions.”⁷⁴ Couple those “considerations” with the likely pressure from superiors to take care of the family and avoid the public and political perception of being insensitive to the Army’s suicide crisis,⁷⁵ and the likelihood of anything other than a finding of “in the line of duty” is minimal.

B. Posthumous Mental Health Evaluations: A Professional’s Opinion

*Soundness has no clinical meaning for us. The best we’re doing is speculating and if we’re going to err, it’s going to be on the side of what’s fundamentally best for the family.*⁷⁶

In concert with an apparent trend in rubber-stamping LOD investigations involving suicides, the Military Psychologists’ Desk Reference (MPDR) asserts that mental-health professionals are simply incapable of determining whether legal issues can be motivating events that lead to suicide.⁷⁷ However, at least one Department of Defense

⁷³ AR 600-8-4, *supra* note 6, para. 2-6b.

⁷⁴ *Id.* para. 2-1.

⁷⁵ In 2009, there were 239 suicides in the Army (including the reserve component). There were also 1,713 known attempted suicides in the same period. *See* PETER W. CHIARELLI, ARMY HEALTH PROMOTION RISK REDUCTION SUICIDE PREVENTION—THE CHIARELLI REPORT, at i (2010) [hereinafter CHIARELLI REPORT]. General (GEN) (Retired) Peter W. Chiarelli retired in 2012 after a forty-year military career that included serving as the Army’s vice chief of staff. Passionate about reducing the number of suicides in the military, GEN Chiarelli led the Army Suicide Prevention Task Force and the Army Suicide Prevention Counsel and is now the Chief Executive Officer for One Mind for Research. *See* Master Sergeant Doug Sample, *Army Vice Chief Retires After 40 Years of Service*, U.S. ARMY (Jan. 31, 2012) http://www.army.mil/article/72859/Army_vice_chief_retires_after_40_years_of_service/ (last visited Mar. 10, 2014).

⁷⁶ Telephonic Interview with Colonel (COL) (Retired) David T. Orman, M.D., Chief, Behavioral Health Serv. Line Integration Office, U.S. Army, Med. Cmd. (MEDCOM), Ft. Sam Houston, Tex. (Nov. 26, 2013) [hereinafter Orman Interview].

⁷⁷ *See generally* BRET A. MOORE & JEFFREY E. BARNETT, MILITARY PSYCHOLOGISTS DESK REFERENCE (2013), available at <http://books.google.com/books?id=TArtdFL1LKeYC&pg=PA338&dq=Army+mental+health+reference+suicide&hl=en&sa=X&ei=AoGeUq6LEdONkAeL54GgBg&ved=0CC0Q6AEwAA#v=snippet&q=courts-martial&f=false> (last visited Dec. 22, 2013).

(DoD) medical professional disagrees with that assessment. When asked whether he believed that the discovery of misconduct could lead a Soldier to rationally choose suicide over facing the consequences of his wrongful acts, Colonel (COL) (Retired) David Orman, M.D., replied, “Of course. We have all kinds of examples of individuals choosing to face death . . . particularly impulsively in the heat of their initial shock of facing major loss (career, confinement, etc.) before allowing themselves to process their options.”⁷⁸ Supporting COL Orman’s position that misconduct being revealed can be a motive for death, a study of military suicides committed between 2005 and 2009 indicated that military-justice encounters and administrative actions were present in 34 percent of the suicides.⁷⁹

Discussing whether such impulsive acts demonstrate mental unsoundness, COL Orman stated, “We make decisions in the negative. Therefore, we wouldn’t normally say that someone was or wasn’t mentally unsound when he committed suicide, we would say there was no prior evidence of mental defect or disease and an impulsive act doesn’t make them mentally ill.”⁸⁰ Supporting COL Orman’s position, the MPDR, which is “written by leading experts in their respective fields of military psychology,” is completely void of any language about mental unsoundness.⁸¹ In fact, the only reference to mental soundness at all in the MPDR’s 330-plus pages is in the translation of a Roman poet. In replying to a question about what people should desire in living, Juvenal said, “*mena sana in corpore sano*” (a sound mind in a healthy body).⁸² Though poetically pleasant, Juvenal’s prose about happy living lacks revolutionary insight and psychological expertise. Unfortunately,

It is important to note that legal issues in the military can have unique characteristics as they include courts-martial, administrative separation actions, nonselection for promotion, and disciplinary actions (e.g., Article 15). Although there has been some discussion in the literature of suicide “triggers” (i.e., an event known to be the motivation for death), current methodologies do not allow for precision in understanding the associated stressors in the vast majority of cases.

Id. at 144.

⁷⁸ Orman e-mail, *supra* note 62.

⁷⁹ See CHIARELLI REPORT, *supra* note 74, at 25. “From 2006–2009, criminal legal issues were the most prevalent individual risk factor for senior personnel and contributed to 39% (7 of 18) of field grade officer suicides.” *Id.*

⁸⁰ *Id.*

⁸¹ MOORE & BARNETT, *supra* note 76.

⁸² *Id.*

based on the opinions of COL Orman and the drafters of the MPDR, the same can be said about evaluating the mental soundness of the dead.

Nevertheless, as discussed in Part II, AR 600-8-4 currently requires IOs to obtain a posthumous evaluation of the decedent's mental health at the time of the suicide. This is so even though in many cases, the mental-health professional never even met the deceased.⁸³ Understandably, COL Orman finds it difficult to rationalize this practice in light of the otherwise thorough nature of his profession. "In my opinion, asking officers to make these determinations is 'unsound' unless there is well-documented behavioral evidence from others with direct knowledge who can attest to the behavior and mental state of the decedent."⁸⁴ Nevertheless, COL Orman reluctantly admits that DoD psychiatric residents are taught to err on the side of an unsound finding even if a decedent was never formally diagnosed before the fatal event.⁸⁵ That instruction is unsettling to COL Orman, who believes making a determination about soundness for purposes of paying out family benefits is a "flawed rationale from our perspective as experts on human behavior."⁸⁶

Colonel Orman's conclusion on soundness determinations is confirmed after reviewing the two cases discussed at the start of this article. There is no well-documented behavioral evidence for MSG Bank or CPT Wills upon which to make a mental-soundness determination because they likely acted impulsively in response to their wrongful acts being exposed. Consequently, based on the opinion of a mental-health professional with 35 years of experience, there was no basis for MSG Bank or CPT Wills to be determined mentally unsound and thus "in the line of duty." The fact that they were found "in the line of duty" is further evidence that AR 600-8-4 allows for mental-health expertise and evidentiary-based motives to be suppressed in favor of emotional desires to take care of surviving family.

⁸³ See generally Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

⁸⁴ Orman e-mail, *supra* note 62.

⁸⁵ *Id.*; see also Orman Interview, *supra* note 75. During his phone interview, it was evident that COL Orman was opposed to the Department of Defense's practice of tying soundness determinations to family benefits: "In my opinion, the whole premise is flawed and without human purpose." *Id.*

⁸⁶ *Id.*

The practice of conducting a post-mortem mental-health evaluation is suspect because it forces mental health professionals to speculate as to the decedent's mental state at the time of the suicide. This is especially true when the mental-health professional had no prior interaction with the decedent and there was no documented history of mental disease or defect to which the mental-health professional may refer. Thus, the normally thorough and specialized practice of diagnosing mental disorders is reduced to a speculative finding often supports the approving authorities' desire to find the decedent "in the line of duty" so that surviving family members can receive as much financial support as possible.

V. The Fix: Do It Right or Don't Do It At All

A. Why Bother?

Recently, the National Football League (NFL) considered the idea of eliminating the extra-point kick after touchdowns because they have become near-automatic despite defensive players' efforts to block them.⁸⁷ The one-point "chip-shots" have become so routine that coaches are reluctant to use their best linemen on the play out of fear they will be subjected to unnecessary injury.⁸⁸

Statistics analyzed in Part III of this article suggest that perhaps suicide line-of-duty determinations have become "near-automatic" as well. Yet, like exposing linemen to injury, the Army still subjects family and friends to unnecessary emotional distress by conducting personal and sensitive inquiries despite what has apparently become a predetermined outcome.

So, why not just do away with LOD investigations for completed suicides? Or, in the alternative, decouple the LOD findings and the survivor benefits? The answer to these questions is that doing so may

⁸⁷ See Josh Alper, *Roger Goodell: NFL Will Explore Eliminating the Extra Point*, NBC (Jan. 20, 2014), <http://profootballtalk.nbcsports.com/2014/01/20/roger-goodell-nfl-will-explore-eliminating-the-extra-point/>. In 2013, 1256 out of 1261 (99.6%) extra points were made. *Id.*

⁸⁸ See generally Mike Florio, *Eliminating Extra Point Makes Sense*, NBC (Jan. 21, 2014), <http://profootballtalk.nbcsports.com/2014/01/21/eliminating-extra-point-makes-sense/>. On November 19, 2012, the New England Patriots' star tight-end, Rob Gronkowski, broke his arm while blocking for an "automatic PAT try." *Id.*

incentivize wrongdoers to commit suicide to avoid the consequences of their offenses. A fictional dramatization of this situation was depicted in an episode of the television show *Blue Bloods*.⁸⁹ In that episode, Corporal John Russell, who was suffering from Post Traumatic Stress Disorder (PTSD), beat his wife and ran away with their eight-year-old son.⁹⁰ A few days later, Corporal Russell was cornered by police on a high-rise rooftop. He let his son go, but the detective's attempt to talk Corporal Russell down from the ledge was unsuccessful. Just before going over the edge, Corporal Russell stated his loved ones would be much better off if he jumped.⁹¹

Because there is such an overwhelming likelihood that they will be found "in the line of duty," Soldiers contemplating suicide in today's Army may have the same mentality as the fictional Corporal Russell did when it comes to taking care of their surviving family members. In their minds, the benefits of committing suicide far outweigh the cost of taking their own lives. Therefore, there must be a motivating factor to compel these troubled Soldiers to climb down off the edge. Eliminating LOD investigations altogether or decoupling the LOD determination and survivor benefits is not the solution because it would completely remove a potential inhibition, no matter how slight it is. That is the last thing that an already suicide-plagued Army needs.⁹² Rather, Soldiers must come to understand that there is a legitimate chance a suicide will be found "not in the line of duty," which would negatively impact their legacy and Families' financial future. Admittedly, this approach will not stop every suicide, but it will demonstrate the Army's resolve to support AR 600-8-4's intended purpose and perhaps provide at least some deterrence to committing suicide.

⁸⁹ *Blue Bloods: Unfinished Business* (CBS television broadcast Jan. 17, 2014).

⁹⁰ *Id.* Corporal Russell was in the U.S. Army and, according to his storyline, had deployed multiple times. Upon returning home from his last deployment, Corporal Russell became paranoid about his surroundings. According to his psychiatrist, he "brought the war home with him." Corporal Russell's wife referred to him as "the love of her life," but after she told him she wanted a divorce because she could no longer deal with his behavior, Corporal Russell beat her and ran away with their son. *Id.*

⁹¹ *Id.* Corporal Russell searched for improvised explosive devices while in Afghanistan. Several of his friends were killed in combat, and he could not deal with his survivor's guilt despite receiving some level of professional help. *Id.*

⁹² See Brough e-mail, *supra* note 37 (1,107 Soldiers have committed suicide in the last eight years).

B. The Right Answer: *Get Back to Where You Once Belonged*⁹³

1. *Eliminate the Mentally Unsound Presumption and Focus on the Motive*

The mentally-unsound presumption found in the current AR 600-8-4 conflicts with other legal mental responsibility standards⁹⁴ and stacks the deck in favor of a finding of in the line of duty before the investigation even begins. Moreover, it degrades the mental-health profession,⁹⁵ demeans the investigatory process, and discounts a judge advocate's subject-matter expertise when it comes to evaluating evidence of the decedent's motives. For these reasons, the Army should eliminate the mentally-unsound presumption and revert to the original LOD investigation regulation. That standard correctly focused on the motive for the suicide, not just the act of committing it.

Motive is "something that leads one to act."⁹⁶ As an example for the use of the word "motive," Merriam-Webster provides, "Their *motive* in running away was to avoid being punished."⁹⁷ Being motivated to choose death to avoid a life filled with shame and punishment is not a new concept. Rather, it transcends culture and time. For example, ancient samurai used to perform a suicide ritual known as seppuku⁹⁸ for a variety of reasons in accordance with the samurai code of conduct. "Motivations could include personal shame due to cowardice in battle" or due to "shame over a dishonest act."⁹⁹ In 1894, COL Robert G.

⁹³ THE BEATLES, *Get Back, on LET IT BE* (Apple Records 1970).

⁹⁴ In criminal proceedings, a defendant or an accused is presumed to be of sound mind and has the burden of proving that he either lacked the mental responsibility to commit the crime or is suffering from a mental disease that makes him unfit to stand trial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706 (2012) [hereinafter MCM].

⁹⁵ See generally Orman e-mail, *supra* note 62 (COL Orman suggested that the DoD's insistence on making a determination of mental soundness is archaic and flawed from the perspective of human behavior).

⁹⁶ BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

⁹⁷ *Motive*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/motive> (last visited Jan. 24, 2014).

⁹⁸ Kallie Szczepanski, *Seppuku*, ABOUT, <http://asianhistory.about.com/od/asianhistoryfaqs/f/seppukufaqs.htm> (last visited Jan. 23, 2014). To perform seppuku, a Samurai would use a short sword or dagger to cut into his abdomen either vertically or horizontally or both to disembowel himself. In most cases, once that was done, a second Samurai would decapitate him immediately. *Id.*

⁹⁹ *Id.*

Ingersoll¹⁰⁰ wrote a letter published in the *New York Times* discounting the belief that only cowards or the insane committed suicide.¹⁰¹ He went on to cite reasons why a person would choose to kill himself: “To the hopelessly imprisoned—to the dishonored and despised—to those who have failed, who have no future . . . to those who are only remnants and fragments of men and women—how consoling, how enchanting is the thought of death.”¹⁰²

Recalling the cases of MSG Bank and CPT Wills, their motive to commit suicide was to avoid punishment (as well as humiliation and disgrace). That is a different circumstance from an honorable Soldier whose motive to kill himself is driven by the continuous agony caused by a mental disease or defect (such as PTSD or depression).¹⁰³ The two motives are incongruent, and dismissing that difference degrades the entire LOD investigation process. Consequently, AR 600-8-4 is ripe for a change that will once again focus on the motive for the suicide as the determinative factor for LOD decisions.

2. Implementation: The Lawyer Also Makes a Formal Line of Duty Recommendation

In suicide cases involving allegations of decedent criminal misconduct, a judge advocate is best suited to evaluate the credibility of any incriminating evidence regarding what may have motivated the suicide. He is also best qualified to conduct a causation analysis to

¹⁰⁰ Michael Robert Patterson, *Robert Green Ingersoll*, ARLINGTON NAT'L CEMETERY, <http://www.arlingtoncemetery.net/rgingersoll.htm> (last visited Nov. 22, 2013). Colonel Ingersoll was born in New York and lived from 1833-1899. He was an accomplished orator and known as the Great Agnostic. He was self-educated and was admitted to the Illinois bar in 1854. In 1862, he organized the 11th Illinois Regiment “and went to the front as a Colonel.” It is believed that had it not been for his agnostic views, he would have received “preferment” as the Republican Presidential Nominee in 1880. *Id.* Colonel Ingersoll is buried at Arlington Cemetery. *Id.*

¹⁰¹ *Ingersoll Says He Wrong It*, N.Y. TIMES, Sept. 1, 1894.

¹⁰² *Id.*

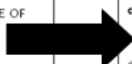
¹⁰³ See generally Chelsea C. Cook, *Soldier's Suicide Note Goes Viral; Family Demands Better for Veterans*, CNN, <http://www.cnn.com/2013/07/06/us/soldier-suicide-note/html> (last visited Jan. 23, 2014). This analogy is loosely based on the suicide of Sergeant Daniel Somers. Sergeant Somers was actually diagnosed with his mental diseases in 2008 and struggled for five years to overcome them before committing suicide on June 10, 2013. *Id.*

determine whether the exposure of the decedent's wrongful acts was a suicidal trigger.

In all military-justice or adverse-administrative actions, commanders rely on their judge advocates to thoroughly review the evidence before making recommendations about what action should be taken.¹⁰⁴ Yet in suicides involving the exposure of the decedent's misconduct, a judge advocate is usually relegated to simply providing legal support to an IO.¹⁰⁵ Meanwhile, a mental-health professional, who likely had no prior involvement with the decedent and who is certainly not a criminal evidentiary expert, provides a formal LOD recommendation to the approving authority. This practice is insensible; therefore, in addition to eliminating the mentally-unsound presumption, AR 600-8-4 should be revised to require the judge advocate to provide a formal LOD recommendation for suicides when exposure of a crime may have been a motive for the suicide.

Under the proposed revisions to AR 600-8-4, the formal legal recommendation would be initiated by the mental-health professional on the pre-existing, but slightly revised, DA 2173. The mental-health professional would complete blocks 1 to 10 of DA Form 2173 as usual. However, block 11 would be revised as follows:¹⁰⁶

Current Block 11 of DA Form 2173 Proposed Revision to Block 11

<p>a. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (<i>Specify</i>):</p> <p>b. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (<i>Attach Psychiatric evaluation if appropriate</i>).</p> <p>c. INJURY <input type="checkbox"/> IS <input type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.</p> <p>d. INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN THE LINE OF DUTY. <i>BASIS FOR OPINION:</i></p>		<p>a. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (<i>Specify</i>):</p> <p>b. INJURY <input type="checkbox"/> IS <input type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.</p> <p>c. INDIVIDUAL <input type="checkbox"/> DOES <input type="checkbox"/> DOES NOT HAVE DOCUMENTED HISTORY OF MENTAL DEFECT OR DISEASE</p> <p>d. EVIDENCE <input type="checkbox"/> DOES <input type="checkbox"/> DOES NOT INDICATE A POTENTIAL MOTIVE FOR SELF-INFLICTED INJURY/DEATH (LEGAL RECOMMENDATION REQUIRED)</p> <p>e. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (<i>Attach Psychiatric evaluation if appropriate</i>)</p> <p>f. INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN THE LINE OF DUTY. <i>BASIS FOR OPINION:</i></p>
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¹⁰⁴ See generally U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011) [hereinafter AR 27-10].

¹⁰⁵ See generally AR 600-8-4, *supra* note 6, para. 4-5.

¹⁰⁶ The author's proposed revisions are in bold.

If the mental health professional indicated that evidence *does* show a potential motive for self-inflicted injury or death in block 11d., he would use block 15 to briefly describe that evidence. See Appendix B for a completed example of the proposed new DA Form 2173.

At this point, the judge advocate would begin formulating a recommendation, as reflected on the DA Form 2173. The formal legal recommendation would be twofold. First, it would include an evaluation of the evidence alleged against the decedent. Second, if deemed sufficient, the judge advocate would conduct a causation analysis to determine whether the exposure of the decedent's criminality led to the suicide. To provide guidance for the changes recommended above, AR 600-8-4 paragraphs 3-8c and 4-11b should be revised as well as Rule 10.¹⁰⁷

Army Regulation 600-8-4 states that "an adverse LD determination is an administrative determination and not a punitive or judicial action."¹⁰⁸ Therefore, preponderance of the evidence should be the evidentiary standard used, rather than the beyond a reasonable doubt level required in criminal cases.¹⁰⁹ Upon reviewing and evaluating all evidence obtained during the investigation, including any final statements by the decedent, the judge advocate would determine whether it is "more likely than not"¹¹⁰ that the decedent committed the wrongful act(s) he was accused of before the suicide. This evaluation of evidence is customary practice for all judge advocates before making recommendations for action regarding misconduct.

¹⁰⁷ These are the most relevant parts of AR 600-8-4 as it applies to suicide LOD investigations. Other pieces of AR 600-8-4 may have to be slightly revised as well in order to provide consistent guidance throughout the regulation. See Appendix C (Proposed Revisions to Army Regulation 600-8-4).

¹⁰⁸ AR 600-8-4, *supra* note 6, para. 4-1.

¹⁰⁹ See generally U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (13 Sept. 2011) [hereinafter AR 600-8-24]; see also U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (4 Sept. 2011) [hereinafter AR 635-200]. When an active-duty enlisted Soldier or officer is subjected to a separation board, the Government has the burden of proving each allegation of misconduct or poor performance by a preponderance of the evidence (more likely than not). This standard of proof differs from criminal proceedings in which the Government must prove all offenses beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970) (clarifying that the burden of proof in any criminal case is proof beyond a reasonable doubt concerning every element of an offense).

¹¹⁰ This is a phrase used to describe the preponderance of the evidence standard. BLACK'S LAW DICTIONARY, *supra* note 95.

If the evidence does not meet the standard of proof, that would be reflected in the formal recommendation to the approving authority, who would proceed with the IO's investigation and mental-health professional's recommendation accordingly. If, however, the judge advocate finds there is sufficient evidence to support the allegations, a causation analysis would follow. For this, the judge advocate would employ a "but-for" test.¹¹¹ That is: but for the revelation of the decedent's wrongful act(s), the decedent would not have killed himself. This is, of course, difficult to determine.

"Working with the concept of 'proximate cause'—in particular, helping investigating officers (IOs) apply it in the field—can be frustratingly difficult."¹¹² Consequently, the causation examination is often overlooked, which is significant in cases involving suicide as a means to avoid criminal prosecution and punishment. On the other hand, judge advocates deal with proximate cause issues in most every legal discipline, ranging from Financial Liability Investigations of Property Loss (FLIPL) to criminal prosecutions.¹¹³ Therefore, for these types of suicide investigations, judge advocates should conduct the causation analysis.

The analysis would focus on two key areas. First, along with the IO, the judge advocate would evaluate the evidence relative to the decedent's actions, mood, and communications immediately before and after the exposure of his misconduct. The purpose of this evaluation would be to determine whether the derogatory information might have acted as a "motivation for death."¹¹⁴ Second, the judge advocate would consult with the mental-health professional about whether there was a prior history of mental disease or defect. If, like in the cases of MSG Bank and CPT Wills, there was an immediate change in behavior and no history of mental problems, the judge advocate would likely determine that the misconduct's exposure was the motivating cause for the suicide. Thus, he would formally recommend "not in the line of duty" to the

¹¹¹ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 61 (5th ed. 1984).

¹¹² Captain Daniel D. Maurer, *Working With Proximate Cause: An "Elements" Approach*, ARMY LAW., Dec. 2011, at 16.

¹¹³ For example, "but-for" the Specialist failing to secure his Night Vision Goggles (NVGs) to his rifle, his NVGs would not be lost. Also, as an example in a criminal case, "but-for" the accused not driving under the influence, he would not have crossed over the center lane and killed a passenger in a head-on collision.

¹¹⁴ MOORE & BARNETT, *supra* note 76.

approving authority. Appendix D contains an example of such a recommendation. This recommendation would not only maintain the integrity of the LOD investigation, but it would also require the approving authority to acknowledge a second professional's LOD opinion (the first being that of the mental-health professional) before making a final determination.¹¹⁵ Additionally, it could also serve as a deterrent to a Soldier contemplating suicide if he knew that there was more than a nine-percent chance¹¹⁶ that he would not be found "in the line of duty" and that, therefore, his family would not receive all of the benefits for which they might otherwise have been eligible.

VI. Conclusion

In 2010, after two combat deployments and 400 combat missions as a gunner, Army clinical psychologists diagnose SGT Strong with traumatic brain injury and PTSD.¹¹⁷ In spite of his efforts to get better over a three-year period, SGT Strong commits suicide in June 2013. His suicide note reads in part,

I am too trapped in a war to be at peace, too damaged to be at war All day, every day a screaming agony in every nerve ending in my body. It is nothing short of torture. My mind is a wasteland, filled with visions of incredible horror, unceasing depression, and crippling anxiety This is what brought me to my actual final mission. Not a suicide, but a mercy killing.¹¹⁸

The letter is a final communication to loved ones about his remorse and shame in not being able to overcome his mental diseases.

Compare SGT Strong to MSG Bank and CPT Wills. SGT Strong never compromised his integrity and fought for years to get better for himself and his family. Unfortunately, the psychological pain stemming

¹¹⁵ An example of a formal legal LOD recommendation can be seen at Appendix D.

¹¹⁶ See statistics in Part II (91-percent of active-duty Army suicides between 2005 and 2012 were found in the line of duty).

¹¹⁷ Cook, *supra* note 102 (Sergeant Strong is a fictional character based loosely on Sergeant Daniel Somers).

¹¹⁸ *Id.* Sergeant Somers' wife sent the entire letter to *The Phoenix Times*, and with the family's permission, it was posted online. *Id.*

from what he experienced during his combat tours was so deep that he simply could not bear to live with it. That was his suicidal motive.

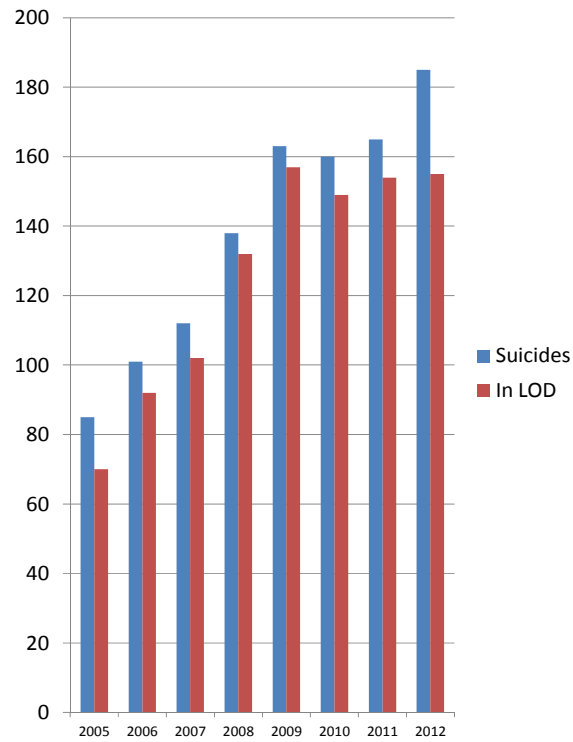
Meanwhile, MSG Bank and CPT Wills both committed wrongful acts that would have likely resulted in some form of significant adverse action had they not killed themselves. Neither of them had prior mental issues like SGT Strong did. They were not experiencing suicidal ideations while having adulterous sex with subordinates or sexually molesting a ten-year-old step-daughter. Rather, it was when they were caught that they simply caved to immediate mental adversity caused by their own doing, acted impulsively, and killed themselves. Their apparent motive was to avoid the personal and criminal consequences of those shameful acts.

How then do SGT Strong, MSG Bank, and CPT Wills all end up with the same line of duty determination? The reason is that despite each suicide having its own set of circumstances, desperation to help the surviving family diminishes the importance of determining what the suicidal motive was. Although it is laudable that the Army trend is to financially assist surviving family members as much as possible after suicide, IOs and approving authorities must take misconduct into consideration when evaluating and determining the true proximate cause of a suicide. If done correctly and in accordance with the proposed regulatory revisions, SGT Strong would be found “in the line of duty” and MSG Bank and CPT Wills would be found “not in the line of duty—[truly] due to their own misconduct.”

Therefore, the Department of the Army must revise AR 600-8-4 to give approving authorities more of a legal basis to make difficult and potentially unpopular determinations to find undeserving suicides not in the line of duty. Focusing on the motive and increasing the judge advocate’s role in situations of suicides involving misconduct by the decedent as a potential trigger are the keys to AR 600-8-4’s much-needed rejuvenation. When wrongdoers like MSG Bank and CPT Wills are able to receive the same line of duty status as Soldiers like SGT Strong, somebody needs to give “it a second thought.”¹¹⁹

¹¹⁹ See Appointing Authority Quote, *supra* note 1.

Appendix A

Active-Duty Army Suicides and Line of Duty Determinations¹²⁰

¹²⁰ Active-Duty Army Suicide Statistics provided by Ms. Charlotte Brought, Data Mgmt. Specialist for Developing Centers on Interventions for the Preventions of Suicide (DCIPS).

Appendix B

Proposed Revised DA Form 2173

STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS			
For use of this form, see AR 600-8-4, the proponent agency is DCS, G-4			
THRU: (Include ZIP Code) COL Commander 12th Brigade, 55th Division Ft. Wherever, Wherever 12345	TO: (Include ZIP Code) Commanding General 55th Division Ft. Wherever, Wherever 12345	FROM: (Include ZIP Code) COL Commander Ft. Wherever Medical Treatment Facility Ft. Wherever, Wherever 12345	
1. NAME OF INDIVIDUAL EXAMINED (Last, First, and Middle Initial) BANK, JOHN, J		2. SSN 123-45-6789	3. GRADE E-8
4. ORGANIZATION AND STATION Headquarters and Headquarters Company, 99th Support Battalion, 12th Brigade, 55th Division, Ft Wherever, Wherever		5. ACCIDENT INFORMATION a. DATE 22 June 2009 b. PLACE (City and State) Wherever, Wherever	
SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR			
6. INDIVIDUAL WAS <input type="checkbox"/> OUT PATIENT <input type="checkbox"/> ADMITTED <input checked="" type="checkbox"/> DEAD ON ARRIVAL		7. NAME OF HOSPITAL OR TREATMENT FACILITY Wherever Medical Treatment Facility <input type="checkbox"/> CIVILIAN <input checked="" type="checkbox"/> MILITARY	
8. HOUR AND DATE ADMITTED 171130JUN11		9. HOUR AND DATE EXAMINED 171200JUN11	
10. NATURE AND EXTENT OF <input type="checkbox"/> INJURY <input type="checkbox"/> DISEASE <input checked="" type="checkbox"/> RESULTING IN DEATH (Explain) Single GSW to head			
11. MEDICAL OPINION: a. INDIVIDUAL <input type="checkbox"/> WAS <input checked="" type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (Specify): b. INJURY <input type="checkbox"/> IS <input checked="" type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE. c. INDIVIDUAL <input type="checkbox"/> DOES <input checked="" type="checkbox"/> DOES NOT HAVE DOCUMENTED HISTORY OF MENTAL DEFECT OR DISEASE d. EVIDENCE <input checked="" type="checkbox"/> DOES <input type="checkbox"/> DOES NOT INDICATE A POTENTIAL MOTIVE FOR SELF-INFLICTED INJURY/DEATH (LEGAL RECOMMENDATION REQUIRED) e. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (Attach Psychiatric evaluation if appropriate) f. INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN THE LINE OF DUTY. BASIS FOR OPINION:			
12. THE FOLLOWING DISABILITY MAY RESULT <input type="checkbox"/> TEMPORARY <input type="checkbox"/> PERMANENT PARTIAL <input checked="" type="checkbox"/> PERMANENT TOTAL		13. BLOOD ALCOHOL TEST MADE <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	14. NO. OF MG ALCOHOL/100 ML BLOOD NA
15. DETAILS OF ACCIDENT OR HISTORY OF DISEASE (how, where, when) Deceased was under investigation for sexual harassment. During the investigation, the deceased became very anxious and told others he did not want to face prosecution or his wife before shooting himself hours later. Deceased had no history of disease.			
16. DATE 22 June 2009	17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR Mental Health Professional		18. SIGNATURE
SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER			
19. DUTY STATION <input checked="" type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ON PASS <input type="checkbox"/> ON LEAVE		20. HOUR AND DATE OF ABSENCE a. FROM b. TO	
21. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY (Explain in item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance) <input type="checkbox"/> YES <input type="checkbox"/> NO			
22. INDIVIDUAL WAS ON <input checked="" type="checkbox"/> ACTIVE DUTY <input type="checkbox"/> ACTIVE DUTY FOR TRAINING <input type="checkbox"/> INACTIVE DUTY TRAINING		23. HOUR AND DATE TRAINING a. BEGAN b. ENDED	
24. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING <input type="checkbox"/> DIRECTLY TO TRAINING <input type="checkbox"/> DIRECTLY FROM TRAINING			
25. MODE OF TRANSPORTATION	26. HOUR BEGINNING TRAVEL	27. DISTANCE INVOLVED	28. NORMAL TIME FOR TRAVEL
29. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY			
30. DETAILS OF ACCIDENT - REMARKS (If additional space is needed, continue on reverse) (Attach inclosures as necessary) Master Sergeant Bank was under investigation for sexual harassment. His weapon was not taken away as there was no change in his mood or behavior. However, during the investigation he is told that all of the devices will be searched and his mood immediately changes because he knows what the search will uncover—proof of adulterous affairs with multiple civilian and military women (including one subordinate who said it was against her will) and thousands of pornographic images and videos of female Soldiers. A few hours later, he tells some junior Soldiers that he cannot handle being court-martialed and going to prison as well as having to explain everything to his wife. Master Sergeant Bank says he would rather be dead. A few hours later, he puts his pistol in his mouth and kills himself.			
31. FORMAL LINE OF DUTY INVESTIGATION REQUIRED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		32. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY (Not applicable on deaths) <input type="checkbox"/> YES <input type="checkbox"/> NO	
33. DATE 23 June 2011	34. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER LTC Commander		35. SIGNATURE

DA FORM 2173, OCT 1972

REPLACES DA FORM 2173, 1 JUN 66, WHICH IS OBSOLETE.

APD PE v2 01ES

Appendix C

Proposed Revisions to Army Regulation 600-8-4¹²¹

AR 600-8-4, para. 3-8e(2)(h)

(h) Evidence regarding the mental competence or impairment of the deceased or injured person, when relevant. In all cases of suicide or attempted suicide, all possible evidence bearing on the mental condition of the deceased or injured person shall be obtained. If no documented mental condition existed at the time of the suicide or suicide attempt, all evidence potentially motivating an impulsive suicide or suicide attempt shall also be obtained. This will include all available evidence about the person's social background, his actions and moods immediately prior to the suicide or suicide attempt, any troubles that might have motivated the incident, and any pertinent examination or counseling by specially experienced or trained persons. Personal notes or diaries of the deceased are valuable evidence. In the case of a death by suicide or a death resulting from an accident involving unusual or suspicious circumstances (for example, a single car motor vehicle accident) or where the cause of death is not clear, obtain the opinion of a mental health officer as to the probable causes of the self-destructive behavior and whether the soldier was mentally sound at the time of the incident. ~~(See para 4-11b.)~~ **In the case of a death by suicide, in which the deceased was accused of misconduct that would have likely resulted in adverse action against the deceased had he not committed suicide and of which the Soldier has been aware when the Soldier committed suicide, obtain the opinion of a judge advocate as to the sufficiency of the evidence that was the basis of the allegations and as to the exposure of that evidence being the proximate cause of the self-destructive behavior. (See para 4-11b.)**

AR 600-8-4, para. 4-11b. Mental responsibility, emotional disorders, suicide, and suicide attempts

Line of duty investigations of suicide or attempted suicide must determine **what motivated the soldier to commit or attempt suicide and** whether the soldier was mentally sound at the time of the incident. The questions of **motive and** sanity can only be resolved by inquiring into and obtaining evidence of the soldier's social background, actions and moods immediately prior to the suicide or suicide attempt, troubles

¹²¹ Author proposed changes to AR 600-8-4 are in bold.

that might have motivated the incident, and examinations or counseling by specially experienced or trained persons. Personal notes or diaries of a deceased soldier are valuable evidence. In all cases of suicide or suicide attempts, a mental health officer will review the evidence collected to determine the bio-psychosocial factors that contributed to the soldier's desire to end his life. The mental health office will render an opinion as to the probable cause of the self-destructive behavior and whether the soldier was mentally sound at the time of the incident. **In all cases of suicide or suicide attempts in which the Soldier was accused of misconduct that would have likely resulted in adverse action against the Soldier had he not committed suicide, a judge advocate will review the evidence in order to determine whether, by a preponderance of the evidence, the deceased committed the alleged misconduct and, if so, whether the exposure of that misconduct provided the soldier with a motive to end his or her life. In these cases, the judge advocate will provide a formal legal recommendation for the deceased's line of duty determination based on an evidentiary and causation analysis.**

B-10. Rule 10

A wound or other injury deliberately self-inflicted by a soldier who is mentally sound is not in line of duty. It is due to misconduct. Suicide is the deliberate and intentional destruction of one's own life. **Whereas** the law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide), **it also recognizes that reasonable adequate motives for self-destruction can be supplied by the evidence. In all cases in which there is affirmative evidence that the motive for self-destruction was to avoid the consequences of one's own misconduct, the mentally unsound** ~~This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion.~~ **should not apply.** Evidence that merely establishes the possibility of suicide, or merely raises a suspicion that death is due to suicide, is not enough to overcome the in line of duty presumption. However, in some cases, a determination that death was caused by a deliberately self-inflicted wound or injury may be based on circumstances surrounding the finding of a body. These circumstances should be clear and unmistakable, and there should be no evidence to the contrary.

Appendix D**Sample Formal Legal Recommendation for Suicide Line of Duty**

ABCD-OSJA

30 November 2009

MEMORANDUM FOR RECORD

SUBJECT: Legal Recommendation for Line of Duty Determination:
MSG Bank

1. Purpose: Pursuant to AR 600-8-4, paragraphs 3-2 and 4-11b, the purpose of this memorandum is to make a formal legal recommendation for the line of duty status involving MSG Bank.

2. BLUF: MSG Bank was not in the line of duty at the time of his suicide.

3. Summary of Facts:

a. On 1 November 2009, an AR 15-6 investigation was initiated against MSG Bank for sexual harassment. He was in good spirits and told others he was sure the investigation would be over in a couple days. A few days into the sexual harassment investigation (4 November 2009), a search and seizure authorization was issued for MSG Bank's computer and electronic devices. MSG Bank was told that all of the devices would be searched.

b. According to witnesses, MSG Bank's mood immediately changed when the items were confiscated. A few hours later he told a few junior Soldiers that he could not handle being court-martialed and going to prison, as well as having to explain everything to his wife. MSG Bank said he would rather be dead. Shortly thereafter, he used his 9mm to shoot himself.

c. A subsequent search of MSG Bank's computer and other digital storage devices uncovered proof of adulterous affairs with multiple civilian and military women (including one subordinate who indicated that it was against her will) and thousands of pornographic images and videos of female Soldiers.

ABCD-OSJA

SUBJECT: Legal Recommendation for Line of Duty Determination:
MSG Bank

d. A full version of the facts can be reviewed in the enclosed Investigating Officer's Findings and Recommendations memorandum.

4. Evidence Analysis:

a. The evidence collected by the Investigating Officer is sufficient to prove by a preponderance of the evidence that MSG Bank committed the following offenses:

adultery, inappropriate relationships with subordinates, sexual harassment, and violation of GO #1 by possessing thousands of pornographic images and videos of female Soldiers.

b. The evidence was found on MSG Bank's personal computer and storage devices. All emails were either sent from or received in MSG Bank's email account. On several occasions, MSG Bank provided his CHU location to female Soldiers and civilians. Additionally, in multiple communications, MSG Bank inquired about protection (birth control). Lastly, in one email, MSG Bank said he was sorry to a subordinate Soldier if he did something she did not want him to do.

5. Causation Analysis:

a. A legal review of the evidence indicated that MSG Bank's realization that his wrongful acts were about to be discovered likely leading to serious adverse action against him was the but-for cause of his suicide. Statements from individuals who spoke with MSG Bank before his personal computer and storage devices were confiscated describe MSG Bank as his usual "good-humored" self. He told numerous senior NCOs that the sexual harassment investigation was just a formality to "check the block" and that he would be back to work in just a few days. His mannerisms were such that no one thought to take his weapons from him.

ABCD-OSJA

SUBJECT: Legal Recommendation for Line of Duty Determination:
MSG Bank

b. Then, when the search and seizure warrant was issued, witnesses said they could “almost see a switch being flipped.” Master Sergeant Bank immediately became distraught and pale. That mood continued when he went to dinner a few hours later with a few of his Soldiers. He specifically stated that he could not handle the humiliation of being court-martialed and going to prison or getting kicked out of the Army, as well as having to explain everything to his wife. Shortly thereafter, MSG Bank killed himself. He had no recorded history of mental defects or issues.

6. Legal Recommendation: Pursuant to AR 600-8-4, paragraph 4-11b, the evidence provided by the IO is sufficient to prove by a preponderance of the evidence that MSG Bank committed the alleged misconduct. Additionally, the evidence gathered by the IO is sufficient to demonstrate that the exposure of MSG Bank’s misconduct and his desire to avoid the personal and criminal consequences of that misconduct were the primary factors for his suicide. Therefore, he should be found NOT in the line of duty.

7. Point of contact for this memorandum is the undersigned at 123-4567.

MARCUS L. MISINEC
MAJ, JA
Administrative Law Attorney