



DEPARTMENTS OF THE ARMY AND AIR FORCE
Illinois Army and Air National Guard
1301 North MacArthur Boulevard, Springfield, Illinois
62702-2399

July 23, 2010

Office of the Staff Judge Advocate

Honorable Ronald D. Spears
Christian County Courthouse
101 S. Main Street
Taylorville, Illinois 62568

SUBJECT: Availability of Military Personnel as Material Witnesses in Criminal Proceedings

Dear Judge Spears –

This letter is to provide information to attorneys and judges with respect to the manner by which military personnel can be made available as witnesses in criminal proceedings in Illinois. This letter will outline Department of Defense (DOD) and Department of the Army (DA) policy with respect to the production of Servicemembers in State criminal proceedings as witnesses, the process by which Servicemembers are screened for possible legal problems prior to mobilization and deployment, and how State's Attorneys can ensure that a Servicemember who is a necessary witness in a criminal trial is present in-court for testimony. This letter will not address issues under the Servicemembers' Civil Relief Act, since that statute does not apply to military personnel as witnesses in criminal proceedings.¹

As discussed below, in general Servicemembers are subject to the same legal requirements to appear in State legal proceedings as non-military personnel. Not surprisingly, the same rule applies in the case of Servicemembers who are members of the National Guard or the Reserves. Army policy acknowledges that Servicemembers can be served with process from State courts, including subpoenas, on Federally-owned installations in the United States in accordance with State law. See Army Regulation (AR) 27-40, Litigation, 19 September 1994, paragraph 2-3d; 32 CFR 516.10.²

The exact procedure for the serving party is to make contact with the Commander of the base or installation where process is to be served, who is then supposed to facilitate service, consistent with base operations, etc. The commander will contact the Servicemember to be served, and determine if he's willing to accept service of the subpoena on the installation, in which case arrangements are then made for service on-post. The rationale is to avoid any unnecessary disruption of military operations that might occur by having process servers wandering around unfamiliar military installations, which sometimes have restricted areas. If the Servicemember declines, however, "the requesting party will be allowed to serve the process per applicable state law, subject to reasonable restrictions imposed by the commander." AR 27-40,

¹ 50 USC App 511, *et seq.*

² Army Regulations are available at US Army Publishing Directorate website, <http://www.apd.army.mil>

paragraph 2-3d(2). The only exception to this general rule can occur on portions of military installations consisting of “exclusive Federal jurisdiction,” also known as “Federal enclaves.” These are areas where only Federal law applies, and in those cases if the Servicemember declines to be served with State court process, an Army attorney will inform the process server that “the nature of exclusive Federal jurisdiction precludes service by State authorities...” AR 27-40, paragraph 2-3d(1). This will rarely happen these days because most military installations in the United States no longer have areas of exclusive Federal jurisdiction and are, as a result, subject to State law like everywhere else. Of course, once the Servicemember leaves the base, he can be served just like anyone else.

The bottom line is – there are no special rules of dispensation for Servicemembers being served with a State court trial subpoena. They can be served off-post, in accordance with State law. If the State wants to serve the subpoena while the Servicemember is on duty, at a Federally-owned military installation within the United States, just contact the base commander and, with few exceptions, arrangements will be made. The same is true of service on a National Guard member on a State-owned National Guard installation, such as at an armory or a Headquarters installation such as Camp Lincoln in Springfield.

Once you’ve got the Servicemember served with a subpoena, the next question that arises is whether the Military Department will somehow impede the member from showing up and testifying. The short answer is, generally, no, particularly in cases where the Servicemember is not going to testify about any “official information” pertaining to military duties or operations.³

Department of Defense policy for production of Servicemembers as witnesses in civilian court proceedings is contained in Department of Defense Directive (DOD) 5405.2, “Release of Official Information and Testimony by DOD Personnel as Witnesses,” and generally provides that official DOD information and personnel should be made available to Federal and State courts “unless the information being sought is classified, privileged or otherwise protected from public disclosure.”⁴ See also chapter 7 of AR 27-40; 32 CFR Part 516.

Army policy defines any civilian court proceeding in which the United States Government does not have an interest as “private litigation.” See AR 27-40, Glossary, Part II⁵. This would generally include State criminal cases in which a Servicemember is a fact witness with respect to matters other than official Department of the Army (DA) information. In those cases, Army policy provides that “involvement of present or former DA personnel ... is solely a personal matter between the witness and the requesting party...” AR 27-40, paragraph 7-8a; 32 CFR 516.47. Army personnel who either receive a request for an interview or a subpoena to testify in private litigation are required to notify their servicing Staff Judge Advocate (SJA) or legal advisor, through their military supervisor. The reason for this requirement is so that the SJA can determine whether official information is sought (and prevent its improper disclosure), to determine whether the Servicemember’s absence from duty will harm mission-accomplishment (and resolve those issues, if possible), and to provide advice to the Servicemember as needed. In

³ If a litigant is seeking disclosure of “official information” in a civilian court proceeding, the Army requires the litigant to submit a written request to the Staff Judge Advocate (SJA) of the command involved, no later than 14 days prior to the desired date of disclosure, detailing the official information requested, and the relevance to the proceeding. The SJA, if necessary in consultation with the Department of the Army Litigation Division, will review the request and determine whether it can be approved. AR 27-40, paragraph 7-2; 32 CFR 516.41.

⁴ DOD Directives are available at the Department of Defense publications webpage, <http://www.defense.gov/pubs>

these cases in which official information is not sought, Army policy provides that it's up to the Servicemember to decide whether to consent to an interview and that the SJA should advise him what the legal consequences may be of refusal to consent to an interview, or to comply with a subpoena. See AR 27-40, paragraph 7-8d; 32 CFR 516.47(d).

The availability of Servicemembers as witnesses while they are on active duty outside the United States is of particular concern to State's Attorneys who may be uncertain how to get those witnesses back to Illinois to testify. The short answer is that the State's Attorney's office involved needs to make contact with the Legal Services Division for the Office of the Judge Advocate General for the Service of that member – Army, Air Force, Navy, as the case may be - to advise them that a particular Servicemember is needed to testify in a criminal matter, the extent to which their testimony is relevant and/or essential, and to ask their assistance to make this happen.

The US Army Legal Services Agency, Litigation Division is located at 901 N. Stuart Street, Suite 700, Arlington, VA, 22203, (703) 588-6412. The US Air Force Legal Services Agency, Litigation Division is located at 1501 Wilson Boulevard, 7th Floor, Rosslyn, VA 22209, (703) 696-9116. The US Navy JAG Corps' Regional Legal Service Office for the Midwest is located at 2540 Paul Jones Street, Suite 300, Building 2, Great Lakes, IL 60088, (847) 688-3805.

In the case of Army National Guard and Reserve members, before they're mobilized for service outside of Illinois, for instance, those whose active duty service may be affected by a pending legal matter are identified. This screening process is known as Soldier Readiness Processing (SRP). During an SRP, Servicemembers are screened for any problems or issues that could affect duty accomplishment, so the chain of command can determine whether or not they should be mobilized with these issues. The command involved may decide not to mobilize a specific Servicemember, or delay that mobilization, depending on the nature and severity of the issue identified and/or whether the issue can be resolved in a timely manner.

Army National Guard and Reserve Servicemembers who have pending civilian criminal charges are usually not mobilized, unless coordination is first made with the Servicing SJA and the State's Attorney's office involved. See US Department of the Army Personnel Policy Guidance for Overseas Contingency Operations (DA PPG), 1 July 2009, paragraph 2-7. To identify such Servicemembers, SRP personnel specifically ask these Servicemembers if they have any pending civilian criminal charges against them. If they disclose that information, that information is referred to an SJA who usually consults with the Servicemember to determine the nature of the pending charges. If needed, the SJA may contact the State's Attorney's office to get more information and find out if that office objects to that Servicemember being mobilized. In some cases, the criminal charges can be resolved, permitting the Servicemember to mobilize. In those cases where the State's Attorney's office advises the SJA that departure from the State is not permitted or would frustrate prosecution, the Soldier does not mobilize or deploy. As can be imagined, this is not a perfect process, since it largely depends on the Servicemember disclosing this information, and not all Servicemembers are forthcoming. There have been instances in which that information is not disclosed and it's only after mobilization that the Army learns of a Soldier's pending civilian criminal charges. In those cases, arrangements are made to release that Soldier from active duty and return him to civilian control back in the United States. AR 630-10, "Absence Without Leave, Desertion and Administration of Personnel Involved in Civilian Court Proceedings," 13 January 2006, chapter 7, provides specific procedures for accomplishing this.

DA PPG does not specifically address mobilization policy of Army Soldiers likely to be needed during the mobilization period as a witness in a State criminal case. However, SJA practice has been to attempt to identify those issues as early as possible in the mobilization/deployment process and assist prosecuting offices in resolving them. In some cases, the SJA may advise the command involved not to mobilize the Servicemember, or to delay mobilization, until after the Servicemember testifies. In other cases, the advice may be that the Servicemember can be mobilized, provided the chain of command understands that the Servicemember will likely be required to return to the United States at some point during the deployment to accomplish this. Either way, if the issue is identified in a timely manner, Army policy is to cooperate with civilian law enforcement and court officials and SJAs within the Services will assist the prosecuting office to ensure that Servicemembers who are necessary witnesses are made available to testify in State court criminal proceedings.

Army Soldiers who testify on behalf of a State may be allowed to do so without it counting against their vacation balance, known as “leave,” that they accrue while on active duty. However, the Army will not pay for the travel expenses which must be borne either by the Servicemember or the State involved. AR 27-40, paragraph 7-16; 32 CFR 516.55.

State’s Attorneys who need any assistance in resolving these issues and in contacting the Offices of the Judge Advocates General can contact me or my office and we will help them work through these issues and get them resolved. Our office phone is (217) 761-3510, and my email contact is robert.c.roth@us.army.mil .

Sincerely,

Robert C. Roth
Lieutenant Colonel, ILARNG
Staff Judge Advocate