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# **Military Legal Assistance and Estate Planning**

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UNCLASSIFIED

# Program Background

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- ❖ **Prior to 1940, there was no organized effort to provide legal aid to service members**
  - WWII outbreak sparked a need for legal services
  - ABA/state/local bar association initiatives
- ❖ **March 1943: War Dept. issued Circular No. 74**
  - Initiative between Army and ABA for assistance
  - Navy mirrored with own program
- ❖ **1946: Army Regulation 25-250 (formalized legal assistance program)**
  - Air Force established in 1950
- ❖ **10 U.S.C. § 1044 codified LA program**

# 10 U.S.C. § 1044



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- ❖ **Subject to resources, each service Secretary may provide legal assistance to certain eligible clients**
- ❖ **Discretionary?**
  - AR 27-3 (Army)
  - DAFI 51-304 (Air Force/Space Force)
  - JAGINST 5801.2B (Navy)
  - MCO 5800.16 (Marine Corps)
  - COMDTINST 5801.4F (Coast Guard)
- ❖ **Attorneys can be licensed in any jurisdiction**

# 10 U.S.C. § 1044



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## ❖ Eligible Clients:

- **Active duty service members**
  - Includes Public Health Service
- **Former members receiving retired pay**
- **Reserve/Guard on orders >30 days and coming on/off orders**
- **Dependents of active duty or retirees**
  - But each Secretary defines “dependent”
- **Surviving dependents of deceased active duty/reserve/retiree who was dependent at time of death**
  - But each Secretary shall decide limits
- **Federal civilian employees only when non-military assistance isn't available (primarily OCONUS)**
  - But each Secretary shall decide limits

# 10 U.S.C. § 1044



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## ❖ **Dependent:**

- **Includes 20/20/20 former spouse and victims of abuse**
- **Army:**
  - **Executor/PR of SM who die in military status or as result of service-connected disability BUT only about estate issues**
  - **Guardian of person eligible for legal assistance for benefit of eligible person**
  - **Fiduciaries (including those who hold POA), limited to matters required to carry out scope of duty**
- **Air Force:**
  - **Executor/PR authorized only**
  - **Others as approved**
- **Navy: “other persons authorized by JAG”**
- **Marine Corps: “other persons authorized by JAG”**

# Areas of Practice

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- ❖ **Family Law**
  - Army: can only see one spouse
  - AF: can see both spouses, wall off attorneys
- ❖ **Estate planning**
  - Army: No inter vivos trusts, basic only
  - AF: No trusts
- ❖ **Servicemembers Civil Relief Act**
- ❖ **Landlord-Tenant**
- ❖ **Real Property**
- ❖ **Torts/Small Claims/Civil Suits**
- ❖ **Economics**
- ❖ **POA/notary services**
- ❖ **Immigration/naturalization**
- ❖ **Name changes**
- ❖ **Civilian criminal matters**
  - Only Army
- ❖ **Military administrative matters**
  - Only Army
- ❖ **Taxes**
  - Some services/installations still provide a tax center
- ❖ **Special Education Law**
- ❖ **Consumer Protection**
  - Automobile Issues
  - Contracts/Scams
  - Debt Collection

# Limitations on Services



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- ❖ **Cannot provide in-court representation**
  - Unless authorized under Expanded Legal Assistance Program (ELAP); rare
- ❖ **Prohibited Practice Areas:**
  - Uniform Code of Military Justice
  - Private Business Activities
  - Standards of Conduct/Federal Ethics
  - Claims/Litigation against United States
  - Inter vivos trusts
  - Employment matters (except USERRA)

# Estate Planning Procedures

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- ❖ **Basic estate planning services**
- ❖ **Often have new attorneys (new to the Army, practice of law, or both)**
- ❖ **Fort Carson Office**
  - **One-stop appointment (consultation, drafting, review, and execution in one appointment)**
  - **Special considerations:**
    - Mobilizations/deployers
    - Elderly/disabled; English as second language
  - **High tempo: 601 wills drafted/executed in 12 months**

# Military Notary Power

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- ❖ 10 U.S. Code § 1044a
- ❖ Certain military personnel have notary power for certain eligible clients
- ❖ Have notary power:
  - Judge Advocates
  - Civilian legal assistance attorneys
  - Adjutants
  - Other members so designated (paralegals)
- ❖ Eligible clients:
  - Member of any uniformed service
  - Anyone eligible for legal assistance
- ❖ No seal/stamp is technically required

# Military Powers of Attorney

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- ❖ 10 U.S. Code § 1044b
- ❖ A military POA is any special/general POA notarized by a military notary
- ❖ Exempt from any requirement of form, substance, formality, or recording that is provided for POAs under state law and shall be given the same legal effect as if they were drafted in accordance with state law
- ❖ Must include “military preamble”:

*This is a MILITARY POWER OF ATTORNEY prepared pursuant to Title 10 United States Code, Section 1044b, and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney by the laws of a state, the District of Columbia, or a territory, commonwealth or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.*

# Military Advance Medical Directive

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- ❖ 10 U.S. Code § 1044c
- ❖ Includes living will and medical power of attorney
- ❖ Must be prepared by a military legal assistance attorney and notarized by a military notary
- ❖ Must include the military preamble
- ❖ Exempt from any requirement of form, substance, formality, or recording that is provided for medical directives under state law and shall be given the same legal effect as if they were drafted in accordance with state law
- ❖ Does not make an advance medical directive enforceable in a state that does not otherwise recognize or enforce them

# Military Testamentary Instrument

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- ❖ 10 U.S. Code § 1044d – created by the 2001 NDAA
- ❖ Last Will and Testament that is exempt from any requirements of form, formality, or recording before probate that is provided for testamentary instruments under state law and has the same legal effect as a testamentary instrument that is prepared IAW state law
- ❖ Document prepared with testamentary intent that is:
  - Executed in accordance with this statute
  - Testator is eligible for military legal assistance
  - Makes disposition of property of testator; and
  - Takes effect upon death of testator
- ❖ Valid if:
  - Executed by testator
  - Two disinterested witnesses
  - Notarized by military legal assistance attorney, other authorized military notary, or state-licensed notary supervised by military legal assistance attorney
  - Drafted in compliance with service-specific regulation

# Military Testamentary Instrument

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## ❖ Requires the “military preamble”:

- *This is a MILITARY TESTAMENTARY INSTRUMENT prepared pursuant to Title 10 United States Code, Section 1044d, and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this document from any requirement of form, formality, or recording that is prescribed for testamentary instruments under the laws of a state, the District of Columbia, or a territory, commonwealth or possession of the United States. Federal law specifies that this document shall be given the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the jurisdiction in which it is presented for probate. It shall remain valid unless and until the Testator revokes it.*

## ❖ Self-Proving Affidavit:

- **Must include 1) certificate, executed by testator, that includes acknowledgement of testamentary instrument, 2) an affidavit executed by the witnesses attesting to circumstances surrounding testator’s signature, and 3) notarization signed by notary or other official administering oath**
- **If requirements above are met, then the signature of a person on the document as the testator, an attesting witness, a notary, or the presiding attorney, together with a written representation of the person’s status as such and the person’s military grade (if any) or other title is prima facie evidence that the testator’s signature is genuine, had appropriate military status at time of execution, and all regulatory requirements were met.**

# Military Considerations

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- ❖ **SMs and their families move frequently**
  - Documents need to move with them without getting re-drafted every time they PCS
- ❖ **SMs and spouses may have ties to multiple states, difficult to determine residency**
  - Driver's license in Colorado, vehicle registered in Oklahoma, pay taxes in Florida, registered to vote in Texas
  - SCRA states that a SM does not have to change domicile for tax purposes if they move due to military orders
    - Military Spouses Residency Relief Act and the SCRA allow mil spouses to do the same
- ❖ **Multi-state probate issues due to owning several houses**
- ❖ **Military spouses from other countries**
- ❖ **Springing POAs may include POW/MIA language**



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# Questions?