



THE ARMY LAWYER

Headquarters, Department of the Army

June 2012

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for \$45.00 each (\$63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at <http://www.jagcnet.army.mil/ArmyLawyer> and at the Library of Congress website at http://www.loc.gov/rr/frd/MilitaryLaw/Army_Lawyer.html.

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Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

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Lore of the Corps
The Military Rules of Evidence:
A Short History of Their Origin and Adoption at Courts-Martial

Fred L. Borch
Regimental Historian & Archivist

The Military Rules of Evidence (MRE) have been a permanent feature of courts-martial practice for more than thirty years. While practitioners today are comfortable with the rules and accept their permanence in military criminal trials, their adoption in 1980 was the end result of a long and contentious struggle. This is the story of the origin of the MRE and their adoption at courts-martial.

Prior to 1975, when the Congress enacted legislation establishing the Federal Rules of Evidence (FRE), the admissibility of evidence in U.S. courts was governed by Federal common law. Similarly, evidentiary rules at courts-martial were governed by a common law of evidence that had emerged from successive decisions from the Court of Military Appeals (COMA) and, to a lesser extent, the inferior service courts. The 1969 Manual for Courts-Martial (MCM), contained these judicial decisions, but it was difficult to know whether the MCM was adopting these “decisions as positive law or merely setting them forth for the edification of the reader.”¹

Under the Uniform Code of Military Justice (UCMJ), Article 36, courts-martial “shall, so far as . . . practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”² Recognizing that the codification of the Federal common law rules of evidence meant that the Armed Forces should consider codifying military evidentiary rules, Colonel (COL) Wayne E. Alley, the then-Chief of Criminal Law in the Office of The Judge Advocate General, decided that “Military Rules of Evidence” should be created and adopted by the Armed Forces.

With the concurrence of Major General (MG) Wilton B. Persons, The Army Judge Advocate General, COL Alley put his idea in a written memorandum, which he submitted to the Department of Defense (DoD) Joint Service Committee on Military Justice (known colloquially as the “JSC”).³

Colonel Alley, who had recently assumed the chairmanship of the JSC, “formally proposed” that the services “revise the Manual for Courts-Martial to adopt, to the extent practicable, the new civilian rules.”⁴

Colonel Alley’s chief argument was that Article 36 required a codification of the military rules to bring courts-martial practice in line with federal civilian practice under the new FRE. A second important reason, as already indicated, was that the evidentiary language contained in the 1969 MCM was not necessary binding, making its usefulness doubtful. But Alley also had a third reason, which grew out of his experience as a military judge wrestling with evidentiary issues at trial. In a recent e-mail, he explained:

I was the only [JSC] member whose mid-career years were spent in the judiciary. I dealt with evidentiary issues on an almost daily basis. I found the best source of helpful case law was in Article III court decisions, which, I believed, *would be less and less helpful for military judges as the cases came more and more to be explications of FREs*. This was particularly important because of the FRE clarity about the necessity to preserve issues by timely objection. Military practice was wishy-washy as to this, and military case law seemed to support bailing out counsel who didn’t do his objecting job.⁵

¹ Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 8 (1990). Lederer is now the Chancellor Professor of Law and Director, Center for Legal and Court Technology, College of William and Mary; he also is a retired reserve judge advocate colonel.

² UCMJ art. 36(a) (2008).

³ The Joint Service Committee on Military Justice (JSC) consists of an Army, Navy, Air Force, Coast Guard, and Marine Corps representative, usually in the grade of O-6. Department of Defense Directive 5500.17, which governs the operation of the JSC, sets out the committee’s duties and responsibilities. Its principal mission is to “conduct an annual review of the Manual for Courts-Martial (MCM) in light of judicial and legislative

developments in civilian and military practice.” As a practical matter, this means deciding if changes are needed to the Military Rules of Evidence (MRE)—and the Punitive Offenses and Rules for Courts-Martial—in light of changes in civilian criminal law. U.S. DEP’T OF DEF., DIR., THE ROLES AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (3 May 2003), available at http://www.dod.gov/dodge/images/jsc_mission.pdf (last visited Jan. 13, 2012).

⁴ Lederer, *supra* note 1, at 6.

⁵ E-mail from Brigadier General (Retired) Wayne E. Alley, to Fred L. Borch, Regimental Historian and Archivist, The Judge Advocate General’s Legal Ctr. & Sch., (7 Dec. 2011, 11:23:00 EST) (emphasis added) (on file with author).

Despite COL Alley's arguments, the Navy opposed the idea of creating MRE. "If it isn't broken, don't fix it" seems to have been the basic reason for the sea service's opposition, but the Office of the Judge Advocate General of the Navy later articulated at least four reasons why "relatively low priority" should be "given to [the FRE's] quick implementation in the military." First, the MCM's rules of evidence were "a well thought out set of rules located in one convenient place." Second, new MRE necessarily would result in "a substantial amount of litigation." Third, it would be difficult to transform the FRE into MRE because these "civilian rules would have to be scrutinized and adapted" to the needs of the military. Fourth and finally, the Navy argued that creating the MRE probably would require special training in order to educate judge advocates about the new rules—training that would be unnecessary if the services simply retained the existing MCM evidentiary rules with which practitioners were already familiar and comfortable.⁶

It is likely that opposition to implementing the FRE at courts-martial also grew out of a general unhappiness with the increasing "civilianization" of the UCMJ advocated by the COMA Chief Judge, Albert B. Fletcher, Jr., and others. The Military Justice Act of 1968 had already introduced extraordinary changes into the UCMJ, and it may have seemed to the Navy that adopting the FRE in military practice was too much civilianization, and too soon. Those opposed to this continued civilianization believed that it ultimately would remove the military character of the military justice system—which they believed was essential if the system was to remain a tool of discipline for commanders.

Since the JSC operates on consensus, the Navy's opposition to COL Alley's idea meant that his proposal went nowhere. By 1977, little had been done on the project. But, as is often the case in a bureaucracy, a new personality's arrival resulted in the revival of a shelved idea. A new DoD General Counsel, Ms. Deanne C. Siemer, had recently arrived in the Pentagon⁷ and began asking questions about military justice. Colonel Alley quickly capitalized on Siemer's newfound interest to "break the logjam" and recommended to her that the FRE be adopted, with suitable changes, into the MCM as MRE.⁸

⁶ Lederer, *supra* note 1, at 8 (quoting Memorandum from William M. Trott, to Code 20, JAG:204.1: WMT:lkb (17 Mar. 1975)).

⁷ Deanne C. Siemer was nominated by President Carter to be the DoD General Counsel. After her confirmation by the Senate, she served from April 1977 to October 1979, http://csis.org/files/publication/111129_DOD_PAS_Women_History.pdf (last visited Jan. 13, 2012).

⁸ Lederer, *supra* note 1, at 10.

The DoD General Counsel embraced COL Alley's idea, created an "Evidence Project as a DoD requirement," and tasked the JSC with drafting a comprehensive MRE package. Beginning in early 1978, the JSC Working Group, consisting of lower-ranking judge advocate representatives from all the services, two attorneys from COMA, and a member of the DoD General Counsel's office, began drafting the rules. Colonel Alley's instructions to the Working Group were that it "was to adopt each Federal Rule of Evidence verbatim, making only the necessary wording changes needed to apply it to military procedure. . . ."⁹

While COL Alley departed for a new military assignment in mid-1978,¹⁰ his earlier instructions continued to be followed by the Working Group, as its members generally embraced the philosophy that each FRE should be adopted as an MRE "unless it is either contra to military law . . . or was so poorly drafted as to make its adoption almost an exercise in futility."¹¹ Although many judge advocates were involved in drafting the new proposed rules, the principal co-author was then-Major (MAJ) Fredric I. Lederer, who was the Army representative on the JSC Working Group.¹²

The end result was that some FRE were adopted without change, while others were modified to fit better with military practice. Military Rules of Evidence 803(6) and (8), for example, were both modified to "adapt" them "to the military environment" so as to permit the admissibility of laboratory reports as an exception to the hearsay rule.¹³

⁹ *Id.* at 13.

¹⁰ Alley had been promoted to Brigadier General (BG) and reassigned to be the Judge Advocate, U.S. Army Europe and 7th Army. He retired four years later to become the Dean, University of Oklahoma School of Law. Brigadier General Alley subsequently was nominated and confirmed as a U.S. District Judge for the District of Oklahoma, becoming only the second Army lawyer in history to retire from active duty and then serve as an Article III judge. For more on Alley's remarkable career, see Colonel George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley, U.S. Army, 1952–1954, 1959–1981*, 208 MIL. L. REV. 213 (2011).

¹¹ Lederer, *supra* note 1, at 14 n.33.

¹² Others who deserve credit for drafting the proposed MREs are Navy Commander Jim Pinnell, Army Major John Bozeman, Air Force Major James Potuck, and Coast Guard Lieutenant Commander Tom Snook. Mr. Robert Mueller and Ms. Carol Scott, both civilian attorneys at COMA and Captain (CPT) Andrew S. Efron, then assigned to the DoD General Counsel's office, also participated in the drafting. Captain Efron was the principal drafter of the proposed privilege rules (MRE Section V). He later served on the Court of Appeals of the Armed Forces and retired as its Chief Judge in 2011. *Id.* at 11 n.21. See also MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 22, sec. 1 (2012) [hereinafter MCM]. Lederer was the primary drafter of the original analysis to the MREs. *Id.*

¹³ MCM, *supra* note 12, MIL. R. EVID. 803 (6), (8) analysis.

The largest difference between the FRE and MRE was the creation of Sections III and V, which for the first time codified, in binding form, evidentiary rules on search and seizure, confessions and interrogations, eyewitness identification, and privileges. All of these rules had to be created from scratch, as there was no FRE counterpart.¹⁴

As the MRE drafting process continued, the services continued to disagree strenuously about adopting some of the FRE. The Air Force, for example, considered FRE 507, Political Vote, (today's MRE 508) to be "ridiculous" and "unnecessary."¹⁵ It also bitterly opposed the codification of search and seizure rules ultimately adopted as MRE 311–317. The Air Force argued that these rules should be rejected because "in the military environment, search and seizure is a very fluid area of the law," and the adoption of MRE governing search and seizure might bind the Air Force more restrictively than case law. The Air Force's objections ultimately were overruled by a majority of the JSC; the DoD General Counsel also approved the proposed MRE 311–317 as written by the Working Group.¹⁶

Ms. Siemer forwarded the completed MRE to the Office of Management and Budget on 12 September 1979. That office, in turn, shared the MRE with the Department of Justice (DOJ) and the Department of Transportation (DOT) (under whose auspices the Coast Guard then operated). After the DOJ and DOT gave their approval, President Jimmy Carter signed an executive order promulgating the new MRE on 12 March 1980.

The new MRE became effective on 1 September 1980, which meant a significant revision of criminal law instruction. This included a round-the-world series of trips by MAJ Lederer and Commander Pinnell to explain the new MRE to Army, Navy, Marine Corps, and Coast Guard judge advocates in the field. At the Army's The Judge Advocate General's School in Charlottesville, Virginia, the teaching of evidence was revamped; the 94th Judge Advocate Officer Basic Course, which started in October 1980, was the first class to receive instruction in the new MRE. While newly minted judge advocates readily accepted the MRE as a permanent part of court-martial practice, it took some time for seasoned practitioners, especially in the judiciary, to accept them.

The COMA wrestled with the new rules in a number of cases. In *Murray v. Haldeman*, for example, the COMA ruled that it was "not necessary—or even profitable—to try to fit compulsory urinalysis" into the MRE.¹⁷ This was simply wrong: the COMA should have found that the fruits of the compulsory urinalysis were lawful under MRE 313, as it would do seven years later in *United States v. Bickel*.¹⁸

But, while avoiding the application of MRE 313 in *Murray v. Haldeman*, the court did correctly conclude that the results of the urinalysis were admissible under MRE 314(k) as a new type of search.

Similarly, in *United States v. Miller*, the Air Force Court of Military Review examined MRE 614(b)'s requirement that court members who desire to question a witness "shall submit their questions to the military judge in writing." The Air Force court said that the rule was only a suggestion, and a foolish suggestion at that.¹⁹

Military judges in the field were no different. The author remembers an attempted rape prosecution at Fort Benning, Georgia in the early 1980s. The military judge, a senior colonel with extensive experience on the bench, was uncomfortable with the trial counsel's explanation that the crying victim's claim of sexual assault was admissible as an excited utterance under MRE 803(2). Instead, ignoring trial counsel's rationale, the judge ruled that the statements were admissible as "fresh complaint" under paragraph 142b of the 1969 MCM. While this trial judge understood that the MRE were in effect, he nevertheless frequently told counsel in other courts-martial—but off the bench and off the record—that he did not like the MRE and would continue to look to the 1969 MCM for guidance on the admissibility of evidence.

This Fort Benning-based judge was not alone in his view. Other trial judges comfortable with the pre-MRE rules also resisted following the MRE, with sometimes disastrous results for the government. But this disinclination to follow the MRE—and any incorrect evidentiary ruling that adversely affected the prosecution's case—went unchecked until government appeals were permitted by the Military Justice Act of 1983.

¹⁴ While Section III had to be created from scratch, there was a proposed Federal Rules of Evidence (FRE) Section V that CPT Effron and his colleagues could use for some of the proposed provisions in MRE Section V. While the FRE Section V had been rejected by Congress when it enacted the FREs in 1975, this did not prevent its use by the JSC Working Group. See *id.* app. 22, sec. V, analysis, at A22-38 (Privileges).

¹⁵ Lederer, *supra* note 1, at 13 n.32.

¹⁶ *Id.* at 16 n.45. See *id.* at 15–19 (providing more on opposition to specific MREs).

¹⁷ 16 M.J. 74, 82 (C.M.A. 1983) (emphasis added).

¹⁸ 30 M.J. 277 (C.M.A. 1990).

¹⁹ 14 M.J. 924, 925 n.1 (A.F.C.M.R. 1982) (The court held that the military judge, at his discretion, may permit oral questions by the court members and sarcastically stated that the new rule "improves efficiency only to the extent that it discourages questions from court members. . . .").

Judge advocates today are comfortable with the MRE, and also accept that the rules will be modified on a regular basis to conform to changes in both the FRE and case law from the U.S. Supreme Court and Court of Appeals for the

Armed Forces. But while practitioners today are sanguine about the MRE, history shows that their origins and early years were somewhat tumultuous.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

<https://www.jagcnet.army.mil/8525736A005BE1BE>

PCSing Again? Triggering Child Relocation and Custody Laws for Servicemembers and Their Families

Major M. Turner Pope Jr.*

“Applicable state laws and international treaties may prohibit a parent, even in the absence of a court order, from removing a child under certain circumstances from the state in which the child is residing without the permission of the other parent.”¹

I. Introduction

Military families represent the proverbial “Tip of the Spear” of American society in terms of constant interstate relocation.² Five, ten, or even fifteen moves in a Soldier’s career are not uncommon. Unfortunately, military families also experience a higher than normal divorce rate, where children inevitably become prizes in highly contested custody battles.³ These custody battles can easily continue for decades and jeopardize the servicemembers’ readiness and even their careers. With each Permanent Change of Station (PCS)⁴ move, military families cross state borders

and become subject to a new set of state laws governing the parental rights to relocate a child. The laws of child relocation are unique to each state, reflecting their own forged stance in addressing custody and interstate movement of children. Many argue that the individual state laws on relocation are in complete “disarray,”⁵ grossly “diverse,”⁶ or as one experienced family court judge put it, simply “a mess,”⁷ providing no uniformity and predictability over interstate child relocation.

Whether advising a servicemember with a child custody issue or a servicemember’s spouse facing a custody battle over children of a prior relationship, either of which must PCS, our legal assistance attorneys must navigate the unpredictable waters of states’ child relocation and custody laws: they need to know at a minimum the departing state’s and the gaining state’s laws and their legal predispositions for child relocation. This article analyzes the presumptions, burdens, and material factors that state courts and legislatures have developed to address competing parental constitutional interests involving interstate relocation of minor children. Second, this article and the accompanying appendix supply the legal assistance practitioner with every state’s laws, factors, and notice requirements governing child relocation, roughly grouping most states into one of three general categories—presumption states, burden states, and modification states. Lastly, this article provides a checklist for the legal assistance practitioner in advising a servicemember or spouse facing PCS and a potential relocation or custody hearing.

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¹ U.S. DEP’T OF ARMY, REG. 608–99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY para. 2–10.a. (29 Oct. 2003) [hereinafter AR 608-99].

² See Haya El Nasser, *More Move, but Not Long Distance*, USA TODAY, May 11, 2010, available at http://www.usatoday.com/news/nation/census/2010-05-10-mobility_N.htm (interpreting data from the 2010 U.S. Census to note the share of job-related moves in the United States jumped from 34% in the middle of the decade to 46% in 2009 in a group of approximately 38 million persons changing address per year).

³ Nat’l Ass’n for Uniformed Servs., *Military Divorce Rate Continues to Climb*, 34 UNIFORMED SERVICES J., no. 1, 2010 at 26, <http://www.naus.org/documents/USJ/JanFebUSJ2010.pdf> (referenced by Alaska House Representative Bill Thomas in his sponsor statement for H.B. 334, 26th Leg., 2d Reg. Sess. (Alaska 2010)).

⁴ U.S. DEP’T OF ARMY, REG. 614-200, ENLISTED ASSIGNMENT AND UTILIZATION MANAGEMENT (11 Oct. 2011); U.S. DEP’T OF ARMY,

II. Preliminary Questions to Shape the Relocation Law Analysis

Before researching the applicable state relocation laws, one should confront several threshold custody questions that focus research on the applicable child relocation or custody law. First and foremost, what type of custody exists? Child custody cases where a parent has sole custody of a child

REG. 614-100, OFFICER ASSIGNMENT POLICIES, DETAILS, AND TRANSFERS (10 Feb. 2006).

⁵ Sally Adams, *Avoiding Round Two: The Inadequacy of Current Relocation Laws and a Proposed Solution*, 43 FAM. L.Q. 181, 182 (2009).

⁶ *Tetreault v. Tetreault*, 55 P.3d 845, 851 (Haw. Ct. App. 2002).

⁷ W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Relocation*, 45 FAM. CT. REV. 193 (2007).

have a different fundamental meaning and application to relocation law than joint or shared physical custody.⁸ In some states, a determination of joint or shared physical custody may eliminate a relocation presumption.⁹ The divorce decree or settlement usually specifies the type of custody. It is important to view the state's statutory definitions of custody. Legal custody may often be shared, but usually only one parent retains physical custody, including the right to receive child support or the right to decide where the child goes to school.¹⁰ In the past, this determination of primary physical custody made a significant difference in predicting whether a custodial parent may move. Yet equally divided physical custody or pure shared custody arrangements are gaining momentum in the United States.¹¹ When joint legal and physical custody exists, or when the child has an actively participating and involved non-custodial parent who exercises visitation zealously, the courts retreat to the "best interest of the child" (BIOC) standards in making relocation decisions.¹² Relocation becomes more complicated and may take longer for the custodial parent to accomplish. Obviously, a child being moved away from an involved non-custodial parent has more to lose when a nurturing emotional bond exist between them.

The second threshold custody question is whether or not the present custody agreement anticipates a geographical

⁸ See, e.g., CAL. FAM. CODE § 3007 (West 2012); IND. CODE ANN. § 31-17-2-8 (West 2012); *Lewellyn v. Lewellyn*, 93 S.W.3d 681, 687 (Ark. 2002); *In re Marriage of Burgess*, 913 P.2d 473 (Ca. 1996); *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). See generally David M. Cotter, *Oh, The Places You'll (Possibly) Go! Recent Case Law on Relocation of the Custodial Parent*, 16 DIVORCE LITIG. 152, 156 (Sept 2004).

⁹ See, e.g., TENN. CODE ANN. § 36-6-108(c) (West 2012).

¹⁰ See ALA. CODE § 30-3-150 (2010); *Blivin v. Weber*, 126 S.W.3d 351 (Ark. 2003).

¹¹ See, e.g., TEX FAM. CODE § 153.001(a) (West 2011) ("The public policy of this state is to: (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; . . . and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage."); Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 114-15 (2007) ("Now, most states permit joint custody, and twelve states and the District of Columbia have some form of presumption of joint custody. Joint legal custody is now the norm rather than the exception. Joint physical custody has also gained traction."). But see *Gray v. Gray*, 239 S.W.3d 26, 29 (Ark. Ct. App. 2006); *Testerman v. Testerman*, 193 P.3d 1141, 1145 (Wyo. 2008).

¹² TENN. CODE ANN. § 36-6-108(c) (West 2012); *In re Marriage of LaMusga*, 88 P.3d 81 (Ca. 2004); *Jaramillo v. Jaramillo*, 823 P.2d 299, 303 (N.M. 1991); *Altomare v. Altomare*, 933 N.E.2d 170, 175 (Mass. App. Ct. 2010). See generally, *Erinn R. Wegner, Should the Standards in "Move-Away" Cases Be Different for Sole and Joint Physical Custody?*, 16 J. CONTEMP. LEGAL ISSUES 261 (2007).

limitation which limits the ability of a parent to relocate: How was this geographical limitation created or negotiated—a settlement avoiding a trial or a court order imposed upon the parties as a result of trial? Some family courts have ruled in favor of previously agreed upon settlements with geographical limitations, while others have expressed a disdain for any provisions that lack flexibility, tying the court's hands from ensuring the BIOC are met.¹³

Third, which state court presently has jurisdiction over the child?¹⁴ Jurisdiction over the child must be carefully resolved before advising any client on applicable state law. For servicemembers' children, jurisdiction can be very difficult to determine because they move constantly and military base residency alone may not confer jurisdiction to the state (or even country).¹⁵ One must research and assess

¹³ See *Evans v. Evans*, 530 S.E.2d 576, 579 (N.C. 2000); *Malenko v. Handrahan*, 979 A.2d 1269 (Me. 2009); *Zeller v. Zeller*, 640 N.W.2d 53 (N.D. 2002); Cotter, *supra* note 8, at 165-67; *Scott v. Scott*, 578 S.E.2d 876 (Ga. 2003) (disapproving a self-executing custody change provision that directed physical custody to be transferred to the non-custodial parent should the custodial parent leave a certain county of residence as a violation of the state's custody statute).

¹⁴ See generally UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 202 (1997) (adopted and modified by forty-six states, this act vests exclusive and continuing jurisdiction for child custody litigation in the courts of the child's "home state," which is defined as the state where the child has lived with a parent for six consecutive months prior to the commencement of the proceeding); *Russell v. Cox*, 678 S.E.2d 460 (S.C. Ct. App. 2009) (determining that Georgia had jurisdiction, even though the mother, the father, or the child were no longer living in Georgia. The South Carolina court found jurisdiction was in Georgia because the father owned real estate in Georgia, was registered to vote there, held a Georgia driver's license, was paid as a Georgia resident, and paid Georgia state taxes); Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Act (UCCJA)*, 75 N.D. LAW REV. 301 (1999); David V. Chipman & Mindy M. Rush, *The Necessity of the "Right to Travel" Analysis in Custodial Parent Relocation Cases*, 10 WYO. L. REV. 267, 283 (2010).

¹⁵ See *Brandt v. Brandt*, 268 P.3d 406 (Colo. 2012) (Army Nurse and mother, who had joint custody, but primary physical custody awarded in Maryland, PCSed to another state and then deployed. Father kept child during her deployment, residing in Colorado. Father registered custody order and obtained jurisdiction in Colorado based on child living in Colorado for 6 months. Facts of the Colorado district court case involved a Maryland family court judge on teleconference with the Colorado district court arguing that Maryland had continuing exclusive jurisdiction under the UCCJEA—the Colorado Supreme Court agreed with the Maryland family court judge carefully defining the jurisdictional term "presently reside." The Colorado Supreme Court also noted that under both federal and Colorado law, the mother could not gain or lose residence for purposes of taxation and voting registration by virtue of her service in the armed forces.); *Lieberman v. Tabachnik*, 625 F. Supp. 2d 1109 (D. Colo. 2008) (application of Hague Convention on Civil Aspects of International Child Abduction and International Child Abduction Remedies Act (ICARA) on

multitudes of factors, requirements, and statutes before making this crucial jurisdictional determination.¹⁶

Fourth, what are the custodial parent's reasons for the move? Although the reason of a PCSing custodial military parent is apparent, motives of the custodial parent are important to the noncustodial military parent's attempt to prevent a custodial parent from relocating without a legitimate and defensible reason. Most family courts are reluctant to allow a custodial parent to move based on a whim, and if the proposed reason for the move is not legitimate, then it may be seen as an attempt to thwart the relationship of a non-custodial parent. One experienced family court judge concluded that a custodial parent's reasons to move are basically broken down into five main categories: (1) remarriage, (2) financial survival or improvement (to include attending a school), (3) creating distance from a non-custodial parent whether thwarting visitation or protecting the child's safety, (4) giving the child a chance to be closer to the custodial parent's extended family, or (5) "care for a disabled parent."¹⁷

Relocation motives must be determined prior to research or advisement. Each motive may have prior specific case law analysis justifying the move. For example, New York at one time distinguished between financial survival and necessity versus financial improvement and promotion before allowing a parent to move.¹⁸ The American Law Institute's *Principles of Law on Family Dissolution* made an attempt to summarize what courts have consistently held to be legitimate reasons for a proposed relocation:

- (1) to be close to significant family or other sources of support;
- (2) to address significant health problems;
- (3) to protect the safety of a child or another member of the child's household from a significant risk of harm;
- (4) to pursue significant employment or educational opportunity;
- (5) to be with one's spouse who lives in, or is pursuing a significant opportunity in, the new location;

international aspects of jurisdiction where father seeks return of three children to Mexico following their removal by mother); see also Mark S. Guralnick, *Child Removal and Abduction in Military Families*, N.J. LAW., no. 246, 2007, at 39.

¹⁶ See, e.g., ALA. CODE § 30-3-169.9(b) (2012); GA. CODE ANN. § 19-9-3(f)(1) (West 2012); D.C. CODE § 16-914.01 (2012).

¹⁷ Duggan, *supra* note 7, at 198 (2007).

¹⁸ See, e.g., Raybin v. Raybin, 205 A.D.2d 918, 919-20 (N.Y. App. Div. 1994) ("The emerging trend which justifies relocation requires proof that the move is necessitated by economic necessity rather than economic betterment or mere economic advantage. . . . exceptional financial, educational, employment, or health considerations which necessitate or justify the move.").

(6) to significantly improve the family's quality of life.¹⁹

Regardless of the reason, these motives must be meshed with the standard BIOC factors, burdens, or presumptions of the particular state in formulating advice to the client.

III. The Best Interest of the Child Standard—The "Compelling State Interest"²⁰ and Guiding Principle of Custody and Relocation Law

After resolving the preliminary issues above, one must then understand the BIOC criteria in any child custody or relocation case. Almost every state court will use some form of the BIOC standard, either as the primary consideration or as one of several emphasized factors, in making determinations in relocation and custody modification cases.²¹ State courts frequently ignore the Servicemembers' Civil Relief Act and its language on child custody proceedings asserting that the BIOC outweigh the federal statute's authority and interest.²² Any family court can shield itself with this BIOC standard arguing that the state has to ensure that the defenseless child is not just a movable chattel. In *Palmore v. Sidoti*, the Supreme Court of the United States stated, "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."²³

Therefore it is crucial for the legal assistance practitioner to understand the BIOC standard's factual effect in a trial on child relocation or custody, while the states' crafting of burdens, presumptions, and other subservient

¹⁹ Linda D. Elrod, *National and International Momentum Builds for More Child Focus in Relocation Disputes*, 44 FAM. L.Q. 341, 359 (2010). The American Law Institute has offered these principles, and although most states have not adopted the principles per se, they still serve as reasons the custodial parents may use to justify a move. Other institutions have offered similar propositions, such as the American Academy of Matrimonial Lawyers' Model Relocation Act, which shadows many states' BIOC factors.

²⁰ *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000).

²¹ Major Janet Fenton, *Family Law Note: Relocation After Initial Custody Determination*, ARMY LAW., July 1998, at 58 ("Complicating the relocation issue, the petition to relocate often leads to an attempt to relitigate custody by way of a modification case. The standards for relocation and modification are different.").

²² Lieutenant Colonel Jeffrey P. Sexton & Jonathan Brent, *Child Custody and Deployments: The States Step in to Fill the SCRA Gap*, ARMY LAW., Dec. 2008, at 9-10.

²³ 466 U.S. 429, 433 (1984).

factors simply shape minor advantages in the determination of where the child should reside. The BIOC standard focuses in on the fact-specific merits relevant to a child who did not initiate this adversarial process, but who will be affected the most by its decisions.²⁴ In *Poluhovich v. Pellerano*, a New Jersey court succinctly described how all states use the BIOC for relocation cases but not necessarily in a uniform manner, stating,

There seems to be an underlying commonality that in all states, regardless of the particular standards which may be applied, there is typically a due process hearing where the parties are able to make their points known, ultimately addressed to the best interest of the children. The devil is always in the detail when it gets to the best interest because there the courts tend to vary in terms of what is in the best interest of the children. Some states believe that they should reside in their home state and never be moved, even though the parent with primary custody or . . . joint physical custody wished to move [I]t's just the perception of what is in the best interest of the children. That varies from state to state and what standards one uses to assess best interest.²⁵

Advocates and opponents have debated the BIOC standard's effect and position in relocation cases for decades. Advocates state that the BIOC criteria focuses decision-making on what is good for the child, shifting away from the parent's relocation reasons, allowing judges flexibility and freedom to render decisions.²⁶ The BIOC standard "represents a willingness on the part of the court and the law to consider children on a case-by-case basis rather than adjudicating children as a class or a homogeneous grouping with identical needs and situations."²⁷

The opponents argue that the unpredictable nature of BIOC standard thwarts custody negotiations and settlement attempts.²⁸ The BIOC standard grants too much discretion to a single judge who accidentally may overemphasize any single

BIOC factor for personal reasons.²⁹ It also reopens the door to expensive litigation where parents feel they have no choice but to fight for the continuation of their parent-child relationship, while antagonizing an already strained post-marital relationship—a relationship where parents are supposed to share important health and welfare decisions for their child.³⁰

A. The BIOC as a Constitutional Heavyweight

The BIOC principle, as a compelling state interest, appears to have superseded custodial and non-custodial parents' constitutional rights in many factual scenarios. One case, *LaChapelle v. Mitten*, clearly articulates that the BIOC is a constitutional law trump card: "The deprivation of fundamental rights is subject to strict scrutiny and may only be upheld if justified by a compelling state interest. The compelling state interest in this case is the protection of the best interests of the child."³¹ Maryland child relocation case law demands that both parents prove the BIOC in *Braun v. Headley*—where Maryland subordinated the competing constitutional rights of the parents to the BIOC.³² Maryland's appellate court held that there would be no constitutional infringement of a parent's right to travel when deciding the BIOC; parents are free to travel anywhere in the United States, but not necessarily with their children.³³ Furthermore, in *Braun*, there is no claim of any constitutional infirmity that gives either parent an advantage, and both have an equal burden in claiming the BIOC.³⁴ *Braun* went even further to state that there are no "absolutes" in a relocation case except the BIOC standard.³⁵

Colorado, a state rejecting presumptions on relocation, held that both parents must demonstrate what is in the child's best interest as the starting point.³⁶ Colorado disallowed the practice of presumptions, believing that they would infringe upon the reciprocal constitutional rights of

²⁹ *Id.*

³⁰ *Id.*

³¹ 607 N.W.2d 151, 163 (Minn. Ct. App. 2000).

³² *Braun v. Headley*, 750 A.2d 624 (Md. 2000), *cert. denied*, 531 U.S. 1191 (2001); *see also* *Momb v. Ragone*, 130 P.3d 406 (Wash. Ct. App. 2006); *Rowsey v. Rowsey*, 329 S.E.2d 57 (W. Va. 1985). *But see* *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999).

³³ *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (constitutional right to travel); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (reiterating the fundamental liberty interest that parents have to association with their children).

³⁴ *Braun*, 750 A.2d at 635 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

³⁵ *Id.* (quoting *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991)).

³⁶ COLO. REV. STAT. ANN. § 14-10-129 (1)(a)(II) (West 2012); *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).

²⁴ Rachel M. Colancecco, *A Flexible Solution to a Knotty Problem: The Best Interests of the Child Standard in Relocation Disputes*, 1 DREXEL L. REV. 573, 602–04 (2009).

²⁵ 861 A.2d 205, 226 (N.J. Super. Ct. App. Div. 2004).

²⁶ Colancecco, *supra* note 24, at 602–03.

²⁷ Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35 FAM. & CONCILIATION CTS. REV. 377, 385 (1997).

²⁸ Colancecco, *supra* note 24, at 604.

the either parent.³⁷ Even though a parent could technically travel without the child, a presumption against relocation “chills the exercise of that parent's right to travel because, in seeking to relocate, that parent risks losing majority parent status. . . .”³⁸ In sum, creating a presumption for the custodial parent to move would infringe upon the non-custodial parent’s competing constitutional right to associate with the child, while a presumption in favor of the non-custodial parent’s right to associate in disallowing relocation would infringe upon the custodial parent’s constitutional right to travel.³⁹

B. The BIOC Factors

The BIOC standard, although tailored slightly differently in every state, has baseline factors seen in almost every state jurisdiction.⁴⁰ Thus, the BIOC factors exist in all three categorical groupings—presumption, burden, or modification states, discussed more in depth later. Usually, the state’s custody statute delineates these applicable factors. For example, Virginia lists nine basic BIOC factors and then supplements these factors with one additional catch-all provision which allows the trial judge to consider as many relevant non-listed BIOC “factors as the court deems necessary and proper.”⁴¹ Other states, such as Georgia, list as

³⁷ *Shapiro*, 394 U.S. at 629; *Troxel* 530 U.S. at 65.

³⁸ *Fredman v. Fredman*, 960 So. 2d 52, 57–59 (Fla. Dist. Ct. App. 2007) (elaborating on *Ciesluk*, 113 P.3d at 142); *e.g.*, *Aguiar v. Aguiar*, 127 P.3d 234 (Idaho Ct. App. 2005). *See generally* *Chipman & Rush*, *supra* note 14.

³⁹ *Ciesluk*, 113 P.3d at 142.

⁴⁰ *See infra* Appendix A (listing each state’s statute where all the state’s “best interest of the child” (BIOC) factors are cited, whether used as part of an initial custody determination or as additional factors in a relocation case).

⁴¹ VA. CODE ANN. § 20-124.3 (West 2012) (“1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs; 2. The age and physical and mental condition of each parent; 3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child; 4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members; 5. The role that each parent has played and will play in the future, in the upbringing and care of the child; 6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child; 7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child; 8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference; 9. Any history of family abuse . . . ; and

many as twenty-three BIOC factors.⁴² One family court judge’s research actually derived thirty-six factors (including typical BIOC factors) that he has seen family courts across the nation consider in relocation case determinations.⁴³ Obviously, the variation in BIOC factors gives judges significant discretion and flexibility to interject their personal views.

IV. Three General Categories of States on Child Relocation or Custody Laws

Upon determining the preliminary matters and the state’s BIOC factors, the legal assistance practitioner must then decide which category (or categories) the state in question falls under. As stated before, there are roughly three categories of states in child relocation laws: presumption states, burden states, and modification states. This categorization is a snapshot of the present status of relocation and custody laws of the fifty states and the District of Columbia. Within this generalized categorization, variations exist that reflect the uniqueness and unpredictability of these state laws.⁴⁴ The categorization should not be treated as conclusively definitive or absolute. As noted earlier, no state relocation laws are exactly alike, nor is there an accepted national standard.⁴⁵ Therefore, some states, such as North Carolina and California, may be referenced in multiple categories. Moreover, because of the fact-intensive nature of child relocation cases, an attorney should exercise caution in predicting, summarizing, or explaining a state’s relocation or custody laws to the client.

A. Presumption States: Effect of Legal Presumptions on Relocation Statutes

Some states’ laws provide for a relocation presumption⁴⁶ that either favors relocation or discourages it.⁴⁷ Presumptions may reduce a custodial parents’ anxiety

10. Such other factors as the court deems necessary and proper to the determination.”).

⁴² GA. CODE ANN. §§ 19-9-3(a)(3)–(a)(6) (West 2012).

⁴³ *Duggan*, *supra* note 7, at 209.

⁴⁴ *Adams*, *supra* note 5, at 187.

⁴⁵ *Id.*

⁴⁶ *See* BLACK’S LAW DICTIONARY 1304 (9th ed. 2009) (“A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.”); *see also* *Colancecco*, *supra* note 24, at 585 (“The role of a presumption is to create a base line value judgment and to add predictability and consistency to the process of adjudication.”).

⁴⁷ *See, e.g.*, *Moses v. King*, 637 S.E.2d 97 (2006) (reviewing child custody in light most favorable to initial order). *But see* 27 C.J.S. DIVORCE § 1069 (May 2010) (distinguishing this relocation presumption from a separate family law presumption that serves the

about relocating by clarifying a state family court's attitude or predisposition toward the subject of interstate child relocation. Tactically, in the relocation context, the existence of such presumption operates to inform the parties which way the court leans prior to having a hearing or taking any facts into consideration. The parent opposing such presumption must produce evidence to overcome it.⁴⁸ Successful rebuttal of this presumption does not create an opposing presumption: it is simply overcome.⁴⁹ The presumption stays or dies with the parent who possesses it prior to entering the courtroom. In layman's terms, the parent with the presumption has a head start or the "home court advantage" when arriving at the contest.

Opponents of presumptions are gaining momentum as many states are shifting away from these procedural advantages in the courtroom.⁵⁰ They are advocating for a standard focused purely on the BIOC factors, making it a separate relocation standard.⁵¹ They point out, "Employing presumptions in the context of relocation moves the court's inquiry away from the interest of the child and towards the interest of the favored parent. . . . [T]he interest of the unrepresented child are often overlooked."⁵² On the other hand, advocates of presumptions argue that these procedures provide predictability and counteract judicial activism or judicial stereotypes prevalent when applying the BIOC standard.⁵³ They also argue that presumptions reduce litigation in family courts and reduce the complexity of each case which may consume judicial resources.⁵⁴

custodial parent "regarding the correctness or validity of the original custody disposition" in a proceeding to modify established custody).

⁴⁸ See, e.g., FED. R. EVID. 301 ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast."). See generally 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURES § 5124 (2d ed. 1987).

⁴⁹ FED. R. EVID. 301; see, e.g., WASH. REV. CODE ANN. § 26.09.520 (West 2012).

⁵⁰ Elrod, *supra* note 19, 356.

⁵¹ Colancecco, *supra* note 24, at 602.

⁵² *Id.* at 585.

⁵³ *Id.*

⁵⁴ See Tricia Kelly, *Presumptions, Burdens, and Standards, Oh My: In Re Marriage of Lamusga's Search for a Solution to Relocation Disputes*, 74 U. CIN. L. REV. 213, 221 (2005). But see Lyn R. Greenburg, Dianna J. Guold-Saltman & Robert Schnider, *The Problem with Presumptions—A Review and Commentary*, 3 J. CHILD CUSTODY 139, 146 (2006) (noting that no empirical evidence exist to support the notion that presumptions are reducing the volume of child relocation cases).

States with relocation presumptions generally fall into three types.⁵⁵ The first type consists of nine states with presumptions initially favoring the custodial parent's desire to relocate.⁵⁶ The second type has only one state, Alabama, with a statutorily based rebuttable presumption favoring the non-relocating parent.⁵⁷ The third type consists of three states and bases relocation presumptions upon the amount of time a non-custodial parent spends with a child, also known as "approximation presumption." Thirty-seven other states have specifically rejected the practice of presumptions, whether they previously had them or never allowed them.⁵⁸

1. Presumption Favoring Custodial Parent's Desire to Relocate

There are nine states that have presumptions, either statutorily or through case law, supporting the custodial parent's desire to relocate. In *Hollandsworth v. Knyzewski*, the Supreme Court of Arkansas ruled that, because of the existence of a relocation presumption, the custodial parent's remarriage out-of-state outweighed the noncustodial parent's right to association with the child.⁵⁹ This case, involving a mother who was moving due to her new servicemember-husband's PCS, held that she could relocate with the child of a previous marriage to be with her new husband at Fort Campbell. Simply put, the court declared that the custodial parent was not required to make an initial showing of an advantage to the child.⁶⁰ In support of this conclusion, the Court held that a non-statutory "presumption exists in favor of relocation for custodial parents with primary custody,

⁵⁵ Elrod, *supra* note 19, at 355.

⁵⁶ See *infra* Appendix A (Arkansas, California, Minnesota, New Mexico, Oklahoma, North Carolina, South Dakota, Washington, and Wyoming).

⁵⁷ ALA. CODE § 30-3-169.4 (2012) ("In proceedings under this article . . . there shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child. The party seeking a change of principal residence of a child shall have the initial burden of proof on the issue. If that burden of proof is met, the burden of proof shifts to the non-relocating party."); see, e.g., *Sankey v. Sankey*, 961 So. 2d 896 (Ala. Ct. App. 2007) (holding that a custodial parent seeking to relocate to Texas to marry a servicemember failed to meet the statutory burden and awarding non-relocating parent the custody). But see *Knight v. Knight*, 53 So. 3d 942, (Ala. Civ. App. 2010).

⁵⁸ See Appendix A for laws on the following states: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, and the District of Columbia.

⁵⁹ 109 S.W.3d 653 (Ark. 2003).

⁶⁰ *Id.*

with the burden being on a noncustodial parent to rebut the presumption; therefore, a custodial parent is not required to prove a real advantage to herself or himself and to the children in relocating.”⁶¹

From the facts of the case, the court determined that a custodial parent’s remarriage, the child’s relationship to half-siblings, and a distance of five hundred miles from the non-custodial parent were not harmful to the child’s interest. Preserving the custodial parent’s relationship to the child was integral to the Arkansas court’s decision.⁶² Even though the effect of this presumption seems harsh to the non-custodial parent in this case, the custodial mother had uncontested “primary physical custody.” The non-custodial parent either did not aspire to maximize his time with the child, or failed to establish a strong bond with the child in the court’s view.⁶³

It should be noted that two states with relocation presumption favoring the custodial parent, California and Oklahoma, have recently diluted their relocation presumptions. Arguably, this weakening of the presumption reflects the new trend moving away from the use of presumptions.

In California, the case law weakened the presumption. Specifically mentioning the case of *In Re Marriage of Burgess* in the statute, California enacted a presumption favoring the custodial parent’s right to relocate because of a child’s need to maintain the present custody arrangement.⁶⁴ A subsequent California Supreme Court case, however, diminished the effect of this presumption.⁶⁵ Thus, California family courts now use a modified BIOC standard called a “changed circumstance” rule.⁶⁶

Oklahoma’s relocation presumption was diluted by a subsequent statute.⁶⁷ Oklahoma had a statutory presumption that its courts aggressively enforced upholding the custodial parent’s right to move. Under the old statute, in *Casey v.*

Casey,⁶⁸ the court stated that “absent prejudice to the rights or welfare of the child, the custodial parent’s decision to change the child’s residence was guaranteed by statute.”⁶⁹ Then the state legislature enacted a subsequent statute that reduced but did not repeal that statutory presumption’s effect.⁷⁰ The first case to grapple with the multi-statute dilemma was *Harrison v. Morgan*, which noted “our legislature made a policy determination that relocation is not to be automatically considered as being in the best interest of the child.”⁷¹ The Court further stated, “Considered together, these statutes continue to recognize a preference for allowing the custodial parent to place the residence of the children where he or she thinks best.”⁷²

2. Presumption Favoring the Non-Custodial Parent’s Desire to Stop Relocation

Alabama is the only state that provides a statutorily based presumption opposing the relocation of a child. Its relevant code states, “In proceedings under this article . . . there shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child The party seeking a change of principal residence of a child shall have the initial burden of proof on the issue. If that burden of proof is met, the burden of proof shifts to the non-relocating party.”⁷³ This statute not only provides a clear presumption against relocation, but also addresses which party has the initial burden at a trial.

This presumption was used in *Sankey v. Sankey*: a custodial parent was seeking to relocate to Texas because she planned to marry a servicemember who was to be stationed in Texas.⁷⁴ She failed to meet the statutory burden and even lost custody to the opposing parent.⁷⁵ The trial court found that: the moving mother failed to rebut the presumption by not presenting evidence on the quality of the school in Texas; both the paternal and maternal grandparents of the children were in Alabama; the children had developed a good relationship with the non-custodial stepmother; and, if custody was given to the non-relocating parent, the children would reside in the home that they had previously lived while the opposing parents were married.⁷⁶ The court

⁶¹ *Id.* at 657.

⁶² *Id.* at 664. *Contra* Sill v. Sill, 228 S.W.3d 538 (Ark. Ct. App. 2006) (holding that non-relocating parent rebutted the presumption because the custodial parent had thwarted visitation).

⁶³ *Hollandsworth*, 109 S.W.3d at 655.

⁶⁴ CAL. FAM. CODE § 7501 (West 2012) (effective Jan. 1, 2004); *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).

⁶⁵ *In re Marriage of Brown & Yana*, 127 P.3d 28, 33–34 (Cal. 2006) (discussing the affect of *In re LaMusga* limiting *In re Burgess* and CAL FAM. CODE § 7501 (West 2012)).

⁶⁶ *In re Marriage of LaMusga*, 88 P.3d 81, 91 (Cal. 2004); *see In re Brown & Yana*, 127 P.3d at 33–34 (modifying best interest test for relocation still giving weight to the prior court determination of custody in regards to the best interest analysis).

⁶⁷ OKLA. STAT ANN. tit. 43, § 112.3 (2012).

⁶⁸ *Casey v. Casey*, 58 P.3d 763, 770 (Okla. 2002).

⁶⁹ OKLA. STAT ANN. tit. 43, § 112.2A (2012) (renumbered from OKLA. STAT ANN. tit. 10 § 19 in 2009).

⁷⁰ *Id.* § 112.3.

⁷¹ *Harrison v. Morgan*, 191 P.3d 617, 623 (Okla. 2008).

⁷² *Id.* at 624.

⁷³ ALA. CODE § 30-3-169.4 (2012).

⁷⁴ 961 So. 2d 896 (Ala. Ct. App. 2007).

⁷⁵ *Id.* at 897.

⁷⁶ *Id.* at 902.

also found that the mother had thwarted visitation of the father several occasions and had misbehaved in front of a police officer displaying an unhealthy temperament at a handoff between the parents after a visitation.⁷⁷ The case is also interesting because of the jurisdiction matters addressed, whereby the state retains jurisdiction even after the child leaves the state.⁷⁸

3. Approximation Presumption

The third and last type of presumption, the “approximation presumption,” exists in only three states. This unique presumption in favor of a custodial parent hinges upon the amount of time the non-custodial parent spends with the child. For example, Tennessee has a strong presumption in favor of relocation unless the non-custodial parent is very involved with the child.⁷⁹ Tennessee law states, “[T]he custodial parent’s happiness and well-being are crucial to the child’s interests because the custodial parent has the responsibility of caring for the child on a daily basis.”⁸⁰ The court only considers three ways to rebut this presumption: the custodial parent’s vindictive motives to frustrate visitation of the non-custodial parent,⁸¹ physical safety of the child, and the amount of time the non-custodial parent spends with the child. Thus, Tennessee’s statutory presumption in favor of a relocating parent is removed if both parents spend approximately equal time with the child.⁸²

This presumption, although facially simple, may be more difficult to apply when calculating the numerical percentages of quality time spent with the child, as Tennessee does.⁸³ This statute does not apply the traditional terms of custody and primary residence.⁸⁴ This statute could

⁷⁷ *Id.*

⁷⁸ *Id.* at 897 n.1 (quoting ALA. CODE § 30-3-169.9(b) (2012)).

⁷⁹ TENN. CODE ANN. § 36-6-108 (West 2012).

⁸⁰ *Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996) (holding that the child’s best interests is “fundamentally interrelated” to the custodial parents’ interests in relocation cases).

⁸¹ As a non-BIOC factor in relocation case, vindictive motives of the custodial parent to thwart visitation are considered by every state court in the nation as having a significant negative effect on any relocation, moreover, custody.

⁸² TENN. CODE ANN. § 36-6-108(c) (West 2012) (“If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child.”).

⁸³ *Kawatra v. Kawatra*, 182 S.W.3d 800, 803 (Tenn. 2005).

⁸⁴ *Perry v. Perry*, 943 S.W.2d 884 (Tenn. Ct. App. 1996).

impact Soldiers who may have to spend less time with their child because of unusual training schedules and numerous deployments. West Virginia and Wisconsin are the other two states that use the approximation presumption, subject to nullification if a non-custodial parent shares equal residential time.⁸⁵

So in these approximation states, the presumption is negated when custodial time, however determined, is approximately equal—depending on the state’s calculation of “approximately.”⁸⁶ Opponents of this presumption criticize the presumption’s focus on actual time spent, rather than the quality of the relationship and emotional bond between the child and the noncustodial parent who is unable to spend the approximately equal time with the child.⁸⁷ The presumption assumes that the parent’s emotional bond with the child may be weak if the parent is not spending much time with the child.

B. Burden States: Burdens of Proof under Relocation Statutes

Burden states force a parent to comply with a procedural threshold known as the “burden of proof”⁸⁸ when interpreting child relocation or custody statutes.⁸⁹ There are two main instances of carrying a burden, as referenced in Appendix A: carrying the burden in relocation cases and carrying the burden in custody modification cases. “Relocation burdens” are not the same as, or as predictable as, the more familiar burden in a modification case that almost always places the burden on the non-custodial parent. As the focal point, burdens in relocation cases arguably deserve separate analysis for two reasons: (1) like a presumption, they may hint at a state’s predisposition and attitude on relocation, and (2) they establish a duty upon a parent to prove certain facts at the trial.

⁸⁵ W. VA CODE ANN. § 48-9-403 (West 2012) allows relocation of the custodial parent “exercising a significant majority of the custodial responsibility. . . . The percentage of custodial responsibility that constitutes a significant majority of custodial responsibility is seventy percent or more.” WIS. STAT. ANN. § 767.481 (West 2012) has a presumption that is simply in favor of the parent that has “greater period of time.” Yet, unlike West Virginia and Tennessee, it does not appear to calculate the exact amount of time the child has with each adult to a mathematical formula.

⁸⁶ *E.g.*, W. VA CODE ANN. § 48-9-403(d) (West 2012).

⁸⁷ Colancecco, *supra* note 24, at 599.

⁸⁸ BLACK’S LAW DICTIONARY 223 (9th ed. 2009) (“A party’s duty to prove a disputed assertion or charge. . . . [It] includes both the ‘burden of persuasion’ and the ‘burden of production.’”).

⁸⁹ *Adams*, *supra* note 5, at 190–91. *See infra* Appendix A. Arizona, Connecticut, Illinois, Michigan, Nevada New Hampshire, Missouri and Louisiana place the burden on the custodial parent to justify the relocation.

It is logical to believe that burdens and presumptions accomplish the same result. Burdens, however, are procedural mechanisms and carry less weight, making them less forceful than the legislative intent of a relocation presumption. Nevertheless, burdens do appear to give an advantage to the party they benefit, i.e., the non-moving party.⁹⁰ Arguably, a parent who bears the responsibility to meet a burden must indirectly battle against a de facto presumption in favor of the opposing parent.⁹¹ Thus, the allocation of the burden of proof affects the result of the relocation hearing, instead of placing both parents on equal ground at the outset of trial. Even though the court will usually consider individual BIOC factors, these burdens are similar to presumptions by giving a procedural advantage to one side.

Two opposing interests are revealed as a result of allocating relocation burdens. First, any burden of proof requiring the non-custodial parent to show that a child's future relocation destination is unhealthy or dangerous is a difficult burden to meet, having the effect of strongly favoring the custodial parent.⁹² This type of burden ignores many factors of the BIOC standard. On the contrary, any burden placed on the custodial parent to justify a proposed relocation where the custodial parent is required to show the benefit to the child in moving, when such a move is not motivated for the child's benefit but for a parent's economic or personal reasons, strongly favors the non-relocating parent at trial.⁹³

Three categories of relocation burdens exist, although scholars disagree about which states have these burdens.⁹⁴ First category is the burden on the relocating parents: ten states place the burden on the parents who want to relocate to justify their moves.⁹⁵ The moving parent has a duty to explain why the relocation would improve the child's life. Second category is the shifting relocating burden: once the relocating parent justifies the move, the non-relocating

parent has the burden to prove the move will have negative effects on the child.⁹⁶ Third category is the burden on the non-relocating parent: the states place a burden on the non-relocating parent to oppose the relocation.⁹⁷ These states appear to be very relocation-friendly: if the non-relocating parent does not attempt to stop the relocation through court procedures, the relocation will be allowed.

Missouri places the burden on the relocating parent to show that the move is in the BIOC and that a proposed relocation is made in good faith.⁹⁸ In *Classick v. Classick*, the Missouri court denied the relocation request of a mother with physical custody of the children from moving to Ohio to be with her new husband.⁹⁹ The children had a good relationship with the non-custodial parent. The court bluntly stated that the newly remarried mother's husband could move to Springfield, Missouri, and get a job there because her request to move was merely to benefit the new husband's career.¹⁰⁰ Missouri's attitude on the effect of a custodial parent's remarriage on child relocation differs significantly from that of states which allow relocation of a parent to be with a new spouse.

In other states, such as California, which also has a presumption, the relocation burden is placed on the non-relocating parent to stop a move. This burden is considered substantial because the California courts presumptively favor preserving the custodial parent's continued custody as initially awarded.¹⁰¹ Moreover, in rejecting a non-relocating parent's argument that a custodial parent must bear the burden of proving why the move is necessary, California allows the custodial parent to move as long as there is "any sound good faith reason" for the custodial parent to reside in a different location.¹⁰² Furthermore, the noncustodial parent can only stop the relocation if the child will suffer some sort

⁹⁰ Kelly, *supra* note 54, at 221.

⁹¹ *Id.*

⁹² Colancecco, *supra* note 24, at 581.

⁹³ Kelly, *supra* note 54, at 221.

⁹⁴ See Elrod, *supra* note 19, at 355. *But see* Adams, *supra* note 5, at 190. Both of these authors agree as to the types of burdens; however, they disagree which states require such burdens. Categorization is difficult in this situation because so many types of burdens exist. Arguably, in Alabama, where neither author notes a burden, the statute clearly delineates a burden to rebut a presumption, but that is not a burden to rebut specific factors unique to the case.

⁹⁵ See Elrod, *supra* note 19, at 355 (Arizona, Connecticut, Idaho, Illinois, Louisiana, Minnesota, Missouri, Nebraska, North Dakota, and West Virginia). *But see* Adams, *supra* note 5, at 190 (Illinois, Mississippi, Arizona, Louisiana, Michigan, and Nevada). See generally *infra* Appendix A (list of state statutes and cases).

⁹⁶ See Elrod, *supra* note 19, at 355 (Florida, Idaho, Massachusetts, Nevada, New Jersey, and Louisiana); e.g., FLA. STAT. ANN. § 61.13001(8) ("The parent or other person wishing to relocate has the burden of proving by a preponderance of the evidence that relocation is in the best interest of the child. If that burden of proof is met, the burden shifts to the non-relocating parent or other person to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the child."). *But see* Adams, *supra* note 5, at 192 (Connecticut, New Hampshire, and New Jersey).

⁹⁷ See Elrod, *supra* note 19, at 355 (California, Kansas, Montana, and Wyoming). *But see*, Adams, *supra* note 5, at 190 (Maryland, Vermont, Indiana, Mississippi, and Idaho).

⁹⁸ MO. ANN. STAT. § 452.377(9) (West 2012); *Classick v. Classick*, 155 S.W.3d 842 (Mo. Ct. App. 2005).

⁹⁹ *Classick*, 155 S.W.3d at 843.

¹⁰⁰ *Id.* at 848.

¹⁰¹ *In re Marriage of LaMusga*, 88 P.3d 81, 91 (Cal. 2004).

¹⁰² *Id.* at 91.

of detriment rendering it “essential or expedient” for the child’s welfare that there be a change in custody.¹⁰³

C. Modification of Custody States: The Majority View

Many states do not have statutes with relocation presumptions or burdens that specifically address relocation after divorce, preferring to handle the matters through the traditional constructs of child custody.¹⁰⁴ At the initial child custody trial, all state family courts have already used the BIOC standard in making their original custodial determination.¹⁰⁵ Therefore, using the modification of custody standard, a non-custodial parent must seek to prevent relocation by either attempting to get primary physical custody of the child or having the custody order modified so that the child may not leave the state. This standard inevitably increases the custodial parents’ risk of losing their custody when they seek to relocate.

Thus, using this common standard, these states emphasize BIOC factors because the courts are familiar with and feel comfortable using them. Not only do modification states gravitate toward the BIOC standard because of its familiarity, but the application of the BIOC also trumps the constitutional rights of the parent, as discussed earlier.¹⁰⁶ In addition, the use of this modification standard lets the courts avoid inflexible presumptions and allows more individual discretion to entertain facts in understanding the child’s circumstances. Finally, the modification of custody standard aligns family courts with the states’ trend toward using a BIOC-type analysis.¹⁰⁷

Treating a relocation matter in the same manner as a request for modification of custody, these state courts apply a two-pronged approach: (1) require a showing of a “material” change in circumstances since the original award of custody, and (2) require the custodial parent to show that their interest in moving is in conformity with the BIOC.¹⁰⁸

¹⁰³ *Id.*

¹⁰⁴ *See, e.g.,* Petry v. Petry, 589 S.E.2d 458, 462 (Va. Ct. App. 2003) (“No Virginia statute specifically addresses relocation of a custodial parent. Though sometimes treated as a special topic, with principles unique to it, the relocation issue is best understood under traditional constructs governing custody and visitation.”).

¹⁰⁵ *See, e.g.,* Jennifer Gould, *California’s Move-Away Law: Are Children Being Hurt by Judicial Presumptions That Sweep Too Broadly?*, 28 GOLDEN GATE U.L. REV. 527, 531 (1998).

¹⁰⁶ *See, e.g.,* Braun v. Headley, 750 A.2d 624 (Md. 2000), *cert. denied*, 531 U.S. 1191 (2001).

¹⁰⁷ Chipman & Rush, *supra* note 14, at 270.

¹⁰⁸ Cotter, *supra* note 8, at 170; Bell v. Squires, 845 A.2d 1019 (Vt. 2003) (“The burden for showing that the best interests of child require a change in custody remains on the moving party, and, due to the value of stability in a child’s life, it is a heavy one.”).

With this standard, three different “modification burdens” lurk within these states, depending upon which state has jurisdiction. These modification burdens are not to be confused with relocation burdens discussed in the previous subsection.

First and foremost, in almost all of these modification states, custodial statutes or appellate decisions place a burden on the non-relocating parent to show a “material” or significant change in circumstances to justify a change in custody.¹⁰⁹ Jurisdictions are split as to whether the custodial parent’s relocation automatically constitutes a material change in circumstances.¹¹⁰ South Carolina and Virginia are divided over this issue as well.¹¹¹ Obviously, states that view relocation by the custodial parent not worthy of triggering a custody hearing lean toward being pro-relocation states. Other states that do consider a move sufficient to justify an evidentiary hearing and mandate BIOC analysis in those hearings are less receptive to a custodial parent wishing to relocate.

This primary burden for modifying custody usually stands with the non-custodial parent, even if the custodial parent has a separate and distinct burden to justify the proposed relocation.¹¹² As exemplified in states such as Virginia, separate burdens can exist in the same factual hearing depending on whether it is a custody or relocation hearing.¹¹³ In other states, this secondary burden on the custodial parent can manifest to an even stricter third type of burden of justifying why they should not lose their custody by wanting to move.¹¹⁴

Twenty-six states subscribe to the modification custody standard which coincidentally champions the BIOC criteria in

¹⁰⁹ The burden of proof here is separate from the type of burden under a relocation statute that may be placed on either parent discussed in *supra* Part IV.B.; thus, determining the burden to obtain custody is more simply understood as the non-custodial parent, wanting custody of the child, must move or convince the court to amend the prior custody order. Usually this requires a higher burden of proof as well.

¹¹⁰ Cotter, *supra* note 8, at 170.

¹¹¹ *Compare* Latimer v. Farmer, 602 S.E.2d 32 (S.C. 2004), *with* Surles v. Mayer, 628 S.E.2d 563, 576 (Va. Ct. App. 2006).

¹¹² *See, e.g.,* Surles, 628 S.E.2d at 576.

¹¹³ *Id.*

¹¹⁴ *See, e.g.,* Wild v. Wild, 737 N.W.2d 882, 898 (Neb. Ct. App. 2007) (“In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child’s best interests to continue living with him or her. Under Nebraska law, the burden has been placed on the custodial parent to satisfy this test.”); Rodkey v. Rodkey, No. 86884, 2006 WL 2441720 (Ohio Ct. App. Aug. 24, 2006).

some form or fashion.¹¹⁵ Three of those modification states outline unique factors specific to a relocation case that differ from the general BIOC analysis.¹¹⁶ Because the custody modification standards vary as to what is “material,” predictions on trial results are risky.

Instead of legislatures crafting a presumption in favor of relocation in support of the custodial parent, a state’s use of the modification approach can accomplish the same result simply by making relocation alone insufficient to trigger a change in circumstances. Such a rule will preclude a non-custodial parent from challenging the child’s relocation. This preclusion is also evident with the welfare and safety requirement that some states allow to challenge a move. North Carolina falls into this category, placing the burden on the non-custodial parent to show negative impact on the child’s welfare or safety to challenge the move. Having a presumption¹¹⁷ in favor of moves but no relocation statute, North Carolina courts found a way to favor the custodial parent in the modification context by stating that “a [non-custodial] party seeking modification of a child custody order bears the burden of proving the existence of a ‘substantial’ change in circumstances affecting the welfare of the child before reaching the best interest question in determining whether custody should be altered.”¹¹⁸ Again, what constitutes a material change of circumstances entitling a non-custodial parent to challenge custody is key, but a welfare and safety justification may prove to be a difficult standard for the non-custodial parent to overcome at a modification hearing.

Kentucky, which also places the burden of proof on the parent seeking to modify the custody award, is not as stringent as North Carolina’s safety and welfare of the child threshold.¹¹⁹ In Kentucky, a custodial parent’s relocation alone is a qualifying change of circumstances justifying an

evidentiary hearing.¹²⁰ In 2001, Kentucky modified its statute for a more liberal list of factors which allows a family court to entertain multiple reasons against moving a child.¹²¹ In *Fowler v. Sowers*, a Kentucky court considered a custodial parent’s move with her child to Alaska, a considerable distance from Kentucky, as a change in circumstances contemplated by its statute.¹²² Interestingly, this case also dealt with a custodial parent who, in the three years since her separation from the non-custodial father, resided in no fewer than six different locations, had given birth to another child out-of-wedlock, and married a man, resulting in yet another child.¹²³ In its decision, the Kentucky court acknowledged that the multiple moves of a child was a factor that could potentially cause a negative impact on the child’s best interest.¹²⁴

V. Conclusion

In this specialized area of the law, marriages will sometimes disintegrate, causing relocation disputes, and there is no easy way to summarize the state of the law concerning relocation. In many states, long awaited and well deserved child custody protections have recently taken hold statutorily to protect a servicemember’s custody arrangements when deploying to a war zone.¹²⁵ However, few statutory protections exist when a servicemember is required to move due to PCS orders. Even our previous Secretary of Defense, Robert Gates, initially against federal legislation on child custody, expressed his interest in legislation that provides servicemembers with a consolidated standard of protection in cases where military service is the sole factor involved in a child custody decision.¹²⁶

¹¹⁵ Adams, *supra* note 5, at 192 (Alaska, Colorado, Delaware, Hawaii, Kentucky, Montana, New York, Oregon, New Mexico, North Carolina, Massachusetts, and Rhode Island.); *see also infra* Appendix A (including Iowa, Maine, Maryland, Mississippi, Nebraska, New Mexico, Ohio, South Carolina, Texas, Utah and Virginia).

¹¹⁶ *Id.* at 193 (Florida, Kansas, Pennsylvania); *see also infra* Appendix A.

¹¹⁷ A presumption in favor of relocation was first noted in 1954 in the case of *Griffith v. Griffith*, 81 S.E.2d 918, 921 (N.C. 1954). Forty-seven years later, in the state’s landmark relocation case of *Evans v. Evans*, 530 S.E.2d 576, 579–80 (N.C. 2000), the court cites this 1954 case. *Evans* allowed relocation of a child even though a geographical limitation existed from the initial divorce decree. Furthermore, this presumption allowed relocation, stating that remarriage alone was not a factor stopping a custodial parent’s relocation, much less justifying a change in custody.

¹¹⁸ *Evans*, 530 S.E.2d at 579.

¹¹⁹ *Fowler v. Sowers*, 151 S.W.3d 357 (Ky. Ct. App. 2004).

¹²⁰ *Id.* at 359.

¹²¹ *Id.*; *see* KY. REV. STAT. ANN. § 403.340 (West 2012).

¹²² *Fowler*, 151 S.W.3d at 358. *See* KY. REV. STAT. ANN. § 403.340(3)(c) (West 2012) which defers to the same factors to determine the initial custody under KY. REV. STAT. ANN. § 403.270(2) (West 2012).

¹²³ *Fowler*, 151 S.W.3d at 358.

¹²⁴ *Id.* at 359.

¹²⁵ Sexton & Brent, *supra* note 22, at 9; *see also* Barry Bernstein & David Guyton, *The Military Parent Equal Protection Act*, S.C. LAW., Mar. 2012, at 32 (explaining S.C. Code Ann. § 63-5-900 (2012) which places military parents on equal footing with non-military parents in family court when facing deployment issues).

¹²⁶ Karen Jowers, *Gates now supports law to protect child custody*, ARMY TIMES, Feb. 17, 2011, <http://www.armytimes.com/news/2011/02/military-child-custody-gates-021711w/> (One recommendation that the states could consider would involve a BIOC analysis that does not discriminate against or use as a negative factor either the custodial or non-custodial parent’s military service to the country. This would avoid cases that made custodial determinations against a servicemember simply for his service or, even worse, used re-marriage of a parent to a servicemember as a basis for denying custody. Using this standard, the national trend towards the

Unfortunately, no end state exists to this ongoing war between parents over their children's geographical residence until they reach the age of majority. If the federal government does not intervene to protect those servicemembers by mandating that the states refrain from drawing a negative inference against a custodial parent under their respective BIOC analyses when a custodial servicemember receives PCS orders, then potential servicemembers who want families or have children might not even consider joining the United States military.¹²⁷

In the meantime, the legal assistance practitioner must guide the servicemember through this obstacle course in a timely manner as PCS orders are inflexible and often issued with short notice. Depending on the jurisdiction, the servicemember or the spouse with custody must provide timely notice to the non-custodial parents. The legal assistance attorney may need to review the letter being sent by the moving parent to ensure it meets the statutory requirements. Many custodial parent servicemembers are not aware of relocation laws, but instinctively know that an involved non-custodial parent may cause problems for their move. Some clients may just want to move with the child and bear the risk of not informing the non-custodial parents, naively hoping that the non-custodial parents will not exercise their respective legal rights in a state court. Some custodial parents have already moved several times with a child due to PCS orders without any complaint from an uninvolved non-custodial parent, being at a lower risk of a challenge to custody.

However, it is the legal assistance practitioner's responsibility to inform the client of the ramifications of the move in terms of the best and worst possible scenarios. It can be an emotionally charged meeting. Thus, attached are two Appendices that will arm the legal assistance attorney with state relocation laws and prepare them for initial client

meetings. Appendix A will give the legal assistance attorney a significant head start on the statutes and case laws involved in the analysis. Appendix B (checklist) lays out a sample plan for the legal assistance attorney's initial meeting with the client to gather information that will affect the legal assistance attorney's legal analysis and research. Appendix B will also ensure that the legal assistance attorney does not miss other important steps of advisement and provide potential courses of action to the client. The legal assistance practitioner must also inform the servicemember that failure to move may subject them to the Uniform Code of Military Justice (UCMJ).¹²⁸ Also, the attorney should advise the Soldier-client to comply with the child custody requirements under the Army Regulation 608-99, Family Support, Child Custody and Paternity.¹²⁹ Failure to comply with the regulation may subject your client to civil penalties or prosecution as well as adverse administrative and UCMJ actions.¹³⁰

Once armed with the laws on child relocation and potential courses of action, the parent will be armed with the rules of the game and aware of what a defeat in court may mean. Ultimately, by providing this preemptive research and legal analysis, the client will be ready for the reality and significance of her contemplated relocation and strongly consider what is in the best interest of their family and the child.

BIOC is also respected allowing the fact-intensive approach to determining what is best for the child, instead of using the inflexible presumption standards still prevalent in some states today).

¹²⁷ Karen Jowers, *Soldier's Deployment Spurs Multistate Custody Battle*, ARMY TIMES, Oct. 10, 2011 at 16 (Although attorneys constantly disagree on whether or not a federal law should address servicemember custody matters, retired Army Reserve Col. Mark Sullivan, who does not see a need for a federal law, still stated, "But the DoD needs to reflect on this If word gets around that . . . PCS orders can result in losing custody . . . you'll have some retention problems.").

¹²⁸ Uniform Code of Military Justice (UCMJ) art. 86 (2012) ("Absence Without Leave"); *id.* art. 87 ("Missing Movement"); *id.* art. 92 ("Failure to Obey Order or Regulation").

¹²⁹ AR 608-99, *supra* note 1, para. 2-10.b., 2-11.

¹³⁰ *Id.* at i (section c of Applicability); UCMJ art. 92 (2012) ("Failure to Obey Order or Regulation").

Appendix A

State Laws on Relocation of Children

State	Relocation Presumptions	Relocation & Modification Burdens	Modification of Custody /or/ BIOC Standard	BIOC & Relocation Factors	Notice Requirements & Time to Object	Geographical Limitations
Alabama	Ala. CODE § 30-3-169.4 (2012); Sankey v. Sankey, 961 So. 2d 896, (Ala. Civ. App. 2007); Knight v. Knight, 2010 WL 1837780 (Ala. Civ. App. 2010); Pepper v. Pepper, 2010 WL 4910868 (Ala. Civ. App. 2010)	Ala. CODE § 30-3-169.4 (2012)	Ala. CODE § 30-3-169.3(a) (2012)	Ala. CODE § 30-3-169.3(a) (2012)	45 days prior to location /&/ 30 days to object	Out-of-state /or/ 60 miles from residence of non-relocating parent
Alaska		Chesser-Witmer v. Chesser, 117 P.3d 711, 717 (Alaska 2005); Chesser v. Chesser-Witmer, 178 P.3d 1154 (Alaska 2008)	ALASKA STAT. ANN. § 25.20.110 (West 2012); Chesser-Witmer v. Chesser, 117 P.3d 711, 717 (Alaska 2005); Entero v. Brekke, 192 P.3d 147 (Alaska 2008)	ALASKA STAT. ANN. § 25.24.150(c) (West 2012)		
Arizona		ARIZ. REV. STAT. ANN. § 25-408.G. (2012)*; Owen v. Blackhawk, 79 P.3d 667 (Ariz. 2003)	ARIZ. REV. STAT. ANN. §§ 25-408.I.2, 25-403.B. (2012); Owen v. Blackhawk, 79 P.3d 667 (Ariz. 2003)	ARIZ. REV. STAT. ANN. §§ 25-408.I.1, + 25-403+ (2012)	Notice prior to move 60 days /&/ 30 days to object	Out of state /or/ 100 miles in state
Arkansas	Sill v. Sill, 228 S.W.3d 538 (2006)	Hollandsworth v. Knyzewski, 109 S.W.3d 653 (Ark. 2003)	Gray v. Gray, 239 S.W.3d 26 (2006)	Hollandsworth v. Knyzewski, 109 S.W.3d 653 (Ark. 2003)		
California	CAL. FAM. CODE § 7501 (West 2012); <i>In re</i> Marriage of Burgess, 913 P.2d 473 (Cal. 1996)	<i>In re</i> Marriage of LaMusga, 88 P.3d 81 (Cal. 2004)	<i>In re</i> Marriage of Brown and Yana, 127 P.3d 28, 33-34 (Cal. 2006)	<i>In re</i> Marriage of Brown and Yana, 127 P.3d 28, 36 (Cal. 2006)	Notice prior to move 45 days	
Colorado		<i>In re</i> Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005)	COLO. REV. STAT. ANN. § 14-10-129(1)(a)(II) (West 2012)*; <i>In re</i> Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005)	COLO. REV. STAT. ANN. §§ 14-10-129(1)(b)(II), (2)(c) (West 2012)*	None, but case is given priority on court's docket	

Appendix A

State Laws on Relocation of Children

<u>State</u>	<u>Relocation Presumptions</u>	<u>Relocation & Modification Burdens</u>	<u>Modification of Custody /or/ BIOC Standard</u>	<u>BIOC & Relocation Factors</u>	<u>Notice Requirements & Time to Object</u>	<u>Geographical Limitations</u>
Connecticut		CONN. GEN. STAT. ANN. § 46b-56d (West 2012); Taylor v. Taylor, 990 A.2d 882 (Conn. Ct. App. 2010)	Noonan v. Noonan, 998 A.2d 231 (Conn. Ct. App. 2010)	CONN. GEN. STAT. ANN. § 46b-56d (b) (West 2012)		
Delaware		DEL. CODE ANN. tit. 13, § 729(c) (West 2012)	DEL. CODE ANN. tit. 13, § 729(c) (West 2012); Karen J.M. v. James W., 792 A.2d 1036 (Del. Fam. Ct. 2002); B.A.T. v. R.A.R. Jr., 2004 WL 2334718 (Del. Fam. Ct. 2004)	DEL. CODE ANN. tit. 13, § 722(a) (West 2012); and additional factors in Karen J.M. v. James W., 792 A.2d 1036 (Del. Fam. Ct. 2002)		
Florida		FLA. STAT. ANN. § 61.13001(8) (West 2012)	FLA. STAT. ANN. § 61.13 (West 2012); Fredman v. Fredman, 960 So. 2d 52 (Fla. Dist. Ct. App. 2007)	FLA. STAT. ANN. § 61.13001(7) (West 2012)		
Georgia			GA. CODE ANN. §§ 19-9-1, 19-9-3(a) (West 2012); Michum v. Spry, 685 S.E.2d 374 (Ga. Ct. App. 2009)	GA. CODE ANN. § 19-9-3(a) (West 2012)	30 days prior to relocation	
Hawaii		Tetreault v. Tetreault, 55 P.3d 845, 851 (Haw. Ct. App. 2002)	Fisher v. Fisher, 137 P.3d 355 (Haw. 2006)	HAW. REV. STAT. § 571-46* (West 2012)		
Idaho		Roberts v. Roberts, 64 P.3d 327 (Idaho 2003)	Roberts v. Roberts, 64 P.3d 327 (Idaho 2003); Allbright v. Allbright, 215 P.3d 472 (Idaho 2009); Markwood v. Markwood, 2012 WL 1301226 (Idaho Ct. App.)	IDAHO CODF. ANN. § 32-717 (West 2012)		
Illinois		750 Ill. COMP. STAT. ANN. §/609(a) (West 2012)*	<i>In re</i> Marriage of Matchen, 866 N.E.2d 683 (Ill. App. Ct. 2007)	<i>In re</i> Marriage of Collingbourne, 791 N.E.2d 532 (Ill. 2003)		
Indiana		IND. CODE ANN. § 31-17-2-2-5(c), (d) (West 2012)	Woljung v. Sidell, 891 N.E.2d 1109 (Ind. Ct. App. 2008); Green v. Green, 843 N.E.2d 23 (Ind. Ct. App. 2006)	IND. CODE ANN. §§ 31-17-2-8* & 31-17-2-2-1(b)* (West 2012)	90 days prior to relocation /60 days after receipt to object	

Appendix A

State Laws on Relocation of Children

<u>State</u>	<u>Relocation Presumptions</u>	<u>Relocation & Modification Burdens</u>	<u>Modification of Custody /or/ BIOC Standard</u>	<u>BIOC & Relocation Factors</u>	<u>Notice Requirements & Time to Object</u>	<u>Geographical Limitations</u>
Iowa		<i>In re</i> Marriage of Thielges, 623 N.W.2d 232 (Iowa Ct. App. 2000)	IOWA CODE ANN. § 598.21D* (West 2012); <i>In re</i> Marriage of Lane, 682 N.W.2d 82 (table) (Iowa Ct. App. 2000); <i>In re</i> Marriage of Gerholdt, 771 N.W.2d 653 (table) (Iowa Ct. App. 2009).	IOWA CODE ANN. § 598.41(3)* (West 2012)		150 miles from child's residence
Kansas		<i>In re</i> Marriage of Grippin, 186 P.3d 852 (Kan. Ct. App. 2008)	<i>In re</i> Marriage of Godfrey, 222 P.3d 564 (table) (Kan. Ct. App. 2010)	KAN. STAT. ANN. §§ 23-3203 + 23-3222 (West 2012)	30 days prior to relocation	
Kentucky		KY. REV. STAT. ANN. § 403.320(3) (West 2012)	Fowler v. Sowers, 151 S.W.3d 357 (Ky. Ct. App. 2004); KY. REV. STAT. ANN. § 403.340 (West 2010); Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008)	KY. REV. STAT. ANN. §§ 403.270(2), 403.340(3), 403.340(4) (West 2012)		
Louisiana		LA. REV. STAT. ANN. § 9:355.13* (2011); Richardson v. Richardson, 25 So. 3d 203 (La. Ct. App. 2009)		LA. REV. STAT. ANN. § 9:355.12* (2011); Richardson v. Richardson, 25 So. 3d 203 (La. Ct. App. 2009); Cass v. Cass, 52 So. 3d 215 (La. Ct. App. 2010)	60 days prior to relocation /&/ 30 days to object	Out of state or 150 miles from non-relocating parent
Maine		Villa v. Smith, 534 A.2d 1310 (Me. 1987)	Kelley v. Snow, 984 A.2d 1281 (Me. 2009); Smith v. Padolko, 955 A.2d 740 (Me. 2008)	ME. REV. STAT. ANN. tit. 19-A, §§ 1653(3)*, 1657(2)(A), 1657(2)(A-1)* (2011)	30 days prior to relocation	Out of state or more than 60 miles
Maryland			Braun v. Headley, 750 A.2d 624, cert. denied, 531 U.S. 1191 (2001); MD. CODE ANN., FAM. LAW § 9-106 (West 2012)	Braun v. Headley, 750 A.2d 624, cert. denied, 531 U.S. 1191 (2001)	90 days prior to relocation /&/ 20 days to object	
Massachusetts		Rosenthal v. Maney, 745 N.E.2d 350 (Mass. App. Ct. 2001)	MASS. GEN. LAWS ANN. ch. 208, § 30 (West 2012); Altomare v. Altomare, 933 N.E.2d 170, 175 (Mass. App. Ct. 2010)	Rosenthal v. Maney, 745 N.E.2d 350 (Mass. App. Ct. 2001)		

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<u>State</u>	<u>Relocation Presumptions</u>	<u>Relocation & Modification Burdens</u>	<u>Modification of Custody /or/ BIOC Standard</u>	<u>BIOC & Relocation Factors</u>	<u>Notice Requirements & Time to Object</u>	<u>Geographical Limitations</u>
Michigan	Grew v. Knox, 694 N.W.2d 772 (Mich. 2005)	Rittershaus v. Rittershaus, 730 N.W.2d 262 (Mich. Ct. App. 2007)	MICH. COMP. LAWS ANN. §§ 722.31(4)* & 722.23* (West 2012)	60 days prior to relocation /&/ 30 days to respond	100 miles from child's residence	
Minnesota	Tarlan v. Sorensen, 702 N.W.2d 915 (Minn. Ct. App. 2005)	Tarlan v. Sorensen, 702 N.W.2d 915 (Minn. Ct. App. 2005)	MINN. STAT. ANN. § 518.17* (West 2012)			
Mississippi	T.K. v. H.K., 24 So. 3d 1055 (Miss. Ct. App. 2010)	T.K. v. H.K., 24 So. 3d 1055 (Miss. Ct. App. 2010); Elliot v. Elliot, 877 So. 2d 450 (Miss. Ct. App. 2003)	T.K. v. H.K., 24 So. 3d 1055 (Miss. Ct. App. 2010)			
Missouri	MO. ANN. STAT. § 452.377(9)* (West 2012); Classic v. Classic, 155 S.W.3d 842 (Mo. Ct. App. 2005)	MO. ANN. STAT. § 452.375* (West 2012)		60 days prior to relocation /&/ 30 days to respond		
Montana	MONT. CODE ANN. § 40-4-217 (2011); <i>In re</i> Marriage of Robison, 53 P.3d 1279 (Mont. 2002)	MONT. CODE ANN. §§ 40-4-211, 40-4-217 (2011)	MONT. CODE ANN. § 40-4-212 (2011)	30 days prior to relocation /&/ 30 days to object		
Nebraska	Wild v. Wild, 737 N.W.2d 882 (Neb. Ct. App. 2007)	Wild v. Wild, 737 N.W.2d 882 (Neb. Ct. App. 2007); Rosloniec v. Rosloniec, 773 N.W.2d 174 (Neb. Ct. App. 2009); Tirado v. Tirado, 2012 WL 882509 (Neb. App.)	Wild v. Wild, 737 N.W.2d 882 (Neb. Ct. App. 2007)			
Nevada	NEV. REV. STAT. ANN. § 125C.200 (West 2011); Flynn v. Flynn, 92 P.3d 1224 (Nev. 2004)	Toppo v. Toppo, 238 P.3d 861 (table) (Nev. 2008)	Schwartz v. Schwartz, 812 P.2d 1268 (Nev. 1991)	Written consent required		
New Hampshire	N.H. STAT. ANN. § 461-A:12 (2012); <i>In re</i> Heinrich, 7 A.3d 1158 (N.H. 2010)	N.H. STAT. ANN. §§ 461-A:12, 461-A:6* (2012)		60 days prior to relocation		

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State	Relocation Presumptious	Relocation & Modification Burdens	Modification of Custody /or/ BIOC Standard	BIOC & Relocation Factors	Notice Requirements & Time to Object	Geographical Limitations
New Jersey		N.J. STAT. ANN. § 9-2-2* (West 2012); Barbick v. Barbick, 890 A.2d 1005 (N.J. Super. Ct. App. Div. 2006); Baures v. Lewis, 770 A.2d 214 (N.J. 2001); Ryan v. Ryan, 2008 WL 3164072 (N.J. Super. Ct. App. Div. 2008).		Baures v. Lewis, 770 A.2d 214 (N.J. 2001)		
New Mexico	Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991)	Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991)	Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991)	N.M. STAT. ANN. § 40-4-9(A) (West 2012)		
New York		Paul v. Pagnillo, 13 A.D.3d 971 (N.Y. App. Div. 2004); Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996); Schneider v. Lascher, 72 A.D.3d 1417 (N.Y. App. Div. 2010)		Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996)		
North Carolina	Evans v. Evans, 530 S.E.2d 576 (N.C. 2000)	Evans v. Evans, 530 S.E.2d 576 (N.C. 2000)	N.C. GEN. STAT. ANN. §§ 50-13.7, 50-13.7A(e) (West 2012); Evans v. Evans, 530 S.E.2d 576 (N.C. 2000); <i>In re</i> K.H.U.E., 672 S.E.2d 103 (table) (2009); Milliken v. Milliken, 412 S.E.2d 909 (N.C. Ct. App. 1992); Ramirez-Barker v. Barker, 418 S.E.2d 675 (N.C. Ct. App. 1992) (overruled on other grounds)	Evans v. Evans, 530 S.E.2d 576 (N.C. 2000)		

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State	Relocation Presumptions	Relocation & Modification Burdens	Modification of Custody /or/ BIOC Standard	BIOC & Relocation Factors	Notice Requirements & Time to Object	Geographical Limitations
North Dakota		N.D. CENT. CODE ANN. § 14-09-07 (West 2011); Maynard v. McNett, 710 N.W.2d 369 (N.D. 2006); Graner v. Graner, 738 N.W.2d 9 (N.D. 2007)	Graner v. Graner, 738 N.W.2d 9 (N.D. 2007)	N.D. CENT. CODE ANN. § 14-09-06.2 (West 2011); Maynard v. McNett, 710 N.W.2d 369 (N.D. 2006)	Consent or court order subject to two exceptions in N.D. CENT. CODE ANN. § 14-09-07 (West 2011)	
Ohio		Williams v. Williams, 2004 WL 1713283 (Ohio Ct. App. 2004)	OHIO REV. CODE ANN. § 3109.04 (E)* (West 2011); Long v. Long, slip op., 2010 WL 3836168 (Ohio Ct. App. 2010)	OHIO REV. CODE ANN. § 3109.4 (F)* (West 2011)	30 days prior to relocation OHIO REV. CODE ANN. § 3109.04(G)* (West 2011)	75 miles
Oklahoma	OKLA. STAT. ANN. tit. 43, § 112.2A (West 2012); Kaiser v. Kaiser, 23 P.3d 278 (Okla. 2001)	OKLA. STAT. ANN. tit. 43, § 112.2A (West 2012); OKLA. STAT. ANN. tit. 43, § 112.3 (West 2012); Harrison v. Morgan, 191 P.3d 617 (Okla. 2008)	OKLA. STAT. ANN. tit. 43, § 112.3 (West 2012); Harrison v. Morgan, 191 P.3d 617 (Okla. 2008)	OKLA. STAT. ANN. tit. 43, § 112.3 J.1. (West 2012)	60 days prior to relocation /&/ 30 days to object	60 miles from residence of non-relocating parent
Oregon		<i>In re</i> Marriage of Colson, 51 P.3d 607 (Or. Ct. App. 2002); <i>In re</i> Marriage of Fedorov, 206 P.3d 1124 (Or. Ct. App. 2009)	<i>In re</i> Marriage of Cooksey, 125 P.3d 57 (Or. Ct. App. 2005)	OR. REV. STAT. ANN. §§ 107.102(3)(D), 107.102(4)(b), 107.137* (West 2012); <i>In re</i> marriage of Maurer, 262 O.3d 1175 (Or. Ct. App. 2011)		
Pennsylvania		23 PA. CONS. STAT. ANN. § 5337 (West 2012); E.D.v. M.P., 33 A.3d 73 (Pa. Super. Ct. 2011); Kios v. Kios, 934 A.2d 724 (Pa. Super. Ct. 2007); Gruber v. Gruber, 583 A.2d 434 (Pa. Super. Ct. 1990)		23 PA. CONS. STAT. ANN. § 5337(b) (West 2012); J.P. v. S.P., 991 A.2d 904 (Pa. Super. Ct. 2010)	60 days prior to relocation /&/ 30 days to object	
Rhode Island		Valkoun v. Frizzle, 973 A.2d 566 (R.I. 2009)	Valkoun v. Frizzle, 973 A.2d 566 (R.I. 2009); Dupre v. Dupre, 857 A.2d 242 (R.I. 2004)	Valkoun v. Frizzle, 973 A.2d 566 (R.I. 2009)		

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<u>State</u>	<u>Relocation Presumptions</u>	<u>Relocation & Modification Burdens</u>	<u>Modification of Custody /or/ BIOC Standard</u>	<u>BIOC & Relocation Factors</u>	<u>Notice Requirements & Time to Object</u>	<u>Geographical Limitations</u>
South Carolina		Latimer v. Farmer, 602 S.E.2d 32 (S.C. 2004)	Latimer v. Farmer, 602 S.E.2d 32 (S.C. 2004)	S.C. CODE ANN. § 63-15-30 (2011); Moore v. Moore, 386 S.E.2d 456, 458 (1989)		
South Dakota	S.D. CODIFIED LAWS § 25-5-13 (2012)	Berens v. Berens, 689 N.W.2d 207 (S.D. 2004)	Hogson v. Pifer, 757 N.W.2d 160 (S.D. 2008); Berens v. Berens, 689 N.W.2d 207 (S.D. 2004)	S.D. CODIFIED LAWS § 25-4-45 (2012)	45 days prior to relocation /&/ 30 days to object	
Tennessee	TENN. CODE ANN. § 36-6-108* (West 2012)	TENN. CODE ANN. § 36-6-108* (West 2012)	TENN. CODE ANN. § 36-6-108(c)* (West 2012); Mann v. Mann, 299 S.W.3d 69 (Tenn. App. Ct. 2009)	TENN. CODE ANN. § 36-6-108(c), (d), (e)* (West 2012)	60 days prior to relocation /&/ 30 days after receipt	Out of state or 100 miles from non-relocating parent
Texas		Bates v. Tesar, 81 S.W.3d 411 (Tex. App. 2002)	TEX. FAM. CODE ANN. §§ 153.001(a), * 153.002* (West 2011); <i>In re</i> Cooper, 2009 WL 3766428 (Tex. App. 2009); Bates v. Tesar, 81 S.W.3d 411 (Tex. App. 2002)	Long v. Long, 144 S.W.3d 64 (Tex. App. 2004); Bates v. Tesar, 81 S.W.3d 411 (Tex. App. 2002)		
Utah		Doyle v. Doyle, 221 P.3d 888 (Utah Ct. App. 2009)	Hudema v. Carpenter, 989 P.2d 491 (Utah Ct. App. 1999); Doyle v. Doyle, 221 P.3d 888 (Utah Ct. App. 2009)	UTAH CODE ANN. §§ 30-3-10,† 30-3-10.2, 30-3-37(4),† (West 2012); Hudema v. Carpenter, 989 P.2d 491 (Utah Ct. App. 1999)	60 day prior to relocation	150 miles from residence specified in decree
Vermont		Hawkes v. Spence, 878 A.2d 273 (Vt. 2005)	Vt. STAT. ANN. tit. 15, § 668 (West 2012); Hawkes v. Spence, 878 A.2d 273 (Vt. 2005); Heide v. Ying Ji, 2009 WL 2411561 (Vt. 2009)	Vt. STAT. ANN. tit. 15, § 665* (West 2012)		
Virginia		Surles v. Mayer, 628 S.E.2d 563 (Va. Ct. App. 2006)	V.A. CODE ANN. §§ 20-124.3, 20-108† (West 2012); Surles v. Mayer, 628 S.E.2d 563 (Va. Ct. App. 2006); Krusell v. Rayes, 2009 WL 3734098 (Va. Ct. App. 2009)	V.A. CODE ANN. § 20-124.3† (West 2012)	30 days prior to relocation	

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<u>State</u>	<u>Relocation Presumptions</u>	<u>Relocation & Modification Burdens</u>	<u>Modification of Custody /or/ BIOC Standard</u>	<u>BIOC & Relocation Factors</u>	<u>Notice Requirements & Time to Object</u>	<u>Geographical Limitations</u>
Washington	WASH. REV. CODE ANN. §§ 26.09.430, 480, 520 (West 2012); <i>In re</i> Marriage of Horner, 93 P.3d 124 (Wash. 2004)	<i>In re</i> Marriage of Horner, 93 P.3d 124 (Wash. 2004); <i>In re</i> Marriage of Chua and Root, 202 P.3d 367 (Wash. 2009)	Bay v. Jensen, 196 P.3d 753 (Wash. Ct. App. 2008)	WASH. REV. CODE ANN. § 26.09.520 (1)-(11) (West 2012)	60 days prior to relocation /&/ 30 days to object	
West Virginia	W. VA. CODE ANN. § 48-9-403(d)(1)* (West 2012)	W. VA. CODE ANN. § 48-9-403(d)(1)* (West 2012)	Storrie v. Simmons, 693 S.E.2d 70 (W. Va. 2010)		60 days prior to relocation	
Wisconsin	WIS. STAT. ANN. § 767.481 (West 2012)	WIS. STAT. ANN. § 767.481 (West 2012)	Warner v. Warner, 756 N.W.2d 809 (table) (Wis. Ct. App. 2008)	WIS. STAT. ANN. § 767.481 (West 2012)	60 days prior to relocation /&/ 15 days to object	Out of state or 150 miles from non-relocating parent
Wyoming	Watt v. Watt, 971 P.2d 608 (Wyo. 1999)	Watt v. Watt, 971 P.2d 608 (Wyo. 1999)	WYO. STAT. ANN. § 20-2-204(c) (West 2012); Testerman v. Testerman, 193 P.3d 1141 (Wyo. 2008)	WYO. STAT. ANN. § 20-2-201* (West 2012)		
District of Columbia			D.C. CODE § 16-914 (West 2012); Samuel v. Person, 2010 WL 2627858 (Trial Order) (D.C. Super. 2010)	D.C. CODE § 16-914 (a)(3) (West 2012)		

+ This statute has been amended by legislative action. In most instances, only one word or sentence of the statute has changed.
 * This statute is subject to proposed legislation. In most instances, only one word or sentence of the statute is pending change.

Appendix B

Non-Exclusive Checklist on Child Relocation

PREMINARY QUESTIONS:

1. Factual Background.
 - a. Legal Assistance Eligibility (i.e., Servicemember, Dependent-spouse, Dependent-child, former spouse, etc.).
 - b. Family Relationships and Locations.
 - c. History of the child(ren)'s residence.
 - d. History of the relationship between the custodial parent and non-custodial parent.
 - e. Relocation Timeline and evidence of intent to relocate (i.e., email, phone call, etc.).
 - f. Whether domestic violence issue is involved.
2. Type of Custody.
 - a. Documentation (i.e., court order, separation agreement, other child custody documentation).
 - b. Applicable state(s)'s definitions.
 - c. Geographic limitation clause or agreement.
3. Jurisdiction.
 - a. Derive facts which assist in the clarification of which state presently has jurisdiction, not limited simply to laws of where divorce or custody decision initially occurred, or longevity of stay in present location.
 - b. Review tax records, property ownership, recent litigation, etc.
4. Relocations Motives.
 - a. Ask where and why does the parent want to relocate, to include past history of moves, reasons for moves, reasons for initial custody award, and probable attitude of opposing parent on relocation?
 - b. Why do they believe the non-custodial parent doesn't want to move?

RESEARCH:

1. Determine the states with potential jurisdiction over the child(ren).
2. Review Appendix A to determine how each of the applicable states handles relocations (Presumptions for Relocation, Presumptions Against Relocation; Burdens for Relocation; Modifications of Child Custody).
3. Determine the Notification Requirements for each state.
4. Determine the state's BIOC factors in shaping a good faith attempt to relocate or prevent relocation.

ADVICE TO CLIENT:

1. Address the following:
 - a. Probable states with jurisdiction.
 - b. Particular states' views on Relocation.
 - c. Procedural requirements (i.e., Days of Advance Notice, Custodial definitions, Presumptions or Burdens created by the state favoring a certain parent).
 - d. The statutory BIOC standard and the state's non-BIOC mandatory factors as applied to the facts or motivations for the move.
 - e. For servicemembers—address any service regulatory requirements (i.e., Legal Obligations under AR 608-99; AR 635-200 Involuntary separation due to parenthood and/or Voluntary separation due to dependency/hardship, etc.).
 - f. Risks: Authority of this court and the possible consequences—Loss of custody, Child Support.
2. Provide potential courses of action:
 - a. Obtain civilian counsel(s) for the applicable jurisdiction(s).
 - b. Pro Se Representation.
 - c. Provide military administrative guidance and options.

A Primer on the Use of Military Character Evidence

Major Walter A. Wilkie*

I. Introduction

You are a young defense counsel sitting at your desk, dismayed over your huge case load, when the senior defense counsel (SDC) comes into your office. “First Lieutenant Smith, got a case for you: Marine Gunnery Sergeant [E-7] (Gunny) Jones has been accused of using marijuana, committing larceny and being in an unauthorized absence (UA) status from his unit. Gunny Jones is a decorated war veteran who received the Silver Star in Fallujah. The facts in this case do not sound good for your client, but the Gunny might have a chance of acquittal if you emphasize his excellent military career. Anyway, here is the file, familiarize yourself with it and be ready to brief me tomorrow on how you are going to present good military character evidence on the merits. Take a look at relevant case law; I think it can be offered, even for non-military offenses. Be ready to brief me tomorrow and explain exactly how you plan on introducing the evidence, over the objections of the trial counsel.”

After the SDC leaves your office you begin racking your brain; what does good military character (GMC) have to do with a larceny case? You quickly remember a primer you read in Naval Justice School (NJS) that talked about GMC and the GMC defense. As you recall GMC “refers to an accused [servicemember’s] introducing evidence of good military character in an attempt to convince the military judge or members that he did not commit the offense for which he is charged.”¹ Furthermore, GMC is introduced with the intended purpose to provide the “basis for an inference that the accused is too professional a soldier to have committed the offense with which he is charged.”² You know you will encounter objections from the trial counsel. What rules of evidence apply to admitting character evidence, and GMC in particular, on the merits? Can defense counsel present specific instances of conduct, such as Gunny Jones’s Silver Star? What tactical considerations should defense counsel make before deciding whether to use this evidence?

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¹ Lieutenant Colonel Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 130 MIL. L. REV. 171, 171 (1990); see also Colonel Mike Hargis, *A View from the Bench: Findings, Sentencing, and the “Good Soldier.”* ARMY LAW., Mar. 2010, at 91, 91.

² Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 119 (2001).

II. Some History of Character Evidence

Courts have always struggled with the proper use and limits of character evidence at trial. Good military character is unique to the military and requires an understanding of what GMC is and how character evidence fits within the Military Rules of Evidence (MREs). The incongruity between the MRE controlling GMC, the *Manual for Courts-Martial* (MCM) sections dealing with GMC, and the military courts’ interpretation of the rule(s) presents challenges for military practitioners.

A. Character Evidence and Good Military Character Evidence Defined

*The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.*³

Introduction of character evidence by the accused is done ultimately with the intent to create “enough of a favorable inference about the accused and his character to convince the trier of fact that the accused could not have done the crimes he is charged with by the government.”⁴ Ultimately, the defense seeks to offer favorable character evidence attempting to create a “seed of doubt to prevent the members from believing that the government met their beyond a reasonable doubt burden.”⁵ Additionally, the presentation of positive character evidence can “humanize [the accused] enabl[ing] fact finders and sentencing agencies to treat [him more favorably].”⁶

Falling within the larger category of character evidence is the “good character defense,” and the particular type used in this primer is the good military character.⁷ This evidence is unique to the military and cannot be used on the merits in state or federal court. Good military character is evidence that highlights the military expertise and qualities of the accused. The offering of character evidence on the merits is

³ Nash v. United States, 54 F.2d 1006, 1007 (2d. Cir. 1932) (concerning the use of character evidence on the merits in a civilian trial).

⁴ Katz & Sloan, *supra* note 2, at 119.

⁵ *Id.*

⁶ Lieutenant Colonel Richard R. Boller, *Proof of the Defendant’s Character*, 64 MIL. L. REV. 37, 40 (1974).

⁷ See DAVID A. SCHLUETER, STEPHEN A. SALTZBURG, LEE D. SCHINASI & EDWARD J. IMWINKELRIED, *MILITARY EVIDENTIARY FOUNDATIONS* ch. 6, at 4-81 (1994) (good military character (GMC) subset of character evidence).

generally prohibited.⁸ But in limited circumstances, evidence of the accused's GMC may be offered at trial, both during the findings phase and sentencing.⁹

B. Good Military Character Before the Military Rules of Evidence

The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors—more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his 'service record,' which follows him throughout his army career and serves as the basis for the terms of his final discharge.¹⁰

The history of character evidence predates the creation of the MRE¹¹ and involves introducing evidence of the accused's performance through documents and testimony.¹² The use of character evidence in defense of an accused dates back in part to a Supreme Court bribery case from 1948, *Michelson v. United States*. In *Michelson*, the Court held that the evidential use of "character, disposition and reputation," prohibited for prosecution, "is open to the defendant because character is relevant in resolving probabilities of guilt."¹³ Also, the Court stated that "in some circumstances, [the testimony on defendant's good character] alone . . . may be enough to raise a reasonable doubt of guilt. . . ."¹⁴ Thus, it is well recognized that character evidence can be a powerful tool for certain accused.¹⁵

Furthermore, the Court in *Michelson* stated that the defense may offer relevant character testimony so that the jury would infer that the defendant could not have done the

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(a) (2012) [hereinafter MCM] ("Evidence of a person's character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion.")

⁹ *Id.*

¹⁰ Lieutenant James F. Chapman, *Establishing and Rebutting Evidence of the Accused's Good Military Character*, JAG J., Nov. 1954, at 9, 9 (quoting JOHN HENRY WIGMORE, ON EVIDENCE § 59 (3d ed. 1940)).

¹¹ See Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 18 (1990) (Military Rules of Evidence (MREs) came into existence 1 September 1980).

¹² Boller, *supra* note 6, at 39 (providing a good discussion of presentation of character evidence).

¹³ *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

¹⁴ *Id.* at 476.

¹⁵ Katz & Sloan, *supra* note 2, at 135.

crime because of his "favorable" character.¹⁶ Accordingly, *Michelson* was speaking to the ultimate intent of offering character evidence for the accused, which is to attack the government's burden of proving the accused's guilt beyond a reasonable doubt. Good military character is merely a subset of character evidence, so the insights and holdings in *Michelson* apply.

Early versions of the MCM allowed the introduction of character evidence with few constraints.¹⁷ The 1969 version stated that the "accused may introduce evidence of his own good character, including evidence of his military record and standing as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted person."¹⁸

C. Good Military Character After the Military Rules of Evidence

The advent of the MRE in 1980 replaced the broader "general good character" standard with a more restrictive standard, which allowed only "evidence of a pertinent trait."¹⁹ For much of the next decade, military courts and practitioners attempted to determine what is a "pertinent trait" and when it was sufficiently "related" to a charged offense,²⁰ particularly when that trait was good military character.²¹ Since then, the courts have generally favored an

¹⁶ *Michelson*, 335 U.S. at 476 ("[A]ffirmative testimony that general estimate of his character is so favorable that jury may infer that he would not be likely to commit the offense charged.")

¹⁷ Katz & Sloan, *supra* note 2, at 121.

¹⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 138f.(2) (1969).

¹⁹ MCM, *supra* note 8, MIL. R. EVID. 404(a)(1) analysis, at A-22-23.

²⁰ See *United States v. Hamneke*, 15 M.J. 609, 611 (N.M.C.M.R. 1982) (stating that for the introduction of evidence under MRE 404(a), there must be a showing that the evidence is of a character trait and that trait is pertinent to the offense charged and before the court); *United States v. Cooper*, 11 M.J. 815, 815 (A.F.C.M.R. 1981) (Air Force Court of Military Review clarified that GMC was admissible on the merits where there is "some direct connection between that specific character trait and offense charged."); *United States v. Fitzgerald*, 19 M.J. 695, 697 (A.C.M.R. 1984) (other than charges involving a purely military offense, such as disobedience of orders or absence without leave, in order for the specific trait of military character to be relevant in a trial, the defense must show a nexus between the offense charged and the performance of military duties).

²¹ See *United States v. Piatt*, 17 M.J. 442, 446 (C.M.A. 1984) (GMC evidence admissible in assault case based on alleged abuse of trainees by USMC drill instructor; court found that character for performing his duties correctly was relevant to whether he performed them incorrectly by means of abuse); *United States v. McNeill*, 17 M.J. 451, 452 (C.M.A. 1984) (same holding for drill instructor accused of sodomy with an officer candidate in his charge); *United States v. Kahakauwila*, 19 M.J. 60, 62 (C.M.A. 1985) (GMC evidence admissible to defend against charge of selling marijuana in violation of Navy regulations, to show that accused "conformed to the demands of military law and was not the sort of person who would have committed such an act in violation of regulations"); *United States v. Vandelinder*, 20 M.J. 41, 44–45 (C.M.A. 1985) (holding that off-post drug offenses were closely related to military effectiveness, so that good military character was pertinent to them); *United States v. Court*, 24 M.J. 11, 14–15 (C.M.A. 1987) (overruling the service court, the CMA found GMC

expansive reading of good military character as a pertinent trait.²²

Military Rule of Evidence (MRE) 404(a) is taken “without substantial change” from Federal Rule of Evidence 404(a).²³ There is some incongruity between what is contained in the text of MRE 404, the drafter’s analysis, and the subsequent interpretation by military courts as to what exactly qualifies as GMC.²⁴ It is within this grey area that

admissible to defend against charge of conduct unbecoming an officer by means of sex offenses, even though offenses occurred off post; the court held that in prosecutions under the Uniform Code of Military Justice (UCMJ) Article 133, GMC evidence could be used either to show that the accused would never commit such an act, or that “the charged conduct was not ‘unbecoming’ because an officer of such fine character would never do anything that would seriously compromise his standing as an officer,” but also held that “it is the substance of the alleged misconduct which is pivotal to a determination whether such evidence is ‘pertinent’”; *but see* United States v. Hooks, 24 M.J. 713, 717 (A.C.M.R. 1987) (holding that accused’s good military character was not pertinent to accusation of off-post kidnapping and rape of German civilian); United States v. Cooper, 11 M.J. 815, 815 (A.F.C.M.R. 1981) (accused charged with possession of marijuana, court held that merely being charged under the code was not a sufficient connection to make the violation “military” in nature, thus warranting presentation of GMC).

²² See United States v. Gleason, 43 M.J. 69, 75 n.11 (C.A.A.F. 1995) (“Consistent with the traditional military emphasis on the importance of good character, Mil.R.Evid. 404(a)(1) has been liberally construed to permit evidence of an accused’s general ‘good character.’”), *cited in* Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 887 n.38 (1999). In *Gleason*, the court set aside a conviction of solicitation to commit murder for unlawful command influence (UCI). In so doing, the court found it possible that witnesses (who were discouraged from testifying by UCI) “would have been . . . willing to testify as character witnesses on the merits and to extol Gleason’s general good character and truthfulness” in light of his stellar service record, and that these character witnesses might have “generated a reasonable doubt.” *Gleason*, 43 M.J. at 75. See also United States v. Perez, 64 M.J. 239, 244 (C.A.A.F. 2006) (Soldier used “good Soldier” testimony to defend against charges of rape, forcible sodomy, and indecent acts with his stepdaughter, starting when she was five or six years old; the pertinence of this evidence was not litigated on appeal and the evidence may not have been objected to at trial); *Court*, 24 M.J. at 16 (Cox, J., concurring in part and dissenting in part) (“in my judgment, the fact that a person has given good, honorable, and decent service to his country is *always* important and relevant evidence for the triers of fact to consider”) (emphasis in original).

²³ MCM, *supra* note 8, MIL. R. EVID. 404(a) analysis, at A-22-23.

²⁴ The MCM states,

Rule 404(a) replaces 1969 Manual [paragraph] 138f and is taken without substantial change from the Federal Rule. Rule 404(a)(1) allows only evidence of a pertinent trait of character of the accused to be offered in evidence by the defense. This is a significant change from [paragraph] 138f of the 1969 Manual which also allows evidence of “general good character” of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. *It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders.*

defense counsel should seek to push the envelope of relevancy to get the evidence into the courtroom while the government may be attempting to have the “military nexus” maintain some sort of relevancy gatekeeping function.²⁵

As a rule, GMC evidence on findings is introduced as a “pertinent character trait” of the accused under MRE 404(a)(1). It may therefore be proved only by reputation or opinion evidence under MRE 405(a). An exception occurs in the extremely rare circumstance when the character trait is an “essential element of an offense or defense”—for example, when the defense of entrapment is raised, so that the accused’s predisposition to commit the crime is at issue—in which case specific instances of conduct may be introduced under MRE 405(b).²⁶ Good military character includes specific traits such as courage, respect, and obedience to orders. Depending on the case, these specific traits may be relevant and admissible; the defense is not limited to a general opinion about GMC. However, testimony that an accused has not been known to commit the

MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 22-32 (1984) (analysis of MRE 404), *quoted with emphasis added in* Katz & Sloan, *supra* note 2, at 124. While the drafters explicitly stated in their analysis that they were significantly changing the law, they also provided that evidence of good military character would be admissible when found to be pertinent. Neither the plain language of the rule, nor the drafters’ analysis provides guidance as to when good military character would be a “pertinent trait.” It has been left to the military courts to interpret the meaning of this language.

²⁵ Whether trial counsel actually should take this route is a question of tactics; if the Government’s case is otherwise strong, it may prefer to avoid the appellate issue by not opposing the evidence. “To avoid needless appellate issues and the attend risk of reversal on appeal, an experienced prosecutor will weigh the factors involved that will, in many cases, counsel a prudent course of action. . . .” United States v. Guthrie, 25 M.J. 808, 810 (A.C.M.R. 1988) (referring to government opposition to defense challenges for cause). See also United States v. Jensen, 25 M.J. 284, 289 (C.M.A. 1987) (Cox, J., concurring) (“In the present case, the military judge ruled against appellant on three very close issues, thus creating difficult appellate questions. . . . It is the Government’s *burden of persuasion* that has importance, not trial counsel’s effectiveness in keeping evidence out of the record. I sometimes wonder why the Government even bothers to object to admission of [credibility or impeaching] evidence in a trial before military judge alone.”).

²⁶ See United States v. Schelkle, 47 M.J. 110, 112 (C.A.A.F. 1998) (evidence of pertinent traits of appellant’s character offered by the defense, including general GMC and law-abidingness, was admissible but limited to reputation and opinion testimony; in particular, evidence that the good character witnesses had never seen the accused use drugs was *not* admissible because it was “specific instances” testimony); see also Hargis, *supra* note 1, at 91; Lieutenant Colonel Stephen R. Henley, *Developments in Evidence III: The Final Chapter*, ARMY LAW., May 1998, at 1, 6–7 & n.58 (“Considering that the Eighth Amendment prohibits the criminalization of a person’s status, character will rarely (if ever) be an essential element of an offense.”) (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)). Lieutenant Colonel Henley argues that the defense of entrapment is the *only* circumstance that will make character an essential element of a crime or defense at court-martial. Henley, *supra*, at 7 & n.64 (citing United States v. Thomas, 134 F.3d 975, 978–80 (9th Cir. 1998)) (holding that accused claiming entrapment could offer “specific acts” evidence, including his own lack of an arrest record, as evidence against his predisposition to commit the crime).

specific crime at issue in the past is “specific acts” testimony and, as such, is normally inadmissible by the defense.²⁷

III. Application of GMC Evidence

A. Pretrial Preparation and Article 32 Hearings

*A pretrial investigation under Article 32, Uniform Code of Military Justice, provides a useful forum in which the accused’s counsel may present character evidence favorable to the defendant.*²⁸

Both prosecutors and defense counsel should leave no proverbial stone unturned when it comes to seeking out character evidence—particularly GMC evidence—related to the case. The defense should seek out and interview individuals who will provide an honest and informed assessment of the accused’s character. Trial witnesses will only be able to testify if they have sufficient knowledge to give informed opinions about the accused or his reputation. A peer of similar rank may have seen and heard things unknown to a first sergeant or sergeant major who has not had the same face time and uncensored observation of the accused. On the other hand, senior leadership have more experience leading troops and a more seasoned notion of what GMC really is. Immediate leadership (such as squad leaders and platoon sergeants for a lower enlisted troop) strike a balance between these considerations, combining knowledge of the accused with experience that gives them credibility on the stand.²⁹

In interviewing these witnesses, the defense must remember that the Government will also cast a wide net in search of rebuttal evidence and will interview military character witnesses regardless of whether they appear on the accused’s witness list. That is one reason why it is important to let the witnesses give their unvarnished opinions, good

and bad, during interviews, and not try to “push” them in the client’s favor.³⁰ If strong rebuttal evidence exists, the defense may wish to reconsider opening the door by introducing GMC evidence in the first place.³¹ If the defense decides to use the evidence anyway, well-informed counsel should have a prepared response to the Government’s anticipated rebuttal.

In searching for character evidence, defense counsel should consider imaginative uses of GMC evidence.³² In *United States v. Benedict*, the defense offered GMC evidence to support its position that the accused lacked mental responsibility for his actions. The defense theory was that the charged misconduct deviated so far from his outstanding military character, “that his acts must have resulted from insanity, because . . . he would never have committed a crime had he been in his right mind.”³³ Good military character is a powerful tool in the right case. Whether a given case is the right case is a matter of professional judgment.

Also important is determining where to find useful GMC witnesses. The accused’s immediate supervisor is a fine place to start. With whom does the accused eat lunch? Who are his “buddies?” Public Facebook or other social media

²⁷ *Schelke*, 47 M.J. at 112.

²⁸ *Boller*, *supra* note 6, at 37.

²⁹ It has been suggested that in a deployed environment the defense can make a case effectively untriable by demanding unavailable live witnesses to establish GMC. Major Frank M. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW., Sept. 2010, at 12, 23. However, if the witness is unavailable within the meaning of MRE 804(a), the defense will have to find some substitute for his testimony or do without, unless the defense can show that the witness’ unavailability is the Government’s fault, or that that particular witness’ testimony is “of such central importance to an issue that it is essential to a fair trial,” in which case, the defense must also convince the military judge that no adequate substitute to the live testimony of that witness is available. MCM, *supra* note 8, MIL R. EVID. 703(b)(3); Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 20 & n.79. Counsel also have an ethical obligation to avoid dilatory practices and may not demand unavailable witness just to delay proceedings. See U.S. DEP’T OF ARMY, REG. 27-26, PROFESSIONAL CONDUCT FOR LAWYERS, app. B, r. 3.2 (1992) (Expediting Litigation).

³⁰ In talking to witnesses, counsel should be open about this point: “I’m defending Private Snuffy, but to do my job right, I have to know how things really are. So I’m asking you to tell me what he’s really like, and what you’ve seen him do, good and bad.” The witness interview is not the place for slashing cross-examination. Counsel on either side (but especially the prosecution) should also be open about the rule of equal access to witnesses under Article 46, UCMJ: “If the lawyer for the other side comes to see you, you should speak just as freely to him as you do to me. That’s the law, and that’s how we make sure the trial is fair.” Witnesses who understand that counsel want to hear the full evidence, the same as the other side will hear, are far less likely to slant what they say in the interview, and thus are far less likely to bring surprises to the witness stand.

³¹ See *United States v. Hensley*, No. 34000, 2001 WL 765607 (A.F. Ct. Crim. App. 21 June 2001) (Appellant introduced evidence of good military character during sentencing and the government rebutted with evidence of three instances of misconduct. The military judge allowed the rebuttal evidence after balancing the probative value of the evidence with its prejudicial effect pursuant to MRE 403. Evidence of the three earlier instances of misconduct was relevant to rebut appellant’s showing specific instances of his good military character.); MCM, *supra* note 8, MIL. R. EVID. 405(a) (allowing evidence of a pertinent character trait offered by the accused “or by the prosecution to rebut the same”); Hargis, *supra* note 1, at 92 (“Under MRE 405(a), the Government can cross-examine a witness on relevant specific instances of conduct. The narrow the character trait offered by you under MRE 404(a)(1), the narrow the range of specific instances of conduct that will be relevant to challenge the basis of that opinion. However, ‘good military character’ is about as broad a character trait as possible. By offering this type evidence, you probably kick the character door off its hinges and allow the Government a nearly unfettered opportunity to cross-examine the witness.”).

³² “[I]magination is the only limit of what demonstrates ‘good military character.’” Rosenblatt, *supra* note 29, at 12, 23.

³³ See *United States v. Benedict*, 27 M.J. 253, 262 (C.M.A. 1988). The trial court excluded the GMC evidence. The Court of Military Appeals held this exclusion to be error. The court did not test the error for prejudice because it was reversing the case on other grounds anyway, but admitted the possibility. *Id.*

profiles can provide long lists of “friends” to interview.³⁴ Do not let your investigation begin and end with the Government-provided discovery on your desk.

Concerning the hypothetical client, Gunny Jones, at your first meeting you should ask him to come back with a list of people he has worked with or for who would be able to speak to his character and reputation, good or bad. This preliminary list should not be limited to his present command, and should include prior assignments. Ask the client not only about previously charged misconduct, but uncharged accusations and any prior negative administrative actions he may have received.³⁵ As counsel you need to advise the Gunny that the Government will be looking to discover any negative character evidence that can strengthen the case against him. Even if the Government does not know you are considering a GMC defense, they may be looking for witnesses who can testify as to the accused’s lack of rehabilitative potential at sentencing,³⁶ and so discover any negative information that exists. The law of unintended consequences is alive and well with regard to using GMC. Thus, before using this kind of evidence and deciding how to use it, consider the Government’s possible responses.³⁷

Good military character evidence can be helpful before trial in convincing the command to take some other route

than trial by court-martial.³⁸ This can be done informally, by informing the trial counsel or a commander of the accused’s background. It may also be done by presenting GMC evidence at an Article 32 hearing. If such evidence makes a favorable impression with the investigating officer (IO), he may recommend dismissal or resolution without resort to general court-martial.³⁹ While the IO’s recommendation is not binding,⁴⁰ it can sometimes influence the convening authority as to the proper disposition of the case.⁴¹ Also, the hearing is an opportunity for the Government to see the GMC evidence uncovered by the defense, and this may influence the command through the trial counsel.

As only a few MREs apply at Article 32 hearings, counsel can and, in the right case, should present GMC evidence even if it will not be admissible at trial.⁴² For example, at the Article 32 hearing but not at trial, specific instances of GMC may be presented to show the charged misconduct is out of character for the accused.

B. Trial—Relevance of GMC to the Charged Offenses

Appellate cases suggest that, in the past, GMC evidence was difficult to present on the merits when the charges were not “military offenses” (that is, offenses without counterparts in civilian law, such as desertion or disobedience of lawful orders).⁴³ Later case law, however,

³⁴ See Ronald L. Frey, *Defending Sex Crimes in the Digital Age*, ASPATORE, Sept. 2012, at 1, 2–3. However, attorneys should be wary of making “friend” requests in the course of obtaining information through social media. See Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 *TOURO L. REV.* 149, 178 (2012).

³⁵ See *United States v. Strong*, 17 M.J. 263, 266–67 (C.M.A. 1984) On sentencing, defense counsel had to “accept responsibility not only for specific evidence it offers, but also reasonable inferences drawn from it,” so that evidence of GMC during one time period could be rebutted by evidence from a different time period, because the original evidence “could not help but convince the military judge that the accused had an outstanding military character.”).

³⁶ For a discussion of rehabilitative potential evidence under Rule for Court-Martial (RCM) 1001(b)(5) and its limits, and tips on how to effectively oppose such evidence, see Edward J. O’Brien, *Rehabilitative Potential Evidence: Theory and Practice*, *ARMY LAW.*, Aug. 2011, at 5.

³⁷ See *United States v. Brewer*, 43 M.J. 43, 46–47 (C.A.A.F. 1995). In that case, the defense questioned a character witness about the accused’s good military character during a specific period of time to create the inference that he would not deceive the panel on the day of trial. The Government, on cross, asked the witness about specific instances of misconduct outside that period. The defense objected, the trial court overruled, and the Court of Appeals for the Armed Forces affirmed. The court held that the issue of the accused’s truthfulness was only relevant insofar as that truthfulness extended from the time the witness knew him until the day of trial (when he gave the testimony that the defense was trying to bolster), so that any misconduct falling between those times was relevant to the issue. *Id.* (citing *United States v. Pearce*, 27 M.J. 121, 124 (C.M.A. 1988)). The court did not word this finding as a universal rule, but stated that “[a]lthough appellant correctly points out that such cross-examination is limited under Mil.R.Evid. 405(a) to relevant instances of conduct, his artificial limitation of relevance to the same time period as that which formed the basis of the opinion sometimes would be illogical. This is such a case. . . .” *Id.* at 47.

³⁸ Boller, *supra* note 6, at 39 (“The best way for a criminal defense lawyer to win a case is to never have to try it. Military pretrial procedure governing the disposition of charges lends itself to the dismissal or modification of charges at the initial stages of a prosecution . . . [i]t is good practice for a defense counsel to give a commander reasons to deal leniently with a defendant at the earliest possible stage of a case. The time spent getting statements from character witnesses at this stage of the proceeding will reward the defendant and his counsel many times over and even if the case is referred for trial.”).

³⁹ *Id.*

⁴⁰ *Id.* R.C.M. 405(a), discussion (“[R]ecommendations of the investigating officer are advisory.”).

⁴¹ CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR & SCH., CRIMINAL LAW DESK BOOK, at N-1 (2011) [hereinafter CRIMINAL LAW DESKBOOK] (The statutory purpose of the investigation is to inquire into the truth of the matter alleged in the charges, consider the forum of the charges and make recommendation as to the disposition of the charges.).

⁴² *Id.* R.C.M. 405(i) (Military Rules of Evidence 301, 302, 303, 305, 412 & Section V do not apply.).

⁴³ See *Clemons*, 16 M.J. at 47 (An Army drill sergeant was charged with stealing his recruit’s property. Defense sought to enter GMC evidence to show how the charges were not consistent with his GMC. The trial judge excluded the evidence as he did not see GMC as pertinent for purposes of MRE 404(a)(1). However, the appellate court held that traits of good military character and character for lawfulness each evidenced “a pertinent trait of the character of the accused” in light of the principal theory of the defense case.); *United States v. Piatt*, 17 M.J. 442, 446 (C.M.A. 1984) (A Marine drill instructor was charged with having two of his recruits assault another recruit. Again, trial judge excluded the GMC evidence as it was “not pertinent.”); *United States v. McNeill*, 17 M.J. 451, 452 (C.M.A. 1984) (A Drill instructor was charged with wrongful sexual relations with a female officer candidate. Trial judge denied the accused ability to present

expanded the interpretation of when GMC is a “pertinent trait” for purposes of MRE 404(a)(1),⁴⁴ so that now GMC evidence is broadly admissible and its pertinence is rarely, if ever, litigated.

Nonetheless, in case the Government does contest the admissibility of the GMC evidence, the defense should be prepared to argue a military nexus to justify its use, regardless of what appears on the charge sheet.⁴⁵ In the hypothetical at the beginning of this article, Gunny Jones has been charged with larceny and unauthorized absence. There is precedent for admitting the GMC evidence as to the larceny charge,⁴⁶ the unauthorized absence charge,⁴⁷ and the drug charge.⁴⁸

Regardless of whether the evidence will be held admissible in court, the defense must also consider the usefulness of the evidence. Most servicemembers have heard of senior leaders with stellar service records who sexually harassed and abused trainees;⁴⁹ will GMC evidence really convince them your client would not have committed a sex offense? After a decade of war, a great many panel members have deployed and seen all kinds of misconduct committed by brave servicemembers who volunteered in wartime and had multiple deployments to combat zones. Will your client’s good deployment history convince them that he could not have committed the crime? Good military character is an extremely broad character trait, and introducing it gives the prosecution an extremely broad scope for rebuttal.⁵⁰ Will the reward be worth the risk? Not

his GMC to counter allegations. Appellate court held this was prejudicial error, as the GMC was pertinent to charges before the court.)

⁴⁴ See *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985) (“The test of pertinence [relevance] is whether a “fact finder could reasonably infer that a person of GMC would be unlikely to participate in an activity that is so harmful to military effectiveness.”). See also *United States v. Lutz*, 18 M.J. 763, 771 (C.G.C.M.R. 1984) (“[T]he law permits admission of only a particular trait of character and then only when this particular trait is pertinent to a particular issue in the case.”).

⁴⁵ See *United States v. Fitzgerald*, 19 M.J. 695, 697 (A.C.M.R. 1984), *United States v. Kahakauwila*, 19 M.J. 60, 62 (C.M.A. 1984), and *McNeill*, 17 M.J. at 452.

⁴⁶ See *Clemons*, 6 M.J. at 47. See also *United States v. Thomas*, 18 M.J. 545, 549 (A.C.M.R. 1984) (“[T]here should be no question concerning the admissibility [of the good military character evidence] on the merits.”).

⁴⁷ See *United States v. Cooper*, 11 M.J. 815, 816 (A.F.C.M.R. 1981) (Offenses such as desertion and absence without leave are examples of offenses where evidence of GMC would be of probative value.).

⁴⁸ See *Kahakauwila*, 19 M.J. at 61.

⁴⁹ See Jim Forsyth, *U.S. Air Force Staff Sergeant Gets 20 Years for Rape, Sex Assault*, REUTERS.COM (Jul. 21, 2012), <http://www.reuters.com/article/2012/07/21/us-usa-military-sex-idUSBRE86J1E320120721>; Scott Wilson & Tom Bowman, *Soldier Cuts Deal in APG Scandal*, BALTIMORE SUN (May 21, 1997), http://articles.baltimoresun.com/1997-05-21/news/1997141134_1_aberdeen-soldier-fort-leavenworth.

⁵⁰ Hargis, *supra* note 1, at 92.

only legal doctrines of admissibility and relevance, but concerns of practical advocacy, must inform a defense decision to rely on GMC evidence.⁵¹

C. Direct Examination

On direct, the defense is normally limited to reputation or opinion testimony to establish GMC. In order to present this type of circumstantial character evidence, counsel must show the following:

- (1) The accused has a relevant specific character trait, (2) the witness knows about the character trait, either personally or by reputation, (3) the witness states their opinion about the accused character trait, or states what the accused’s reputation is regarding that character trait.⁵²

In basic terms, you can lay the foundation by showing how well your witness knows the accused. However, you can strengthen the foundation by bringing out the witness’s own military and leadership experience. That way, you not only show that he knows your client’s character, but that he knows what good military character is, so that the factfinder should take him seriously. The following is a hypothetical exchange of a GMC witness testifying on behalf of Gunny Jones as to the larceny charge and the witness’s opinion as to Gunny Jones’s character for GMC:

DC: First Sergeant Davis, tell us about your military background.

Wit: I joined the Marine Corps in 1996, went to Parris Island Recruit Training, followed on to the School of Infantry, went to an initial assignment with 2/6 Marines, Camp Lejeune, North Carolina, served as a Drill Instructor at Parris Island, deployed with 24th MEU, then assumed my present duties as first sergeant of B Co., 1/6 Marines.

DC: And outside of being first sergeant, what leadership positions have you held?

Wit: Squad leader, platoon leader, and senior drill instructor.

DC: First Sergeant Davis, do you know Gunny Jones?

Wit: Yes, then Staff Sergeant Jones was the senior enlisted advisor for my platoon during our deployment to Iraq back in 2008.

DC: When is the last time you saw Gunny Jones?

Wit: Most recently I see him here today sitting at the table over there.

⁵¹ See Hillman, *supra* note 22, at 901 nn. 110, 111 (interviews with experienced military defense counsel suggested that GMC evidence was most effective when the charged crime involved violation of a military duty, and when the charges were “relatively minor”).

⁵² SCHLUETER, SALTZBURG, SCHINASI & IMWINKELRIED, *supra* note 7, at 171.

DC: Let the record show the witness is pointing at my client, Gunny Jones, sitting at defense counsel table.
 DC: What contact, if any do you have with Gunny Jones?
 Wit: Four years ago we were deployed for a year together as part of 1/6.
 DC: 1/6?
 Wit: First Battalion, Sixth Marines.
 DC: Okay, back when you were deployed with him in 2008, how often did you see him?
 Wit: All day, every day for a whole year.
 DC: Have you kept in touch with him since your deployment in 2008?
 Wit: Yes we talk at least once a week, sometimes a couple of times a week.
 DC: Do you have an opinion about Gunny Jones' military character?
 Wit: Yes.
 DC: What is that opinion?
 Wit: He is an outstanding Marine. He has always had excellent military character.
 DC: And how is he for punctuality?
 Wit: Excellent. He is one of the most punctual and squared away Marines I have ever had work for me.

TC: Lieutenant Smith, what is your opinion of Gunny Jones' military character?
 Wit: I think he is a lousy Marine.
 MJ: Cross-examination defense counsel?
 DC: Yes, your honor. Lieutenant Smith, are you aware that Gunny Jones earned the Silver Star in Iraq?
 Wit: I knew he had the award, yes sir.
 DC: Did you know he received it for his heroic actions during the battle of Fallujah?
 Wit: No sir.
 DC: Were you aware that those heroic actions included Gunny Jones single handedly saving two Marines from enemy fire?
 Wit: No, sir, I did not.
 DC: Killing three insurgents with his bare hands?
 Wit: No.
 DC: And that on the same occasion he saved two Iraqi children from a burning building?
 Wit: No, sir.
 DC: Or that he was the top rated drill instructor at Parris Island for a whole year while serving on the drill field?
 Wit: No, sir.
 DC: Your Honor, I have no further questions for this witness.

The second, important way to utilize GMC to persuade the members to agree with your theme of the case is through cross-examination. As you have diligently interviewed both your witnesses and the opposing side's witnesses, you are more than prepared to cross-examine each witness who takes the stand.

D. Cross Examination

On cross examination, under MRE 405(a), counsel may inquire as to specific acts involving character, but extrinsic evidence is not allowed.⁵³ Thus, if the prosecution introduces a rebuttal witness who opines that your witness has bad military character, you can cross-examine him with specific instances of good conduct,⁵⁴ provided those instances lie within the scope of the prosecution's direct.⁵⁵

⁵³ *Id.*

⁵⁴ See Colonel Francis A. Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence*, 46 OHIO ST. L. J. 595, 633 (1985) (discussing character for truthfulness under MRE 608) (“[T]he proponent, during cross-examination of a witness who has testified to another witness’s character for untruthfulness, may ask about instances of good acts by the supposedly untruthful witness.”); see also O’Brien, *supra* note 36, at 11 (giving examples of specific acts in cross-examination of a Government “rehabilitative potential” witness).

⁵⁵ Cross-examination with specific instances of good conduct may open the door to specific instances of bad conduct on redirect examination. See *United States v. Fiorito*, No. 07-CR-0212(1), 2009 WL 1086518, at *4 (D. Minn. Apr. 22, 2009) (concerning character for law-abidingness, cross-examination on specific instances “opens the door”); but see *United States v. Whiting*, 28 F.3d 1296, 1301 (1st Cir. 1994) (opposite holding concerning character for truthfulness). Military appellate courts do not appear to have resolved this issue with respect to GMC evidence, but they have held that cross-examination with specific instances of good conduct

E. Written Statements

In addition to witness examination, under MRE 405(c) “[t]he defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused.” If the defense does this, the prosecution may introduce written statements in rebuttal. The affidavits are subject to the same rules as direct testimony. So you can not use affidavits to introduce specific acts of good conduct that would be inadmissible under MRE 404(a)(1), and if you try, the military judge may respond by refusing to admit the evidence or by having it redacted.⁵⁶ To be both effective and admissible, an affidavit should contain the same kind of foundational information as a good direct examination—that is, both the witness’s own military and leadership background (to show that he knows GMC when he sees it) and information on how long and how often he has observed the accused (to show that he knows the accused’s GMC).

opens the door to specific instances redirect in the context of rehabilitative potential testimony at sentencing. *United States v. Eslinger*, 69 M.J. 522, 534 (A. Ct. Crim. App. 2010); *United States v. Foley*, No. 9802072, 2000 WL 703642, at *1 (N-M. Ct. Crim. App. May 26, 2000) (citing *United States v. Mance*, 47 M.J. 742, 748 (1997)).

⁵⁶ See *United States v. Schelkle*, 47 M.J. 110, 110–12 (C.A.A.F. 1997) (upholding decision of military judge to redact character affidavits to exclude statements that the witnesses had never known him to use drugs, because these statements were inadmissible “specific instances”); *United States v. Kerr*, No. 32249, 1997 WL 801475, at *2 (A.F. Ct. Crim. App. Dec. 12, 1997) (military judge ordered redaction of written defense character affidavits to remove inadmissible specific instances).

If the accused really has exhibited GMC, so that many witnesses are able to testify about it, consider a judicious mix of witnesses and written statements. A good witness can leave a powerful impression on the factfinder, but written statements go back into the deliberation room to be reread during deliberations. Three witnesses testifying about the accused's good conduct during the same period of service may seem redundant to the factfinder. One good witness backed up by a few written statements (to show that the witness's good opinion is shared by others) may accomplish as much or more.

F. Sentencing and Post-Trial

Discussion of character evidence on sentencing exceeds the scope of this article.⁵⁷ Rule for Court-Martial (RCM) 1001(c)(1)(B) makes "particular acts of good conduct or bravery" admissible on sentencing without the need to relax the Rules of Evidence under RCM 1001(c)(3). The defense counsel may wish to ask the judge to relax the rules anyway (for example, to admit unauthenticated documents showing GMC), but should be wary of the Government's ability to present rebuttal evidence under the relaxed rules. Only thorough pretrial preparation can ensure that the defense will make informed tactical decisions of this kind.

Good military character evidence can also be a powerful tool during the post-trial process when requesting deferment of confinement or clemency from the convening authority.⁵⁸ At this point counsel is not bound by the MRE and can present any and all forms of GMC.

IV. Conclusion

Defense counsel should strive to identify both good and bad military character evidence as early as possible before trial, to determine whether the risks of presenting such evidence outweigh its benefits. If the evidence is useful, the defense can use it to influence the command in the accused's favor before and after trial and to influence the factfinder in his favor during trial. Although the Government is unlikely to contest the admissibility of such evidence in the usual case, the defense should still be prepared to argue its admissibility to the military judge. Character evidence, particularly GMC evidence, is a powerful tool and if used wisely could result in an acquittal or reduced sentence for your client.

⁵⁷ See Hargis, *supra* note 1, at 92–93 for a discussion of character evidence at sentencing.

⁵⁸ See Boller, *supra* note 6, at 41–42.

Book Reviews

On Combat: The Psychology and Physiology of Deadly Conflict in War and in Peace¹

Reviewed by *Commander Valerie Small*^{*}

*War on paper and war in the field are as different as darkness from light, fire from water, or heaven from earth.*²

I. Introduction

The idea that combat is glamorous and romantic is an old notion that books and movies have successfully supplanted with realistic images of shocking destruction to lives suffered by our warriors and adversaries in conflict. Nevertheless, significant physical and mental consequences of conflict remain unspoken—presumably due to societal shame or to an underwhelming effort to understand the human body's response to traumatic stimuli. Dave Grossman's latest book, *On Combat*, sheds light on the surprising effects of combat stress to the human body and psyche and offers some solutions to counter those effects.³ The thesis of the book is that failing to prepare "warriors"⁴ for the consequences and post-war effects of conflict is tantamount to sending them into warfare without proper armor or sufficient ammunition. Grossman introduces the concept, developed from his Pulitzer Prize nominated book, *On Killing*,⁵ that humans have a universal aversion of killing fellow human beings and that such activity can result in severe and long-lasting trauma.⁶ The author also introduces new information suggested by the book's title—the psychological and physiological effects of combat—such as loss of bowel and bladder control, visual and auditory distortions, and memory loss. The result is a fascinating read that will provide many "ah-ha" moments, but that ultimately, and unfortunately, will leave the reader searching for supporting evidence to all the *emphatically* stated facts. In addition, the constant self-aggrandizing efforts by Grossman throughout the book are distracting and credibility-

impacting. This review examines Grossman's salient assertions and the value of his underlying theories to military judge advocates.

II. Biographies

Dave Grossman is a retired U.S. Army Lieutenant Colonel with twenty-three years of service. He began his career as an enlisted paratrooper and retired in 1998 as an Airborne Ranger Infantry officer. Post-retirement, Grossman taught Psychology at West Point and Military Science at Arkansas State University and is currently the Director of the Warrior Science Group. He authored *On Killing: The Psychological Cost of Learning to Kill in War and Society*⁷ in 1995, which Grossman claims was later nominated for a Pulitzer Prize,⁸ and followed up with *On Combat* in 2004. Grossman is a regular in the lecture circuit, largely to law enforcement and military audiences, and is a frequent contributor to numerous journals and papers. His co-contributor, Loren Christensen, lent his expertise to the book regarding the nature of police work and use of deadly force issues. Christensen retired after twenty-nine years in law enforcement, which included his one tour of duty as a military police officer in the U.S. Army. He has authored and co-authored four books (including *On Combat*) and over thirty articles.⁹

III. Analysis

The book is divided into four sections titled "The Physiology of Combat," "Perceptual Distortions in Combat," "The Call to Combat," and "The Price of Combat." Grossman further divided each section into manageable chapters that relate directly to their

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¹ LIEUTENANT COLONEL DAVE GROSSMAN WITH LOREN W. CHRISTENSEN, *ON COMBAT, THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY COMBAT IN WAR AND PEACE* (3d ed. 2008).

² LAMAR UNDERWOOD, *THE QUOTABLE SOLDIER* (2000) (citing WILLIAM FAULKNER, *THE LITTLE BRICK CHURCH* (1882)).

³ GROSSMAN, *supra* note 1, at 13.

⁴ *Id.* at xiii, xix, 176 (explaining that "warriors" in this book refers to both law enforcement officers (warriors in blue) and military members (warriors in green) for their willingness to go "into the heart of darkness, into the toxic, corrosive, destructive realm of combat").

⁵ DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COSTS OF LEARNING TO KILL IN WAR AND SOCIETY* (1996).

⁶ *Id.* at 2, 4.

⁷ GROSSMAN, *supra* note 1, at xii, xv, 402.

⁸ *Id.* at xv, 402. *But see* The Pulitzer Prizes, www.pulitzer.org (Pulitzer Prize Winners are selected from two or three nominated finalists in each category. The Pulitzer Prize Board uses the term "nominee" only for those entrants who become finalists from which the winner in the respective category are chosen. Work that is submitted, but not chosen as a nominated finalist or winner, is merely termed an "entry" or "submission." The Pulitzer Prize Board discourages authors from claiming they are a nominee solely because an entry was submitted to the Board. Review of the list of nominated finalists from 1994 to 2008 reveals that *On Killing* was never a nominated finalist and therefore could only have been a submission to the Board.).

⁹ GROSSMAN, *supra* note 1, at 402–03.

respective sections. The first two sections are the soul of the book and most directly relate to the psychological and physiological impact of combat. Section three offers some solutions for the warrior to inoculate against combat stress and to accept his decision to kill. Finally, the fourth section discusses post-traumatic stress disorder and the role of others in helping the warrior cope with combat stress.

In Section I, the author immediately discusses his “Universal Human Phobia” theory, stating that humans have an innate aversion to killing other humans and, correspondingly, that violence directed at humans is the greatest phobia shared by ninety-eight percent of the population.¹⁰ His example of the D.C. snipers’ ability to paralyze an entire city offers validity to that theory.¹¹ While data regarding this universal phobia is fascinating and feels quite probable, the author never cites where such information is derived. Grossman merely does a drive-by, dropping statistics out of thin air, and moves on to another, equally unsupported statement. For instance, in keeping with his universal phobia theory, Grossman asserts that the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) IV “specifically states that any time the causal factor of a stressor is human in nature, the degree of trauma is usually more severe and long lasting” without any reference as to where the DSM IV states so.¹² Another example, in support of his premise, is his assertion that the number of Soldiers removed from combat, as a result of psychiatric casualties in both World Wars and the Korean War, was greater than the total number of soldiers who died in combat.¹³ Other than indicating that the information about trauma derived from human violence was located in the DSM IV (again no specific location noted), Grossman never reveals his source regarding the psychiatric casualties during the above-mentioned wars.

Grossman cleverly explains the zero-sum internal bodily activity initiated by combat (or other stressful events that trigger fight or flight responses).¹⁴ Sympathetic (SNS) and parasympathetic (PNS) nervous systems play a key role in a human’s innate survival functions: SNS acts as a quick reaction force to stress and thus concentrates energy into surviving some identified stressor (and inhibiting other functions deemed unnecessary toward that goal—like digestion and decreasing bronchial tubes—while expanding other

functions—dilating heart vessels and increasing adrenaline); whereas, PNS’s role is more maintenance in nature and concerned with increasing the “body’s supply of stored energy” (digestion, salivation, sleep).¹⁵ These two systems are nearly mutually exclusive.¹⁶ Under extreme stress, the body shifts from routine maintenance existence to conservation of energy and preparation for flight, all of which leads the body to react in unexpected ways: spontaneous defecation and urination, uncontrolled need for sleep, hyper heart rate, and excessive adrenaline.¹⁷ Grossman argues the military and police academies should train the warrior to understand the body’s “redirection of . . . assets”¹⁸ as part of combat training, remove the embarrassing stigma, and teach members to employ techniques to control what little bodily functions are controllable.

In support of his argument to adopt this training, the author shares that Special Weapons and Tactics (SWAT) teams prepare for high risk activity by first taking a “battle crap.”¹⁹ In addition, Grossman suggests warriors could learn to leverage some of the autopilot responses to their required tasks or learn methods to mitigate them as needed. With regard to the increased heart rate due to combat stress, Grossman asserts that a warrior should be trained to maintain an optimal heart rate for a specific task: he explains that a Soldier whose job it is to break down doors and conduct security sweeps may well benefit from an increased heart rate, as the adrenaline rush will assist peak performance; on the other hand, a sniper cannot function with a less-than-optimal higher heart rate because steady hands and eye coordination are key for that skill.²⁰ Again, although intuitively believable, Grossman offers few or no sources to support his assertions.

In Section II, Grossman continues the illustration about how the human body adds and subtracts senses in response to acute stimuli—visual, auditory, and memory functions play a sort of whack-a-mole disappearing and reappearing act that can have a profound impact on the warrior, especially when he attempts to recall details of a gun-fight or self-defense shooting.²¹ According to the author, the dominant theory to explain this sensory restriction is that it is a side-effect of “vasoconstriction” stress responses.²² As with so many other statements, there are no sources to support his assertion.

¹⁰ *Id.* at 2–3.

¹¹ *Id.* at 3.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.* at 8–9 (describing the story of the kindergarten teacher, panicked by a mouse that ran up her pant leg to her upper thigh, who involuntarily urinated on herself).

¹⁵ *Id.* at 14–29.

¹⁶ *Id.* at 14–15.

¹⁷ *See id.*

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 15.

²⁰ *Id.* at 30–35.

²¹ *Id.* at 54–73, 94–99.

²² *Id.* at 54.

Grossman offers tactical breathing exercises as a possible solution to control heart rate, adrenaline, and vasoconstriction responses. In his words, “Tactical breathing is truly revolutionary in warrior training”²³ While Grossman may call it “tactical” breathing, the technique is merely purposefully slow breathing, commonly used to calm oneself down and frequently taught to athletes, professional shooters, and yoga devotees.²⁴ It may be that formal acceptance of breathing techniques is new in general combat training (except for sniper training),²⁵ but the technique itself is far from revolutionary.

That aside, understanding the autopilot response to stressors is useful to a judge advocate who may be conducting an investigation into a shooting or explosion or other near-death event. Understanding the physiological effects to extreme stressors should lessen any frustration for an investigator after the fact. The warrior, too, will understand that his seemingly improbable lack of recollection is normal.

Section III discusses how inoculating a warrior against acute stressors in combat is the best relief to combat stress and fear. Grossman’s complaint is that unless training successfully triggers the autopilot responses in the body, it is ineffective and only serves to increase panic, deplete confidence, and train the wrong muscle memory (“training scars”) needed to counter the SNS response.²⁶ Training hard and often is the key to what he coins the “pre-battle warrior.”²⁷ To illustrate his point that history has taught us how poor training leads to poor battle-ready warriors, Grossman again produces information without any reference to his sources, and on those occasions where he provides a crumb of citation, it is woefully lacking. For instance, Grossman states that during World War II, only fifteen to twenty percent of riflemen fired their weapon at exposed adversaries and that those riflemen only fired because they were ordered to do so by superiors—otherwise, they would not have fired at all.²⁸

Grossman briefly mentions his colleague’s work on this research, but fails to discuss any additional information that would direct a reader for further

investigation. Grossman emphatically asserts that the military leaders of World War II knew the research to be true.²⁹ He later suggests that firing rates increased by ninety-five percent during the Vietnam War.³⁰ We are none-the-wiser as to how and where he discovered this information. By chance, however, Grossman did exploit this opportunity to inform the reader of his achievement related to the matter: he wrote an article to what appeared to be a prestigious journal and three encyclopedia entries—all presumably subject to peer review by experts in the field. Grossman does not share the dates of his works, the titles of his works, nature of his articles and entries, nor the specific locations of the pertinent information within the article and encyclopedic entries.³¹

Section IV tidies up the book by explaining the post-combat process. Grossman informs the reader that training should not end post-combat. Rather, there is still much to do: he offers suggestions such as post-combat debriefing, training to discuss continued psychological and physiological responses, and education about post-traumatic stress disorder (PTSD).³² Once again, evidentiary support exists only in the form of anecdotal stories, except for the PTSD diagnostic criteria extracted from DSM-IV.³³ He ends his book with surprising advice to the reader about how to approach and support a combat-weary warrior. His advice is simple, yet admirably communicated—treat everyone the same, for the reader cannot know the depth of the warrior’s combat experience, and assure the warrior that “I’m glad you are okay.”³⁴

IV. Conclusion

Grossman’s book is an easy and quick read, but it falls short of being a scholarly effort. Essentially, the book appears to be a long version of the author’s lectures and speeches. It is written as one might speak, without the formalities of citations or explanation of facts from learned studies. Grossman relies disproportionately on anecdotal evidence and colleagues’ literature and lectures without providing the nature or citation of the literature or lectures.³⁵ In addition, the writing is fraught with the overuse of quotation marks for no apparent reason other than Grossman’s desire to highlight a particular word. Further,

²³ *Id.* at 42.

²⁴ D.L. GILL, *PSYCHOLOGICAL DYNAMICS OF SPORTS AND EXERCISE* (2d ed. 2000); U.S. DEP’T OF ARMY, *FIELD MANUAL 23-10, SNIPER TRAINING* para. 3-3 (17 Aug. 1994); U.S. MARINE CORPS, *FLEET MARINE FORCE MANUAL 1-3B, SNIPING* para. 306 (28 Jan. 1981) [hereinafter *FMFM 1-3B*]; ELIZABETH ROBBINS ESHELMAN, *MARTHA DAVIS & MATTHEW MCCAY, THE RELAXATION AND STRESS REDUCTION WORKBOOK* (2d ed. 1982).

²⁵ *FMFM 1-3B*, *supra* note 24.

²⁶ GROSSMAN, *supra* note 1, at 132–37.

²⁷ *Id.* at 75, 134.

²⁸ *Id.* at 78.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 78.

³² *Id.* at 27–82, 266, 269.

³³ *Id.* at 279.

³⁴ *Id.* at 345.

³⁵ *Id.* at 10, 345, 347.

Grossman litters his book with self-serving statements about his expertise; about being sought-after by any number of organizations to lecture, particularly by prestigious institutions like the FBI Academy, West Point, University of Oxford, and Harvard University; and to references of his important contribution to the field of “killology.”³⁶ The effect diminishes the professionalism of his product and leads a reader to question the credibility of his thesis.

That aside, as an informal read, the book does provide fascinating information about the auto-responses of the body, how they relate to combat behavior, and why understanding that information is important to combat training. The anecdotal stories used to buttress the information are genuinely interesting and easily relatable for the reader. His philosophy that military and law enforcement members should be trained to anticipate the effects of

combat and accept survivor-related emotions resonates as needed steps in combat training. Grossman’s tone, while overly militarized or heavy on the “warrior” mindset, is infectious in the manner he expresses reverence for those who choose to work in the field to protect and defend.

The military lawyer whose work requires understanding the motivations and behaviors of servicemembers (such as trial counsel, staff judge advocates, counsel for military hospitals, and operational judge advocates), would likely find Grossman’s book interesting. However, judge advocates are advised to research beyond the book to corroborate any relevant information at issue and be prepared to discover that some facts are regrettably, or thankfully, inaccurate.

³⁶ See KILLOLOGY RESEARCH GROUP: A WARRIOR SCIENCE GROUP PARTNER, <http://www.killology.com> (last visited Oct. 11, 2012).

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (September 2012–September 2013) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
	61st Judge Advocate Officer Graduate Course	13 Aug 12 – 23 May 13
	62d Judge Advocate Officer Graduate Course	12 Aug 13 – 22 May 14
5-27-C20	189th JAOBC/BOLC-B (Ph 2)	1 Feb – 18 Mar 13
	190th JAOBC/BOLC-B (Ph 2)	22 Feb – May 13
	191st JAOBC/BOLC-B (Ph 2)	4 Oct – 19 Nov 13
5F-F1	224th Senior Officer Legal Orientation Course	3 – 7 Dec 12
	225th Senior Officer Legal Orientation Course	4 – 8 Feb 13
	226th Senior Officer Legal Orientation Course	18 – 22 Mar 13
	227th Senior Officer Legal Orientation Course	17 – 21 Jun 13
	227th Senior Officer Legal Orientation Course	26 – 30 Aug 13
5F-F3	19th RC General Officer Legal Orientation Course	27 May – 1 Jun 13

5F-F5	2013 Congressional Staff Legal Orientation (COLO)	21 – 22 Feb 13
5F-F52	43d Staff Judge Advocate Course	3 – 7 Jun 13
5F-F52-S	16th Team Leadership Course	3 – 7 Jun 13
5F-F55	2013 JAOAC	7 – 18 Jan 13
5F-57E	16th Paralegal Triennial Training	15 – 26 Jul 13
5F-F70	44th Methods of Instruction	27 May – 1 Jun 13
	45th Methods of Instruction	4 – 6 Sep 13
JARC-181	JA Recruiting Course	17 – 19 Jul 13

NCO ACADEMY COURSES

512-27D30	1st Advanced Leaders Course (Ph 2)	15 Oct – 20 Nov 12
512-27D30	2d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	3d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	4th Advanced Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D30	5th Advanced Leaders Course (Ph 2)	10 – 16 Jun 13
512-27D30	6th Advanced Leaders Course (Ph 2)	12 Aug – 17 Sep 13
512-27D40	1st Senior Leaders Course (Ph 2)	15 Oct – 20 Nov 12
512-27D40	2d Senior Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D40	3d Senior Leaders Course (Ph 2)	10 – 16 Jun 13
512-27D40	4th Senior Leaders Course (Ph 2)	12 Aug – 17 Sep 13

WARRANT OFFICER COURSES

7A-270A0	20th JA Warrant Officer Basic Course	20 May – 28 Jun 13
7A-270A1	24th Legal Administrator Course	24 – 28 Jun 13
7A-270A2	14th JA Warrant Officer Advanced Course	25 – 29 Mar 13

ENLISTED COURSES

512-27D/20/30	24th Law for Paralegal NCO Course	18 – 22 May 13
512-27D/DCSP	22d Senior Paralegal Course	10 – 14 Jun 13
512-27DC5	40th Court Reporter Course	4 Feb – 22 Mar 13
	41st Court Reporter Course	29 Apr – 21 Jun 13
	42d Court Reporter Course	5 Aug – 20 Sep 13
512-27DC6	13th Senior Court Reporter Course	8 – 12 Jul 13

512-27DC7	18th Redictation Course	7 – 11 Jan 13
	19th Redictation Course	8 – 12 Apr 13

ADMINISTRATIVE AND CIVIL LAW

5F-F22	66th Law of Federal Employment Course	29 Jul – 2 Aug 13
5F-F24	37th Administrative Law for Military Installations & Operations	11 – 15 Feb 13
5F-F28	2012 Income Tax Law Course	3 – 7 Dec 12
NA	Tax Year 2012 PACOM Income Tax CLE	7 – 11 Jan 13
5F-F29	31st Federal Litigation Course	26 – 30 Aug 13
5F-F202	11th Ethics Counselors Course	8 – 12 Apr 13

CONTRACT AND FISCAL LAW

5F-F10	166th Contract Attorneys Course	15 – 26 Jul 13
5F-F11	2012 Contract & Fiscal Law Symposium	12 – 16 Nov 12
5F-F12	84th Fiscal Law Course	11 – 15 Mar 13
5F-F14	31st Comptrollers Accreditation Fiscal Law Course	18 – 22 Mar 13

CRIMINAL LAW

5F-F31	19th Military Justice Managers Course	9 – 13 Sep 12
5F-F33	56th Military Judge Course	15 Apr – 3 May 13
5F-F34	43d Intermediate Trial Advocacy Course	29 Oct – 2 Nov 12
	44th Intermediate Trial Advocacy Course	4 – 15 Feb 13
5-F-301	16th Advanced Trial Communications Course	29 – 31 May 13

INTERNATIONAL AND OPERATIONAL LAW

5F-F41	9th Intelligence Law Course	12 – 16 Aug 13
5F-F45	12th Domestic Operational Law	29 Oct – 2 Nov 12
5F-F47	59th Operational Law of Armed Conflict Course	25 Feb – 1 Mar 13
	60th Operational Law of Armed Conflict Course	29 Jul – 9 Aug 13
5F-F48	6th Rule of Law Course	8 – 12 Jul 13

3. Naval Justice School and FY 2012–2013 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
03RF	Legalman Accession Course (10) Legalman Accession Course (20)	4 Mar – 17 May 13 10 Jun – 23 Aug 13
03TP	Basic Trial Advocacy (10)	4 – 8 Feb 13
049N	Reserve Legalman Course (10) (Phase I)	Cancelled
056L	Reserve Legalman Course (10) (Phase II)	Cancelled
07HN	Legalman Paralegal Core (030) Legalman Paralegal Core (10) Legalman Paralegal Core (20) Legalman Paralegal Core (30)	31 Aug – 20 Dec 12 21 Jan – 17 May 13 20 May – 9 Aug 13 29 Aug – 18 Dec 13
08LM	Reserve Legalman Phases Combined (10)	TBD
08XO	Legal Ethics for Paralegals Course (20) Legal Ethics for Paralegals Course (30)	28 Jan – 1 Feb 13 26 – 30 Aug 13
09XU	Professional Development (10)	Cancelled
09XY	Afghanistan Pre-Deployment (10) Afghanistan Pre-Deployment (20)	TBD TBD
09XZ	Information Operations Law Training (10)	TBD
09YA	Sexual Assault Disposition Authority Class for JA-Mobile Training Teams (10)	TBD
09YB	Sexual Assault Disposition Authority Class for Convening Authorities - Mobile Training (10)	TBD
09YF	Sexual Assault Disposition Authority Class for JA-Distance Learning (10)	TBD
09YO	Litigating Complex Cases (10)	20 – 24 May 13
09Y9	Working with Experts (10)	Cancelled
10E1	Ethics for Trial and Defense (10) Ethics for Trial and Defense (20)	26 Nov 12 – 7 Dec 12 6 – 13 May 13

10E2	Post Trial Review (10) Post Trial Review (20)	22 Oct 12 – 7 Nov 12 15 – 30 Apr 13
10E3	Operational Law (10) Operational Law (20)	3 – 21 Dec 12 10 – 28 Jun 13
10E4	Law of Armed Conflict (10) Law of Armed Conflict (20)	29 Oct – 12 Nov 12 29 Apr – 13 May 13
846L	Senior Legalman Leadership Course (10)	22 – 26 Jul 13
932V	Coast Guard Legal Technician Course (10)	TBD
0257	Lawyer Course (10) Lawyer Course (20) Lawyer Course (30)	9 Oct – 14 Dec 12 22 Jan – 29 Mar 13 29 Jul – 4 Oct 13
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080) Senior Officer (090) Senior Officer (110) Senior Officer (120) Senior Officer (130) Senior Officer (140)	13 – 15 Nov 12 (Newport) 17 – 19 Dec 12 (Newport) 22 – 24 Jan 13 (Newport) 11 – 13 Feb 13 (Newport) 11 – 13 Mar 13 (Newport) 15 – 17 Apr 13 (Newport) 13 – 15 May 13 (Newport) 17 – 19 Jun 13 (Newport) 1 – 3 Jul 13 (Newport) 29 – 31 Jul 13 (Newport) 26 – 28 Aug 13 (Newport) 23 – 25 Sep 13 Newport)
627S	Senior Enlisted Leadership Course (Fleet) (30) Senior Enlisted Leadership Course (Fleet) (40) Senior Enlisted Leadership Course (Fleet) (50) Senior Enlisted Leadership Course (Fleet) (60) Senior Enlisted Leadership Course (Fleet) (70) Senior Enlisted Leadership Course (Fleet) (80) Senior Enlisted Leadership Course (Fleet) (90) Senior Enlisted Leadership Course (Fleet) (100)	14 – 16 Nov 12 (Norfolk) 9 – 11 Jan 13 (Norfolk) 20 – 22 Feb 13 ((San Diego) 25 – 27 Mar 13 (San Diego) 29 – 31 May 13 (Norfolk) 29 – 31 May 13 (San Diego) 31 Jul – 2 Aug 13 (Norfolk) 16 – 18 Sep 13 (Pendleton)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	15 – 19 Apr 13 (San Diego) 16 – 20 Sep 13 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (10)	29 Jul – 2 Aug 13
786R	Advanced SJA/Ethics (10)	22 – 26 Apr 13

846M	Reserve Legalman Course (10) (Phase III)	Cancelled
850T	Staff Judge Advocate Course (10) Staff Judge Advocate Course (20)	25 Feb – 8 Mar 13 8 – 19 Jul 13
850V	Law of Military Operations (10)	6 – 17 May 13
900B	Reserve Legal Assistance (10)	15 – 19 Apr 13
961J	Defending Sexual Assault Cases (10)	12 – 16 Aug 13
2622	Senior Officer (Fleet) (10) Senior Officer (Fleet) (20) Senior Officer (Fleet) (30) Senior Officer (Fleet) (40) Senior Officer (Fleet) (50) Senior Officer (Fleet) (60) Senior Officer (Fleet) (70) Senior Officer (Fleet) (80) Senior Officer (Fleet) (90) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120)	14 – 17 Jan 13 (Cancelled) 25 – 28 Feb 13 (Cancelled) 8 – 11 Apr 13 (Cancelled) 20 – 23 May 13 (Cancelled) 24 – 27 Jun 13 (Cancelled) 8 -12 Jul 13 (Camp Lejeune, NC) 15 – 19 Jul 13 (Quantico, VA) 22 – 26 Jul 13 (Parris Island) 19 – 22 Aug 13 (Cancelled) 9 – 13 Sep 13 (Cancelled)
4040	Paralegal Research & Writing (10) Paralegal Research & Writing (20) Paralegal Research & Writing (30)	26 Nov – 13 Dec 12 11 – 22 Feb 13 16 – 27 Sep 13
4048	Legal Assistance Course (10)	15 – 19 Apr 13
7878	Legal Assistance Paralegal Course (10)	15 – 19 Apr 13
S-5F-1217	Prosecuting Alcohol Facilitated Sexual Assaults (10)	12 – 16 Aug 13
S-5F-1218	TC/DC Orientation (10) TC/DC Orientation (20)	29 Apr – 3 May 13 9 – 13 Sep 13
NA	Leadership Training Symposium (10)	5 – 9 Nov 12 (Washington, DC)
NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020)	10 Jan – 12 Apr 13 11 Jul – 10 Oct 13
NA	Legal Services Military Justice (10)	13 – 24 May 13
NA	Legal Services Post Trial Review (10)	22 Apr – 3 May 13
NA	Legal Services Admin Law (10)	3 – 14 Jun 13

NA	Legal Services Admin Board Recorder (10)	TBD
NA	Legal Specialist Course (10) Legal Specialist Course (20) Legal Specialist Course (30)	4 Oct 12 – 18 Dec 12 10 Jan – 12 Apr 13 7 May – 18 Jul 13
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (10)	Cancelled

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (10) Legal Officer Course (20) Legal Officer Course (30) Legal Officer Course (40) Legal Officer Course (50) Legal Officer Course (60) Legal Officer Course (70) Legal Officer Course (80) Legal Officer Course (90)	15 Oct – 2 Nov 12 26 Nov – 14 Dec 12 28 Jan – 15 Feb 13 11 – 29 Mar 13 8 – 26 Apr 13 6 – 24 May 13 10 – 28 Jun 13 8 – 26 Jul 13 12 – 30 Aug 13
0379	Legal Clerk Course (20) Legal Clerk Course (30) Legal Clerk Course (40) Legal Clerk Course (50) Legal Clerk Course (60) Legal Clerk Course (70) Legal Clerk Course (80)	26 Nov – 7 Dec 12 28 Jan – 8 Feb 13 11 – 22 Mar 13 8 – 19 Apr 13 10 – 21 Jun 13 8 – 26 Jul 13 12 – 23 Aug 13
0360	Senior Officer Course (20) Senior Officer Course (30) Senior Officer Course (40) Senior Officer Course (50) Senior Officer Course (60)	5 – 7 Nov 12 14 – 16 Jan 13 29 Apr – 1 May 13 3 – 5 Jun 13 9 – 11 Sep 13

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (10) Legal Officer Course (20) Legal Officer Course (30) Legal Officer Course (40) Legal Officer Course (50) Legal Officer Course (60) Legal Officer Course (70) Legal Officer Course (80)	15 Oct – 15 Nov 12 26 Nov – 14 Dec 12 28 Jan – 15 Feb 13 25 Feb – 15 Mar 13 6 – 24 May 13 10 – 28 Jun 13 22 Jul – 9 Aug 13 19 Aug – 6 Sep 13

947J	Legal Clerk Course (10) Legal Clerk Course (20) Legal Clerk Course (30) Legal Clerk Course (40) Legal Clerk Course (50) Legal Clerk Course (60) Legal Clerk Course (70) Legal Clerk Course (80) Legal Clerk Course (90)	22 Oct – 2 Nov 12 3 – 14 Dec 12 7 Jan – 18 Jan 13 4 – 15 Feb 13 4 – 15 Mar 13 13 – 24 May 13 17 – 28 Jun 13 29 Jul – 9 Aug 13 26 Aug – 6 Sep 13
3759	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060)	13 – 15 Nov 12 (San Diego) 7 – Jan 13 (San Diego) 8 – 10 Apr 13 (San Diego) 29 Apr – 1 May 13 (San Diego) 3 – 5 Jun 13 (San Diego) 16 – 18 Sep 13 (Miramar)

4. Air Force Judge Advocate General School Fiscal Year 2013 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 13-01	2 Oct – 20 Nov 12
Paralegal Craftsman Course, Class 13-01	4 Oct – 20 Nov 12
Judge Advocate Staff Officer Course, Class 13-A	9 Oct – 13 Dec 12
Medical Law Mini Course, Class 13-A (off-site)	6 – 9 Nov 12 (Travis AFB, CA)
Article 32 Investigating Officer Course, Class 13-A	16 – 17 Nov 12
Wills Preparation for Paralegals Course, Class 13-A	3 – 5 Dec 12
Deployed Fiscal Law & Contingency Contracting Course, Class 13-A	3 – 7 Dec 12
Trial & Defense Advocacy Course, Class 13-A	7 – 18 Jan 13
Gateway, Class 13-A	7 – 18 Jan 13
Wills Preparation for Paralegals Course, Class 13-B	8 – 10 Jan 13

Paralegal Apprentice Course, Class 13-02	15 Jan – 8 Mar 13
Homeland Defense/Homeland Security Course, Class 13-A	22 – 25 Jan 13
CONUS Trial Advocacy Course, Class 13-A	28 Jan – 1 Feb 13 (Maxwell AFB, AL)
Joint Military Judge’s Annual Training, Class 13-A	39 Jan – 1 Feb 13
Legal & Administrative Investigations Course, Class 13-A	4 – 6 Feb 13
Judge Advocate Staff Officer Course, Class 13-B	11 Feb – 12 Apr 13
Paralegal Craftsman Course, Class 13-02	11 Feb – 29 Mar 13
Wills Preparation for Paralegals Course, Class 13-C	12 – 14 Mar 13
Paralegal Apprentice Course, Class 13-03	19 Mar – 8 May 13
Environmental Law Update Course-DL, Class 13-A	26 – 28 Mar 13
Defense Orientation Course, Class 13-B	1 – 5 Apr 13
Advanced Labor & Employment Law Course, Class 13-A (off-site)	2 – 4 Apr 13 (Washington, D.C.)
Air Force Reserve & Air National Guard Annual Survey of the Law, Class 13-A (off-site TBD)	12 -13 Apr 13
Military Justice Administration Course, Class 13-B	15 – 19 Apr 13
European Trial Advocacy Course, Class 13-A (off-site)	22 – 26 Apr 13 (Ramstein AB, Germany)
Cyber Law Course, Class 13-A	23 – 24 Apr 13
Negotiation & Appropriate Dispute Resolution, Class 13-a	29 Apr – 3 May 13
Advanced Trial Advocacy, Class 13-A	6 – 10 May 13
Operations Law Course, Class 13-A	6 – 17 May 13
CONUS Trial Advocacy Course, Class 13-B (off-site)	13 – 17 May 13 (Lackland AFB, TX)
Reserve Forces Paralegal Course, Class 13-A	20 – 29 May 13
Paralegal Apprentice Course, Class 13-04	20 May – 11 Jul 13
CONUS Trial Advocacy Course, Class 13-C (off-site)	3 – 7 Jun 13 (Nellis AFB, NV)
Staff Judge Advocate Course, Class 13-A	10 – 21 Jun 13
Law Office Management Course, Class 13-A	10 – 21 Jun 13
Paralegal Craftsman Course, Class 13-03	10 Jun – 26 Jul 13
Wills Preparation for Paralegals Course, Class 13-D	24 – 26 Jun 13

Judge Advocate Staff Officer Course, Class 13-C	8 Jul – 6 Sep 13
Paralegal Apprentice Course, Class 13-05	23 Jul – 12 Sep 13
Gateway, Class 13-B	29 Jul – 9 Aug 13
Environmental Law Course, Class 13-A	12 – 16 Aug 13
Paralegal Craftsman Course, Class 13-04	12 Aug – 27 Sep 13
Paralegal Contracts Law Course, Class 13-A	19 – 23 Aug 13
Accident Investigation Course, Class 13-A	27 – 30 Aug 13

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2013 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours November 2012 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil.

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site:
<http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The Judge Advocate General’s School, U.S. Army (TJAGSA), Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows Vista™ Enterprise and Microsoft Office 2007 Professional.

The faculty and staff of TJAGSA are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please

contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

3. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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U.S. Army
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