

# **SILENT PARTNER**

## **CLIENT COUNSELING**

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about legal assistance issues and procedures. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

It is essential for the legal assistance attorney (LAA) to be skilled in the art of counseling each day's clients. There is little that's written about the *process* of counseling in AR 27-3, "The Army Legal Assistance Program," or elsewhere. That is the subject of this SILENT PARTNER. The "live comments" in this SILENT PARTNER were provided by members of the Army JAG School's 45<sup>th</sup> and 46<sup>th</sup> Legal Assistance Courses in October 1999 and April 2000.

### **Right Street, Wrong Address?**

First of all, make sure the client is in the right place. Is his complaint about an improper eviction? "Great – step right in, Sergeant Jones." But what if he's here to complain about the housing referral process? Then he needs to visit the housing referral office, not the JAG office. If he has a pay problem, he'll need to visit the finance office, not legal assistance. And if the issue involves a claim against the government? Or an incident leading to criminal charges? Make sure that the client knows of the appropriate sections of the SJA office which deals with these issues.

But don't just send Sergeant Jones on his way. You can also "go the extra mile" for that client by coordinating his visit to the proper office. Here's an example given by Army Captain Ellen Jennings:

*Refer clients who have had property stolen by another soldier to the claims office immediately for an Article 139 Claim Application. At the same time, call the trial counsel for the unit that has the offender and find out the timeline for prosecution and discharge. The faster the Article 139 is processed, the more likely the client is to get paid.*

### **Turn-Around Time**

Stay current with the appointment roster. Clients need to see an attorney within several days of calling the LAO (legal assistance office). If it takes more than a week, then the chances improve that the client won't keep the appointment – and that means "No Shows." This cuts down on the efficiency of your office and will also hurt the client's case in all likelihood. When a client can't see a lawyer promptly, she may try to solve the problem herself, which might work sometimes but at other times would be disastrous. And if the client *can't* fix the problem, then perhaps what was a bad problem becomes a catastrophe.

How to deal with emergencies? When there's a real emergency, there should be a way to get in touch with a judge advocate promptly. Set up an "emergency response system" in your office. One procedure would be to have all "emergencies" (whether real or perceived) screened by the office NCO to ensure that they belong in the LAO and that they are true emergencies. Then have a "stand-by" JAG assigned each day for emergency situations; she'll usually have a

somewhat lighter schedule for that day to allow her to pick up the phone or to meet the client at the front desk to deal with the immediate difficulty.

### **Client Counseling Overview**

What are the basics of client counseling? In a nutshell, you want to give the client what information he or she needs to know in order to make an informed, intelligent decision about a course of action. Put another way, you should be giving that client what YOU yourself would like to know before expending a major amount of time, worry, money and effort into any substantial undertaking, whether it's a major car repair, surgery, having a child, etc.

Here are the basic elements and techniques for counseling a client:

- Talk about time. How long will the case take? While you cannot be exact in your guidance, you should be able to give some estimate for what length of time will be involved in resolving this dispute. What could delay the resolution? What will the opposition likely do that will resolve the problem quickly or prolong it? Your client should appreciate a realistic assessment and the factors that go into it. Few clients want to hear that something is “a piece of cake” only to discover that it’ll be a *long time* before they’ll be able to enjoy that cake!
- Consider cost. Will there be an expense? What kind of money will this resolution demand? Sometimes the answer may be \$0, as when the legal assistance attorney does the work, sends the letters or makes the phone calls. Or perhaps the cost is, at most, a couple of postage stamps when the client writes the letter, or maybe the cost of filing a suit in small claims court. But at other times the client simply has “too much case for the pocketbook,” as when a dependent spouse has a custody fight in court or an E-2 wants to take on a landlord for violation of the local health and sanitation regulations. For more on fees, costs, how lawyers charge and how to deal with the client who can’t afford the legal help he needs, see the SILENT PARTNER on “Lawyer Resources and Referral.”
- Upsides, downsides. What might the results be, including the *pro*’s as well as the *con*’s. It does no good to explain only the rosy outcomes to the client. When you explain about going to court against the landlord, for example, you need to talk about getting damages from him, or reinstatement of the lease, or other affirmative relief that might be gained. But you also need to talk about the downside (if there is one), about how the landlord could win and, quite possibly, the client could wind up paying court-awarded attorney’s fees. Honest and open disclosure is what’s at stake in this interview. Always commit at the outset to tell the client the good and bad aspects of the case, the upside and the downside regarding the problem. No client is well served when she’s told only the “good prospects” for resolution. When you talk about outcomes, mention the worst case as well as the best one. When consulting SGT Jones about her contested custody case in Cumberland County, North Carolina (near Ft. Bragg), for example, you might tell her that—
  - At best, she’ll be awarded full legal custody. This means that the children will live with her and she’ll be entitled to make major decisions for the children. She’ll probably be awarded child support consistent with the state’s child support guidelines (but that doesn’t necessarily mean that she’ll receive it regularly and on time).
  - At worst, she’ll lose custody, and she will be required to pay child support to the child’s father, and maintain medical insurance. She will also pay a portion of medical expenses and day care, and possibly pay attorney’s fees as well.
- Focus the interview. You don’t have unlimited time to meet with a client. So, at the start of the office visit, try to organize the interview process. Tell the client at the outset what

is to take place, how you want her to outline the problem for you, how you'll be happy to provide advice or get information on what can be done, and why she should jot down any questions she has while you're talking so you can answer them at the end. Should she start wandering off the subject, gently bring her back to the issue at hand.

- Be patient. A good LAA is always a good listener. Despite what was just said above, remember that there must be a fine balance between "keeping it moving" and trying to be considerate regarding the needs of the client to vent her frustrations, explain her exasperation, or "tell her story." This not only allows the relevant facts and details to come out, but it also lets clients pour out their feelings. In the words of Army Captain Terry O'Neill, "Listen to your clients. Let them vent their anger, confusion and frustration. This alone may solve 90% of their problems, and it will help you identify sub-issues or even see a larger problem that they didn't recognize." Air Force Captain Jennifer M. Bell-Towne adds, "Remember that sometimes our clients just need someone to listen to them. Then they can move ahead to solve the issues. Being a good listener means being a good judge advocate."
- Let 'em finish. Wait, wait, wait until the client has completed explaining the problem before you start giving advice. Don't jump right in and give an answer until the client has had a chance to explain everything. Perhaps she's not finished, and advice shouldn't be based on partial facts. Be sure you ask, inquire and probe until there are no more facts to come out. Wait until you think that the client has finished and then ask, "Is there more?" Then, and only then, proceed with your advice.
- Advise fully. Always listen to what the client is asking or requesting, says Patricia Laverdure, an LAA at the Coast Guard Station at Alameda, California. When your client asks, "Can I get child support?" answer the question and also address *all* the legal issues that the client needs to know regarding the subject. For example, be sure to cover medical expenses, day care costs, state guideline amount, a variance from the guidelines, service regulations, and methods of collection in the support area. When you discuss preparation of a will, discuss with your client whether she needs a power of attorney, an advance care directive (health care power of attorney) or a living will. If you're assisting a client with a divorce or an adoption, why not discuss the need for a new will? The client can then make decisions as to what is needed, what will be too difficult, time-consuming or expensive, and so on. LAA's should advise the client on all alternatives so that the client can make a guided, informed decision.
- Follow-Up Appointments. Full advice, Laverdure adds, is sometimes impossible in a short amount of time. If your office has only 15-20 minute appointments, use one or more follow-up appointments to get the details, provide full advice, ask additional questions or provide feedback on solving the problem. New judge advocates shouldn't assume that they can handle all matters in the first 20 minutes just because the appointments are set at 20-minute intervals. Civilian lawyers cannot. Most appointments for private practitioners are from half an hour to an hour. The author's initial appointments are rarely less than *two* hours. Always ask, "Am I doing justice to this case?" as you try to finish within the time limits of the initial office visit.
- Preserve the privilege. Be sure to take steps to safeguard confidentiality and avoid losing the attorney-client privilege. If a person other than your client is present while you're counseling, the privilege is lost. Now there are many reasons why there might be another person in your office other than the client. She might want to have her current husband there so he can express his viewpoint on the problem. She might want her sister there to better retain the information given by the LAA. She might want her brother there because he was a party to the transaction, but, while this might not matter in a consumer fraud case, it could be of critical concern in a matter involving a will or a

divorce. The presence of a third party in the interview may be a good idea, but it will invariably destroy the confidentiality that comes from communication between an attorney and his client. This means that *you* can be compelled to testify about what she said to you in the interview. Be sure to inform the client of the privilege and how it can be waived.

- o Retain records. Keep accurate records of what you do. That means keeping track of when the client met with you, what she said, what documents she presented, what the problem is, how you advised, what course of action was agreed upon, whom you called or wrote (or e-mailed) and, with each successive contact phone call or interview, the same or similar information. The best place to retain a record of information is in your computer at a directory called c:\docs\clients. And the best way to keep these in the computer is to use an outline, which is simple in MS Word – all you do is click on **Format**, then **Bullets and Numbering**, then **Outline Numbered** and then click on the outline style you want to use. So here's what the start of a very simplified client outline might look like, saved at c:\docs\clients\jones.m.

#### MARY JONES

- 1) 5/6/99- INITIAL OFFICE VISIT WITH CLIENT:
  - A) CL SAYS SHE HASN'T GOTTEN SUPPORT FROM H FOR 2 MONTHS
  - B) SHE IS ABOUT TO BE EVICTED FROM HER MOBILE HOME AT GREEN ACRES TRAILER PARK
  - C) H IS A CAPTAIN IN B BTRY, 3/17 FIELD ARTILLERY, FT. SWAMPY, NC
  - D) PARTIES SEPARATED MARCH 1 AFTER A FIGHT
  - E) PARTIES HAVE TWO MINOR CHILDREN, NO SEPARATION AGREEMENT
- 2) 5/7/99- WROTE LETTER TO COMMANDER OF H'S UNIT RE NONSUPPORT, FAXED SAME TO BATTALION CDR AT FT. SWAMPY, PLACED PHONE CALL TO BATTALION ADJUTANT TO ALERT HER TO SITUATION, AND MAILED COPY OF LETTER TO CL
- 3) 5/7/99- PHONED JACK GRIFFIN, LANDLORD AT GREEN ACRES, EXPLAINED CLIENT'S SITUATION, ASKED HIM FOR THREE MORE WEEKS TO COME UP WITH THE RENT IN FULL; HE SAID HE'S A RETIRED SERGEANT FIRST CLASS, HAS TO MAKE A LIVING BUT CAN UNDERSTAND HER SITUATION, WILL GIVE HER 3 WEEKS.

An expanded version of a legal assistance outline would contain information such as a section on basic facts, a list of the client's goals, a "to-do list" for follow-up actions, a *journal* that lists daily activities and work on the case, and so on. Here is an example:

#### LEGAL ASSISTANCE DIVISION

OSJA, XVIII ABN CORPS

FT. BRAGG, NC 28307

910-396-2511

#### OUTLINE: SALLY BROWN CASE

##### I. **FACTS**

- A. DATE OF MARRIAGE: 1/12/80
- B. DATE OF SEPARATION: 1/1/99
- C. CHILDREN: RALPH, 12; ELLEN, 10; SANDRA, 8; RAY, 6
- D. CLIENT - NO SUBST. WORK OUTSIDE HOME SINCE DATE OF MG.
  1. ABT 5 YRS AGO TAUGHT PRESCHOOL 2 MORNINGS/WK - \$4/HR
  2. FAST FOOD REST. AFTER THEY MARRIED, FOR 9 MO.
  3. CAN'T GET A JOB NOW
  4. WANTS TO WORK IN REAL ESTATE
- E. HUSB - COL (O-6) IN TRANSPORTATION OFC; L.E.S. SHOWS \$6,567 BASE PAY.
  1. 1997 FM 1099 INCOME SHOWS \$8,694 – INVESTMENTS?

2. WHAT ABOUT 1998?
3. \$483 IN CAR LEASE FOR HUSB
- F. CHILD SUPT...\$1292 = BASIC CH. SUPT. OBLIGATION FOR PARENTS OF 4 KIDS, EARNING \$4600/MO. ACCORDING TO STATE GUIDELINES
- G. MED INSUR THRU CHAMPUS
- H. SUPPORT ISSUES:
  1. PARTIES SEPARATED 1-1-97
  2. H WAS PAYING W \$300/MO SINCE SEPARATION
  3. AS OF MARCH 1, 1996, HE CUT BACK TO \$160 EACH MONTH
  4. NOW HE'S PAYING NOTHING; CLIENT IS BROKE
- II. **CLIENT'S OBJECTIVES**
  - A. UNEQUAL DIVISION OF PROPERTY
  - B. ENOUGH SUPPORT TO KEEP CURRENT LIFESTYLE AND TO PAY DEBTS AND EXPENSES
- III. **SETTLEMENT OPTIONS**
  - A. NONE-- OTHER SIDE WON'T TALK TO US
  - B. HUSBAND PREVIOUSLY TOLD WIFE HE'D GIVE HER AN EQUAL DIVN OF PROPERTY AND THE HOUSE ALSO IF SHE'D DROP HER ALIMONY CLAIM
- IV. **TO-DO LIST**
  - A. CALL OPPOSING COUNSEL
  - B. DRAFT SETTLEMENT PROPOSAL
  - C. RESEARCH ISSUE OF RECONCILIATION
  - D. OUR DRAFT PROPOSAL DUE IN THREE WEEKS
- V. **JOURNAL**
  - A. INITIAL OV WITH CL 2-11-99:
    1. ADVISED HER ABT GROUNDS FOR ALIMONY, PROCEDURES FOR C/S
    2. ASKED CL TO BRING IN FINANCIAL STMTS FILED OR PREPARED IN THE LAST 3 YRS
    3. TOLD CL TO COMPLETE FIN. AFFID., GAVE HER INSTRUCTION SHEET ON HOW TO DO THIS
  - B. TC WITH CL 2-12-99:
    1. NEEDED INFO ON FILLING OUT FIN.AFFID.
    2. SAID SHE'D WANTED TO PURSUE SEP AGREEMENT

Keeping an outline record of each client can be a real lifeline when it comes to the Bar grievance, the "letter to TJAG," the base commander complaint, or the malpractice claim that occasionally surfaces in the professional life of every JAG. Just as doctors take notes and retain records of treatment to prevent unfounded complaints, so should legal professionals keep a record at all times of what they say and do. This is just common sense and self-protection, as well as protection for the client.

#### **Some Additional Pointers on How to Counsel**

Records are important. Advise your clients to keep a calendar or diary of all acts, support payments made, statements from the opposing party, and significant events for possible later use if the matter doesn't settle. Be careful about the client tape-recording himself in a phone conversation – this may or may not be legal depending on your jurisdiction, how the client does it, federal or state law, and whether the telephone is a cellular one or a wire transmission phone. It is *never* legal to record someone in a wire transmission without his knowledge or consent; this is illegal wire-tapping in violation of the 1974 Omnibus Crime Control and Safe Streets Act.

Big decisions shouldn't be made on the spot. Don't allow client to make a long-range decision at that first interview, says Fort Polk legal assistance attorney Lou Sherman. Instead, have him or her think about it, talk about it, sleep on it, pray on it, and then make the decision.

### **Review of Documents**

*Always* get the papers involved in the case. Virtually all cases that end up at the LAO involve documents. It doesn't matter what the document is – divorce decree, lease, repair estimate or sales contract. Just make sure you *look at it!* In the words of Air Force Captain Michael Blackburn, "Document, document, document. Make sure you have all the relevant papers involving your client, and then keep a detailed and accurate record of what you do for him or her." Civilian attorneys *always* insist on seeing the paperwork before accepting a case or advising a client. No effective and professional judge advocate should be willing to advise about a paper she's never seen. What an opportunity to commit malpractice! How can you possibly know what to do or say when you haven't seen the document? No ethical supervisor is going to insist you meet a client and counsel on a document you have not seen.

You may have to "lean on" the client to get the document. Often he'll tell you that it's back at his quarters, or still in shipment with his hold baggage, or he lost his copy in the last flood, fire, PCS move, etc. Stand firm when confronted with this – if necessary, help the client to make arrangements to get a copy of the document from the salesman, the divorce court, the register of deeds, etc.

Often this can be handled efficiently at the front desk when the client calls to make an appointment. After writing down the nature of the problem, the client's name and her phone number, the clerical staff should ask the client if there are any documents that are involved. With this kind of monitoring by the staff and the supervision of a good NCO, the problem can be conquered most of the time.

### **Other Office Management Tips**

Some other ideas for office and time management are:

- Consider setting aside one evening each week for legal assistance hours to service those dependents who work full-time or are shift workers, as well as those active duty personnel who don't work the regular 0730-1630 shift, says Air Force Captain Jennifer Diepering. She advises that the office advertise through the base newspaper, at the community support center, in family advocacy newsletters, and other places where the message will be seen.
- Keep a box of tissues handy, advises Lieutenant Chris Kirmay, USMC. Keep some toys in the office for small children (and for yourself when nobody is looking).
- Read the screening sheets at the beginning of the day so you can pull pamphlets for the client and look up rules/law/cases in advance, suggests Navy Lieutenant Lori Ellen Goedecke.
- Be on time for appointments. Clients can be unforgiving.
- To bring home the reality of the courtroom, tell your client (especially in domestic cases that need to be settled), "These are important matters that will have long-lasting effects on you and your family. Do you want to resolve these issues with the other side, or do you want a tired, overworked and impatient judge to decide these matters that have important results for your family situation? Who is better able to make a decision in this area – you and the other party... or some judge who's never seen either of you before, who'll probably never see you again, who wouldn't remember you if she did, and who

gets paid whether she comes to the *right decision* or not in your case?”

- Utilize the strengths of your staff, says New York National Guard Lieutenant Jude Mulvey, by focusing on specialization. “In our Guard office, we have a tax attorney who handles most tax matters. I handle family, criminal and administrative law issues. We hold yearly seminars to educate other staff on our specialties. And it works great!” In other offices, there might be an attorney who focuses on family law issues, one whose responsibilities are in consumer protection and one who deals primarily with landlord-tenant and housing issues.
- Never leave your client alone in your office, says Navy Lieutenant Frank Gatto. There are often confidential matters regarding other clients that are on your desk and that should not be available to others who are not privileged to see them. This goes double for kids – do your best to keep children out of your office! They may be wonderful little persons, but they can wreck the exchange of advice and information (plus destroying the attorney-client privilege).

### **Focus on Communication**

The method of communication is sometimes as important as the message. Without exception, you should concentrate on speaking in plain English. Whether in front of a court-martial panel, an administrative board or a legal assistance client, all judge advocates labor under the burden of a legal education where we were taught how to speak, think and write like lawyers, not like ordinary people. And we have to overcome that to get our ideas across to the client. Use “car” instead of “motor vehicle,” speak of “self-help” instead of *in forma pauperis*, and talk about “agreements” instead of “stipulations.” This kind of talk will get your ideas across to your clients instead of confusing them.

The telephone is a neglected tool in some legal assistance offices. We focus so much on “leaving a paper trail” that we sometimes ignore that invention of Alexander Graham Bell that has made possible instantaneous worldwide communication at the touch of a button. Here’s what Air Force Captain Michael Askew says:

*Using the telephone to help your client sounds so simple, but I never cease to be amazed at how reluctant many judge advocates are to just pick up the phone and call the other side – a landlord, a car repairman, a creditor, or even the attorney for your client’s spouse.*

When you think about it, the phone doesn’t cost anything to use, and how can you lose by using it? It can often clarify the basis for disputes, and it can provide you with a wealth of information you may need to bargain effectively for your client or provide a recommendation to “give it up or go to court.” In the words of Air Force Captain Keisha Jones-Joseph,

*The phone is the quickest and cheapest way to help your client. Negotiations can save servicemembers time, money and stress if you advocate well on their behalf. If not, you lose nothing -- just go to Plan B.*

If used effectively, the phone can speed up the resolution process and reduce the need for follow-up letters. If documentation is still necessary, then go ahead – at least the phone conference provides a basis for the compromise or a clarification of the dispute you are handling. Using the phone is not a substitute in every case for writing a letter, but it can be an effective complement to the documentation you may need to prepare.

When a client has finished explaining the facts, ask (as gently as possible) whether there could be other facts that might help in understanding the case. Ask how the other side would describe the problem or cast about for someone to blame. Keep in mind there are usually three

versions of the truth -- your client's, the other side's and, ultimately, the judge's version. In the final analysis -- that is, when the case goes to court -- only the last of these counts. Don't rely 100% on how your client describes the problem and the facts.

Another office skill that should be practiced and perfected is how to explain the law when it contains bad news for your clients. Instead of telling them that the law doesn't support their side of the issue, why not "act it out" as if you were the lawyer in court making your arguments and then listening to the judge explaining her decision to you? In that way, it may be easier for the clients to accept if they know that you can and have made each appropriate argument to the court and what the basis is for her Honor's decision.

In addition, if the clients' position is one that has *no basis* in fact or law, then it's going to be easier to swallow when the judge chews YOU out instead of the clients in your dramatization. It might sound like this:

*I'm sorry, Captain Barker, but your defense isn't based on any rule of law we recognize. You simply cannot stop an eviction by showing that Sergeant Green didn't get paid last month. Whatever pay problems he has are due to the U.S. Government. They are not the fault of this innocent landlord. The landlord has a business to run, and he has a right to be paid for his services. Just as your client expects to be paid for his work, so does this landlord expect to be paid when he provides your client an apartment. There's no defense to an eviction based on poverty or pay problems here in New Jersey. The eviction may proceed. Your client will need to be moved out by 5 p.m. tomorrow.*

Another tip on communicating is passed on by Navy Lieutenant Jason Lien, who recommends e-mail (consistent, of course, with privacy and confidentiality concerns) for your contacts with clients. When you want to keep in touch with your clients quickly and efficiently, he advises, ask them at the initial interview for their e-mail addresses. Then you can post messages to them and give them updates on their cases. You can even attach drafts of documents or copies of letters you send. All of this without playing *phone tag* or interrupting your client at his duty station. Whenever possible, send questionnaires by e-mail in advance to your clients to save them time at the appointment.

Army Captain Jeremy Ball suggests that you can also give some extra help to your clients by giving them pen and paper for taking notes during the interview. Lawyers sometimes talk fast and it's hard to remember the advice that is given. Writing it down, says Ball, is a great help to the client in remembering those important tips and precious pearls that you mentioned during the last office visit. Or, better yet, consider typing up the outline that you've made and giving a copy to the client to summarize at the end of the interview the actions and events that are important. When your clients must take some action or return with more information, ask them to "back brief" you before they leave your office, that is, repeat to you everything that they need to do before their follow-up appointment.

### **Professionalism**

Here are some tips on professional dealings with your clients:

- Don't allow clients to sign separation agreements or wills without your involvement. Be sure that you, as the judge advocate, go over the documents line by line with your client. To be able to do this, ensure that your clerks get you the rough draft no later than 24 hours before the client comes in. If you don't give yourself this leeway, you are bordering on malpractice and may miss critical omissions or mistakes.
- Treat all your clients as if they were the TJAG. Go the extra mile for them -- write that letter, make the phone call, and do the necessary research, advises Air Force Captain

Nathan

Kearns.

- When you or a subordinate LAA becomes frustrated over dealing with a client's problems, says Navy LCDR Anthony Mazzeo, remind yourself that this issue is one of the most important in your client's life. He or she has likely attempted to resolve this difficulty by consulting family, friends and others. And this is without success, so the client has come to you. Do your best to fulfill his or her expectations.
- Don't promise, suggest or imply that you can do more for the client than you're capable of doing. Unmet expectations and unfulfilled promises are some of the primary causes of grievances and malpractice complaints. Know your limitations!
- Keep in mind that the spouse in a domestic matter may be visiting counsel at a nearby base or LAO. Be sure to provide the full measure of help and support, lest you be on the receiving end of a TJAG complaint that starts out, "My wife got far better help from her legal assistance attorney than I did..."
- When first arriving at a new LAO, says Navy Lieutenant Derek Hampton, make a trip to local courthouse. Speak with the clerks of the various divisions or courts, such as probate, divorce and small claims. Find out what "ticks them off" about the JAG office and *how to make them happy*. This is the goal, after all, of each client or potential client of yours, so why not make sure it happens?

#### **Handouts Help**

Keep in mind the importance of client information letters, office brochures and handouts.<sup>1</sup> Most LAA's recognize that an ounce of legal prevention is worth far more than a pound of cure. The avoidance of legal problems through education and publicity can go a long way toward reducing the time and expense of such problems for the client and prevent worrying about a car repossession, a credit problem, or a custody dispute. If a problem can be avoided or detected early, the time spent will be far less than if it is brought to the lawyer when it is really too late -- the car has been towed away by the finance company, the credit rating is shot, or the child has just been snatched.

LAA's prefer preventive law. It keeps the caseload at a manageable level and reduces the incidence of schedule-crippling emergencies. Because of the substantial savings in time, money, and anxiety, preventive law and client education are favorites with the client as well.

Legal assistance attorneys quickly learn three "facts of life" regarding clients' cases. These are common to all offices, regardless of location. First, a high percentage of the office workload is composed of a half dozen or so key subjects. The best examples are:

1. Housing and real estate (evictions, security deposits, housing codes, leases and home purchases);
2. Consumer protection (used cars and car repairs, freezer meat sales, interstate land contracts, door-to-door sales, mail-order offers, time-sharing agreements, and so-called "free gifts");
3. Criminal and traffic offenses (trespass, assault, speeding, driving while impaired, lack of proper registration or inspection); and
4. Family law (divorce, separation agreements, property division, custody and visitation, alimony, child support, adoption and paternity).

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<sup>1</sup> See Sullivan, "Preventive Law by Handout," The Army Lawyer, May 1984.

Thorough knowledge of these key problem areas will usually speed up the intake and interview processes, as well as improve the ability of the attorney to give the client meaningful and effective assistance.

Second, there are certain key questions that continue to be asked in each subject area, such as:

1. "How do I get a divorce?"
2. "What do I have to pay when selling my house?"
3. "How can I get my child support on time?"
4. "What can I do to get back my rental security deposit?"
5. "What kind of insurance points will this ticket cost me?"

Third, the creation and avoidance of legal problems often depends on factors that can be taught as basic skills, (e.g., how to read a contract, compare costs or exercise sales resistance), that can be identified and publicized in advance, and that are generic in nature, rather than specific to a certain client or location. A client who knows how to read a contract will usually avoid problems with separation agreements as well as with leases and credit applications. A client who can budget, plan ahead and avoid impulse buying will usually avoid problems with repossessions and foreclosures as well as complaints regarding child support.

### **Answering Basic Questions**

So long as certain key questions continue to be asked by our clients, it will remain the responsibility of the LAA to devise ways to answer them. This can be done in the time-honored one-by-one method: "*Gee, SGT Jones, you'll have to make an appointment to find out how you can get your car repaired/divorce finalized/security deposit back. I've got an opening two weeks from tomorrow -- is that okay?*" Or it can be handled on a broad but efficient basis with the use of client assistance fact sheets, handouts and pamphlets. These can be made available at a rack in the waiting room of the lawyer's office, or the attorney can give each new client a list of the pamphlets that area available. The author's list of family law pamphlets (about 60 of them) is too large for an office rack, so each new client is given a list entitled, "Yours for the Asking..." and is encouraged to request as many handouts as are needed.

Handouts and pamphlets can be mailed or e-mailed to potential clients who call or contact the LAO about a problem but have not yet been interviewed at the office and accepted as clients. They can be put on the office website for downloading. Even questionnaires for wills, separation agreements and powers of attorney can be e-mailed to clients in advance of their coming in for the initial appointment. And finally, in the context of client counseling, they can also be used as interview tools so that the client is "introduced" to the answers through the pamphlet before meeting with the LAA. Then the attorney can fill in the details in the client's case and prepare specific advice on the client's problem.

Handouts are superior to larger printed manuals on state law for the client because they tend to be picked up, read and used, rather than handed out, skimmed and stored for future use. In addition, they are usually cheaper to reproduce and easier to amend as the law changes. Finally, they can speed up the counseling process by providing concise and realistic answers to the most common questions in certain key legal areas.

One other tip – be sure to offer your office's handouts to *all* your clients, not just the ones that you think might need them. This will avoid the potential complaint that your office gave the client's spouse the necessary information (in a handout) but didn't give *this client* the same information. Many clients are sensitive to the concept of a "level playing field." In an effort to avoid this problem, this author's firm gives *each new client* a list of *all* of the firm's 60 information letters on family law subjects, called "Yours for the Asking..." which allows him or her to pick and

choose the ones that he or she wants to receive. These then are provided by e-mail to the client or in a “hard copy” to take home from the initial interview.

### **Other Helpful Hints**

Here are several other ideas that will help you to “be the best you can be” in delivering legal assistance:

- If your LAO doesn't have a website yet, get one -- NOW! Most SJA offices, and this includes the legal assistance section of the office, have already created one and maintain a ‘public folder’ for clients which contains all the information, phone numbers, handouts and questionnaires that they can possibly use, for their convenience.
- There's lots of help available out there. In particular, *pro se* and self-help materials are available for clients with state-specific information on more than 100 websites maintained by legal services organizations in the U.S. Go there and use them!
- Especially regarding consumer, landlord-tenant and family law problems, legal aid is an invaluable resource for help, forms and advice—legal services lawyers are often serving the same kind of clients with similar problems (and also at no charge) that you are! When you don't know what to do, call your counterpart in the legal services organization.

### **Dealing with Conflicts**

Be aware that there are many possibilities for conflicts in the LAO, especially because the military is a tight, closed community where *everyone* who has a legal problem heads over the JAG shop for answers. To keep on top of the conflict crunch, keep these ideas in mind:

- Always ask if the client's spouse has visited this LAO when counseling on domestic matters.
- ▶ When logging in clients, make sure you get the maiden name of your client's spouse so you can do a conflict check under that name.
- ▶ Make sure your office staff is thoroughly aware of the conflict problem and ways to overcome it. Consider an initial LAO briefing for all staff -- officer, enlisted and clerical – on this important issue.
- ▶ Conflicts aren't limited to wills and divorces. Conduct conflict checks when the appointment is made to find out who the other party is, even if it is a consumer law case, says Marine Captain Lawson Quinn. For example, the opposing party could be a servicemember's spouse who is operating a home day care and whom someone in the office has already seen on some other matter – or maybe YOU have seen her!
- ▶ Marine Captain M.J. Kent suggest that, when advising your client about a possible conflict or the dangers in a particular course of action, you should consider writing this up in the instrument itself so you are covered if there's a complaint, a grievance or a malpractice petition filed. When you do this, you make a record that's easier to retrieve and prove than a lost “letter to the file” or a memorandum for record that may later be misplaced or “written over” on your computer hard drive. This also avoids a possible challenge in court to the validity of a document you prepared and your client signed.
- ▶ Finally, always ask if a client is represented or seeing a lawyer at the beginning of the appointment to avoid a conflict (or a bar grievance) later on, suggests Air Force Captain Andrew LeBlanc. No one likes to be second-guessed, and attorneys are often jealous of the advice they've given, the work they've done and the relationship they have with their clients. Don't go poking your nose into this business without a clear *okay* from that

attorney or else clear information that the attorney no longer represents this client. Along these same lines, Captain Laureen Jones, USAF, counsels:

*Remember to ask clients whether they are currently represented by counsel regarding the matter in which they are consulting you. If so, don't advise them without written permission from the civilian attorney or else written acknowledgment from the client of non-representation. This is a particular problem with overseas bases and clients.*

### **Know When to Say "No"**

There are some cases you just shouldn't take.<sup>2</sup> After all, the danger of legal malpractice is not unique to the civilian practitioner. Claims against the government have been filed for alleged negligence in drafting wills, executing separation agreements and advising on tort claims against the United States. The target of the claim is usually a legal assistance attorney. The problem is, most commonly, a lawyer who is "beyond his depth"--due to lack of experience, time, research, or practical knowledge of local law.

Sometimes legal malpractice is the result of a "big-hearted" legal assistance attorney who, quite commendably, wants to "go the extra mile" for a client. In other cases, malpractice may be caused by a boss who wants to bend the rules, even at the cost of putting legal officers on the spot with nowhere to turn for support. In no case is it defensible.

Of course a lawyer in the service can always deal with the problem once it has arisen. This exacts a very high price, in worrying about one's reputation, license to practice, officer evaluation rating and (possibly) personal liability. Or he or she can stop the problem from arising. This means avoiding legal negligence in the first place. It means training to prevent legal malpractice. It means learning to say "No."

### **Causes of Claims**

Some of the malpractice worries of the civilian attorney are not shared by the lawyer in uniform. Leading problems for private lawyers include commingling of personal and trust funds, failure to file documents on time or perfect an appeal, and improper diversion of client trust accounts. Since the legal assistance attorney usually is not authorized to handle matters such as these, they are seldom seen in the military lawyer's office.

At other times, there is a ready parallel between the private bar and the ranks of legal assistance attorney in malpractice exposure. Failure to refer to a specialist or to associate competent co-counsel, failure to warn a client of the statute of limitations or other aspects of defenses and claims, and failure to refuse cases for which the attorney is not qualified are some of the leading causes of malpractice claims that are shared by service and civilian lawyers.

The problem is compounded for the military lawyer. He or she is expected to be all things to all clients. Legal assistance, with or without appointment, is usually given generously to all who meet the basic qualifications--active duty or retired, or a dependent of either one. The guidelines and regulations limiting or prohibiting delivery of legal assistance services speak generally of avoiding military justice cases, claims against the government or those involving fee-generating (i.e., personal injury) or commercial (i.e., the military landlord) work. The legal assistance attorney is not told clearly and frequently enough that he may--indeed, must--avoid and refuse legal work that he is incompetent to handle, even if the services requested fall within the permitted area of delivery. For example, helping a high-ranking officer with trusts and tax planning would probably be a gross case of legal malpractice for any attorney who was not a

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<sup>2</sup> See Sullivan, "When to Say NO", Legal Assistance Newsletter, Vol. XIX (1984) [now known as The LAMPlighter] published by the Standing Committee on Legal Assistance for Military Personnel (LAMP), American Bar Association.

specialist in taxes and estate planning. The lawyer must know of the law, the choices and their consequences to advise the client properly and avoid malpractice.

Legal malpractice is a very real issue for the military legal assistance attorney. Guidance is available for ethical issues that arise in a legal assistance office.<sup>3</sup>

Avoidance of malpractice can take many forms. The use of office checklists is an excellent way to systematize the process of uncovering needs and delivering legal assistance.<sup>4</sup> The use of a "needs assessment" as a means of evaluating legal services delivery is directly applicable to legal assistance offices of the uniformed services.<sup>5</sup>

Continuing legal education is the responsibility of every legal assistance attorney, even if the state of licensing does not require it (and most states now do so). The seminars and programs are usually available locally. The resources are there, and it is the responsibility of the legal assistance attorney to find what tools are necessary and to use them.

### **Learning When and How to Say "NO"**

This does not, however, solve the problem of legal malpractice. What should be done, for example, when a client arrives who has too much case for the knowledge and ability of the legal assistance staff on hand? The LAA faced with such a problem should apply the following analysis:

1. Is the client (and his legal problem) eligible for legal assistance? The uniformed services have guidelines that can be used to determine whether certain kinds of legal matters are properly within the scope of legal assistance delivery. Personal injury cases and commercial matters may be specifically forbidden by the appropriate service regulation. When in doubt, check the regulation!
2. Is the particular service provided at the base legal office? Even if the regulation does not specifically prohibit services in some areas, the base SJA may have developed guidelines on what matters cannot be handled by the legal assistance office due to lack of expertise or manpower constraints. It is a fairly common practice to prohibit the preparation of individual tax returns or lengthy trust agreements for these reasons.
3. Don't make waves. If the work can be done competently and without "rocking the boat," sometimes it is better to provide the services to the client, even at the risk of going outside the local or service guidelines, so long as it is done with the knowledge and consent of the SJA. The practical fact of the matter is that the SJA is directing that the work be performed and he or she will have a definite impact on the rating or evaluation of that officer at the appropriate time. This is not to say that any work required by the SJA should be done without question, without expertise or without authority. It is simply a reflection of "the facts of life" in a legal assistance office.

A common example of this situation occurs when April 15 rolls around and the base commander wants someone to prepare his income tax return. Regardless of service regulations or station guidelines, it usually falls to the chief of legal assistance to prepare the necessary forms and schedules for the general or admiral. This author knows of several cases in which this was done by a certain legal assistance chief (who shall remain nameless) at Ft. Bragg, North Carolina. One case even involved the pricing of a garden hose at the post exchange (because

<sup>3</sup> See, e.g., ABA Formal Opinion #343, issued December 23, 1977 [ABA Legal Assistance Newsletter #7 at page 7 et seq. (1977) and #11 at page 15 (1977)].

<sup>4</sup> ABA Legal Assistance Newsletter #7 at page 13 (1975).

<sup>5</sup> ABA Legal Assistance Newsletter #14 at pp. 2-10 (1981).

the general had lost his receipt) in connection with business expense deductions for rental property and the preparation of depreciation schedules on the subject property. Was this outside the guidelines? Certainly--no authority existed for the personal tax return legal services performed, other than the "suggestion" by the SJA. Should it have been done? Of course--if for no other reason than the fact that no harm was done and the competent handling of the problem had "no adverse impact" on the officer's OER.

4. Use the chain of command. But what about General Goldbucks, the local base commander who wants specialized help with his substantial estate? The preparation of Clifford and QTIP Trusts for such a client by an LAA almost invariably involves legal work far beyond his present state of expertise which would be more wisely entrusted to a legal practitioner with specialization in this area. The chain of command is the best way to resolve these problems.

A frank discussion with the deputy SJA may put the issue in perspective and bring some resolution of the problem. Make the supervisor aware of the specific nature of the legal duty and the limitations of the officer to whom it has been entrusted. In addition, provide the supervisor with a realistic proposed solution to the problem. In the case of General Goldbucks, for example, it would probably not be sufficient simply to refuse to take the case. A better solution would be to interview the General, obtain detailed information on the nature and extent of his assets as well as the primary goals of the estate plan, and review the law (both federal and state) for possible tax problems. After a discussion with the supervisor or the legal assistance chief, it may be possible to obtain the assistance of a local attorney (for referral or for association in resolving the problem). Banks frequently provide trust officers and will manuals for assistance in estate planning matters.

One or several of these proposed solutions may give the legal assistance attorney enough leeway to avoid what would almost certainly develop into a case of legal malpractice. In any event, it will help to *develop a record* in the case to show that the LAA identified a legal malpractice problem and took immediate steps to avoid it. As in all such cases, the taking and preserving of a complete set of notes and memoranda for the file will help to serve the client and protect the legal assistance attorney.

Remember that the problem of legal malpractice is not unique to civilian practitioners. Military and naval attorneys must learn to use the resources available to them to maintain and upgrade their legal expertise. When a possible problem develops, it must be identified early and confronted promptly. Knowledge of one's limitations, use of the chain of command and adherence to the Code of Professional Responsibility are the keys to preventing malpractice in the legal assistance office. The dedicated legal assistance attorney will have the integrity and the competence to know when (and how) to say "No."

### **Conclusion**

Each LAA should approach client counseling with professionalism, courtesy, efficiency and patience. Getting all the facts, reviewing the documents involved and advising about the positive and negative aspects of the problem are all essential. Properly done, this can guide clients in the right direction and resolve their cases with little or no expense for them. For more on lawyers' fees, referring clients to civilian counsel and how to deal with the client who can't afford the legal help he needs, see the SILENT PARTNER on "Lawyer Resources and Referral."

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