

In the Line of Duty? A Primer on Line of Duty Determinations and the Impact on Benefits for Soldiers and Families

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I. Introduction

*It looked like an open-and-shut case: two U.S. servicemembers found dead in Ghana, each lying unresponsive in their hotel room after a night of partying to bring in the New Year, with heroin, cocaine, and alcohol detected in their bodies. The Ghanaian authorities ruled that the deaths were caused by abuse of drugs and alcohol without involvement of any external factors indicating foul play. Even so, the command investigation that followed determined that both servicemembers died in the line of duty as opposed to as a result of their own misconduct. The rationale was simple—how much did their families stand to lose?*¹

Despite commanders' best efforts to safeguard their troops with weekly unit safety briefings and extensive training, Soldiers are not immune from death, injury, or disease. It can occur during hostile engagements, during garrison physical training, while on leave overseas for New Year's Eve, or even when a Soldier is absent without leave (AWOL). Anytime a Soldier suffers injury or death, a line of duty (LD) investigation is initiated to determine entitlements to certain benefits.²

Although the mantra, "I am a Soldier every day, all day—24/7,"³ is ubiquitous in the Army, the reality is that an individual's conduct and duty status control who is eligible to receive certain benefits, to include family members in death cases.⁴ As a consequence, leaders are often concerned with the prospective loss of substantial benefits for an injured Soldier and his Family. This typically creates a tension between protecting the interest of the individual concerned and the readiness of the Army where service is interrupted by death, injury, or disease.

Army regulations provide detailed guidance regarding LD investigations as well as specific rules governing LD and misconduct determinations.⁵ Yet, existing guidance on the full implications of receiving a "not in line of duty" (NLD) determination is scattered, incomplete, and often fraught with misconceptions.⁶ For example, many leaders may be surprised to learn that numerous benefits are not lost (e.g., the death gratuity⁷) even when a Soldier's injury or death is determined to be NLD.

The potential loss of benefits in a LD investigation should neither outweigh nor overcome prescribed regulatory procedures, although it is a common tendency for leaders to make a LD determination based precisely on that consideration.⁸ This primer informs judge advocates and

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¹ This example is loosely based on real events involving Navy Petty Officer 1st Class Patrick Brendan Mack and Navy Seaman Lonnie Davis, Jr. See Lisa M. Novak, *Misconduct Rarely Found in Servicemember Deaths*, STARS & STRIPES, Mar. 10, 2010, available at <http://www.stripes.com/news/misconduct-rarely-found-in-servicemember-deaths-1.100000>. See, e.g., Matthew M. Burke, *Report: Sailor Left His Friend to Die After Fall from Train in Japan*, STARS & STRIPES, Oct. 20, 2013, available at <http://www.stripes.com/news/report-sailor-left-his-friend-to-die-after-fall-from-train-in-japan-1.247908> (reporting that the approval authority reversed the investigating officer's opinion that the subject servicemember did not die in the line of duty when he climbed aboard a train after drinking several Japanese cocktails and subsequently falling on the train platform).

² See U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 2-3 (4 Sept. 2008) [hereinafter AR 600-8-4] (outlining requirements of line of duty (LD) investigations). Among the various benefits available, some examples include Dependent and Indemnity Compensation (DIC), Survivor Benefit Plan (SBP), accrual

of creditable service and leave, receipt of pay and allowances as well as severance or physical disability pay, and free hospitalization.

³ U.S. DEP'T OF ARMY, FIELD MANUAL 7-21.13, THE SOLDIER'S GUIDE para. 7-6 (Feb. 2004) [hereinafter FM 7-21.13].

⁴ AR 600-8-4, *supra* note 2, para. 2-2. See also U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7a, ch. 01 (Apr. 2013) [hereinafter DoD FMR].

⁵ See generally AR 600-8-4, *supra* note 2. Appendix B, Army Regulation (AR) 600-8-4, provides several basic rules when making LD and misconduct determinations. The purpose of the rules is to find out whether there is evidence of intentional misconduct or willful negligence. These rules are also listed in Appendix B of this article.

⁶ In the author's professional experience, one reason for confusion by Soldiers and commanders alike on the various benefits available is the breadth of pertinent information being spread across a number of federal statutes and regulations, rather than provided for in one repository.

⁷ Payment of the death gratuity has not depended on the outcome of a LD investigation since 1959. 10 U.S.C. §§ 1475-1480, amended by Act of Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1452.

⁸ Anecdotal evidence suggests that impacted benefits ultimately become the crux of each investigation, often with the belief that a NLD determination will deprive the Soldier of *all* benefits. Although limited to LD investigations involving suicides, see Major Marcus Misinec, *Get Back in Line: How Minor Revisions to AR 600-8-4 Could Bring Major Rejuvenation to Suicide Line of Duty Investigations*, 221 MIL. L. REV. 183 (Fall 2014). "In a survey conducted by [Major Misinec], 12 out of 17 (70.6%) current suicide [LD] appointing authorities (future approval

leaders of the LD investigation process and, more importantly, the LD investigation effect on benefits so they can make informed LD determinations, protect the integrity of the LD system, and not be distracted by false beliefs about impacted benefits.

This primer examines the reasons for conducting LD investigations and the benefits at stake after final approval authority decision, with emphasis on the effects of being found NLD-Due to Own Misconduct (DOM). Part II of this article previews the LD process while Part III considers the possible outcomes of a LD investigation. Part IV analyzes the impact of a LD determination; in particular, it focuses on the provision of benefits administered by the Department of the Army (DA), Department of Veterans Affairs (DVA), and other federal agencies. Finally, Part V addresses special considerations and other matters that may affect LD investigations.

II. Line of Duty Investigation Overview

A. Background

1. Purpose and Function

At its core, a LD investigation is predicated on the simple proposition that “every [S]oldier whose service is interrupted by injury, disease, or death while conducting himself properly in the Army is entitled to certain benefits.”⁹ The operative language hones in on two issues: proper conduct and duty status. Specifically, a LD determination is required whenever a Soldier cannot perform his duties due to incapacitation from injury or disease.¹⁰ Any Soldier can become the subject of a LD investigation, so naturally

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.” *Id.* at n.41. Further, the opening scenario in Ghana illustrates this point by illuminating the apparent friction for a commander to do all that he can to assist the Soldier and Family, while adhering to regulation. Recognizing the disconnect between rule and application, albeit without the benefit of large scale empirical data across the Army, see *infra* Parts IV and V for a non-exhaustive list and discussion of the most applicable source documents for the reader’s awareness and use.

⁹ OFFICE OF THE STAFF JUDGE ADVOCATE, U.S. ARMY NORTH AND FORT SAM HOUSTON, GUIDE FOR THE LINE OF DUTY INVESTIGATING OFFICER (ARMY REGULATION 600-8-4) (Feb. 2012) [hereinafter ARNORTH LD GUIDE], available at http://www.samhouston.army.mil/sja/pdf_files/2012/Line%20of%20Duty%20Investigating%20Officer%20Guide.pdf. Many installation legal offices have created similar guides to assist investigating officers (IO) conduct LD investigations. This guide can be a valuable resource for any appointed LD IO. It is complete with a sample notification letter and evidence checklist. For another excellent guide, see OFFICE OF THE STAFF JUDGE ADVOCATE, CIVIL AND ADMIN. LAW DIV., 101ST AIRBORNE DIV. (AIR ASSAULT), LINE OF DUTY INVESTIGATOR’S GUIDE (Apr. 2005) [hereinafter 101ST ABN LD GUIDE], available at http://www.campbell.army.mil/campbell/SJA/Documents/LOD_Investigating_Officers_Guide.pdf.

¹⁰ AR 600-8-4, *supra* note 2, para. 2-3.

leaders want to ensure their Soldiers receive the various benefits that accrue when death or injury transpires.¹¹

Army Regulation 600-8-4, *Line of Duty Policy, Procedures, and Investigations*, promulgates the policies and procedures for investigating the circumstances surrounding a Soldier’s death, disease, or injury and prescribes the standards used in determining LD status. The purpose of making LD determinations is to protect the interests of the individual, the individual’s family, and the United States, because significant benefits are at stake depending upon whether the death, injury, or illness occurred “in line of duty” (ILD).¹² Unlike worker’s compensation, which requires that a worker be performing job related duties in order to qualify for benefits/compensation, a LD determination is not dependent on a Soldier actually performing military duties at the time of impairment or, more broadly, that any resulting disability is job-related.¹³ Rather, LD determinations are based on a Soldier’s duty status, coupled with the question of whether he committed any misconduct that precipitated the injury or death.¹⁴

It is important to remember that LD investigations not only apply to the Active Army, the Army National Guard, and the U.S. Army Reserve, they also apply to cadets at the U.S. Military Academy and those enrolled in the Senior Reserve Officers’ Training Corps (ROTC);¹⁵ moreover, they encompass applicants for enrollment in the military while performing authorized travel to or from or while attending training.¹⁶ Three procedures can be used to make a LD determination: a presumptive finding, an informal investigation, and a formal investigation.¹⁷

¹¹ See Lieutenant E. J. Harrington, *Eligibility for Death or Injury Benefits*, JAG J., Oct. 1951, at 17, 17. Lieutenant Harrington stresses the significance of LD investigations by portending the situations where any servicemember, whether he or she is in the Reserve component or active component, may become the subject of a LD investigation because any servicemember can fall prey to death or injury during military service.

¹² AR 600-8-4, *supra* note 2, para. 2-1.

¹³ Worker’s compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee’s right to sue his employer for the tort of negligence. See BLACK’S LAW DICTIONARY FREE ONLINE LEGAL DICTIONARY (2d ed. 1910), <http://thelawdictionary.org/no-fault-compensation> (last visited Mar. 20, 2014) (“Without having to prove any other party was at fault in an accident, an aggrieved party is awarded compensation. Workmen’s compensation is no-fault compensation.”).

¹⁴ For further discussion, see *infra* Part II.B.

¹⁵ AR 600-8-4, *supra* note 2, at i.

¹⁶ *Id.*; accord 10 U.S.C.A. § 2109 (West 2014). See also *id.* § 2110. Line of duty investigations extend to applicants for enrollment while engaged in flight or flight instruction. *Id.*

¹⁷ AR 600-8-4, *supra* note 2, paras. 2-3 to 2-5. For further discussion, see *infra* Part II.A.2.

2. Types of Investigation

a. Presumptive Finding of In Line of Duty—A Determination Without an Investigation

Line of duty investigations are not always necessary, even when a determination is required because a Soldier has died or was injured—of course if willful negligence is involved, then one is required. The LD determination is presumed to be ILD when no investigation is completed.¹⁸ For instance, a person will be automatically presumed ILD when he incurs injuries from a terrorist attack or enemy action, dies from natural causes or while a passenger on civilian or military aircraft, or, barring the presence of any circumstances that necessitate a formal investigation, in the case of disease.¹⁹ When appropriate, a commander will determine a Soldier is ILD merely by filling out and signing a Department of the Army (DA) Form 2173, *Statement of Medical Examination and Duty Status*.²⁰ In all other cases, a LD investigation must be conducted.

b. Informal Investigation

An investigation can be conducted informally by the chain of command, unless misconduct or negligence is suspected and a formal investigation is required.²¹ The special court-martial convening authority (SPCMCA) is the appointing and approval authority for informal LD investigations.²² At a minimum, documentation for an informal investigation typically consists of a DA Form 2173, which is completed by the Military Treatment Facility (MTF) and the unit commander.²³ In contrast to a formal LD investigation, an informal investigation's determination may only result ILD.²⁴ Before the commander finds a Soldier NLD, a formal LD investigation must be

¹⁸ AR 600-8-4, *supra* note 2, para. 2-3a. *But see, e.g.*, Major Gregory Block, *Line of Duty—How Strong is the Presumption of “In Line of Duty?”*, ARMY LAW., May 1995, at 66, 66. Major Block cautions practitioners to not become blindly obedient when using LD presumptions, given differing affected interests between the individual and the government: “[p]resumptions in favor of ILD status may give some deference to the individual, but should not be used to unduly prejudice the agency.” *Id.*

¹⁹ AR 600-8-4, *supra* note 2, para. 2-3.

²⁰ *Id.* para. 3-2.

²¹ *Id.* para. 2-3c.

²² *Id.* para. 3-6. The special court-martial convening authority is normally in the grade of O-6 and commands a brigade-size organization. For the Army National Guard, the appointing authority must be a commander of at least a battalion- or squadron-size organization, and the approval authority is the respective state Adjutant General. *Id.*

²³ *Id.* para. 3-2.

²⁴ *Id.* para. 3-4a. An exception to the rule is in the case where the MTF finds that a condition existed prior to service (EPTS), and in that event the LD status would be NLD-Not Due to Own Misconduct (NDOM). *Id.* para. 4-8e.

conducted.²⁵

c. Formal Investigation

Formal LD investigations are detailed investigations that are much more comprehensive than the two procedures explained above. A Soldier subject to a formal investigation enjoys certain protections, such as the right to counsel, notification of any contemplated adverse action, and an opportunity to respond before a final determination is made.²⁶ A formal LD investigation must be conducted when certain factors are present, including such circumstances as death or injury involving abuse of drugs or alcohol, possible suicide, or injury incurred while AWOL, among others.²⁷ Once the appointing authority—the SPCMCA—receives the DA Form 2173, he will appoint an investigating officer (IO) to complete Department of Defense (DD) Form 261, *Report of Investigation--Line of Duty and Misconduct Status*.²⁸ After the IO completes the report, the SPCMCA will ensure the IO's report complies with his instructions, refer the report for legal review, and approve or disapprove the IO's findings before forwarding it to the approval authority.²⁹ The final approval authority for a formal LD investigation is

²⁵ *Id.* para. 3-4c to d.

²⁶ *Id.* para. 3-8.

²⁷ *Id.* para. 2-3c. The following enumerated list contains the circumstances that mandate a formal LD investigation.

- (1) Injury, disease, death, or medical condition that occurs under strange or doubtful circumstances or is apparently due to misconduct or willful negligence.
- (2) Injury or death involving the abuse of alcohol or other drugs.
- (3) Self-inflicted injuries or possible suicide.
- (4) Injury or death incurred while AWOL.
- (5) Injury or death that occurs while an individual was en route to final acceptance in the Army.
- (6) Death of a USAR or ARNG soldier while participating in authorized training or duty.
- (7) Injury or death of a USAR or ARNG soldier while traveling to or from authorized training or duty.
- (8) When a USAR or ARNG soldier serving on an AD tour of 30 days or less is disabled due to disease.
- (9) In connection with an appeal of an unfavorable determination of abuse of alcohol or other drugs (para 4-10a).
- (10) When requested or directed for other cases.

Id.

²⁸ *Id.* para. 2-5. An IO must be appointed in writing and the IO may be a commissioned officer, warrant officer, or commissioned officer of another U.S. military service in joint activities where the Army has been designated as the executive agent. *Id.* para. 3-7. Moreover, the IO must be senior in grade to the individual being investigated. *Id.* See generally U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6]. The IO inquiring into the matter will use the general guidance contained in AR 15-6, chapter 5, unless AR 600-8-4 provides more specific or different guidance.

²⁹ AR 600-8-4, *supra* note 2, para. 3-9.

the general court-martial convening authority (GCMCA), a distinction from the informal investigation process.³⁰ In summary, there are essentially three separate and independent reviews by the IO, SPCMCA, and GCMCA during the formal LD investigative process.

3. Standards and Timeline

The evidentiary standard for LD investigations is preponderance of the evidence standard.³¹ That is, the findings or determinations must be supported by “a greater weight of evidence than supports any different conclusion.”³² Investigated Soldiers are given the benefit of the doubt from the outset of each case and are presumed ILD unless there is substantial evidence that rebuts this presumption.³³

Investigating officers should fully consider and apply, where appropriate, the rules in Appendix B of AR 600-8-4 throughout the LD investigation. The Appendix B rules provide detailed guidance for analyzing various types of cases and injuries.³⁴ They assist the IO in assessing how misconduct plays a role in making such findings and recommendations.³⁵ The prescribed completion time for an informal investigation is forty days.³⁶ Formal investigations must be completed within seventy-five days of the incident.³⁷

B. Conduct and Status Interface

In order to make a LD determination, two questions must be answered. The first question is whether the Soldier’s intentional misconduct or willful negligence proximately caused the injury, illness, or death. The second question determines the Soldier’s duty status at the time of

injury, illness, or death.³⁸

1. Intentional Misconduct or Willful Negligence

A Soldier’s conduct is characterized by his behavior at the time of injury or death.³⁹ A person can never be found ILD if his own misconduct or willful negligence causes some degree of incapacitation that interferes with carrying out one’s duties, regardless if that person was in an authorized duty status.⁴⁰ Also, violating an Army regulation by itself is not misconduct—it is simple negligence, but regulatory violations should still be considered and weighed by investigating officers and approval authorities.⁴¹ If misconduct or willful negligence was not the proximate cause of any resulting death, injury, or illness, then the Soldier’s status comes into question.

2. Soldier’s Status

The duty status inquiry is related to an individual’s duty status as a functioning member of the Army.⁴² Duty status is a term of art that involves more than direct performance of military duties and does not necessarily mean conduct within the scope of employment. It refers to whether a Soldier was in an authorized status at the time of injury or death, such as being present for duty, on leave, or on pass, or in unauthorized status, such as AWOL, deserter, or dropped from rolls.⁴³ For example, a person injured while on

³⁰ *Id.* para. 2-5. The general court-martial convening authority is normally in the grade of O-7 or higher. *See id.* para. 3-11 (for actions by the final approval authority).

³¹ *Compare id.* para. 2-6c (the Army uses a preponderance of evidence standard when making LD determinations), with U.S. DEP’T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) sec. 0212 (26 June 2012) (prescribing a clear and convincing standard for evidence, which is a higher bar than preponderance of the evidence but lower than beyond a reasonable found at court-martial, that supports a finding of misconduct).

³² AR 600-8-4, *supra* note 2, para. 2-6c.

³³ *Id.* para. 2-6b.

³⁴ *See id.* app. B.

³⁵ *Id.* para. 2-6e.

³⁶ *Id.* tbl.3-1.

³⁷ *Id.* tbl.3-2.

³⁸ *Id.* paras. 2-6a; 3-4(b). Determining if misconduct occurred in a LD investigation is considered the threshold or crucial question because that finding is irrespective of the Soldier’s duty status. Once it is determined that misconduct or willful negligence did not take place, then and only then would the investigating officer or commander have to answer the second question of the two-step analysis in formal LD investigations.

³⁹ *See* ARNORTH LD GUIDE, *supra* note 9, at 1. “‘Conduct’ is a characterization of a [S]oldier’s behavior based on tort principles. These principles are summarized for guidance in 12 rules governing line of duty and misconduct determinations which are set forth in Appendix B of AR 600-8-4.” *Id.*

⁴⁰ AR 600-8-4, *supra* note 2, para. B-1. Intentional misconduct is defined as “any wrongful or improper conduct which is intended or deliberate,” but does not necessarily involve committing an offense under the Uniform Code of Military Justice (UCMJ) or local law. *Id.* at 27. Willful negligence is defined as “a conscious and intentional omission of the proper degree of care that a reasonably careful person would exercise under the same or similar circumstances.” *Id.*

⁴¹ *Id.* para. B-2. As an example, a Soldier illegally parks his car in a loading dock on Fort Irwin, California when an incoming semi-truck trying to unload freight strikes his vehicle. Consequently, the Soldier is injured in the accident. So long as the Soldier was not willfully negligent or the cause of his injury was not his illegal parking, he would still likely be considered to be ILD. A mere technical violation of an installation’s parking policy would not constitute deliberate wrongdoing. *See, e.g.*, Policy Memorandum 7, Headquarters, U.S. Army Garrison, Fort Irwin, subject: Parking Policy on Fort Irwin (24 May 2012).

⁴² ARNORTH LD GUIDE, *supra* note 9.

authorized pass or leave is as much ILD as a Soldier injured while at his military post. However, the mere fact that a Soldier is in an authorized status does not by itself always support an ILD determination.⁴⁴ Moreover, a Soldier in an unauthorized status can never be injured ILD unless mentally unsound.⁴⁵

The conduct-status equation is critical to the LD determination calculus because each possible outcome has a differing impact for the Soldier being investigated. Once an IO has completed gathering all available evidence related to the Soldier's conduct and status, he may find the Soldier ILD, NLD-Not Due to Own Misconduct (NLD-NDOM), or NLD-Due to Own Misconduct (NLD-DOM).

III. Possible Outcomes (and Consequences)

A. In Line of Duty

An ILD determination means that a Soldier was in an authorized status at the time of the injury and his injury was not proximately caused by intentional misconduct or willful negligence of the Soldier.⁴⁶ Though most cases result in a determination of ILD, the language "in line of duty" can seem misleading. Often, this phrase connotes carrying out one's work duties, as intended by the idiom, "killed in the line of duty," with law enforcement personnel. However, for the military, the language does not hinge on whether the Soldier was actually performing military duties, but rather on the two-step analysis concerning conduct and status discussed in Part II.B. As the most favorable determination, it qualifies the Soldier involved for all available benefits.⁴⁷ Naturally, the desire to reach an ILD determination can permeate the LD process where the commander's final decision justifies the means, even for laudable reasons.⁴⁸

⁴³ See generally U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVE AND PASSES (15 Feb. 2006) (RAR 4 Aug. 2011) [hereinafter AR 600-8-10].

⁴⁴ AR 600-8-4, *supra* note 2, para. 3-4b.

⁴⁵ *Id.* para. 4-7 ("Any injury or diseases incurred while the [S]oldier is AWOL is handled as "not in line of duty" unless the [S]oldier was mentally unsound at the inception of the unauthorized absences.").

⁴⁶ *Id.* para. 2-1.

⁴⁷ A Soldier found ILD would be analogous to separating from military service with an Honorable conditions discharge in terms of eligibility for the receipt of statutory benefits and entitlements.

⁴⁸ See Novak, *supra* note 1; see also Burke, *supra* note 1. Both articles call attention to commanders finding each servicemember's death to be ILD even when evidence to the contrary existed, and that the appropriate determination in each case likely should have been NLD. Take the events in Ghana, for instance, where both servicemembers were found ILD. Autopsies revealed that the mixed use of drugs and alcohol led to their deaths. However, the final approval authority appeared to primarily base his LD determination on efforts to get the families all financial benefits, which would run counter to the intent and textual application of LD rules. In the sailor's death in Japan, he was found to be ILD even though the IO originally concluded he was NLD-DOM. The final approval authority

The other two possible determinations, both coming under the NLD subheading, are considered adverse and result in diminished entitlements.⁴⁹

B. Not in Line of Duty

1. Not Due to Own Misconduct

A NLD-NDOM determination means that a Soldier is in an unauthorized status, usually AWOL, but any resulting injury is not caused by intentional misconduct or willful negligence of the Soldier.⁵⁰ For example, a Soldier is AWOL, but is injured in a car accident where the Soldier is not at fault. Accordingly, the Soldier is considered to be NLD, but not due to any volitional act that is deemed to be misconduct or negligence. This determination may also be based on a medical condition that "existed prior to service" (EPTS), which was not aggravated by military service.⁵¹ Of the three possible outcomes of a LD investigation, a NLD-NDOM determination materializes least frequently.⁵²

2. Due to Own Misconduct

A NLD-DOM determination means that a Soldier's intentional misconduct or willful negligence proximately caused injury or death, regardless of duty status.⁵³ To illustrate this point, imagine that a Soldier gets intoxicated at a party and attempts to drive home. The Soldier then becomes involved in an accident as a result of his intoxication. In this scenario, the Soldier would be found NLD-DOM because his own personal misconduct caused his injuries.

disapproved the findings and substituted ILD for the sake of benefits to the deceased's son. This consideration, while commendable, runs afoul of what is contemplated by statute and regulation.

⁴⁹ For further discussion, see *infra* Part IV.

⁵⁰ AR 600-8-4, *supra* note 2, para. 2-2. See also *id.* para. 4-7c ("If the driver of a Government vehicle on an unauthorized trip is injured during an unjustified deviation from his or her assigned route, the driver should be considered AWOL for LD purposes.").

⁵¹ AR 600-8-4, *supra* note 2, para. 4-8e.

⁵² To the author's knowledge, the difference between NLD-NDOM and NLD-DOM determinations has not shown any salient distinction when it comes to impacted benefits, regardless of the agency administering the provision of benefits. Simply, the gravamen in determining eligibility for benefits lies in the binary choice of ILD or NLD only.

⁵³ AR 600-8-4, *supra* note 2, para. 2-6a. For background on basic concepts of misconduct as it relates to LD investigations and areas of misconduct, such as malingering, intoxication, or assaults, see Lieutenant Grant Cole, *Misconduct and Line of Duty*, JAG J., May-June 1953, at 3, 3. Of course, many relevant statutes have been enacted and regulations promulgated since the publication date. Therefore, the article is referred in order to provide a basic overview of various types of misconduct.

Each possible outcome of a LD investigation correlates with specific benefits, whether total or partial. Therefore, the impact of LD determinations is paramount to Soldiers and Families, and the commanders who attempt to get them benefits.

IV. Impact of Line of Duty Determination⁵⁴

*Commodum Ex Injuria Sua Nemo Habere Debet*⁵⁵

For Soldiers and leaders, the impact of LD determinations begins and ends with entitlements. Entitlements have the greatest effect and impact on that individual's life, outside of the triggering incident itself. Again, eligibility for these entitlements is based on an administrative determination in cases involving death, disease, or disability, which controls the benefits available to the Soldier and his Family.

For instance, as discussed further below, an injury that is incurred ILD entitles a Soldier to Army disability retirement or separation compensation, Department of Veterans Affairs compensation, and hospitalization benefits. Conversely, a NLD-DOM determination may result in the loss of pay as well as the loss of creditable days for pay and allowances for as long as the Soldier is unable to perform his duties. Because creditable days are lost, they are then added to the Soldier's active duty service obligation (ADSO) to fulfill any contractual terms of service. In the event a servicemember is found NLD-NDOM, he may be denied civil service preference, disability retirement or separation compensation, and DVA disability or hospitalization benefits.

As Parts II and III set up the regulatory framework for LD investigations, this Part—and to a lesser extent, Part V—explores the wide array of benefits across the military. The taxonomy of benefits should be viewed against the backdrop of four categories: immediate income assistance, transition assistance, income replacement, and unpaid compensation.⁵⁶ Attendant to this approach, this section comments on the effect of LD determinations for each topic, whether it is ILD or NLD.

⁵⁴ See *infra* Appendix A.

⁵⁵ F.J. STIMSON, GLOSSARY OF TECHNICAL TERMS, PHRASES, AND MAXIMS OF THE COMMON LAW (1881). Roughly translated, the maxim means that a wrongdoer should not be enabled by law to take any advantage from his actions. In simpler terms, one should not be able to profit from one's wrongdoing. Although ordinarily used in the context of tort law, this phrase highlights the delicate balance in LD investigations between social responsibility for the Soldier who has been disabled and social protection from the Soldier who irresponsibly has brought disability upon himself.

⁵⁶ See Patrick Mackin et al., *Review of Survivor Benefits*, THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION ch. 12 (June 2012). The authors employ this functional categorization to evaluate military survivor benefits and compare it with civilian occupations.

A. Benefits Administered by the Department of the Army⁵⁷

Recalling the Ghana case from the introduction, imagine that the servicemembers were found NLD-DOM instead of ILD and consider the benefits the servicemembers stood to lose. Should a commander's altruistic motive trump the intended purpose of LD determinations? Or is a simple misunderstanding of the law the contributing factor for the incongruent nature of LD investigations?

Soldiers who are on active duty (AD) for more than 30 days will not lose their entitlement to medical and dental care, even if the injury or disease is found to have incurred NLD.⁵⁸ Likewise, reserve or guard Soldiers under similar circumstances are eligible to receive medical and dental care if their duty extends beyond 30 days.⁵⁹

Soldiers who are absent from their regular duties as a result of injuries or disease caused by misconduct, generally still receive pay during that absence.⁶⁰ However, if the disease or injury is directly caused by or immediately follows an intemperate use of drugs or alcohol, a Soldier is not entitled to pay for any continuous absence of more than one day.⁶¹ Further, an enlisted Soldier who is unable to perform duties for more than one day because of an intemperate use of drugs or alcohol or disease or injury caused by misconduct or willful negligence will have to make up the lost time at the end of his initial service obligation.⁶²

Soldiers will not accrue creditable service for longevity and retirement purposes, if they are absent due to injury or disease determined to be NLD-DOM.⁶³ In contrast, Soldiers are still eligible to receive allowances even if found NLD-DOM.⁶⁴ Yet, Soldiers will not accrue leave for injury or

⁵⁷ See *infra* Part V.C for additional benefits not covered in Parts IV.A thru IV.C; namely, it contains survivor benefits in death cases, such as the Survivor Benefit Plan, life insurance, and death gratuity.

⁵⁸ 10 U.S.C.A. § 1074 (West 2014).

⁵⁹ *Id.* § 1074a. For Reserve component members on AD for a period of thirty days or less, see U.S. DEP'T OF DEF. DIR., 1241.1, RESERVE COMPONENT MEDICAL CARE AND INCAPACITATION PAY FOR LINE OF DUTY CONDITIONS (28 Feb. 2004) [hereinafter DoDD 1241.1].

⁶⁰ AR 600-8-4, *supra* note 2, para. 2-2c. In other words, self-indulgent or excessive drug or alcohol use is grounds to deny pay for those days a Soldier does not work if it is more than one duty day. Seemingly, it appears that drug or alcohol abuse is the only basis to deny pay in this context.

⁶¹ *Id.* The DoD FMR defines pay to include the following: basic pay, special pays, and incentive pay for hazardous duty. DoD FMR, *supra* note 4, para. 010301.C.2.

⁶² 10 U.S.C.A. § 972 (West 2014).

⁶³ DoD FMR, *supra* note 4, para. 010102.B.1.d & tbl.1-2, r. 6.

⁶⁴ *Id.* tbl.1-12, r. 3. The DoD FMR defines allowances to include the following: basic allowance for subsistence (enlisted leave rations), basic allowance for housing, personal money allowances, clothing maintenance

disease caused by alcohol or drug abuse or disease caused by other misconduct.⁶⁵ Also, Soldiers can have their reenlistment bonuses, or at least a pro rata share, recouped due to misconduct.⁶⁶ Additionally, Soldiers found NLD-DOM will not receive severance or physical disability pay.⁶⁷

Under limited circumstances, there are statutory provisions for the award of posthumous warrants by the Secretary of the Army and posthumous commissions by the President in the name of the members of the Army who die after September 8, 1939. These warrants and commissions are only awarded for deaths occurring ILD.⁶⁸

In summary, the primary consequences of NLD-DOM determinations in non-death case are loss of creditable time in service and loss of retirement or disability separation. In the event of permanent disability, the loss of creditable time becomes less important. Generally an adverse determination does not cause a loss of medical benefits or deny eligibility for pay and allowances, unless it involves alcohol or drugs. However, if a servicemember is no longer connected with the Army, then the benefits offered by the DVA become of paramount importance.

B. Benefits Administered by the Department of Veterans Affairs

The DVA makes a separate determination for “service-connected” injuries and is not bound by the Army’s conclusion.⁶⁹ Notwithstanding, the DVA will use the Army’s (or sister service’s) investigation to make its own finding.⁷⁰

allowances, family separation allowances, and station allowances as outlined in JFTR, vol. 1, ch. 9 (C 310, Oct. 1, 2012). *Id.* para. 010301.C.2.

⁶⁵ AR 600-8-4, *supra* note 2, para. 2-2c; AR 600-8-10, *supra* note 43, para. 2-3a(7). This provision is one of seven enumerated exclusions for purposes of leave accrual.

⁶⁶ U.S. DEP’T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM para. 5-10a (31 Jan. 2006) (RAR 15 Sept. 2011) [hereinafter AR 601-280].

⁶⁷ 10 U.S.C.A. § 1207.

⁶⁸ *Id.* §§ 1521–1522. If a Soldier was “officially recommended for appointment or promotion to a grade other than a commissioned grade but was unable to accept the appointment or promotion because of death[,]” then the Secretary of the Army may issue a posthumous warrant in the name of the Soldier. *Id.*

⁶⁹ 38 U.S.C.A. § 105 (West 2014); 38 C.F.R. § 3.301 (2014). “The term ‘service-connected’ means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.” 38 U.S.C.A. § 101(16). In other words, service-connected means ILD.

⁷⁰ See AR 600-8-4, *supra* note 2, para. 2-2f.

In determining whether a veteran or his survivors or family members are eligible for certain benefits, the DVA makes its own determinations with respect to

Payments to veterans for service-connected disabilities are called compensation.⁷¹ A veteran who becomes disabled by incurring an injury or a disease, or by aggravating a pre-existing disease or injury while on active service during a period other than war, is entitled to receive peacetime disability compensation if the veteran was discharged or released under conditions other than dishonorable.⁷² As one example, a Soldier who exacerbates a pre-existing rotator cuff injury, say, from his high school football glory days, during training at the National Training Center in Fort Irwin would be eligible for compensation. However, the veteran is not eligible to receive this compensation if the disability is a result of willful misconduct or abuse of alcohol or drugs.⁷³ Hence, the two servicemembers in the Ghana scenario would not be able to receive compensation if they were found NLD due to drugs or alcohol.

A veteran disabled by an injury or disease incurred during a period of active service in wartime, or by an aggravation of a pre-existing injury or disease during such service, is entitled to wartime disability compensation. This is the case if the veteran was separated from the service under honorable or general conditions. The veteran is not eligible to receive it if the disability is a result of willful misconduct or abuse of alcohol or drugs.⁷⁴

The DVA may furnish hospital or domiciliary care to a veteran who has a service-connected disability, or who was released from military service for a disability incurred or aggravated ILD, or who is receiving disability compensation.⁷⁵ However, if the veteran’s disability was incurred NLD or was nonservice-connected, or if the disabled veteran is not receiving disability compensation for a reason other than the receipt of retirement pay, the veteran is not entitled to hospital care unless it is necessary and he is unable to defray the expense personally.⁷⁶

Statute provides that surviving widows and children and dependent parents of veterans shall be entitled to death compensation, but only if the death was ILD and resulted from injury or disease incurred in or aggravated by active

LD. These determinations rest upon the evidence available. Usually this consists of those facts that have been officially recorded and are on file within DA, including reports and LD investigations submitted in accordance with the provisions of this regulation.

Id.

⁷¹ 38 U.S.C.A. § 101(13) (West 2014).

⁷² *Id.* § 1131.

⁷³ *Id.*

⁷⁴ *Id.* § 1110.

⁷⁵ *Id.* § 1710.

⁷⁶ *Id.* § 1722.

service.⁷⁷ For service-connected deaths and deaths occurring after 31 December 1956 that resulted from disability incurred in active service (provided the veteran was released under conditions other than dishonorable), the DVA will pay dependency and indemnity compensation⁷⁸ to the widow,⁷⁹ children,⁸⁰ and parents.⁸¹ A widow or child eligible for death compensation may elect to take dependency and indemnity compensation in lieu thereof.⁸²

For purposes of disability or death compensation and dependency and indemnity compensation, a veteran's death or disability is treated as though it were service-connected if the injury or an aggravation of the injury is caused by hospitalization, medical, or surgical treatment.⁸³ The injury cannot be as a result of willful misconduct or abuse of alcohol or drugs by the Soldier. Similarly, the DVA will treat a veteran's injury as if it were ILD if the individual was pursuing a course of vocation rehabilitation awarded by the DVA or submitting to an examination required by any of the laws administered by the DVA.⁸⁴

A veteran discharged or released from AD by reason of a service-connected disability may be entitled to have the DVA guarantee or insure a loan issued to the veteran for farm, home, and business purposes.⁸⁵ A member of the armed forces serving on active duty who is suffering from a disability is eligible for specially adapted housing if the disability is incurred or aggravated ILD during the active military service.⁸⁶

In the case of a deceased veteran who incurred an injury or disease ILD, the DVA may pay a sum not exceeding \$300 for funeral expenses if there is no next of kin or there are not

sufficient resources to cover funeral and burial expenses.⁸⁷ When a veteran dies as the result of a service-connected disability, the DVA shall pay up to \$2,000 in burial and funeral expenses.⁸⁸ Lastly, the DVA will furnish a flag for the casket of each person who was a veteran of any war if he had served at least one enlistment or was released from AD for a disability incurred or aggravated ILD.⁸⁹

C. Benefits Administered by Other Federal Agencies

Clearly, the most consequential results of a NLD-DOM determination are those effectuated by the Army and DVA; however, other agencies of the federal government administer considerable privileges and benefits to veterans, particularly to disabled veterans. These agencies rely on the DVA determination of whether the injury of the Soldier (veteran) was ILD, NLD-NDOM, or NLD-DOM.

Disabled veterans are given preference in employment in all federal agencies and in the civil service of the District of Columbia. This preference is contingent upon having served on AD, having been separated under honorable conditions, and either (1) having established the present existence of a service-connected disability, or (2) being in receipt of compensation, disability retirement benefits, or a pension from the DVA.⁹⁰ Thus, a NLD-DOM determination by the DVA may jeopardize this preference for disabled veterans.

V. Special Considerations and Other Matters

A. How Strong is the "In Line of Duty" Presumption?

Army regulation has promulgated certain presumptions governing LD determinations.⁹¹ Judge advocates and leaders "wrestle with the strength of our regulatory presumption in favor of in line of duty (ILD) determinations,"⁹² especially in cases without direct evidence to corroborate a claim. Therein lies the rub for the commander who wants to help out his Soldier and the Family, but not contradict the ancient principle that one should not profit by one's wrongdoing.⁹³

⁷⁷ *Id.* §§ 1121, 1141.

⁷⁸ *Id.* § 1310. Dependency and Indemnity Compensation (DIC) is a tax free monetary benefit paid to eligible survivors of military Servicemembers who died in the line of duty or eligible survivors of Veterans whose death resulted from a service-related injury or disease. DEP'T OF VETERANS AFFAIRS, DEPENDENCY AND INDEMNITY COMPENSATION, http://benefits.va.gov/compensation/types-dependency_and_indemnity.asp (last visited Nov. 18, 2014). Possible beneficiaries include a spouse who is not currently remarried or children, or parent dependents. One caveat with the DIC is that a surviving spouse who remarries on or after 16 December 2003, and on or after attaining age fifty-seven, is entitled to continue to receive DIC. *Id.*

⁷⁹ 38 U.S.C.A. § 1311.

⁸⁰ *Id.* § 1313.

⁸¹ *Id.* § 1315.

⁸² *Id.* § 1317.

⁸³ *Id.* § 1151.

⁸⁴ *Id.*

⁸⁵ *Id.* § 3702.

⁸⁶ *Id.* § 2101A.

⁸⁷ *Id.* § 2302.

⁸⁸ *Id.* § 2307. The request is made by the survivors of the veteran.

⁸⁹ *Id.* § 2301.

⁹⁰ 5 U.S.C.A. § 2108 (West 2014).

⁹¹ The key for an IO is to use the rules in AR 600-8-4, *supra* note 2, app. B; *see also infra* Appendix B.

⁹² The question of whether the injury is incident to service becomes more difficult based on this rationale. *See* Block, *supra* note 18, at 67.

⁹³ *E.g.*, STIMSON, *supra* note 55.

B. Suicide and Suicide Attempts⁹⁴

All suicides and attempted suicides require a formal LD investigation appointed by the GCMCA.⁹⁵ Soldiers may not be held responsible for acts of conduct when they are unable to comprehend or appreciate the nature of the conduct in question if those acts are the result of mental defect, disease, or derangement. Such disorders are presumed ILD unless they existed prior to service (EPTS). It is important to remember that personality disorders, by their nature, are considered to have EPTS.⁹⁶

Suicide and suicide attempt LD investigations must determine whether the subject Soldier was mentally sound,⁹⁷ which means that an inquiry is necessary into the subject's background. If the Soldier was mentally unsound at the time of the incident, a medical officer must determine if the condition EPTS.⁹⁸ Self-inflicted injuries by a mentally sound Soldier are considered misconduct.⁹⁹ To be clear, there are two legal presumptions in play for suicide-related LD investigations: (1) presumption of mental unsoundness—a mentally sound person would not attempt to or commit suicide,¹⁰⁰ and (2) presumption of death to be ILD unless refuted by available evidence.¹⁰¹

C. Death Cases and Survivor Benefits

Before 10 September 2001, deaths did not require a LD determination; however, all active duty deaths on or after 10 September 2001 require a LD determination.¹⁰² Qualified survivors¹⁰³ of Soldiers who die on AD before becoming eligible to receive retirement pay, may appeal an adverse LD determination in a death case.¹⁰⁴ The appeal must be

submitted within six years of the date of the LD determination.¹⁰⁵ An investigation is required for all deaths except death by natural causes, when death occurs while a passenger on a common commercial carrier or military aircraft, death as the result of combat, attack by terrorists, or other forces antagonistic to the interests of the United States, in friendly-fire incidents, or while a prisoner of war. These instances are presumed to be ILD and do not require an investigation.¹⁰⁶

Significantly, LD determinations affect a Soldier's Survivor Benefit Plan (SBP), but not his Servicemembers' Group Life Insurance (SGLI) or death gratuity. A NLD finding is costly for a deceased Soldier's Family members because they are not authorized to receive the SBP payment, a monthly annuity paid to the surviving spouse or children.¹⁰⁷ On the other hand, a deceased Soldier's named beneficiaries, say, his Family members, will still receive the SGLI benefits—a contractual obligation up to \$400,000 depending on the amount of coverage the servicemember elected—regardless of the outcome of any LD investigation.¹⁰⁸

The death gratuity payment of \$100,000 will still be disbursed to the Family irrespective of LD determinations.¹⁰⁹ Concomitant to the SGLI and death gratuity, unpaid pay and allowances¹¹⁰ and social security benefits¹¹¹ are provided to the Family, again, irrespective of any LD determination decision. So in contrast to some people's beliefs, the panoply of benefits is not all lost from the foreboding NLD finding. In fact many benefits are still available to the Soldier's Family.

VI. Conclusion

In light of the number of statutory benefits contingent upon an injury or death having been incurred ILD, the

⁹⁴ For an excellent overview of suicide LD investigations, including suggested revisions to AR 600-8-4 on suicide-related LD determinations, see generally Misinec, *supra* note 8.

⁹⁵ U.S. DEP'T OF ARMY, DIR. 2010-01, CONDUCT OF AR 15-6 INVESTIGATIONS INTO SUSPECTED SUICIDES AND REQUIREMENTS FOR SUICIDE INCIDENT FAMILY BRIEFS (26 Mar. 2010) [hereinafter ARMY DIR. 2010-01].

⁹⁶ AR 600-8-4, *supra* note 2, para. 4-11a.

⁹⁷ See *id.* para. 4-11b.

⁹⁸ *Id.* para. 4-11c.

⁹⁹ *Id.* paras. 4-11e & B-10.

¹⁰⁰ *Id.* para. B-10. Interestingly, the regulation lays out the legal presumption of mental unsoundness in the negative. For a more in-depth discussion on the evolution of the mentally unsound presumption from its progeny to present day, see Misinec, *supra* note 8, pt. IV.

¹⁰¹ AR 600-8-4, *supra* note 2, para. 2-6b.

¹⁰² *Id.* paras. 4-13a(1)-(2).

¹⁰³ 10 U.S.C.A. § 1448 (West 2014).

¹⁰⁴ AR 600-8-4, *supra* note 2, para. 4-17. The appeal is sent to HQDA (AHRC-PED-S), Alexandria, Virginia 22332. According to Army regulation, the Soldier's surviving Family members may seek assistance with the appeal from the supporting legal assistance office.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* para. 4-13a(2).

¹⁰⁷ 10 U.S.C.A. § 1448(d). The initial payment is calculated to be fifty-five percent of the projected retirement pay had the servicemember "retired" on the date of his death, which also takes into account the Soldier's time in service. Moreover, the amount lowers to 35 percent upon the surviving spouse attaining the age of sixty-two. *Id.*

¹⁰⁸ 38 U.S.C.A. § 1967 (West 2014).

¹⁰⁹ See *supra* note 7 and accompanying text. The payment is made as one lump sum payment.

¹¹⁰ 37 U.S.C.A. § 501 (West 2014).

¹¹¹ 42 U.S.C.A. § 402 (West 2014).

importance of a LD determination to an injured Soldier or the next of kin in cases of death cannot be overstated. Understandably, leaders never want to put Family members in a position where they may be penalized for the Soldier's conduct. Despite the best of intentions, however, commanders should not view the potential loss of benefits as the overarching factor in LD investigations.

The fact remains that a NLD determination does not automatically equate to a loss of all or even most benefits for the Soldier and Family. This is a common area of confusion for many involved. This primer, in laying out the impacted benefits and availability of each benefit, can help ease the difficulty in the commander's mind when reaching a decision in LD cases because he will know all of the relevant facts. As such, the role of judge advocates in this process is significant—not just staying engaged to ensure a thorough investigation, but also advising leaders of the various benefits at stake to prevent distractions from interfering with the integrity of the process.

The ramifications of LD determinations extend not only to the military service, but well beyond to other federal agencies. Although the DVA renders its own LD determination on each case, which is then relied upon by other government agencies, the DVA uses evidence from the unit's LD investigation in reaching its own LD determination. Confronting misconceptions about impacted entitlements now will, in turn, permit careful consideration of relevant LD factors that will not only benefit the Soldier, but the Army as well.

Appendix A

Active Duty Deaths Benefits Summary

In Line of Duty OR Over 20 Years Time in Service	Not in Line of Duty AND Less than 20 Years Time in Service
Servicemembers' Group Life Insurance	Servicemembers' Group Life Insurance
Death Gratuity	Death Gratuity
Social Security ¹¹²	Social Security
Unpaid Pay and Allowances ¹¹³	Unpaid Pay and Allowances
Survivor Benefit Plan ¹¹⁴	
Dependent and Indemnity Compensation ¹¹⁵	

¹¹² A lump sum Social Security benefit of \$255 is provided to the surviving spouse or children, along with monthly survivor benefits based on work history (work quarters). *See* U.S. SOC. SECURITY ADMIN., <http://www.ssa.gov> (last visited Nov. 18, 2014).

¹¹³ Survivors receive all pay owed to the servicemember at the time of death. *See supra* note 60 and accompanying text. To apply to receive the remaining money in the deceased servicemember's account, see U.S. Gov't Accountability Office, SF 1174, Claim for Unpaid Compensation of Deceased Member of the Uniformed Services (Sept. 1992).

¹¹⁴ Survivor Benefit Plan disbursement is automatic upon the servicemember's death. *See* 10 U.S.C.A. § 1448(d)(1)(B) (West 2014).

¹¹⁵ Dependent and Indemnity Compensation is only available if the servicemember's death was service-connected. Additionally, surviving spouses or former spouses are eligible to receive the Special Survivor Indemnity Allowance (SSIA) if they are eligible to receive or already receiving the SBP and DIC. The amount of payment increases gradually from \$150 for the months during fiscal year 2014 to \$310 for the months during fiscal year 2017. Like the SBP, SSIA is taxable. *Id.* § 1450(m).

Appendix B

Rules Governing Line of Duty and Misconduct Determinations¹¹⁶

Rule 1. Injury, disease, or death directly caused by the individual's misconduct or willful negligence is not in line of duty. It is due to misconduct. This is a general rule and must be considered in every case where there might have been misconduct or willful negligence. Generally, two issues must be resolved when a soldier is injured, becomes ill, contracts a disease, or dies – (1) whether the injury, disease, or death was incurred or aggravated in the line of duty; and (2) whether it was due to misconduct.

Rule 2. Mere violation of military regulation, orders, or instructions, or of civil or criminal laws, if there is no further sign of misconduct, is no more than simple negligence. Simple negligence is not misconduct. Therefore, a violation under this rule alone is not enough to determine that the injury, disease, or death resulted from misconduct. However, the violation is one circumstance to be examined and weighed with the other circumstances.

Rule 3. Injury, disease, or death that results in incapacitation because of the abuse of alcohol and other drugs is not in line of duty. It is due to misconduct. This rule applies to the effect of the drug on the Soldier's conduct, as well as to the physical effect on the soldier's body. Any wrongfully drug-induced actions that cause injury, disease, or death are misconduct. That the Soldier may have had a pre-existing physical condition that caused increased susceptibility¹¹⁶ to the effects of the drug does not excuse the misconduct.

Rule 4. Injury, disease, or death that results in incapacitation because of the abuse of intoxicating liquor is not in line of duty. It is due to misconduct. The principles in Rule 3 apply here. While merely drinking alcoholic beverages is not misconduct, one who voluntarily becomes intoxicated is held to the same standards of conduct as one who is sober. Intoxication does not excuse misconduct. While normally there are behavior patterns common to persons who are intoxicated, some, if not all, of these characteristics may be caused by other conditions. For example, an apparent drunken stupor might have been caused by a blow to the head. Consequently, when the fact of intoxication is not clearly fixed, care should be taken to determine the actual cause of any irrational behavior.

Rule 5. Injury or death incurred while knowingly resisting a lawful arrest, or while attempting to escape from a guard or other lawful custody, is incurred not in line of duty. It is due to misconduct. One who resists arrest, or who attempts to escape from custody, can reasonably expect that necessary force, even that which may be excessive under the circumstances, will be used to restrain him and, is acting with willful negligence.

Rule 6. Injury or death incurred while tampering with, attempting to ignite, or otherwise handling an explosive, firearm, or highly flammable liquid in disregard of its dangerous qualities is incurred not in line of duty. It is due to misconduct. Unexploded ammunition, highly flammable liquids, and firearms are inherently dangerous. Their handling and use require a high degree of care. A Soldier who knows the nature of such an object or substance and who voluntarily or willfully handles or tampers with these materials without authority or in disregard of their dangerous qualities is willfully negligent. This rule does not apply when a Soldier is required by assigned duties or authorized by appropriate authority to handle the explosive, firearm, or liquid, and reasonable precautions have been taken. The fact that the Soldier has been trained or worked with the use or employment of such objects or substances will have an important bearing on whether reasonable precautions were observed.

Rule 7. Injury or death caused by wrongful aggression or voluntarily taking part in a fight or similar conflict in which one is equally at fault in starting or continuing the conflict, when one could have withdrawn or fled, is not in line of duty. It is due to misconduct. An injury received or death suffered by a Soldier in an affray in which he is the aggressor is caused by his own misconduct. This rule does not apply when a Soldier is the victim of an unprovoked assault and sustains injuries or dies while acting in self-defense. The Soldier's provocative actions or language, for which a reasonable person would expect retaliation, is a willful disregard for personal safety, and injuries or death directly resulting from them are due to misconduct. When an adversary uses excessive force or means that could not have been reasonably foreseen in the incident, the resulting

¹¹⁶ See AR 600-8-4, *supra* note 2, app. B (the specific rules are restated here for the reader's convenience). These rules are to be considered fully in every formal investigation in deciding LD determinations, and they elaborate upon, but do not modify, the basis for LD determinations. *Id.* para. 2-6e. Often overlooked or even unheeded, these basic rules apply to various situations that IOs may encounter in their investigations. The rules help inform the IO to arrive at decisions of "whether there is evidence of intentional misconduct or willful negligence that is substantial and of a greater weight than the presumption of 'in the line of duty.'" *Id.* app. B.

injury or death is not considered to have been caused by misconduct. Except for self-defense, a Soldier who persists in a fight or similar conflict after an adversary produces a dangerous weapon is acting in willful disregard for safety and is therefore willfully negligent.

Rule 8. Injury or death caused by a Soldier driving a vehicle when in an unfit condition of which the Soldier was, or should have been aware, is not in line of duty. It is due to misconduct. A Soldier involved in an automobile accident caused by falling asleep while driving is not guilty of willful negligence solely because of falling asleep. The test is whether a reasonable person, under the same circumstances, would have undertaken the trip without expecting to fall asleep while driving. Unfitness to drive may have been caused by voluntary intoxication or use of drugs.

Rule 9. Injury or death because of erratic or reckless conduct, without regard for personal safety or the safety of others, is not in the line of duty. It is due to misconduct. This rule has its chief application in the operation of a vehicle but may be applied with any deliberate conduct that risks the safety of self or others. "Thrill" or "dare-devil" type activities are also examples of when this rule may be applied.

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. 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.

Rule 11. Misconduct or willful negligence of another person is attributed to the Soldier if the Soldier has control over and is responsible for the other person's conduct, or if the misconduct or neglect shows enough planned action to establish a joint venture. The mere presence of the Soldier is not a basis for charging the Soldier with the misconduct or willful negligence of another, even though the Soldier may have had some influence over the circumstances or encouraged it. If the Soldier, however, has substantially participated with others in the venture, then that is misconduct.

Rule 12. The line of duty and misconduct status of a Soldier injured or incurring disease or death while taking part in outside activities, such as business ventures, hobbies, contests, or professional or amateur athletic activities, is determined under the same rules as other situations. To determine whether an injury or death is due to willful negligence, the nature of the outside activity should be considered, along with the training and experience of the Soldier.