



South Carolina Bar

Continuing Legal Education Division

In the Best Interest of the Child: 2023 Guardian *ad Litem* Training and Update

23-002

Friday, January 20, 2023

presented by
**The South Carolina Bar
Continuing Legal Education Division**

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SC Supreme Court Commission on CLE Course No. 231196

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In the Best Interests of the Child:
2023 Annual Guardian *ad Litem* Training and Update
Friday, January 27, 2023

Commission Course Code: # In person- 231196; Webcast- 231197ADO

This program qualifies for 6.0 MCLE; .5 LEPR credits

Program Agenda

- 8:30 a.m. Registration**
- 8:50 a.m. Welcome and Opening Remarks**
Jenny R. Stevens, Esq.
The Stevens Law Group, LLC – Spartanburg, SC
- 9:00 a.m. How Truancy, Suspensions, Expulsions, & Other School Issues Affect the Custody Case**
Heather V. Scalzo, Esq.
Offit Kurman, P.A. – Spartanburg, SC
- 9:30 a.m. Post-COVID Child Custody and Visitation Case Law Update (2020-2022)**
Gregory S. Forman, Esq.
Gregory S. Forman, PC – Charleston, SC
- 10:30 a.m. Morning Break**
- 10:45 a.m. The GAL Protects the Kids, But Who Protects the GAL?**
Almand J. Barron, Esq.
Shea & Barron – Columbia, SC
- Megan H. Dell, Esq.
Dell Family Law – Charleston, SC
- 11:15 a.m. The GAL's Guide to Advocating for LGBTQ+ Children and Teens in Family Court Cases**
Lauren M. Edwards, Esq.
Condon Family Law and Mediation – Charleston, SC
- 11:45 a.m. Ethics 101 for Your GAL Practice**
M.J. Goodwin, Esq.
Goodwin Law – Anderson, SC
- 12:15 p.m. Lunch (on your own)**

- 1:30 p.m. Military Parenting Plan Considerations for GALs**
Mary Fran Quindlen, Esq.
Quindlen Law Firm, P.A. – Beaufort, SC
- 2:15 p.m. What is Evidence in the GAL Investigation?**
Ashby L. Jones, Esq.
Kinard & Jones – Lexington, SC
- 3:00 p.m. Afternoon Break**
- 3:15 p.m. Judges Panel: “Help Us Help You Help the Children”**
The Honorable C. Vance Stricklin, Jr., *S.C. Family Court, 5th Circuit*
The Honorable Ernest J. Jarrett, *S.C. Family Court, 3rd Circuit*
- 4:00 p.m. Tying It All Together – GAL Report Writing Best Practices**
Jenny R. Stevens, Esq.
The Stevens Law Group, LLC – Spartanburg, SC
- 4:30 p.m. Final Questions & Answers Session**
Jenny R. Stevens, Esq., *Moderator*
- 4:45 p.m. Adjourn ~ Safe Travels Home!**

In the Best Interest of the Child: 2023 Annual Guardian *ad Litem* Training and Update

SPEAKER BIOGRAPHIES

(by order of presentation)

Jenny R. Stevens

The Stevens Law Group, LLC

(course planner)

Jenny is the owner of The Stevens Law Group, LLC in Spartanburg. She was born and raised in Charleston, South Carolina, and is a graduate of the College of Charleston and Charleston School of Law. Prior to moving to Spartanburg, she helped form the Charleston County Custody Fast-Track Committee, which she co-chaired. She was trained and certified as a Volunteer Guardian ad Litem during her first year of law school. Following her certification, she devoted her pro bono service work for over two years to representing many children involved in abuse and neglect cases in the Charleston County Family Court. These cases, along with her own personal experience with divorce inspired her to practice family law in a way that focuses not only on the legal aspect of domestic relations, but also on the impact these events have on the individuals involved.

Jenny is a member of the Spartanburg County Bar Association, the South Carolina Bar, the American Bar Association, and the South Carolina Women Lawyer's Association. Jenny is a frequent speaker at local, state, and regional continuing legal education seminars, and thoroughly enjoys engaging with her peers to better the practice of family law in South Carolina. She is also a certified private Guardian ad Litem and finds her work representing children in private custody litigation to be some of her most rewarding work.

When she isn't working, Jenny enjoys spending time at home with her husband, Ben (also a family law attorney), and their six children, who range in age from 12 to 25, and her granddaughter who has just started kindergarten. She and Ben enjoy traveling to attend and/or present at various family law and legal conferences, but also are learning to enjoy the quiet of their almost-empty-nest!

Heather V. Scalzo

Offit Kurman, P.A.

Heather was born and raised in Greenville, South Carolina. She received her Bachelor of Arts degree from Emory University in 1996 and her Juris Doctorate from Rutgers University, School of Law in 2002. As a third-year law student, she was involved in the Child Advocacy Clinic and upon graduation was awarded the Sera Ramcharitar Memorial Prize for her work on behalf of women, children, and families.

After law school, she worked as an attorney-advisor for the Social Security Administration's Office of Hearings and Appeals before joining the Thirteenth Circuit Public Defender Office in Greenville, S.C., where she was a contract assistant public defender representing juveniles from June 2005 until June 2018. She also served as a juvenile public defender in the Seventh Circuit Public Defender's Office in Spartanburg, S.C. She has been involved in the private practice of law since 2005, first as a solo practitioner and then, from 2015 to 2022, as a law partner with Byford & Scalzo, LLC. Heather joined Offit Kurman's Spartanburg office in June 2022 as counsel where she handles all types of cases in family court, including divorce, child custody, adoption, abuse and neglect, and juvenile delinquency as well as appeals from family court.

She is a member of the South Carolina Bar and the Greenville County Bar Association. She has served on the Family Court Subcommittee of the S.C. Supreme Court Docket Management Task Force, S.C. Children's Justice Act Task Force, and the S.C. Status Offender Task Force. She is a past member of the Southern Juvenile Defender Center Advisory Board and is a National Juvenile Defender Center (Juvenile Training Immersion Program) certified trainer. In addition to practicing law, Heather is a member of the Junior League of Greenville where she served two terms on its Board of Directors. She lives in Greenville with her husband and four children.

Gregory S. Forman

Gregory S. Forman, PC

Gregory S. Forman is a sole practitioner in Charleston, South Carolina. A 1984 graduate of Haverford College and a 1991 Cum Laude graduate of Temple Law School, Mr. Forman has been a member of the South Carolina Bar since 1992 and practicing family law since 1993. His practice's emphasis is on family law at both the trial court and the appellate level.

He has handled over 40 family court appeals, resulting in nine published victories. He is a past president of the South Carolina Bar's Trial & Appellate Advocacy Committee and has been a mentor to numerous family law attorneys. He has an AV rating from Martindale-Hubbell and is a "Super Lawyer" according to SuperLawyers.com. He was on the Board of Editors for the 4th and 5th Editions of Marital Litigation in South Carolina.

Mr. Forman lectures frequently on Family Law to judges, lawyers, law students, and the general public. He has had 40 articles published on family law in publications including South Carolina Lawyer, the South Carolina Trial Lawyers= Magazine, The Bulletin, the American Bar Association's Family Advocate, and the American Journal of Family Law. His first published legal work, "Privacy Rights In South Carolina After Singleton v. State," in the March/April, 1994 Volume of South Carolina Lawyer, successfully predicted that Article, I, Section 10 of the South Carolina Constitution might protect the right to abortion.

Almand Barron

Shea & Barron

Almand is a 1998 Graduate of the University of South Carolina School of Law and has practiced solely in the Family Courts of South Carolina since her admission to the Bar. Since 2012, she and David Shea have been partners in the Columbia law firm of Shea and Barron. Almand is a member of the South Carolina Chapter of the American Academy of Matrimonial Lawyers, Board Certified in Family Trial Advocacy by the National Board of Trial Advocacy, and a member of the LGBTQ+ Bar Family Law Institute. Almand is also a current member of the South Carolina Supreme Court's Commission on Alternative Dispute Resolution and is a current Board Member of the Harriet Hancock Center in Columbia. Almand frequently serves as a Guardian ad Litem for children in custody, visitation and adoption matters.

Megan H. Dell

Dell Family Law

Megan Hunt Dell is the sole shareholder of Dell Family Law, P.C., which serves the coastal counties of South Carolina. Megan was born and raised in Moncks Corner. She is a graduate of the College of Charleston, where she completed coursework in journalism, public relations, relationship communications and functioning, development of child welfare policy, and education.

Megan subsequently graduated from the Charleston School of Law. While in law school, Megan served as a volunteer guardian ad litem, advocating for the best interests of children in DSS abuse and neglect cases. She also clerked for the Charleston County Family Court and a local family law firm, and volunteered for the Federal Public Defender.

Between 2012 and 2016, Megan served on the Charleston School of Law Alumni Association's Board of Directors. For the South Carolina Bar Association, Megan has served in the House of Delegates, as well as on the Publications Committee, Resolution of Fee Disputes Board, and as a member of the Family Law Section.

Megan is a nerd who enjoys research and drafting complex motions, which she regularly does for other firms on a contract basis, in addition to managing her own caseload. She also handles appeals from the Family Court.

When Megan is not practicing law, she is attempting new recipes, trying to become a runner, singing loudly and offkey, and reading. Megan and her husband live in southern Charleston County with their two toddlers, who they refer to as the #ChaosMonsters.

Lauren M. Edwards

Condon Family Law and Mediation

Lauren grew up in Southern Virginia and attended the College of William and Mary in Williamsburg, Virginia. After graduating, Lauren taught multiple grade levels in both Virginia and South Carolina. After nearly fifteen years in the classroom, Lauren attended the University of South Carolina School of Law. In law school, she served as the President of C.A.L.S, Child Advocacy

Law Society, and was the managing editor of the Journal of Law & Education. She graduated in 2013 and was sworn in to the practice of law that November.

Lauren has worked with Colleen at Condon Family Law & Mediation since February 2017 and was named partner in 2021. She practices in all areas of Family Law and as a Guardian ad litem. As a member of the LGBTQIA+ community, Lauren is especially honored to be able to assist clients throughout the State with name change and gender confirmations.

She is a member of the Charleston County Bar, Berkeley County Bar, Solo and Small Firm Section, Civil Rights Section, the South Carolina Women Lawyers Association, Education Law Committee, National LGBTQ+ Bar, American Bar Association. In addition, she has been selected to be a member of both FLI (Family Law Institute) and TLI (Trans Law Institute) within the National LGBTQ+ Bar, an honor shared with only three other attorneys in South Carolina.

When not practicing law, Lauren enjoys spending time with her Wife and her three adorable dogs. She is an avid fan of the Law & Order franchise, live music, and loves a good karaoke night with friends.

M. J. Goodwin

Goodwin Law

M. J. Goodwin is a graduate of Clemson University (1987) and the University of South Carolina School of Law (1991). She has practiced law in Anderson County, South Carolina for over 31 years. Ms. Goodwin began her career as an Assistant Solicitor. She opened her own firm in 1994 and has focused her practice on Family Court and Probate Court work. Ms. Goodwin has handled in excess of 1500 Guardian ad Litem cases since opening her law firm. When not practicing law, Ms. Goodwin enjoys spending time with her husband of 30 years, Chris, and her son, Thomas, who is a law student. The Goodwin Family breeds and raises the critically endangered Carolina Marsh Tacky Horse, which is the official South Carolina State Heritage Horse. Ms. Goodwin also enjoys art, literature, crochet & knitting and all fiber arts, travel and yoga. She particularly loves her pet toy poodle, Griffin.

Mary Fran Quindlen

Quindlen Law Firm, P.A.

Mary Fran Quindlen holds two bachelor's degrees in History and English from Rutgers University. She received her law degree from the University of South Carolina in 1998, where she was a member of Women in Law and the Phi Alpha Delta Fraternity. Following her admission to the South Carolina Bar, Mary Fran practiced as a Marine Corps Judge Advocate serving as a Legal Assistance Attorney and Defense Counsel. She continued to serve in the United States Marine Corps Reserve until May of 2006 when she resigned her commission as a Major. After her release from active duty in 2002, Mary Fran became an Associate at Harvey & Battey, P.A. in Beaufort, South Carolina. She worked as their family law practitioner until 2005 when she opened her own practice in Beaufort. Mary Fran's practice is concentrated in the areas of Military and Family Law, to include custody, visitation and divorce. Mary Fran is a Fellow in the American Academy of Matrimonial Lawyers, the International Academy of Family Lawyers, is a Member of the South Carolina Family Law Council, and serves on the South Carolina Bar's Fee Dispute Resolution Board. Mary Fran has been qualified as an expert in South Carolina Family Courts regarding military matters related to divorce and she teaches military family law CLE's around the country.

Ashby Jones

Kinard & Jones

Ashby Jones is a graduate of Presbyterian College and a 1998 graduate of the University of South Carolina School of Law. She is a founding member of the firm Kinard and Jones, LLC in Lexington. Ashby's focus is domestic litigation, though she has practiced extensively in Circuit Court and is licensed to practice in the United States District Court and the United States Supreme Court. Ashby is one of few South Carolina domestic practitioners admitted as a Fellow in the American Academy of Matrimonial Lawyers, generally recognized by judges and attorneys as preeminent family law practitioners with a high level of knowledge, skill and integrity. Ashby is Board Certified in the area of Family Law by the National Board of Trial Advocates and in 2022 was inducted into the charter chapter of the South Carolina Family Law Inn of Court as a Master. She is the Family Law Section chair of the South Carolina Association for Justice. Ashby holds an AV Preeminent peer-review rating from Martindale-Hubbell. She has contributed to the SCAJ journal, *The Bulletin*, and the national magazine *Family Lawyer*. She was appointed by the Chief Justice of the South Carolina Supreme Court as a Lawyer-Neutral Member of the Commission on Alternative Dispute Resolution in 2022 and sits on the Advisory Board for the Lexington District One Center for Law and Global Policy Development. She speaks regularly at continuing legal education seminars. Ashby has been named one of the Legal Elite of the Midlands by *Columbia Business Monthly* and has been a Super Lawyers Selectee, both on numerous occasions. She has been named as one of the Best Lawyers in America on three occasions. She is a 2022 recipient of the University of South Carolina Compleat Lawyer Award, which recognizes alumni for their outstanding civic and professional accomplishments, significant contributions to the legal profession, and those who exemplify the highest standards of professional competence, ethics and integrity.

The Honorable C. Vance Stricklin, Jr.

S.C. Family Court

C. Vance Stricklin, Jr., was elected to fill the unexpired term of the Honorable Dorothy Mobley Jones in February 2020 and sworn in on March 24, 2020. He is a former partner in the Moore Taylor Law Firm, P.A. and served two years as the managing partner. His practice focused primarily on family law, including domestic litigation. Prior to private practice, he was an Assistant Public Defender, primarily representing juveniles in Family Court. He has been practicing in the Family Courts for over 25 years.

A Dreher High School graduate, Judge Stricklin graduated from Winthrop College with a double major in Political Science and Philosophy/Religion, and in 1994, graduated from the University of South Carolina School of Law.

He has served as the Past President of the Lexington County Bar, and Past Chair of the South Carolina Bar Family Law Section Counsel. He was a member of the South Carolina Bar Family Law Section Council, South Carolina Supreme Court Docket Task Force, and was the co-chair for the South Carolina Bar Family Law Section Council's Subcommittee on Alimony. Judge Stricklin also

served for several years as a member of the Lexington County Public Defender Board, and was a long-time member of the South Carolina Association of Justice.

Over the years, he was named several times as one of the Midlands Legal Elite by the Columbia Business Monthly magazine and has been selected by his peers as one of the Super Lawyers by Super Lawyer magazine for multiple years. Judge Stricklin is a frequent speaker at Continuing Legal Education seminars on the topic of family law.

The Honorable Ernest J. Jarrett

S.C. Family Court

Judge Ernest J. Jarrett was born in Kingstree, South Carolina. His parents are William “Billy” Jarrett and Mattie “Beezie” Jarrett.” He is married to Josette Jarrett and they have three children, Kyle, Katie and Winston, and one granddaughter, Evie.

Judge Jarrett graduated from Williamsburg Academy in 1985. He received his Bachelor of Arts Degree from Wofford College in 1989. He received his Juris Doctor degree from the University of South Carolina School of Law in 1992.

After graduating from law school, Judge Jarrett moved back to his hometown of Kingstree, South Carolina. He is the former managing partner of Jenkinson, Jarrett and Kellahan, P.A. He spent his 28 years practicing primarily family law. He was selected by his peers as one of the Super Lawyers by Super Lawyer magazine in 2020.

Judge Jarrett has served on the Williamsburg County Bar Association, the Georgetown County Bar Association, the South Carolina Association for Justice, the Family Law Section Council of the South Carolina Bar, the Supreme Court Commission on Docketing – Family Court Committee, the South Carolina Bench-Bar Committee, and the South Carolina Bar Resolution of Fee Disputes Board. In 2018 – 2019, Judge Jarrett was the Chairperson of the Family Law Section Council of the South Carolina Bar.

Judge Jarrett is actively involved in his community. He has been President of Kingstree Rotary, served on the Williamsburg County First Steps Board, and served on the Tri-County Regional Development Board. He is an active member of Kingstree United Methodist Church.

Judge Ernest J. Jarrett was elected to fill the term of the Honorable Gordon B. Jenkinson who retired.



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Continuing Legal Education Division

How Truancy, Suspensions, Expulsions, & Other
School Issues Affect the Custody Case

Heather Scalzo

No materials provided



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Post-COVID Child Custody and Visitation Case
Law Update

Gregory Forman

Child custody case law update since January 2020

By Gregory S. Forman

[*Alukonis v. Smith*](#), 431 S.C. 41, 846 S.E.2d 600 (Ct.App. 2020)

- Custody dispute between Maternal Grandfather (hereinafter Grandfather) and Father
- Prior to Mother's death, the child primarily lived with Mother and her family in Florida, with Mother occasionally bringing the child to South Carolina to see Father
- Mother had mental health issues that impacted her parenting ability. Her family, especially Grandfather, assumed much of the parenting responsibility
- After Mother committed suicide while in South Carolina, Father took physical possession of the child. Fearing Mother's family would remove the child to Florida, he began preventing her family from visiting the child. Eventually Grandfather filed for custody and was awarded temporary custody
- At trial, the family court found Grandfather met the criteria of De Facto Custodian but found Father was fit. It awarded Father primary physical custody and final decision-making authority. It granted Grandfather secondary custodianship and extensive visitation
- Grandfather appealed custody issue
- Court of Appeals reversed custody to Grandfather and remanded to family court to set Father's visitation schedule
 - Court of Appeals affirmed the family court's determination that Father was fit and that Grandfather had met his "clear and convincing" evidentiary burden of proving he was the child's De Facto Custodian
 - It further found that Grandfather was the child's psychological parent
 - In finding Grandfather was the child's psychological parent, it noted Grandfather undertook "the obligations of parenthood by being affirmatively involved in Child's life, assuming the day to day caretaking duties, and providing emotional support for Child on a continuing basis... Because Father abdicated his parental role for much of Child's life prior to [Mother's] death, we believe he left a void there that was gladly and graciously filled by Grandfather."
 - The Court of Appeals noted, "there exists a rebuttable presumption that the right to custody of a minor child automatically reverts to the surviving parent when the custodial parent dies."
 - It held that even when a party meets the criteria of De Facto Custodian or psychological parent, that party has a "significantly higher burden" to obtain custody from a fit parent. However it found that Grandfather met this significantly higher burden
 - The opinion has a lengthy factual recitation of why Grandfather met this burden. Basically, while Mother was alive, Father had a limited relationship with the child and a contentious relationship with Mother. Meanwhile, Grandfather was the primary caretaker during this same time period
- *Alukonis* is the first published opinion analyzing the factors in [*Moore v. Moore*](#), 300 S.C. 75, 386 S.E.2d 456 (1989), to award custody to a third-party over a fit parent

- It is the first published opinion to analyze South Carolina’s De Facto Custodian Statute, [S.C. Code § 63-15-60](#). In doing so, it establishes that such custodians have a “significantly higher burden” to obtain custody from a fit parent
- While it is the third published opinion to recognize a party as a psychological parent, it is the first published opinion to award custody to a psychological parent over parent. In doing so, it establishes that psychological parents have a “significantly higher burden” to obtain custody from a fit parent
- It is the first published opinion to find a party can be a psychological parent when that party is the same gender as the opposing party

[Turner v. Thomas](#), 431 S.C. 527, 848 S.E.2d 353 (Ct.App. 2020)

- Custody and visitation dispute between a Maternal Grandmother, a Maternal Grandfather, and a Psychological Parent with Mother deceased
- Mother had been dating Garrard when she died and child lived with Garrard for most of the first 2 ½ years of life
- At trial, the family court found Garrard was a de facto custodian and psychological parent, awarded Grandmother custody, granted Grandfather and Garrard visitation
- Grandfather appealed
- The Court of Appeals, examining the four-prong test of [Middleton v. Johnson](#), 369 S.C. 585, 594, 633 S.E.2d 162, 167 (Ct. App. 2006), affirmed the family court's finding that Garrard was a psychological parent.
 - It was undisputed that the Child and Garrard lived in the same household for 2 ½ years
 - It found Mother consented to Garrard establishing a parent-like relationship with the Child, as he lived with the Child for almost all of the Child's life, and there was no other paternal figure for the Child
 - Mother encouraged Garrard to take on a parental role
 - Garrard assumed a care-taking role for the Child and contributed to the Child's financial support: both directly and, by covering many of the household's expenses, indirectly
 - The Court of Appeals held that 2 ½ years was sufficient time to establish a bonded parental relationship with the Child
- Grandfather objected that Mother's Facebook post attesting to Garrard being "such a great father to [Child]," arguing it was inadmissible hearsay
 - The Court of Appeals held it was properly admitted, pursuant to [Rule 803\(3\), SCRE](#), as a statement of Mother's existing state of mind
- Grandfather also objected to the family court considering evidence of Garrard's relationship with the Child after this action commenced
 - The Court of Appeals found it was proper to consider this evidence in determining visitation, and that the family court had not considered this evidence in determining Garrard was a psychological parent
 - It declined to address whether the family court may properly consider evidence of the existence of a psychological parent-child relationship arising after an action is filed
- Grandfather also appealed the finding that Garrard was a de facto custodian
 - The Court of Appeals declined to address that issue because its finding that Garrard was a psychological parent was sufficient to award him visitation
- Grandfather appealed the award of custody to Mother.
 - Evidence showed that Grandmother was better able to care for the Child and was more willing to facilitate Child's relationship with others

[Whitesell v. Whitesell](#), 431 S.C. 575, 848 S.E.2d 588 (Ct.App. 2020)

- Father filed custody modification action
- Family court denied request and Father appealed
- Primary issue on custody was Father's claim that the family court failed to properly address witness credibility, specifically Mother's credibility
- Neither family court nor guardian found Mother uncredible
 - Court of Appeals affirmed this finding
- Court of Appeals affirmed finding that both parties bore responsibility for their parenting relationship deteriorating
- "Father does not show by a greater weight of the evidence that the family court erred."
- "Father argues that the family court made a variety of specific errors and that even if those alleged errors are insufficient to warrant relief when standing alone, they have combined to prejudice him and deprive him of a fair trial. As already noted, the family court's decision was driven by a view of the record with which we agree."

[Sellers v. Nicholls](#), 432 S.C. 101, 851 S.E.2d 54 (Ct. App. 2020)

- Custody modification case brought by Mother, seeking sole custody and supervised visitation for Father
- During litigation Mother was granted permission to relocate with child within the state
- During litigation Mother raised sexual abuse allegations against Father which DSS determined were unfounded
- Mother's second attorney was disqualified and she was unable to obtain a new attorney in time for trial
- Despite Mother's request, family court would not continue trial—the Court of Appeals found the family court erred in considering itself bound by prior order but held continuance should not have been granted
- Family Court granted Father primary physical custody and Mother appealed
- Court of Appeals affirmed change of custody
 - “[W]hen one parent relocates when there is joint physical and legal custody, we must first address a modification of primary physical custody.”
 - Mother “failed to show Children would see the economic benefit, which was her basis for the move”
 - “Mother was willing to violate the family court orders, failed to inform Father of Son’s medication, and failed to provide that medication when Son was in Father’s custody.”

“Mother placed her personal interests ahead of Children’s by choosing to spend time with her boyfriend during specific instances when Children needed her.”

[Daily v. Daily](#), 432 S.C. 608, 854 S.E.2d 856 (Ct.App. 2021)

- Relocation case in which Mother wanted to move from South Carolina to Florida and Father already lived in Georgia
- During pendency of action, Father moved from Georgia to Ohio without first informing Mother or the guardian
- At trial, family court allowed relocation and changed Father's visitation schedule
- Both parties appealed
- The Court of Appeals found the family court did not error in awarding Mother sole custody
 - It found the parties' respective relocations, and inability to communicate and make joint decisions necessitated Mother having sole custody
 - It discussed Father's failure to foster a positive relationship between Mother and daughters, contrasting that with Mother's continuous and appropriate efforts to encourage their relationship with Father
- Court of Appeals altered parenting plan to provide greater clarity and required Mother to provide notice of events
- Required Father to take daughters to extracurricular activities during his weekends
 - "By taking Daughters to these events, Father attends to Daughters' psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational needs."
- The Court of Appeals denied Father's request to return the children to school at the end of his weekends, finding that the daughters needed time in Mother's home to "recuperate and resume their routine prior to the start of the school week."
- Court of Appeals gave Mother an additional weekend during summer
- Court of Appeals granted Father additional time during Christmas
- *Daily* demonstrates that, under *de novo* appellate review, the Court of Appeals will examine the minutia of custody orders and alter them if it believes modifications will benefit the children
- Family courts can require a non-custodial parent to take children to extracurricular activities during that parent's time

[Singh v. Singh](#), 434 S.C. 223, 863 S.E.2d 330 (2021)

- Cannot arbitrate family court child issues
- Neither South Carolina [ADR rule 3](#) or [4](#) authorizes arbitration of children's issues, thus no subject matter jurisdiction
- The *parens patriae* doctrine, "Parents may not attempt to circumvent children's rights to the protection of the State by agreeing to binding arbitration with no right of judicial review."

[Stasi v. Sweigart](#), 434 S.C. 239, 863 S.E.2d 669 (2021)

- TPR/adoption action against Mother
- Family court granted TPR/adoption but Court of Appeals reversed
- Supreme Court granted certiorari and reversed Court of Appeals
- Found Mother's failure to visit was willful under [S.C. Code § 63-7-2570\(3\)](#)
 - In reaching this decision, the Supreme Court credited Mother with only two visits during the 33 month time frame at issue. It did not credit her with two short visits when she came to South Carolina for court, finding them incidental
 - It did not credit her with Facetime visits, finding, "Whether a parent consistently pursues—or often chooses not to pursue—FaceTime or telephone contact can be important evidence on the difficult question of whether the failure to make court-ordered visitation was understandable, or willful. However, FaceTime or telephone contact is not visitation. As the family court judge aptly stated in the November 2018 order, 'A parent cannot hug a child or dry a crying child's tears via FaceTime.'"
 - The Supreme Court noted Mother missed almost 50% of her FaceTime calls including twelve consecutive weeks that ran over a month after she was served with the TPR action
 - It found her failure to exercise this FaceTime visitation—especially during periods when she was unable to exercise physical visitation, was evidence of willfulness
 - It further found her more regular exercise of visitation beginning five months after this action was filed was "judicially motivated," and therefore not a mitigation of her prior failure to visit
 - Supreme Court noted numerous ways Mother's own bad behavior hindered her ability to visit and considered that evidence of willfulness
- Supreme Court found TPR/adoption in child's best interests
 - The child, who was six years old at the time of the 2018 trial, had lived with the adoptive parents since age two. Their home was essentially the only environment the child had ever known. The child referred to them as "mom" and "dad" and to their other children as her brothers and sisters. The expert in child development and attachment, testified the child has developed a secure-attachment relationship with them in the years the child has lived with them
 - Child had problematic relationship with Mother, whom she found untrustworthy
 - Child had not seen or spoken to Mother for three years at time of Supreme Court opinion

Swain v. Bollinger, 435 S.C. 280, 866 S.E.2d 923 (2022)

- TPR/Adoption case between Father and Maternal Grandfather (Grandfather)
- Shortly after child's birth, Grandfather obtained custody through DSS because both parents were using drugs
- Mother eventually rehabilitated but Father continued to use drugs, engage in criminal behavior, and stopped paying child support
- Grandfather filed to terminate Father's parental rights and to adopt the child.
- At trial the following year, the family court had concerns with Mother and Grandfather being listed as parents on the child's birth certificate, despite neither Mother, Grandfather, nor the guardian ad litem having an issue with it
- The family court found that Grandfather had proven grounds to terminate parental rights but failed to establish that termination would be in the child's best interests. The court based its conclusion on the fact that the birth certificate would include Child's grandfather and mother as parents and a denial of TPR and adoption would not affect Child's stability since grandparents had legal custody
- The Court of Appeals, in an unpublished opinion, affirmed. It acknowledged Father's conduct could be grounds for TPR if this were a DSS adoption, but because the grandparents already had legal custody of Child, TPR would not promote stability
- The Supreme Court granted certiorari and reversed
 - The family court granted undue weight to the birth certificate issue, especially as "neither Mother, Grandfather, nor the guardian ad litem expressed any reservations about listing Grandfather as Child's father. Further, the modern day family structure reflects itself in many forms—a historical change from the nuclear family that society traditionally viewed as the norm."
 - Supreme Court "reject[ed] the notion that because Grandfather already has custody, TPR and adoption would not promote stability for the child. Custody and adoption are clearly two distinct statuses, with the latter providing a level of permanency that a custody determination cannot. Without the adoption, Father would be free to attempt to inject himself into the child's life at any time, either by demanding visitation or by bringing an action for custody. When everyone—including Father—agrees that Child does not even know who he is, it is difficult to fathom how this could possibly be in Child's best interest."
 - The Supreme Court further noted that adoption would enable the child to qualify for Grandfather's social security benefits and that adoption would foster stability by leaving the child in the only living situation she had known
 - Finally, the Supreme Court rejected the Court of Appeals' suggestion that a different standard for TPR should apply when a child is in DSS custody
- *Swain* establishes an important point: TPR and adoption promote stability in a manner that mere custody cannot
- *Swain* also establishes that the family courts can approve a grandparent adoption without having to terminate the parental rights of that grandparent's own child

[Glinyanay v. Tobias](#), 436 S.C. 137, 871 S.E.2d 193 (Ct.App. 2022)

- Visitation modification case
- Family court awarded Mother sole custody and suspended Father's visitation rights, ordering Father to undergo a psychological evaluation and complete any recommended treatment, and ordering Father's counselor and daughters' counselor to determine when Father's visitation could resume
- Father appealed
- Court of Appeals first found it appropriate to allow children's counselor and the guardian ad litem to testify about statements the children had made to them
 - Counselors' testimony on children's hearsay was authorized by [Rule 803\(4\), SCRE](#) (statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.")
 - "Rule 803(4) is subject to overextension (almost anything a mental health patient says could be "reasonably pertinent" to the diagnosis), and the wise trial judge will, when appropriate, deploy his discretion 'to admit the statements only as proof of the patient's condition and not as proof of the occurrence of the recited events.' That is what the family court did here. We recognize the 'selfish treatment motivation' may not hold up when the patient is a malingerer or afflicted by a mental malady like Munchausen's syndrome, but that is why [Rule 803\(4\)](#) contains the 'reasonably pertinent' requirement, and [Rules 401](#) and [403](#), SCRE, may be used to exclude the irrelevant and unduly prejudicial. It is also why we have cross-examination." (citations omitted)
 - Because counselor's testimony met hearsay exception, counselor's written report was merely cumulative or met requirements of [Rule 7\(c\), SCFCR](#) (authorizing written report of physician)
 - Guardian's testimony on children's hearsay statements was "cumulative to her report," which was entered into without objection
- Father also appealed denial of his request to cross-examine older daughter
 - Family court did in chambers interview of daughter
 - [Rule 23, SCFCR](#), regarding presence or testimony of a child
 - Court of Appeals found daughter's "testimony was not essential to establish the facts."
 - "[T]he counselors explained their diagnoses did not depend on whether Father actually did or said what his daughters claimed. What mattered was the girls' perceptions of and responses to the situations and environment. The counselors acknowledged these perceptions could be flawed, unrealistic, or mistaken. Because the truth of the events was not essential to the custody and visitation issue, the family court acted within its discretion in ruling Rule 23, SCFCR, did not require J's testimony."
- Court of Appeals affirmed Father's visitation being suspended
 - Court of Appeals cited evidence that the daughters' mental health had deteriorated from their visits with their Father. It further noted Father's visitation rights were suspended "without prejudice."

- Court of Appeals reversed provision suspending Father's visitation until his and daughters' counselors "deemed it appropriate."
 - Cited numerous cases that "The family court cannot delegate its authority to determine the best interests of the children"

[Jacobs v. Zarcone](#), 436 S.C. 170, 871 S.E.2d 211 (Ct.App. 2022)

- Custody and visitation dispute involving Mother, Paternal Grandparents, and Stepmother, with Father deceased
- Family court awarded custody to Stepmother, visitation to Paternal Grandparents, and supervised visitation to Mother, who it found to be unfit
- Mother appealed
- Mother argued she cannot be unfit as DSS allowed her to regain custody of another child
 - Court of Appeals rejected that argument, noting “serious concerns about Mother’s ability to protect the children from David [Stepfather] given her repeated violations of the ‘no contact’ provision in the second DSS safety plan, her continuing refusal to believe David injured D.J., and her minimization of other incidents.”
 - Mother’s testimony indicated a clear disbelief that Stepfather had abused the children
 - Both the guardian *ad litem* and the children’s therapist noted Mother’s pattern of minimizing Stepfather’s behavior and not believing the children
- Court of Appeals found [S.C. Code § 63-3-550](#) gave Stepmother standing to seek custody of a neglected or delinquent child
 - Stepmother was most logical choice to have custody
 - Family Court and Court of Appeals still analyzed factors of [Moore v. Moore](#), 300 S.C. 75, 79–80, 386 S.E.2d 456, 458–59 (1989), and the doctrines of Psychological Parent and DeFacto Custodian
 - Court of Appeals affirmed finding that Stepmother’s was a Psychological Parent because Father had fostered Stepmother’s parent-like relationship with the children while he was alive
 - The Court of Appeals noted the amount of caregiving Father delegated to Stepmother while he worked
- The Court of Appeals vacated the portion of the family court’s order finding Stepmother to be a de facto custodian because the Children were not in Stepmother’s sole custody for one year prior to the commencement of this litigation.
 - It noted the controlling statutory language of [S.C. Code Ann. § 63-15-60\(A\)\(2\)](#)
- Court of Appeals affirmed award of grandparent visitation
 - Amount of visitation was agreed to between Grandparents and Stepmother
 - No finding that Mother’s visitation denials lasted in excess of ninety days, as required by [S.C. Code § 63-3-530\(A\)\(33\)](#)

[Rossington v. Rossington](#), Op. No. 28123 (S.C. Sup. Ct. filed November 23, 2022) (Howard Adv. Sh. No 41 at 26)

- Custody trial in which family court awarded joint custody
- Mother appealed
- In unpublished January 2022 opinion, Court of Appeals reversed and awarded Mother custody
- Father filed petition for writ of certiorari
- Supreme Court dispensed with briefing and partially granted writ
- Remanded for trial de novo
- Supreme Court found “it is more than likely the amount of time that has passed since the family court's order has resulted in a stale record incapable of reflecting facts and circumstances from which the current best interests of the child can be determined.”
- Prior week, [Supreme Court issued order requiring expediting of appeals involving child custody](#)

[SCDSS v. Frank](#), Op. No. 5957 (S.C. Ct. App. filed January 4, 2023) (Howard Adv. Sh. No. 1 at 36)

- DSS abuse and neglect case in which family court placed Father on Central registry for sexual abuse of daughter and Father appealed
- Father unsuccessfully challenged subject matter jurisdiction because alleged abuse took place in North Carolina
 - Court of Appeals held there was subject matter jurisdiction as [UCCJEA](#) applied
 - Child custody had previously been litigated in South Carolina
 - Mother and child lived in South Carolina
 - Central registry finding could impact child custody
- Father unsuccessfully challenged use of child's counselor as expert
 - Child's counselor had graduate degree in counselor education and had counseled the child
 - Therefore, she "possessed the specialized knowledge to assist the family court in determining a fact in issue."
- At pre-trial court granted DSS's request pursuant to [S.C. Code § 19-1-180](#) to present child's out-of-court statement in lieu of testimony
 - Court of Appeals reversed
 - The expert's testimony that Child would "more likely than not" experience severe emotional trauma from testifying was insufficient "to find there was a substantial likelihood that Child would suffer severe emotional trauma from testifying."
 - The Court also expressed concern "by the lack of credence given to Father's suggestion to waive Father's presence in the courtroom to allow Child to testify."
 - It noted DSS had argued Father could question the people he thought Child may have been coached by as a remedy but that the family court then limited Father's scope of cross-examination
- Father successfully challenged limitations on his cross-examinations
 - Questions of expert's knowledge of divorce proceedings was relevant as "evidence regarding Mother and Father's divorce was relevant to the trustworthiness of Child's statements."
 - Cross-examination of Mother regarding motive was improperly limited "because evidence regarding Mother's motive to coach Child was relevant to facts in issue."
- Court of Appeals remanded for new trial



South Carolina Bar

Continuing Legal Education Division

The GAL Protects the Kids, But Who Protects the
GAL?

Almand Barron

Megan Dell

**Guardians *ad Litem* Protect the Children,
But Who Protects the Guardian *ad Litem*?**

In the Best Interests of the Child: 2023 Annual Guardian *ad Litem* Training and
Update

South Carolina Bar

January 27, 2023

Megan Hunt Dell, Esquire

Almand Barron, Esquire

2016 NOV 23 AM 9:20
FILED

STATE OF SOUTH CAROLINA)
)
COUNTY OF [REDACTED])
)
[REDACTED],)
)
Plaintiff,)
)
vs.)
)
[REDACTED],)
)
Defendant.)

IN THE FAMILY COURT OF THE
[REDACTED] JUDICIAL CIRCUIT
CASE NUMBER: [REDACTED]

**AMENDED MOTION TO COMPEL
AND TO REMOVE
GUARDIAN AD LITEM**

**TO: THE HONORABLE COURT, THE [REDACTED],
[REDACTED], ESQUIRE, AND [REDACTED],
GUARDIAN AD LITEM:**

PLEASE TAKE NOTICE that at 9:30 a.m. on December 12, 2016, the [REDACTED], by and through [REDACTED] counsel of record, will move before the Presiding Judge of the [REDACTED] Family Court for the [REDACTED], [REDACTED], South Carolina for an Order as follows:

(A) Compelling [REDACTED], ESQUIRE to produce those documents commanded in the [REDACTED]'s subpoena issued on [REDACTED], and thereafter personally served upon her on [REDACTED], which have not been produced in conformity therewith as required by Rule 45 of the South Carolina Rules of Civil Procedure; specifically:

- (1) Responsive emails between [REDACTED], and [REDACTED], Esquire, from [REDACTED], through present that are relevant to this matter; and
- (2) Responsive emails between [REDACTED], Esquire, and/or [REDACTED] (from/to any address used by the [REDACTED], including [REDACTED]), and/or any other individual relevant to this matter.

(B) Requiring [REDACTED], ESQUIRE to pay compensatory damages, specifically those the attorney's fees and costs incurred by the [REDACTED] for the filing of this Motion and enforcement of any orders issued as a result thereof; and

(C) Removing [REDACTED], ESQUIRE as the court-appointed Guardian *ad Litem* in this matter based upon the following:

(1) Despite the requirements of S.C. Code Ann. § 63-3-830(A)(2), the investigation of the Guardian *ad Litem* has not been independent, balanced, and/or impartial, as indicated by:

(a) The Guardian *ad Litem*'s failure to disclose text message communication with a material witness when compelled to provide a copy of her complete file, specifically: the [REDACTED] was previously in a romantic relationship with [REDACTED], and the Guardian *ad Litem* interviewed him by telephone on [REDACTED], then detailed portions of their conversation in her Report; thereafter, the Guardian *ad Litem* sent a text message to [REDACTED] [REDACTED] on [REDACTED] (Affidavit of [REDACTED]), but did not produce a copy of said text message despite affirming that she had provided her entire file in response to [REDACTED]'s subpoena by signing a Certification (**Exhibit 1, Certification**) and thereafter when counsel inquired about why additional text messages had not been provided, the Guardian *ad Litem* responded by email that no text messages after [REDACTED] [REDACTED], exist (**Exhibit 2, Email from Guardian *ad Litem***).

(b) The Guardian *ad Litem*'s failure to provide material information to the court-appointed expert, [REDACTED], Ph.D., specifically: during her

telephone conference with [REDACTED] on [REDACTED], the Guardian *ad Litem* was informed that the [REDACTED] had previously admitted to engaging in “cutting” and/or other self-harming behavior, and the Guardian *ad Litem* not only acknowledged having heard this information, but explicitly inquired about it (**Exhibit 3, Transcript of Telephone Interview – relevant portion only**)¹; however, on [REDACTED] [REDACTED], the Guardian *ad Litem* stated to [REDACTED]’s counsel, and again later that day – during a scheduled telephone conference with [REDACTED]’s counsel, [REDACTED]’s counsel, and the court-appointed custodial evaluator – that she had not received any information about the [REDACTED] engaging in self-injurious behavior (**Affidavit of [REDACTED]’s Counsel**).

- (c) The Guardian *ad Litem*’s material misrepresentations to a third party witness, specifically: in her text message to [REDACTED] [REDACTED], the Guardian *ad Litem* stated that [REDACTED]’s counsel had informed her that [REDACTED] [REDACTED] had provided information about the [REDACTED]’s history of “cutting”; in fact, when asking the Guardian *ad Litem* about this information on [REDACTED], [REDACTED]’s counsel specifically avoided stating the source of the information, and the Guardian *ad Litem* thereafter stated twice – first during the telephone conference with Dr. [REDACTED] on [REDACTED], and then during a chambers conference on [REDACTED] – that she did not know where the allegation that [REDACTED] has a history of “cutting” behavior came from. **Affidavit of [REDACTED]’s Counsel**.

¹ Recording of interview available upon request.

- (d) The Guardian *ad Litem*'s effort to persuade a material witness to cooperate with her request by means that imply a risk if he did not cooperate, specifically: in the Guardian *ad Litem*'s [REDACTED] interview with him, [REDACTED] expressed uncertainty about disclosing the names of his children, and the Guardian *ad Litem* led him to believe that she would forego inclusion of their names in her report (despite there being no legitimate reason their names would be included in any event) (**Exhibit 4, Transcript of Telephone Interview – relevant portion only**); thereafter, in her [REDACTED] text to that witness, the Guardian *ad Litem* referenced having “honored” the witness’ request to exclude his children’s names in her report after requesting his assistance (**Affidavit of [REDACTED]**).
- (e) The Guardian *ad Litem*'s willingness to assist [REDACTED]'s counsel in circumventing the Court’s Consent Order for Psychological Evaluation and Other Relief², filed on [REDACTED], specifically: on [REDACTED], [REDACTED], counsel for the [REDACTED] contacted the Guardian *ad Litem* by email and requested that specific information be shared with the custodial evaluator, and the Guardian *ad Litem* thereafter seemingly indicated that she intended to convey the information requested. **Exhibit 5, Emails.** Text messages between [REDACTED]'s counsel and the Guardian *ad Litem* reflect the same such request, also on [REDACTED]. **Exhibit 6, Texts.** Following these emails, the [REDACTED] is informed and believes that the

² The Consent Order for Psychological Evaluation and Other Relief provides, in relevant part: “Neither party nor their attorneys shall communicate in ex parte fashion with the evaluator in this matter, except in the ordinary course of the evaluator’s assessment (i.e. individual clinical interviews). The parties agree, however, that the Guardian *ad Litem* may communicate with Dr. [REDACTED] without the necessity of informing the parties or their attorneys.” (Consent Order filed [REDACTED], page 4 ¶ 8.

Guardian *ad Litem* had a conference with the custodial evaluator on [REDACTED] 6, when the children were interviewed, and then had a telephone conference with the custodial evaluator on [REDACTED].

- (f) The Guardian *ad Litem* advising [REDACTED]'s counsel that her client should tell the truth about an allegation in this matter, and implying that if the [REDACTED] continued to misrepresent the facts, then the children's counsel would be able to determine as much:

Meant to say:

Please counsel [REDACTED] to come clean about co-sleeping etc. [REDACTED] has a sharp nose for bs, and kids tell her they co-sleep. If it's simple misunderstanding, fine. But if she's fudging, better not to.

Also, something came up w [REDACTED] about kids needing to change shoes and coats/clothes when they switch from [REDACTED] last mtg w [REDACTED]. Let's address if needed

Exhibit 6, Texts.

- (g) On [REDACTED], the Guardian *ad Litem* contacted the court-appointed custodial evaluator and seemingly encouraged her to prioritize certain collateral information – the Guardian *ad Litem*'s own reports and the transcript from the deposition of the children's therapist – over other information. **Exhibit 7, Email.**
- (h) The Guardian *ad Litem*'s attempts to sell nutritional supplements and/or other nutritional products to a material witness, specifically: between [REDACTED], and [REDACTED], the Guardian *ad Litem* exchanged text messages with [REDACTED], who is the therapist for the minor children in this matter, has provided deposition testimony, and has been named as a likely trial witness by both parties; in these messages, the

Guardian *ad Litem* indicates having provided [REDACTED] sample products and asks whether she wishes to purchase additional products. **Exhibit 8, Texts.** Amidst the references to these products, the Guardian *ad Litem* also references the parties in this action. **Exhibit 8, Texts.**

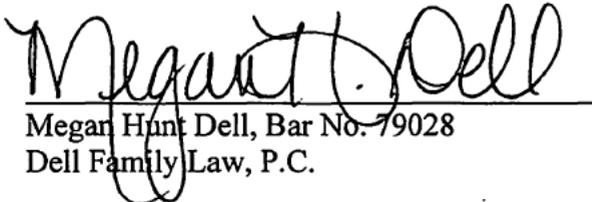
- (i) The Guardian *ad Litem*'s failure to include corroborated facts that substantiate the [REDACTED]'s claims in her report, specifically: in the documents provided by the Guardian *ad Litem* in response to [REDACTED]'s subpoena, a copy of the Amended Answer and Counterclaim with notes reflecting that specific allegations are "true" was included (**Exhibit 9, Amended Answer and Counterclaim with notations**), but the allegations noted to be true are not addressed or otherwise acknowledged in the Guardian *ad Litem*'s report.
- (j) In the Supplemental Report of the Guardian *ad Litem*, filed on [REDACTED] [REDACTED], the Guardian *ad Litem* states: "[REDACTED] was referred to Dr. [REDACTED] [REDACTED], at least in part, for a psycho-sexual evaluation based upon the concerns of [REDACTED] and myself that the children may be at risk." (Supplemental Report of the Guardian *ad Litem*, [REDACTED], pg. 4.) The [REDACTED] is informed and believes that he was not referred for a psycho-sexual evaluation at any time, and that there is no reasonable basis for the Guardian *ad Litem* to believe that such evaluation was recommended by the children's counselor.

- (2) Both the Interim³ Report of the Guardian *ad Litem*, filed on [REDACTED], and the Supplemental Report of the Guardian *ad Litem*, filed on [REDACTED], are facially non-compliant with S.C. Code § 63-3-830(A)(6) and S.C. Code Ann. § 63-3-830(B) and, likewise, the [REDACTED] Order Appointing Guardian *ad Litem*.
- (3) Over the objection of [REDACTED]'s counsel, and in contravention of S.C. Code Ann. § 63-3-830(A)(4), the Guardian *ad Litem* has attended hearings solely related to a financial matter, specifically the [REDACTED], hearing on the [REDACTED]'s Rule to Show Cause alleging that the [REDACTED] had failed to pay attorney's fees and costs.
- (D) Requiring [REDACTED] ESQUIRE to refund fees paid for her services to date; and
- (E) Providing such other and further relief as the Court may deem appropriate.

This Motion shall be based upon the previously-filed Affidavit, the attached Affidavit(s) and Exhibit(s), the record in this matter, and upon such Affidavits, supporting documents, memorandums of law and fact and/or testimony as shall be presented to the Court at the time of the hearing.

[REDACTED] are hereby noticed that all affidavits responsive to the within Motion should be served in compliance with Rule 6 of the South Carolina Rules of Civil Procedure.

Respectfully submitted,


Megan Hunt Dell, Bar No. 79028
Dell Family Law, P.C.

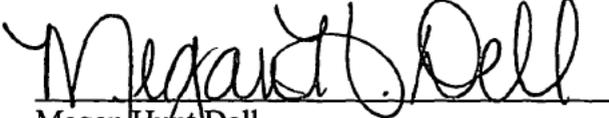
³ It is unclear to undersigned counsel why the report prepared in anticipation of trial was captioned as an "interim" report.

[REDACTED]
718A Wappoo Road
Charleston, SC 29407
Telephone: (843) 242-7477
Facsimile: (843) 408-4477
Email: megan@dellfamilylawpc.com

[REDACTED]

Rule 11, SCRCP, Certification

Pursuant to Rule 11, SCRCP, I affirm that prior to the filing of the within Motion that I have communicated orally or in writing with the opposing party and/or counsel and have attempted in good faith to resolve the matter contained in the Motion, *or* I certify that consultation would serve no useful purpose or could not be timely held, *or* I certify that Rule 11, SCRCP, is inapplicable to the within Motion.


Megan Hunt Dell

STATE OF SOUTH CAROLINA)
)
COUNTY OF [REDACTED])
)
[REDACTED])
)
Plaintiff,)
)
vs.)
)
[REDACTED],)
)
Defendant.)

IN THE FAMILY COURT OF THE
[REDACTED] JUDICIAL CIRCUIT
CASE NUMBER: [REDACTED]

**NOTICE OF MOTION AND
MOTION FOR REMOVAL AND
SUBSTITUTION OF
GUARDIAN AD LITEM**

**TO: THE HONORABLE COURT; PLAINTIFF, [REDACTED],
[REDACTED] AND [REDACTED], GUARDIAN AD LITEM:**

PLEASE TAKE NOTICE that [REDACTED] by and through [REDACTED] counsel, will move before the Presiding Judge of the [REDACTED] County Family Court for the [REDACTED] Judicial Circuit, [REDACTED] South Carolina on the _____ day of _____, 2019, at _____ A.M./P.M., for an Order removing and substituting the Guardian *ad Litem* as permitted by S.C. Code Ann. § 63-3-870, based upon the following:

LEGAL GROUNDS FOR RELIEF

1. A guardian *ad litem* is a representative of the court appointed to assist it in properly protecting the interests of an incompetent person. *Shainwald v. Shainwald*, 302 S.C. 453, 457 (Ct. App. 1990). Children are best served by the presence of a vigorous advocate free to investigate, consult with them at length, marshal evidence, and to subpoena and cross-examine witnesses. *Id.*
2. The Court has a duty to ensure that guardians *ad litem* perform their duties properly and in the best interest of their wards. *Id.* at 458.
3. A guardian *ad litem* may be relieved for failure to conduct an “independent, balanced, and impartial investigation” as required by S.C. Code Ann. § 63-3-830(2)(a) through (f).
4. A guardian *ad litem* may be relieved for failure to advocate “for the child’s best interest by making specific and clear suggestions, when necessary, for evaluation, services, and treatment for the child and the child’s family” as required by S.C.

Code Ann. § 63-3-830(3).

5. A guardian *ad litem* may be relieved for failure to maintain a complete file as required by S.C. Code Ann. § 63-3-830(5).
6. A guardian *ad litem* may be relieved for refusing to communicate freely with one party and his or her counsel as provided by *Patel v. Patel*, 347 S.C. 281 (2001).
7. A guardian *ad litem* may be relieved for failure to afford each party a balanced opportunity to interact with her as contemplated by *Patel* and *Latimer v. Farmer*, 360 S.C. 375 (2004).
8. A guardian *ad litem* may be relieved when her investigation reflects overwhelmingly favorable treatment of one party and negligible consideration of the other party's capacity to competently parent the minor child. *Pirayesh v. Pirayesh*, 359 S.C. 284 (Ct. App. 2004); *see also Patel*.
9. A guardian *ad litem* may be relieved for employing a method of investigation and evaluation that creates a high potential for bias in favor, or against, either party as contemplated by *Patel*, 347 S.C. 281, *Pirayesh*, 359 S.C. 284, and *Nasser-Moghaddassi v. Moghaddassi*, 364 S.C. 182 (2005).
10. A guardian *ad litem* may be relieved for pressuring the parties and/or counsel to settle an action in a particular way because such conduct violates S.C. Code Ann. § 63-3-840.
11. As established by *Simcox-Adams v. Adams*, 408 S.C. 252, 263 (Ct. App. 2014) and *Spreeuw v. Barker*, 385 S.C. 45, 70-71 (Ct. App. 2009), to preserve the right to challenge the sufficiency of a guardian *ad litem*'s investigation during the trial in any matter, a party must first file a motion to relieve the guardian *ad litem*.
12. A guardian *ad litem*'s action or inaction can so taint the decision of the Court that a party may be denied due process. *Patel*, 347 S.C. at 287.

FACTUAL ALLEGATIONS

13. In this action, the Guardian *ad Litem* was first appointed by the Order [REDACTED] [REDACTED] entered on [REDACTED].
14. When the parties appeared before the Court on [REDACTED], the Court did not inquire whether either party objected to continued appointment of the Guardian *ad Litem*. However, on [REDACTED], counsel for [REDACTED] notified the Court of an

objection to her continued appointment, and the Court found the objection by [REDACTED]'s counsel was non-disqualifying.

15. Pursuant to the Ex Parte Order entered on [REDACTED], and the subsequent Temporary Order entered on [REDACTED], the minor child resides with [REDACTED] in [REDACTED], and presently [REDACTED] is entitled to *only* supervised visitation [REDACTED].
16. On [REDACTED], undersigned counsel spoke with the Guardian *ad Litem* by telephone and asked whether the Guardian *ad Litem* had obtained the minor child's school records and stated that [REDACTED] has been concerned about the minor child's school performance.
 - a. The Guardian *ad Litem* expressed a belief that [REDACTED] was prohibited from contacting the school of the minor child by a provision in a court order.
 - b. The Guardian *ad Litem* stated that [REDACTED] should have been aware of how the minor child was doing in school, based upon [REDACTED] providing the child's report cards to her.
 - c. The Guardian *ad Litem* expressed concern that if [REDACTED] were aware of the name of the minor child's school, she might travel to the school unannounced.
 - d. Thereafter, by email, undersigned counsel asked that the Guardian *ad Litem* provide specific documents, including any school records for the minor child and/or the name of the school the minor child attended. **Exhibit A**.
 - e. The Guardian *ad Litem* never provided the name of the child's school to undersigned counsel.
17. Undersigned counsel requested records from [REDACTED] School on [REDACTED] [REDACTED], on [REDACTED]'s behalf.
 - a. [REDACTED] is informed and believes that a representative of the school contacted the Guardian *ad Litem*, who directed the school to provide her with a copy of the request prior to complying with the request. **Exhibit B**.
 - b. Thereafter, counsel and the Guardian *ad Litem* notified the school

representative that the records could be released to all parties simultaneously. **Exhibit C**.

18. On [REDACTED], undersigned counsel requested a copy of specific materials from the Guardian *ad Litem*. In response to that request, Exhibit **D** herein was provided, and in that letter to counsel, the Guardian *ad Litem* notes having enclosed her video recording of the [REDACTED] visit to [REDACTED]'s home.
- The enclosures to the Guardian *ad Litem*'s correspondence were not provided to undersigned counsel. [REDACTED]
 - To date, despite a separate request for those enclosures, **Exhibit E**, undersigned counsel has not received a copy of the recording from the Guardian *ad Litem*'s visit to [REDACTED]'s home on [REDACTED].
 - [REDACTED] is informed and believes that the Guardian *ad Litem* described that recording to the forensic evaluator, as the evaluator referenced its existence when interviewing [REDACTED] on [REDACTED].
19. On [REDACTED], at [REDACTED] p.m., the Guardian *ad Litem* emailed [REDACTED] to request [REDACTED] submit to drug and alcohol testing by 12:00 p.m. on [REDACTED]. This deadline provided [REDACTED] with less than fourteen (14) hours to submit to testing, with only four (4) of those – 8:00 a.m. to 12:00 p.m. – during the testing facility's hours of operation. **Exhibit F**.
- After discovering the Guardian *ad Litem*'s email requesting the testing had been sent to the incorrect email address for undersigned counsel, the Guardian *ad Litem* extended the deadline for testing to only 2:00 p.m. on [REDACTED]. **Exhibit G**.
 - During the confusion, the Guardian *ad Litem* contacted undersigned counsel several times, indicating that [REDACTED]'s excuses would likely be unacceptable to the Court. **Exhibit H**.
 - [REDACTED] successfully submitted to testing by the initial 12:00 p.m. deadline set by the Guardian *ad Litem*, despite having to seek accommodation from her employer to do so.
 - Though the Guardian *ad Litem* noted that she would inform the testing facility of the desired test(s), [REDACTED] would show that she was required

to make two trips to the testing facility because the facility did not collect a urine sample during her first visit.

- e. The Consent Order filed on [REDACTED], provides that the Guardian *ad Litem* has the right to request that either party present for additional drug or alcohol testing, and that failure to do so *within twenty-four hours* shall be deemed a positive request.
20. On [REDACTED], [REDACTED]'s counsel issued a subpoena to the Guardian *ad Litem* for "any and all documents records, photographs, and other tangible evidence provided by the [REDACTED] by the [REDACTED]'s attorney, or by any third party on behalf of the [REDACTED]." **Exhibit I**.
- a. [REDACTED] is informed and believes that the Guardian *ad Litem* and [REDACTED]'s counsel thereafter communicated about the scope of the subpoena production being narrowed to only some documents. **Exhibit J**.
 - b. [REDACTED] is informed and believes that in response to that subpoena, the Guardian *ad Litem* produced the minor child's birth certificate, [REDACTED]'s certificate of completion of an alcohol risk reduction program, [REDACTED]'s certificate of completion for a parenting class, the report from [REDACTED]'s Parental Fitness Evaluation, an Order for Destruction of Arrest Records of [REDACTED], and a letter reflecting [REDACTED]'s completion of [REDACTED] Parenting Program.
21. [REDACTED], undersigned counsel issued a subpoena to the Guardian *ad Litem* for "a comprehensive, complete, and accurate copy of the entire file maintained pursuant to S.C. Code Ann. § 63-3-830(A)(5)." **Exhibit K**.
- a. In correspondence enclosing that subpoena, counsel asked the Guardian *ad Litem* to accept service of that subpoena by [REDACTED]. **Exhibit L**.
 - b. Thereafter, counsel received a letter from the Guardian *ad Litem* on [REDACTED], which challenged the basis for issuance of the subpoena, and noted, "In the event you intend to pursue your subpoena *duces tecum*, this email will serve as notice that I intend to file a Motion to Quash to protect

me from harassment, annoyance, oppression and/or undue burden imposed by your subpoena *duces tecum*. I may also move to request that a lawyer represent me on your motion and throughout the duration of this litigation.” Exhibit M.

- c. Thereafter, counsel and the Guardian *ad Litem* had additional communications about the appropriateness of the subpoena, whether the Guardian *ad Litem* intended to accept service of it, and what materials would be produced in response to it. Exhibit N.
- d. It is unclear whether the Guardian *ad Litem* has purported to have produced all portions of her file to date.

22. [REDACTED] was ordered to undergo a forensic evaluation, and the Supplemental Consent Order for Forensic Evaluation entered on [REDACTED] detailed the expectations for that evaluation.

- a. [REDACTED] submitted to psychological testing with the evaluator on [REDACTED].
- b. [REDACTED] is informed and believes the evaluator interviewed the Guardian *ad Litem* by telephone on [REDACTED], [REDACTED], and [REDACTED].
- c. The Guardian *ad Litem* did not provide written collateral information to the evaluator until [REDACTED].
- d. When providing collateral information to the evaluator, based upon the contents of the evaluator’s report, it appears that materials responsive to the subpoena for production of the Guardian *ad Litem*’s file were provided to the evaluator without being copied to counsel.
- e. These materials provided to the evaluator *ex parte* are the same materials not been produced in response to the subpoena for the Guardian *ad Litem*’s file.

23. In multiple oral communications with undersigned counsel, the Guardian *ad Litem* has commented on the adequacy of settlement proposes made by [REDACTED], inquired whether [REDACTED] intends for this matter to be tried over the issue of custody, and stated her belief about the likely result of a trial before the Court.

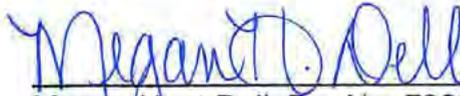
Necessity of Continued Appointment of Guardian *ad Litem*

24. [REDACTED] is informed and believes there remains a substantial dispute over custody and/or visitation and that the Court will likely not be fully informed about the facts of the case without the continued appointment of a guardian *ad litem* as provided by S.C. Code Ann. § 63-3-810(A)(1), such that it is appropriate and necessary for a substitute guardian *ad litem* to be appointed.

This Motion shall be based upon the Verification(s) attached hereto, the record in this matter, and upon any supplemental and/or reply affidavits, supporting documents, memorandums of law and fact and/or testimony as may be presented to the Court.

[REDACTED] and the Guardian *ad Litem* are hereby noticed that all affidavits responsive to the within Motion should be served in compliance with Rule 6 of the South Carolina Rules of Civil Procedure.

Respectfully submitted,



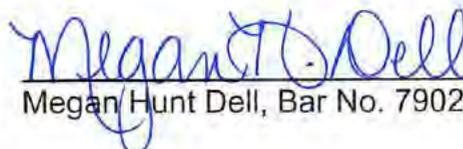
Megan Hunt Dell, Bar No. 79028
Dell Family Law, P.C.
1064 Gardner Road, Suite 201
Charleston, SC 29407
Telephone: (843) 242-7477
Facsimile: (843) 408-4477
Email: megan@dellfamilylawpc.com
ATTORNEY FOR [REDACTED]

[REDACTED]

RULE 11 CERTIFICATION

Pursuant to Rule 11, SCRCP, I affirm that prior to the filing of the within Motion that I have communicated orally or in writing with the opposing party and/or counsel and have attempted in good faith to resolve the matter contained in the Motion, or I certify that consultation would serve no useful purpose or could not be timely held, or I certify that Rule 11, SCRCP, is inapplicable to the within Motion.

[REDACTED]



Megan Hunt Dell, Bar No. 79028

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

JOHN SMITH,)
)
Plaintiff,)
)
vs.)
)
JANE SMITH,)
)
Defendant.)
_____)

IN THE FAMILY COURT
FIFTH JUDICIAL CIRCUIT
Docket No. 2022XXXXXXX

**NOTICE OF MOTION AND
MOTION FOR APPOINTMENT
OF AN ATTORNEY FOR THE
GUARDIAN *AD LITEM***

TO: PLAINTIFF AND DEFENDANT, ABOVE NAMED, AND THEIR ATTORNEYS

YOU WILL PLEASE TAKE NOTICE that the Guardian *ad Litem* will move before the Presiding Judge of the Richland County Family Court, for the Fifth Judicial Circuit, on the _____ day of _____, 2021, at _____ .M., or as soon thereafter as counsel may be heard, at the Richland County Courthouse, 1701 Main Street, Columbia, South Carolina, for an Order granting the relief requested herein.

Such Motion shall be based upon the statutory and decisional law of the State of South Carolina including, applicable rules of the South Carolina Rules of Civil Procedure and South Carolina Law, including, but not limited to, South Carolina Code § 63-3-850 and §63-3-820(e), and shall be made upon the following grounds:

1. The Guardian *ad Litem* was appointed to serve in this matter by an Order Appointing Guardian *ad Litem* of the Honorable Judge Diana Prince filed on July 30, 2022.
2. This matter is a custody and visitation action. This matter has been before the Court for a hearing on the Plaintiff’s emergency Motion, as well as a temporary hearing in June 2022.
3. The Guardian *ad Litem*’s investigation is ongoing. On December 1, 2022, she issued a Preliminary Report of the Guardian *ad Litem* as Ordered by the Family Court.

4. The Plaintiff is dissatisfied with the findings and recommendations of the Guardian *ad Litem*. In December 2022, counsel for the Plaintiff requested changes to the Preliminary Report. Counsel's changes included substantive revisions to the factual information in the report, as well as the Guardian *ad Litem*'s related recommendations.

5. Since the issuance of the Guardian *ad Litem*'s preliminary report, counsel for the Plaintiff has served three Subpoenas Duces Tecum upon the Guardian *ad Litem*. Each subpoena seeks the same information from her file, which is voluminous and contains approximately 2000 pages of materials, correspondence and other materials. The Guardian *ad Litem* is informed and believes that the three, repetitive subpoenas served upon her are excessive and unduly burdensome and may be an effort to harass and intimidate the Guardian *ad Litem*.

6. Although he has repeatedly served these materials on the Guardian *ad Litem*, counsel for the Plaintiff has not agreed to her request to increase the fee cap of the Guardian *ad Litem*. The Guardian *ad Litem*'s request for an increase in her cap is attached hereto at Exhibit A. The subpoenas served on the Guardian *ad Litem* are attached hereto at Exhibit B.

7. Contemporaneously in time with the service of these Subpoenas Duces Tecum, counsel for the Plaintiff has noticed the Guardian *ad Litem*'s deposition and the deposition of multiple others. The Guardian *ad Litem*'s deposition is currently scheduled for February 1, 2023. Trial has not been scheduled and the case is not ready for trial and discovery appears to be incomplete. Again, counsel has declined to agree to increase the Guardian *ad Litem*'s fee cap. The Notice of Deposition of the Guardian *ad Litem* is attached at Exhibit C.

8. On January 15, 2023, the undersigned wrote the attached letter to counsel asking for consent that she be appointed to serve as counsel for the Guardian *ad Litem*. The letter and proposed Consent Order is attached at Exhibit D. Counsel for the Plaintiff notified the undersigned

and the Guardian *ad Litem* she would consent. The undersigned also notified counsel she is unavailable on the date specified to attend the deposition of the Guardian *ad Litem*. Counsel for the Plaintiff also indicated that same should be continued and rescheduled. Counsel for the Defendant has declined to cooperate with this request.

9. In response to this request, counsel for the Plaintiff wrote a letter to the undersigned, the Guardian *ad Litem* and counsel for the Plaintiff, addressing matters related to the Guardian *ad Litem*'s personal and family life, disparaging the Guardian *ad Litem* and indicating that he intended to use his alleged examples of the Guardian's work and personal life in her deposition and his litigation of this case. Counsel's letter is attached at Exhibit E.

10. The Guardian *ad Litem* has also filed a Motion for a Protective Order and the apparently effort to obtain personal information about her by counsel for the Plaintiff.

11. Therefore, as a result of the circumstances, the Guardian *ad Litem* requests an Order of this Court appointing attorney Megan Hunt Dell, Esquire to serve as her attorney in this matter pursuant to §63-3-820(e).

12. The Guardian *ad Litem* would show that she is also in need of an Order establishing the parties' responsibility for the attorney's fees she has and will incur in this matter. A copy of the Order that addresses the parties' respective responsibilities for the Guardian *ad Litem*'s fees and costs is attached at Exhibit F.

This motion is based on the foregoing, the record in this case, and such further argument and evidence as may be submitted at a hearing on this Motion.

Respectfully submitted,

SHEA & BARRON

Almand J. Barron
1916 Henderson Street
Columbia, South Carolina 29201
(803) 779-3700 [Telephone]
(803) 779-3044 [Fax]
GUARDIAN AD LITEM

_____, 2022

RULE 11 AFFIRMATION

The undersigned counsel for the movant in the attached Motion hereby affirms and certifies, pursuant to Rule 11(a) of the *South Carolina Rules of Civil Procedure*, that (s)he has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the Motion or has not done so based upon the undersigned's belief that consultation would serve no useful purpose, or that the same could not be timely held.

SHEA & BARRON

Almand J. Barron
1916 Henderson Street
Columbia, South Carolina 29201
Telephone: (803) 779-3700
Facsimile: (803) 779-3044

_____, 2022

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

JOHN SMITH,)
)
Plaintiff,)
)
vs.)
)
JANE SMITH,)
)
Defendant.)
_____)

IN THE FAMILY COURT
FIFTH JUDICIAL CIRCUIT
Docket No. XXXXX

**NOTICE OF MOTION AND
MOTION FOR PROTECTIVE
ORDER FOR GUARDIAN AD
*LITEM***

TO: PLAINTIFF AND DEFENDANT, ABOVE NAMED, AND THEIR ATTORNEYS

YOU WILL PLEASE TAKE NOTICE that the Guardian *ad Litem* will move before the Presiding Judge of the Richland County Family Court, for the Fifth Judicial Circuit, on the _____ day of _____, 2021, at _____ .M., or as soon thereafter as counsel may be heard, at the Richland County Courthouse, 1701 Main Street, Columbia, South Carolina, for an Order granting the relief requested herein.

Such Motion shall be based upon the statutory and decisional law of the State of South Carolina including, applicable rules of the South Carolina Rules of Civil Procedure and South Carolina Law, including, but not limited to, South Carolina Code § 63-3-850, and shall be made upon the following grounds:

1. The Guardian *ad Litem* was appointed to serve in this matter by an Order Appointing Guardian *ad Litem* of the Honorable Diana Prince filed on July 30, 2022.
2. This matter is custody and visitation action. This matter has been before the Court for a hearings on Motions filed by each party.

3. The Guardian *ad Litem*'s investigation is ongoing. On January 17, 2022, she issued a Preliminary Report of the Guardian *ad Litem* as Ordered by the Family Court. The Plaintiff is dissatisfied with the findings and recommendations of the Guardian *ad Litem*.

4. In the six weeks preceding the filing of this Motion, counsel for the Plaintiff has served three Subpoenas Duces Tecum upon the Guardian *ad Litem*. Each subpoena seeks the same information from her file, which is voluminous and contains approximately 2500 pages at the time of the filing of this Motion.

5. The Guardian *ad Litem* is informed and believes that the three, identical and repetitive subpoenas are excessive and unduly burdensome and may be an effort to harass and intimidate the Guardian *ad Litem*.

6. Counsel for the Plaintiff has not agreed to her request to increase the fee cap of the Guardian *ad Litem*.

7. The subpoenas served on the Guardian *ad Litem* are attached hereto at Exhibit A.

8. In addition, counsel for the Plaintiff has noticed the Guardian *ad Litem*'s deposition and the deposition of multiple others. The Guardian *ad Litem*'s deposition is currently scheduled for February 15, 2023. Trial has not been scheduled and the case is not ready for trial and discovery appears to be incomplete. Again, counsel has declined to agree to increase the Guardian *ad Litem*'s fee cap. The Notice of Deposition of the Guardian *ad Litem* is attached at Exhibit B.

9. On January 7, 2023, counsel for the Plaintiff circulated to the participants in this case numerous photographs of the Guardian *ad Litem* with her face circled in red, which photographs appear to have been collected from the personal Social Media pages of multiple members of the Bar, along with a letter referencing the Guardian *ad Litem*'s family, including her children.

10. Counsel for the Plaintiff has also argued in Court that the Guardian *ad Litem*'s family members should be investigated in this matter, but has indicated a desire for the Guardian *ad Litem* to continue to serve in this case. Counsel has also filed affidavits speculating about the health of the Guardian *ad Litem* and has gathered materials on the Guardian *ad Litem*'s private life that have no bearing on the merits of this case whatsoever.

11. The Guardian *ad Litem* has offered to be relieved from service in this case, but has requested that counsel and the parties be permanently restrained and enjoined from interfering with or investigating her, members of her family or otherwise engaging in conduct that harasses or intimidates the Guardian *ad Litem*. Counsel has refused to cooperate with these requests. Counsel for the Plaintiff has not moved to have the Guardian *ad Litem* relieved or substituted with another Guardian *ad Litem*. Counsel for the Plaintiff has not consented to have the Guardian *ad Litem* substituted.

12. Therefore, as a result of the circumstances, the Guardian *ad Litem* requests an appropriate protective Order pursuant to the South Carolina Rules of Civil Procedure, including but not limited to South Carolina Rules of Civil Procedure Rule 26(c) prohibiting the Defendant or his counsel from attempting to depose the Guardian *ad Litem* without counsel and requiring that same be coordinated with the calendars of all attorneys involved, including the Guardian *ad Litem*.

13. In addition, as a result of the circumstances, the Guardian *ad Litem* requests an appropriate protective Order pursuant to the South Carolina Rules of Civil Procedure, including, but not limited to South Carolina Rules of Civil Procedure 26(c) restraining and enjoining any party or counsel in this matter from surveilling, stalking, interfering with or otherwise investigating, personally or electronically, the Guardian *ad Litem* or her family in any personal capacity whatsoever.

14. The Guardian *ad Litem* further requests a protective Order as to discovery regarding any matter in this case outside the scope of her role as Guardian *ad Litem* for the children of the parties.

15. The Guardian *ad Litem* further requests an Order requiring that counsel provide to her and to the Court the original and all copies of all materials compiled on her by Plaintiff, counsel, investigators, investigatory information, photographs, surveillance reports and similar matters and that counsel and the parties be restrained from further engaging in such conduct. The Guardian *ad Litem* also requests that the Court require counsel and the Plaintiff to provide, under oath, a detailed list of all individuals with whom they have shared any information that they have obtained in this regard.

This motion is based on the foregoing, the record in this case, and such further argument and evidence as may be submitted at a hearing on this Motion.

Respectfully submitted,

SHEA & BARRON

Almand J. Barron
1916 Henderson Street
Columbia, South Carolina 29201
(803) 779-3700 [Telephone]
(803) 779-3044 [Fax]
GUARDIAN *AD LITEM*

_____, 2022

RULE 11 AFFIRMATION

The undersigned counsel for the movant in the attached Motion hereby affirms and certifies, pursuant to Rule 11(a) of the *South Carolina Rules of Civil Procedure*, that (s)he has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the Motion or has not done so based upon the undersigned's belief that consultation would serve no useful purpose, or that the same could not be timely held.

SHEA & BARRON

Almand J. Barron
1916 Henderson Street
Columbia, South Carolina 29201
Telephone: (803) 779-3700
Facsimile: (803) 779-3044

_____, 2022

RULE 402. Admission to Practice Law

(Applicable to Applications for Admission Filed On or After August 1, 2016)

[\[1\]](#)

(a) Purpose. This rule provides for the admission of persons to practice law in South Carolina. A person admitted under this rule is eligible to be a regular member of the South Carolina Bar under Rule 410 of the South Carolina Appellate Court Rules. Other rules provide for the issuance of limited certificates of admission and pro hac vice admission in South Carolina.

(b) Definitions.

(1) ABA Approved Law School: A law school that was approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the degree was conferred. An approved law school includes a school that is provisionally approved by the Council. [\[2\]](#)

(2) Board of Law Examiners: The Board established by section (k) of this rule.

(3) Committee on Character and Fitness: The Committee established by section (l) of this rule.

(4) Existing UBE Score: A Uniform Bar Examination (UBE) score previously obtained in South Carolina or another jurisdiction.

(5) Filing: For the purposes of this rule, filing means: (i) delivering the document to the Clerk of the Supreme Court; (ii) depositing the document in the U.S. mail, properly addressed to the Clerk of the Supreme Court, with sufficient first class postage attached; or (iii) uploading the document or information on the Bar Admissions page of the South Carolina Judicial Department Website to the extent that electronic filing is provided by that website. [\[3\]](#) The date of filing shall be the date of delivery, the date of mailing, or the date of uploading.

(6) MPRE: The Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners. [\[4\]](#)

(7) Supreme Court: The Supreme Court of South Carolina.

(9) UBE: The Uniform Bar Examination prepared by the National Conference of Bar Examiners. The UBE is composed of the Multistate Performance Test (MPT), Multistate Essay Examination (MEE), and the

Multistate Bar Examination (MBE), which are prepared by, given, and graded in accordance with the standards established by the National Conference of Bar Examiners. [\[5\]](#)

(c) Qualifications for Admission. Except as provided in section (j) below, no person shall be admitted to the practice of law under this rule unless the person:

(1) is at least twenty-one (21) years of age;

(2) is of good moral character;

(3) has received a JD or LLB degree from an ABA Approved Law School. An applicant who has applied to take the UBE in South Carolina and has not provided proof of graduation by July 10th for the July UBE or February 10th for the February UBE shall not be allowed to sit for the examination. An applicant, however, who has not graduated may sit for the UBE in South Carolina if the law school certifies in writing that the applicant has completed all requirements for graduation by July 10th for the July examination or February 10th for the February examination; the applicant must provide proof of graduation by April 1st following the February examination or October 1st following the July examination;

(4) has been found qualified by a panel of the Committee on Character and Fitness;

(5) has received a score of 266 or higher on the UBE administered in South Carolina or any other jurisdiction. A UBE score that is more than three (3) years old may not be used to satisfy this requirement. For a UBE administered in February, this three (3) year period shall begin on March 1st following the examination. For a UBE administered in July, this three (3) year period shall begin on August 1st following the examination. Applications seeking admission based on an existing UBE score from another jurisdiction will not be accepted until May 1, 2017;

(6) has received a scaled score of at least seventy-seven (77) on the MPRE. This score must be from an administration of the MPRE that occurred within three (3) years of the date on which the application for admission is filed with the Clerk of the Supreme Court. While an application for admission can be filed without proof of completion of this requirement, applicants are warned that failure to timely submit proof of completion of this requirement can significantly delay admission as indicated by section (h)(2) of this rule;

(7) is not disbarred, suspended from the practice of law, or the subject of any pending disciplinary proceeding in another jurisdiction;

(8) has successfully completed a Course of Study on South Carolina Law. The content and method of delivery of this Course of Study shall be determined by the Board of Law Examiners. The Course of Study may not be taken prior to the filing of a complete application with the Clerk of the Supreme Court. Successful completion of the Course of Study may be used to satisfy the requirements of this rule for subsequent applications filed within three (3) years of the date of completion of the Course of Study. Applicants are warned that the failure to promptly complete this requirement can significantly delay admission as indicated by section (h)(2) of this rule; and

(9) has paid the fees required by this rule and taken the oath or affirmation specified by section (h)(3) of this rule.

(d) Application for Admission.

(1) Filing Application. Any person desiring to be admitted to practice law under this rule shall file an application for admission with the Clerk of the Supreme Court. The application form shall be approved by the Committee on Character and Fitness and shall be available on the Bar Admissions page of the South Carolina Judicial Department Website. An application will not be considered complete until both the fully completed application (along with any required attachments) and fee(s) are received by the Clerk of the Supreme Court. The application fees shall be paid by check or money order made payable to the Clerk of the Supreme Court.

(2) Applications for Admission Based on an Existing UBE Score. Applications based on an existing UBE Score (as defined in section (b) of this rule) will not be accepted for filing until May 1, 2017. On and after that date, these applications may be filed at any time. If based on a UBE Score from another jurisdiction, the applicant must have the score transferred to South Carolina by the National Conference of Bar Examiners. [\[6\]](#)

The non-refundable application fee shall be \$1,000. If the applicant has been admitted to practice law for more than one (1) year in another state, the District of Columbia, or another country at the time the application for admission is filed, the applicant shall pay an additional fee of \$750. If the application is withdrawn, the applicant shall not be entitled to a refund of the application fee(s) or to have the application fee(s) credited to a later application.

(3) Applications for Admission Where the Applicant Will Take the UBE in South Carolina. Applications for admission shall be accepted from December 1st to January 31st for the July UBE and from August 1st to September 30th for the February UBE for applicants who desire to take the UBE in South Carolina. The non-refundable application fee shall be:

(i) \$1,000 for applications filed from December 1st to January 10th or from August 1st to August 31st.

(ii) \$1,500 for applications filed during the remainder of the application periods.

If the applicant has been admitted to practice law for more than one (1) year in another state, the District of Columbia, or another country at the time the application is filed, the applicant shall pay an additional fee of \$750. If the application is withdrawn or the applicant fails to sit for the examination, the applicant shall not be entitled to a refund of the application fee(s) or to have the application fee(s) credited to a later application.

An applicant taking the UBE in South Carolina must sit for all portions of the examination in South Carolina, and may not use scores from a previous examination to satisfy this requirement.

(4) Applicants Who Have Failed to Receive a Qualifying Score on Three or More Bar Examinations. An applicant who has failed to receive a qualifying score on three or more bar examinations shall not be eligible to sit for the UBE in South Carolina until at least one (1) year following the administration of the last bar examination resulting in a non-qualifying score. For the purpose of this provision, an applicant shall be treated as receiving a non-qualifying score on a bar examination if: (1) the applicant failed a bar examination in South Carolina prior to February 2017; or (2) the applicant sat for the UBE in this or any other jurisdiction and failed to receive a score of 266 or higher.

(5) Duty to Keep Application Current. Until admitted, an applicant is under a continuing obligation to keep the application for admission current and must update responses whenever there is an addition or a change to information previously filed with the Clerk of the Supreme Court. These updates must be filed with the Clerk of the Supreme Court along with all relevant documentation.

(6) Special Accommodations for Disabled Applicants. An applicant needing special accommodations for the administration of the UBE in South Carolina due to a disability shall submit a written request for such accommodations to the Board of Law Examiners. The procedure and forms

to be used in making a written request shall be specified in the rules of the Board of Law Examiners. ^[7] Unless the chair of the Board determines there is good cause to allow a late request, written requests for special accommodations must be submitted by November 1st for the February UBE and April 1st for the July UBE.

(e) False and Misleading Information. An applicant who knowingly provides false or misleading information in an application (to include any attachments to the application), document, or statement submitted or made to the Committee on Character and Fitness, the Board of Law Examiners, or the staff of the Supreme Court shall be guilty of contempt of the Supreme Court and may be punished accordingly. For the purpose of this rule, false or misleading information shall include the knowing omission of material information by an applicant in the application (to include any attachments to the application) or in response to an inquiry by the Committee on Character and Fitness, the Board of Law Examiners or staff of the Supreme Court. Any allegation that an applicant has violated this section shall be investigated by the Committee on Character and Fitness using the procedures in sections (g) and (l)(5) of this rule. If it is determined that the applicant has violated this section, the Supreme Court may take such action as it deems appropriate. This may include, but is not limited to, finding the applicant in contempt, finding the applicant unfit for admission, prohibiting the applicant from using the results of the examination for admission, and/or preventing the applicant from reapplying for admission for up to five (5) years. Further, if the applicant has already been admitted, the Supreme Court may vacate the admission or discipline the lawyer under Rule 413 of the South Carolina Appellate Court Rules.

(f) Administration of the UBE in South Carolina.

(1) When Given. The UBE shall be administered twice each year on the last consecutive Tuesday and Wednesday in February and July. The MPT and MEE will be given on Tuesday, and the MBE will be given on Wednesday.

(2) Anonymous Grading; Prohibited Comments in Answer Sheets and Booklets. Applicants taking the UBE in South Carolina shall be assigned an identification number that shall be used for the purposes of taking and grading the examination. Except for the identification number and any other information the applicant may be directed to provide by those administering the examination, answer sheets or booklets for the examination shall contain no other information revealing the identity of the applicant. Any reference to the applicant's economic status, social standing, employment, personal hardship, or other extraneous information in the answer sheets or booklets is prohibited.

(3) Notification of Results. For applicants who take the UBE in South Carolina, the Clerk of the Supreme Court shall notify each applicant of the score received on the UBE and on the MBE. Additionally, the names of those receiving a score of 266 or higher on the UBE, and the identification numbers of those receiving a score of less than 266 on the UBE shall be posted on the Bar Admissions page of the South Carolina Judicial Department Website.

(4) Access to Examination Answers; Re-grading or Other Review. No applicant shall be given access to the answers the applicant submitted during a UBE taken in South Carolina. The results reported for the examination are final, and no applicant shall be allowed to seek re-grading or any other review of the results of the examination.

(5) Request for Verification of Multistate Bar Examination. While no review or inspection of the MBE will be permitted, an applicant who took the UBE in South Carolina may request a hand grading of the MBE. Any such request must be filed with the Clerk of the Supreme Court, along with the applicable fee, within fifteen (15) days of the date of the notification in (3) above. [\[8\]](#)

(6) Prohibited Contacts. An applicant shall not, either directly or through an agent, contact any member of the Board of Law Examiners or any member of the Supreme Court regarding the questions on any section of the examination, grading procedures, or an applicant's answers. This provision does not prohibit an applicant from seeking verification of the MBE score as permitted by (5) above.

(7) Cheating and Other Prohibited Acts. An applicant taking the UBE in South Carolina shall not:

(i) cheat or attempt to cheat on the UBE in South Carolina;

(ii) assist or attempt to assist another in cheating on the UBE in this or any other jurisdiction;

(iii) possess an item on the premises of the examination site or in the examination room if the possession of that item is prohibited by the Board of Law Examiners; or

(iv) remove or attempt to remove any testing material from the examination room or site.

Any allegation that an applicant has violated this section shall be investigated by the Committee on Character and Fitness using the procedures in sections (g) and (l)(5) of this rule. If it is determined that the

applicant has violated this section, the Supreme Court may take such action as it deems appropriate. This may include, but is not limited to, finding the applicant unfit for admission, prohibiting the applicant from using the results of the examination for admission, and/or preventing the applicant from reapplying for admission for up to five (5) years. Further, if the applicant has already been admitted, the Supreme Court may vacate the admission or discipline the lawyer under Rule 413 of the South Carolina Appellate Court Rules. Finally, an applicant committing one of these prohibited acts shall be guilty of contempt of the Supreme Court and may be punished accordingly.

(g) Determination of Character and Fitness for Admission.

(1) Determination by Committee on Character and Fitness. The Committee on Character and Fitness shall consider the application and any further information it deems relevant to determine if the applicant has the requisite qualifications and character to be admitted to practice law in this state. The Committee shall notify the Clerk of the Supreme Court whether it finds the applicant qualified or unqualified and, if found to be unqualified, the Clerk shall notify the applicant of this finding. An applicant found to be unqualified shall not be allowed to sit for the UBE in South Carolina. If the Committee has not made a determination of the applicant's qualification by July 1st for the July examination or February 1st for the February examination, the applicant shall be allowed to sit for the examination, and the Committee shall make its determination after the examination is administered.

(2) Determination of Fitness of Certain Law Students. A student enrolled in an ABA Approved Law School who has a character problem that might disqualify the student from being admitted to practice law may have the matter resolved by filing a provisional application. The application shall be made on a form approved by the Committee on Character and Fitness and shall be filed in duplicate with the Clerk of the Supreme Court. Each request must be accompanied by a non-refundable fee of \$100. The Committee on Character and Fitness may begin an immediate investigation of the individual's character and shall promptly notify the individual of its determination. No adverse inference concerning an applicant's character and fitness shall be drawn because the applicant filed a provisional application, nor does the filing of a provisional application relieve an applicant from fully complying with the normal application process.

(3) Review by Supreme Court of Fitness Determination; Re-application. Any applicant dissatisfied with the determination of the Committee on Character and Fitness may petition the Supreme Court for review within fifteen (15) days of the date of the notification advising the

applicant of the Committee's determination. The petition shall comply with the requirements of Rule 240 of the South Carolina Appellate Court Rules, to include the filing fee required by that rule. An applicant who is found not to be qualified by the Committee or whose petition for review of the Committee's determination has been denied may not reapply for admission until two (2) years after the date of the notification advising the applicant of the Committee's determination.

(h) Admission.

(1) Admission Ceremonies. Admission ceremonies shall be conducted by the Supreme Court in February, May, September, and November. Applicants must have submitted proof of completion of all requirements for admission (see section (c) of this rule) at least ten (10) days prior to the scheduled date of the ceremony to participate in that ceremony. Applicants who take the February UBE in South Carolina are expected to have all requirements for admission completed for the May ceremony following the examination, and applicants who take the July UBE in South Carolina are expected to have all requirements for admission completed for the November ceremony following the examination. Applicants will be notified of the date and time of the admission ceremony.

(2) Special Admission Ceremonies. The Supreme Court may authorize an applicant to be admitted at a special admissions ceremony conducted before a justice, clerk or deputy clerk of the Court. An applicant seeking admission based on a bar examination administered in South Carolina must file a petition seeking to be admitted at a special ceremony. The petition must be based on a compelling circumstance such as illness or irreconcilable conflict which prevents the applicant from appearing at one of the ceremonies established in (1) above. Further, applicants who are ineligible to participate in one of the admission ceremonies established in (1) above due to their failure to timely submit proof of completion of the MPRE or the Course of Study on South Carolina Law are not eligible to be admitted at a special admission ceremony.

(3) Fee and Oath. To be admitted, the applicant must pay a fee of \$50 and take and subscribe the following oath or affirmation:

Lawyer's Oath

I do solemnly swear (or affirm) that: I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect, and defend the Constitution of this State and of the United States;

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

To my clients, I pledge faithfulness, competence, diligence, good judgment, and prompt communication;

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

I will not pursue or maintain any suit or proceeding which appears to me to be unjust nor maintain any defenses except those I believe to be honestly debatable under the law of the land, but this obligation shall not prevent me from defending a person charged with a crime;

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge, or jury by a false statement of fact or law;

I will respect and preserve inviolate the confidences of my clients, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice;

[So help me God.]

The oath or affirmation shall be administered during the ceremony, and all persons admitted shall sign their names in a book, kept for that purpose, in the office of the Clerk of the Supreme Court.

(i) Failure to be Admitted.

(1) Applicants Seeking Admission Based on An Existing UBE Score. If an applicant seeking admission based on an existing UBE score (as defined in section (b) of this rule) is not admitted within one (1) year of the date of the filing of the application, the applicant must file a supplemental application with the Clerk of the Supreme Court. The supplemental application shall be on a form prescribed by the Committee on Character and Fitness, and the applicant may not be admitted to the South Carolina Bar unless the Committee on Character and Fitness makes a re-

determination that the applicant is qualified. The filing shall be accompanied by a fee of \$250. Further, the application for admission (along with the supplemental application) shall be treated as being withdrawn if the applicant fails to be admitted within two (2) years of the date of the filing of the application.

(2) Applicants Taking the UBE in South Carolina. If an applicant taking the UBE in South Carolina is not admitted within one (1) year of the date of the notification advising the applicant that the applicant has received a qualifying score on the UBE for admission, the applicant must file a supplemental application with the Clerk of the Supreme Court. The supplemental application shall be on a form prescribed by the Committee on Character and Fitness, and the applicant may not be admitted to the South Carolina Bar unless the Committee on Character and Fitness makes a re-determination that the applicant is qualified. The filing shall be accompanied by a fee of \$250. Further, the application for admission (along with the supplemental application) shall be treated as being withdrawn if the applicant fails to be admitted within two (2) years of the date of the notification advising the applicant that the applicant has received a qualifying score on the UBE for admission.

(j) Admission of Certain Law Professors. A person serving as the Dean or as a tenured professor at the University of South Carolina School of Law or the Charleston School of Law may be admitted to practice law in this State without complying with the requirements of sections (c)(5) (qualifying UBE score), (c)(6) (qualifying MPRE scaled score), and (c)(8) (successful completion of Course of Study on South Carolina Law) of this rule if the Dean or professor:

(1) has been admitted to practice law in the highest court of another state or the District of Columbia for at least five (5) years;

(2) has been a full-time and continuous member of the faculty of the law school with the rank of assistant professor of law or higher for the previous three (3) or more complete academic years; and

(3) has been recommended for admission by the Dean of the law school, or in the case of the Dean, by the President of the University of South Carolina or the Chairman of the Board of Directors of the Charleston School of Law.

The application for admission shall be made on a form prescribed by the Committee on Character and Fitness, and shall be filed with the Clerk of the Supreme Court. The application shall be accompanied by a non-refundable application fee of \$1,000. The Dean or professor must comply with all other requirements of section (c) of this rule. If found qualified by the Committee

on Character and Fitness, the Dean or professor shall be admitted upon taking the oath and paying the fee specified by section (h) of this rule.

(k) Board of Law Examiners.

(1) Members. The Board of Law Examiners shall consist of members of the South Carolina Bar who are actively engaged in the practice of law in South Carolina and who have been members of the South Carolina Bar for at least seven (7) years. Members of the bar who are inactive members, judicial members, military members, administrative law judge or workers' compensation commission members, retired members, or limited members shall not be appointed to the Board. The Board members shall be appointed by the Supreme Court for three (3) year terms and shall be eligible for reappointment. At least one member shall be appointed from each Congressional District. In case of a vacancy on the Board, the Supreme Court shall appoint a member of the South Carolina Bar to serve the remainder of the unexpired term.

(2) Chair; Secretary. The Supreme Court shall appoint a chair from among the members of the Board of Law Examiners. The Clerk of the Supreme Court shall serve as secretary of the Board *ex officio*.

(3) Duties. The Board of Law Examiners shall conduct the UBE in South Carolina. The Board shall be responsible for grading the MPT and the MEE portions of the examination. The Board shall develop a Course of Study on South Carolina Law that an applicant must successfully complete prior to being admitted under this rule. The content and method of delivery of this Course of Study shall be determined by the Board. The Board may promulgate rules and regulations including those relating to the accommodation of applicants with disabilities. These rules and regulations shall not become effective until at least ninety (90) days after they are approved by the Supreme Court.

(l) Committee on Character and Fitness.

(1) Members. The Committee on Character and Fitness shall consist of eighteen (18) members of the South Carolina Bar who shall be appointed by the Supreme Court for five (5) year terms. Members of the bar who are inactive members, judicial members, military members, administrative law judge or workers' compensation commission members, retired members, or limited members shall not be appointed to the Committee. In case of a vacancy on the Committee, the Supreme Court shall appoint a member of the South Carolina Bar to serve the remainder of the unexpired term.

(2) Chair; Secretary. The Supreme Court shall appoint a chair and a secretary from among the members of the Committee on Character and Fitness.

(3) Panels and Meetings. The members shall be divided by the chair into panels composed of three (3) members. The chair may rotate membership on the panels, and may substitute members between panels. Panels shall meet when scheduled by the chair or the Committee, and the full Committee may meet to consider administrative matters. Meetings of the Committee other than periodic meetings may be called by the chair upon the chair's own motion and shall be called by the chair upon the written request of three members of the Committee.

(4) Quorum. A quorum for a meeting of the full Committee shall be ten (10) members, and a quorum for a panel shall be three (3) members.

(5) Duties. The Committee on Character and Fitness shall investigate and determine whether an applicant for admission possesses the qualifications prescribed by this rule as to age, legal education, and character. The applicant must establish to the reasonable satisfaction of a majority of a panel that the applicant is qualified. In conducting investigations, a panel may take and hear testimony, compel by subpoena the attendance of witnesses, and require the applicant to appear for a hearing before a panel or for a personal interview before a single member of the Committee. An applicant will not be denied admission by the Committee without being afforded the opportunity for a hearing before a panel. Any member of the Committee may administer oaths and issue subpoenas. The Committee may adopt rules that shall become effective upon approval by the Supreme Court. In addition, the Committee shall perform the duties specified by Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, and any other duties as directed by the Supreme Court.

(m) Confidentiality and Release of Information.

(1) The files and records maintained by the Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to applications for admission, examinations, and admissions shall be confidential, and shall not be disclosed except as necessary for the Board, the Committee, or the Clerk of the Supreme Court to carry out their responsibilities. The Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court may disclose information to the National Conference of Bar Examiners and to the bar admission authorities in other jurisdictions, and may disclose the names of those persons who have received a score of 266 or higher on a UBE administered

in South Carolina, or those who are or will be admitted and the date of their admission. Information may be released as provided by Rule 410(f) of the South Carolina Appellate Court Rules. The Supreme Court may authorize the release of confidential information to other persons or agencies.

(2) Beginning with the results of the February 2017 examination, the Clerk of the Supreme Court may release the following information to a law school regarding a graduate of that law school who has taken the UBE in South Carolina: the name of the graduate, the UBE and scaled MBE scores the graduate received, and the number of times the graduate has taken a bar examination in South Carolina. Any information released to law schools pursuant to this rule shall be kept confidential by the law school, shall only be used for statistical analysis, and shall only be released for purposes of reporting aggregated information to accrediting bodies. Each law school requesting the release of the above information shall, on a form approved by the Supreme Court, agree to comply with the confidentiality and use restrictions placed on this information.

(n) Immunity.

(1) The Board of Law Examiners, the Committee on Character and Fitness, and the members, employees, and agents of the Board of Law Examiners or the Committee of Character and Fitness, are absolutely immune from all civil liability for conduct and communications occurring in the performance of their official duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted, readmitted, or reinstated to the practice of law.

(2) Records, statements of opinion, testimony and other information regarding an applicant for admission, readmission or reinstatement to the Bar communicated by any entity, including any person, firm, or institution, to the Board of Law Examiners, the Committee on Character and Fitness, or to the members, employees or agents of the Board of Law Examiners or Committee on Character and Fitness, are absolutely privileged, and civil suits predicated thereon may not be instituted.

History:

Last amended effective 12/21/2016; amended by Order dated September 21, 2022, effective 9/21/2022.

[\[fn1\]](#) Admissions based on the July 2016 or earlier bar examinations are governed by the prior version of Rule 402 which is available [here](#). See Order of the South Carolina Supreme Court dated June 24, 2016 (prior rule "shall remain in effect for the July 2016 South Carolina Bar Examination and shall

continue to govern all aspects of admission based on South Carolina Bar Examinations conducted prior to February 2017.").

[\[fn2\]](#) Additional information on ABA Approved Law Schools is available at www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html.

[\[fn3\]](#) The Bar Admissions page is located at www.sccourts.org/bar/index.cfm.

[\[fn4\]](#) Additional information about the MPRE is available at www.ncbex.org.

[\[fn5\]](#) Additional information regarding the content of the UBE is available at www.ncbex.org.

[\[fn6\]](#) Information about UBE score transfers is available at www.ncbex.org/ncbe-exam-score-services/ube-score-services.

[\[fn7\]](#) The Rules of the Board of Law Examiners are available at www.sccourts.org/courtReg/Part4AppendixA.html

[\[fn8\]](#) The fee is currently fifty dollars (\$50) and must be paid by check or money order made payable to the National Conference of Bar Examiners.

392 S.C. 328
709 S.E.2d 633

In the Matter of ANONYMOUS MEMBER
OF the SOUTH CAROLINA BAR,
Respondent.

No. 26964.

Supreme Court of South Carolina.

Heard Sept. 22, 2010. Decided April 25,
2011.

[709 S.E.2d 635]

Disciplinary Counsel Lesley M. Coggiola and
Deputy Disciplinary Counsel Barbara M.
Seymour, both of Columbia, for Office of
Disciplinary Counsel. David Dusty Rhoades, of
Charleston, and Cynthia Barrier Patterson, of
Columbia, for Respondent. PER CURIAM.

[392 S.C. 331] In this attorney discipline matter, the Hearing Panel (the Panel) determined Respondent was subject to discipline for violating Rule 7(a) (5), RLDE, Rule 413, SCACR, and Rule 8.4(e), RPC, Rule 407, SCACR, both of which provide that a lawyer may be disciplined for engaging in conduct tending to pollute the administration of justice or bring the legal profession [392 S.C. 332] into disrepute, and Rule 7(a)(6), RLDE, Rule 413, SCACR, which provides it is a ground for discipline for an attorney to violate the attorney's oath of office. A majority of the Panel concluded Respondent's action warranted an admonition and would require Respondent to pay the costs of this proceeding, while one member of the Panel recommended Respondent receive a Letter of Caution with a finding of minor misconduct. We find that Respondent did violate the rules outlined above, but we disagree with the majority of the Panel's recommendation. We find Respondent's acknowledgement of misconduct and remorse to be sincere and effective in the mitigation of our sanction. Accordingly, we issue a private Letter of Caution with a finding of minor misconduct to Respondent.

Additionally, for the benefit of the bar, we take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication. We are concerned with the increasing complaints of incivility in the bar. We believe United States Supreme Court Justice Sandra Day O'Connor's words elucidate a lawyer's duty: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 8 (1998).

Facts

The formal charges in this matter arose out of a disciplinary complaint regarding an

[709 S.E.2d 636]

e-mail message Respondent sent to opposing counsel (Attorney Doe) in a pending domestic matter. Respondent represented the mother and Attorney Doe represented the father in an emotional and heated domestic dispute. It was within this context that Respondent sent Attorney Doe the following e-mail (the "Drug Dealer" e-mail):

I have a client who is a drug dealer on ... Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, [392 S.C. 333] they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack

head at night on or near ... Street. Think about it. Am I right?

Attorney Doe's spouse, also an attorney, filed the complaint in this matter after Attorney Doe disclosed the "Drug Dealer" e-mail to him. At the hearing, Respondent admitted that Attorney Doe's daughter had no connection to the domestic action.

At the hearing, Respondent asserted that the e-mail was in response to daily obnoxious, condescending, and harassing e-mails, faxes, and hand-delivered letters from Attorney Doe. These communications allegedly commented on the fact that Respondent is not a parent and therefore could not advise Respondent's client appropriately.¹ In support of this contention, Respondent submitted five e-mail exchanges between Respondent and Attorney Doe, four of which were dated after the "Drug Dealer" e-mail. In further support of Respondent's assertions, Respondent claimed to possess ten banker's boxes full of e-mails and other documents that constituted daily bullying from Attorney Doe; however, these documents were not produced. Due to a lack of evidence supporting Respondent's assertions, the Panel found Respondent's testimony to be entirely lacking in credibility. Ultimately, the Panel found Respondent was subject to discipline for sending the "Drug Dealer" e-mail to Attorney Doe.

Standard of Review

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000) (citations omitted). "Although this Court is not bound by the findings of the Panel and Committee,[392 S.C. 334] these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of the witnesses." *In re Marshall*, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998) (citation omitted). "However, this Court may make its own findings of fact and conclusions of law." *Id.* (citation omitted).

Law

I. Conduct Prejudicial to the Administration of Justice

"It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice." Rule 8.4(e), RPC, Rule 407, SCACR. Additionally, a lawyer is subject to discipline for "engag[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute...." Rule 7(a)(5), RLDE, Rule 413, SCACR. This Court has stated that a lawyer "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client." *In re Goude*, 296 S.C. 510, 512, 374 S.E.2d 496, 497 (1988).

We agree with the Panel that Respondent's e-mail was conduct tending to bring the legal profession into disrepute and

[709 S.E.2d 637]

was prejudicial to the administration of justice. By sending the "Drug Dealer" e-mail to Attorney Doe, Respondent was doing a disservice to Respondent's client. An e-mail such as the one sent by Respondent can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer's ability to objectively represent his or her client. This kind of personal attack against a family member of opposing counsel with no connection to the litigation brings into question the integrity of the judicial system and prejudices the administration of justice.

II. Violation of the Lawyer's Oath

Respondent contends that the civility clause contained within the lawyer's oath is unconstitutionally vague and overbroad. We disagree.

[392 S.C. 335] Respondent took the lawyer's oath which includes the following clause, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications...." Rule 402(k), SCACR. The United States Supreme Court has noted that lawyers are not entitled to the same First Amendment protections as laypeople. See *In re Snyder*, 472 U.S. 634, 644–45, 105 S.Ct. 2874, 2881, 86 L.Ed.2d 504 (1985). Moreover, attorneys' "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In re Sawyer*, 360 U.S. 622, 646–47, 79 S.Ct. 1376, 1388, 3 L.Ed.2d 1473 (1959) (Stewart, J., concurring). "Even outside the courtroom, ... lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071, 111 S.Ct. 2720, 2743, 115 L.Ed.2d 888 (1991).

A. Vague

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001) (citation omitted).

In *Grievance Administrator v. Fieger*, 476 Mich. 231, 719 N.W.2d 123 (2006), cert. denied, 549 U.S. 1205, 127 S.Ct. 1257, 167 L.Ed.2d 75 (2007), an attorney challenged the constitutionality of Michigan's "civility" and "courtesy" rules for lawyers. That court held, "Such a challenge cannot be successfully advanced here because there is no question that even the most casual reading of these rules would put a person clearly on notice that the kind of language used by Mr. Fieger would violate MRPC 3.5(c) and MRPC 6.5(a)." *Fieger*, 719 N.W.2d at

139. In this case, there is no question that even a casual reading of the attorney's oath would put a person on notice that the type of language used in Respondent's "Drug Dealer" e-mail violates the civility clause. Casting aspersions [392 S.C. 336] on an opposing counsel's offspring and questioning the manner in which an opposing attorney was rearing his or her own children does not even near the margins of the civility clause. While no one argued it in this case, it could be argued that the language used by Respondent in the "Drug Dealer" e-mail constituted fighting words. Moreover, a person of common intelligence does not have to guess at the meaning of the civility oath. We hold, as the court held in *Fieger*, that the civility oath is not unconstitutionally vague.

B. Overbroad

"The First Amendment overbreadth doctrine is an exception to the usual rules regarding the standards for facial challenges." *In re Amir X.S.*, 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006). Under the overbreadth doctrine, "the party challenging a statute simply must demonstrate that the statute could cause someone else—anyone else—to refrain from constitutionally protected expression." *Id.* (citation omitted). The overbreadth doctrine has "been implemented out of concern that the threat of enforcement of an overly broad law may deter or 'chill'

[709 S.E.2d 638]

constitutionally protected speech—especially when the overly broad law imposes criminal sanctions." *Id.* at 384–85, 639 S.E.2d at 146 (citation omitted). The overbreadth doctrine:

... permits a court to wholly invalidate a statute only when the terms are so broad that they punish a substantial amount of protected free speech in relation to the statute's otherwise plainly legitimate sweep—until and unless a limiting construction or partial invalidation narrows it so as to remove the threat or deterrence to constitutionally protected expression.

Id. at 385, 639 S.E.2d at 146–47 (citation omitted).

A court analyzing whether a disciplinary rule violates the First Amendment must balance “the State’s interest in the regulation of a specialized profession against a lawyer’s First Amendment interest in the kind of speech that was at issue.” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073, 111 S.Ct. 2720, 2744, 115 L.Ed.2d 888 (1991). “In those instances where a lawyer’s unbridled speech amounts to misconduct[392 S.C. 337] which threatens a significant state interest, a state may restrict the lawyer’s exercise of personal rights guaranteed by the Constitutions.” *In re Johnson*, 240 Kan. 334, 729 P.2d 1175, 1178 (1986) (*citing* *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340–41, 9 L.Ed.2d 405 (1963)). “A layman may, perhaps, pursue his theories of free speech ... until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics.” *In re Woodward*, 300 S.W.2d 385, 393–94 (Mo.1957).

The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked Attorney Doe. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer’s ability to objectively represent his or her client. There is no substantial amount of protected free speech penalized by the civility oath in light of the oath’s plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship. Thus, we find the civility oath is not unconstitutionally overbroad.

Conclusion

We find Respondent violated Rule 7(a)(5), RLDE, Rule 413, SCACR, and Rule 8.4(e), RPC, Rule 407, SCACR, both of which provide that a lawyer may be disciplined for engaging in conduct

tending to pollute the administration of justice or bring the legal profession into disrepute, and Rule 7(a)(6), RLDE, Rule 413, SCACR, which provides it is a ground for discipline for an attorney to violate the attorney’s oath of office. Because we find Respondent’s acknowledgement of misconduct and remorse to be sincere, we issue a private Letter of Caution with a finding of minor misconduct to Respondent. We publish this Letter of Caution in the *In re Anonymous* format so as to provide guidance to the bar. We [392 S.C. 338] caution the bar that henceforth, this type of conduct could result in a public sanction.

Justice PLEICONES has filed a separate opinion. Justice PLEICONES.

As I would impose no sanction or other requirement in connection with this matter, I respectfully decline to join in the opinion.

Notes:

¹A complaint filed by Respondent against Attorney Doe was concluded in a confidential manner.



South Carolina Bar

Continuing Legal Education Division

The GAL's Guide to Advocating for LGBTQ+
Children and Teens in Family Court Cases

Lauren Edwards

The GAL's Guide to Advocating for LGBTQ+ Children and Teens in Family Court Cases

Presenter: Lauren M. Edwards
Condon Family Law & Mediation
4840 Chateau Ave.
N. Charleston, SC 29405
843-225-7288 lauren@condonfamilylaw.com

What does it mean to be a marginalized group?

As defined by the Office of the United Nations High Commissioner for Human Rights and the European Union Agency for Fundamental Rights (FRA), marginalized groups are

“Different groups of people within a given culture, context and history at risk of being subjected to multiple discrimination due to the interplay of different personal characteristics or grounds, such as sex, gender, age, ethnicity, religion or belief, health status, disability, sexual orientation, gender identity, education or income, or living in various geographic localities.”¹

Those in marginalized groups experience inequalities in access to rights, education, employment, health care, housing, protection against violence, and justice. Those of us who are called upon to advocate for those in marginalized groups need to understand and be empathetic to the inequalities, discrimination, and fears our clients and wards face daily. We need to recognize and address our own privilege and biases in order to be true allies.

SC Code § 63-3-80 (in part):

(A) The responsibilities and duties of a guardian ad litem include, but are not limited to:

(1) representing the best interest of the child;
(2) conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family.

(f) considering the wishes of the child, if appropriate;

(3) advocating for the child's best interest by making specific and clear suggestions, when necessary, for evaluation, services, and treatment for the child and the child's family.

¹ <https://eige.europa.eu/taxonomy/term/1280>

The GAL's Guide:

1. Examine your own privilege and biases.
 - a. Recognize that it is okay to be uncomfortable at times – that means you are growing.
 - b. We do not choose our sexuality, we just are who we are.
2. Learn the difference between sexual orientation and gender identity.
 - a. Sexual Orientation: The scientifically accurate term for any person's enduring physical, romantic and/ or emotional attraction to another person.
 - b. Gender Identity: A person's internal, deeply held knowledge of their own gender.
3. Respect and Protect. Do your very best to not “out” someone.
 - a. Check your allyship. If your vocal support or protection of someone will out them to a stranger, choose another approach.
 - b. Honor your ward. If they have shared their truth with you, and have told you with whom and where they are safe to be themselves, honor and protect those boundaries.
4. Do not make assumptions about a person's sexual orientation or gender identity based on their personal expression.
 - a. Gender expression is not the same as gender identity, and gender identity does not dictate sexual orientation.
 - b. Start with “What are your pronouns?” and go from there!
5. Our pronouns are our pronouns. Our names are our names. We are not our “preferred” selves, we are ourselves.
 - a. As with sexual orientation and gender identity, if your ward has shared that they are only using their name and pronouns in certain safe spaces, honor that and protect those boundaries.
 - b. Practice using the singular they – Shakespeare did it for years, and we can too!
6. If you make a mistake, apologize and move on!
7. Be a visible advocate.
 - a. An advocate doesn't have to be covered head to toe in rainbows to clearly be an advocate. Perhaps a pronoun or gender identity lapel pin? For all of the Doctor

Who fans, David Tennant has been donning a nonbinary lapel pin on the interview circuit lately – simple and effective.

- b. Show up at a school’s GSA meeting, stand on the sideline at a PRIDE Parade, or jump on a float! Or speak for a gender non-conforming kid in court and explain the importance of gender affirming care.
8. Challenge myths and stereotypes. Speak up when anyone denigrates another group of people. Do not allow others around you to use harmful language or slurs.
9. Ensure the safety of your ward.
 - a. Listen, Act, Investigate
 - b. SC Code § 63-3-80 (B) A guardian ad litem may submit briefs, memoranda, affidavits, or other documents on behalf of the child. A guardian ad litem may also submit affidavits at the temporary hearing. Any report or recommendation of a guardian ad litem must be submitted in a manner consistent with the South Carolina Rules of Evidence and other state law.
10. Research and be aware of local, SC, and national resources.
 - a. WPATH, the World Professional Association for Transgender Health has recently published their Standards of Care Version 8 (SOC 8) which is available for free download.
 - b. The AMA, American Academy of Pediatrics, and American Association of Clinical Endocrinologists, among others, offer resources for advocates for gender diverse youth.
11. Be aware of the laws and proposed legislation impacting LGBTQIA+ youth.
12. Participate in specific training related to working with LGBTQIA+ youth as well as young people in any marginalized group.
 - a. As you acknowledge your biases, educate yourself.
 - b. Reach out to local organizations and resources for offerings in your area. Many LGBTQIA+ groups and organizations offer public events, trainings, and meetings to educate and provide resources to the community.

The Pillars of Allyship:

1. Ask questions
2. Listen with empathy
3. Show up
4. Speak up, but not speak for

Q & A

Resources

Condon Family Law & Mediation: condonfamilylaw.com

We Are Family (WAF): wearefamilycharleston.org, waf.org

Alliance for Full Acceptance (AFFA): www.affa-sc.org

The National LGBTW+ Bar Association: lgbtbar.org

National Center for Transgender Equality: transequality.org

Lambda Legal: www.lambdalegal.org

GLAAD: www.glaad.org

Glossary of Terms: glaad.org/reference/terms

Glossary of Trans Terms: glaad.org/reference/trans-terms

National Center for Lesbian Rights: www.nclrights.org

WPATH World Professional Association for Transgender Health: wpath.org

Standards of Care: www.wpath.org/publications/soc

Advocates for Youth: advocatesforyouth.org

The Trevor Project: thetrevorproject.org

Human Rights Campaign: HRC.org

PFLAG: pflag.org

GLSEN: www.glsen.org

Gender Benders (Upstate): genderbenders.org

It Gets Better Project: itgetsbetter.org

European Union Agency for Fundamental Rights (FRA) and the Office of the United Nations

High Commissioner for Human Rights (UN OHCHR): eige.europa.eu



South Carolina Bar

Continuing Legal Education Division

Ethics 101 for Your GAL Practice

M.J. Goodwin

Ethics 101 for Your GAL Practice

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1. Who is the client of the Guardian ad Litem?

Interestingly, the Rules of Professional Conduct do not define “client.” Identification of one’s client is crucial to understanding one’s obligations pursuant to the Rules of Professional Conduct.

Merriam Webster defines “client” as follows:

“1

: one that is under the protection of another; DEPENDENT
a first-rate power, able to defend her political clients in central and eastern Europe
—W. W. Kulski

2

a

: a person who engages the professional advice or services of another
a lawyer's clients
a personal trainer ... enjoyed the challenges of helping clients buff up their bodies.
—S. K. Parks

b

: CUSTOMER

hotel clients

a restaurant's clients

c

: a person served by or utilizing the services of a social agency
a welfare client

d

: a computer in a network that uses the services (such as access to files or shared peripherals) provided by a server
also : software that allows a computer to function as a client in a network.”

SC Code Section 63-3-830 (A) (1) provides “The responsibilities and duties of a guardian ad litem include, but are not limited to: representing the best interest of the child.

Litigants, and sometimes attorneys, refer to the guardian ad litem as “the child’s lawyer.”

The child is not a “client” in the traditional sense, however. The child is a minor and may even be an infant not yet capable of communication. The child did not hire the

guardian ad litem. However, the child is, to an extent, under the protection of the guardian ad litem.

I advise everyone I deal with that I am a representative of the Family Court, the extra eyes and ears of the Judge, and that it is important that they be both honest and candid with me, while understanding that nothing they say to me is privileged or confidential.

2. Clarifying who is NOT the client might be more useful:
 - a. PARENTS
 - b. GRANDPARENTS
 - c. OTHER LITIGANTS
 - d. INTERESTED PARTIES AND MEDDLERS

3. **What do the Rules of Professional Conduct tell us that might be helpful in determining how to ethically conduct a GAL practice?**

- a. Rule 1.1: COMPETENCE

*The comment to this rule includes: “Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study.”

*Being the GAL has frequently required that I educate myself on many topics, such as:

- *medical conditions I have not ever heard of before;
- *the latest illegal and/or illicit drugs
- *other cultures
- *video games
- *various religious beliefs
- *criminal behavior
- *psychological conditions and personality disorders
- *educational matters
- *home schooling
- *transgender issues
- *polyamorous relationship issues

*This rule intersects with SC Code Section 63-3-820 QUALIFICATIONS.

4. Rule 1.2: SCOPE OF REPRESENTATION

*SC Code Section 63-3-830 sets out the responsibilities of a guardian ad litem.

*Watch out for hearings that don't deal with any child related issues.

*DO NOT MEDIATE

*I try to make clear to the parties that I am going to do everything that I think is necessary to make sure that the Family Court has all the information it needs to make a decision that is in the best interest of the child. But, that I am not going to do things that I do not think are necessary (such as interviewing 50 "character witnesses").

*Be clear with people on what the limits are.

*One of the most difficult calls are those Friday afternoon "my lawyer is out of town" calls. In these calls, the litigant is looking for legal advice and cannot find their own lawyer. That is not your problem as the GAL. Unless the child is in danger, don't get involved in this type of call. I have my assistant screen these calls out.

***ARE YOU A MANDATORY REPORTER IN SC?**

***Private guardians are NOT; but lay volunteer guardians ARE. See SC Code Section 63-7-310.**

*If in doubt, report it.

5. Rule 1.3: DILIGENCE

*Have an established protocol that you use in every guardian case. This will help keep you on track and keep the case moving. In my office, once my assistant is made aware that we have a case, she opens a file and gets all the documents and contact information. The first contact is my assistant telling the litigants that I am appointed, when their GAL fee is due, and how to set an appointment with me. I generally try to talk to both adults before I talk to the children. However, if I have an uncooperative adult, I skip that person and talk to the children. There have been times over the years that I have deviated some from this protocol, but not many times.

*I subpoena school records.

*I get a HIPAA release from all litigants and for the children.

*I calendar when the reports are due.

6. Rule 1.4: COMMUNICATION

*Most of my communications to the attorneys and parties are in writing, to minimize any miscommunication. I try to limit it to names of suggested counselors or other resources.

7. Rule 1.7: CONFLICT OF INTEREST

*I do check guardian cases for conflicts of interest to make sure I have not ever represented either party. Difficulties sometimes arise if people have changed their names or if lawyers do not use full legal names in their pleadings.

*If a conflict is waived, get that in writing.

8. Rule 2.4: LAWYER SERVING AS THIRD PARTY NEUTRAL

*You cannot mediate as the GAL. However, there is good language in this rule regarding advising parties that you cannot give them legal advice.

9. Rule 8.4: MISCONDUCT

*Being the GAL does not relieve you of the obligation to report misconduct.

ARTICLE 7

Private Guardians ad Litem

DERIVATION TABLE

Showing the sections in former Chapter 7, Title 20 from which the sections in this article were derived.

New

Section Former

Section 63-3-810 20-7-1545 63-3-820 20-7-1547 63-3-830 20-7-1549 63-3-840 20-7-1551 63-3-850 20-7-1553 63-3-860 20-7-1555 63-3-870 20-7-1557

SECTION 63-3-810. Appointment.

(A) In a private action before the family court in which custody or visitation of a minor child is an issue, the court may appoint a guardian ad litem only when it determines that:

(1) without a guardian ad litem, the court will likely not be fully informed about the facts of the case and there is a substantial dispute which necessitates a guardian ad litem; or

(2) both parties consent to the appointment of a guardian ad litem who is approved by the court.

(B) The court has absolute discretion in determining who will be appointed as a guardian ad litem in each case. A guardian ad litem must be appointed to a case by a court order.

HISTORY: 2008 Act No. 361, Section 2.

SECTION 63-3-820. Qualifications.

(A) A guardian ad litem may be either an attorney or a layperson. A person must not be appointed as a guardian ad litem pursuant to Section 63-3-810 unless he possesses the following qualifications:

(1) a guardian ad litem must be twenty-five years of age or older;

(2) a guardian ad litem must possess a high school diploma or its equivalent;

(3) an attorney guardian ad litem must annually complete a minimum of six hours of family law continuing legal education credit in the areas of custody and visitation; however, this requirement may be waived by the court;

(4) for initial qualification, a lay guardian ad litem must have completed a minimum of nine hours of continuing education in the areas of custody and visitation and three hours of continuing education related to substantive law and procedure in family court. The courses must be approved by the Supreme Court Commission on Continuing Legal Education and Specialization;

(5) a lay guardian ad litem must observe three contested custody merits hearings prior to serving as a guardian ad litem. The lay guardian must maintain a certificate showing that observation of these hearings has been completed. This certificate, which shall be on a form approved by Court Administration, shall state the names of the cases, the dates and the judges involved and shall be attested to by the respective judge; and

(6) lay guardians ad litem must complete annually six hours of continuing education courses in the areas of custody and visitation.

(B) A person shall not be appointed as a guardian ad litem pursuant to Section 63-3-810 who has been convicted of any crime listed in Chapter 3 of Title 16, Offenses Against the Person; in Chapter 15 of Title 16, Offenses Against Morality and Decency; in Chapter 25 of Title 16, Criminal Domestic Violence; in Article 3 of Chapter 53 of Title 44, Narcotics and Controlled Substances; or convicted of the crime of contributing to the delinquency of a minor, provided for in Section 16-17-490.

(C) No person may be appointed as a guardian ad litem pursuant to Section 63-3-810 if he is or has ever been on the Department of Social Services Central Registry of Abuse and Neglect.

(D) Upon appointment to a case, a guardian ad litem must provide an affidavit to the court and to the parties attesting to compliance with the statutory qualifications. The affidavit must include, but is not limited to, the following:

(1) a statement affirming that the guardian ad litem has completed the training requirements provided for in subsection (A);

(2) a statement affirming that the guardian ad litem has complied with the requirements of this section, including a statement that the person has not been convicted of a crime enumerated in subsection (B); and

(3) a statement affirming that the guardian ad litem is not nor has ever been on the Department of Social Services Central Registry of Child Abuse and Neglect pursuant to Subarticle 13, Article 3, Chapter 7.

(E) The court may appoint an attorney for a lay guardian ad litem. A party or the guardian ad litem may petition the court by motion for the appointment of an attorney for the guardian ad litem. This appointment may be by consent order. The order appointing the attorney must set forth the reasons for the appointment and must establish a method for compensating the attorney.

HISTORY: 2008 Act No. 361, Section 2.

SECTION 63-3-830. Responsibilities.

(A) The responsibilities and duties of a guardian ad litem include, but are not limited to:

(1) representing the best interest of the child;

(2) conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family. An investigation must include, but is not limited to:

(a) obtaining and reviewing relevant documents, except that a guardian ad litem must not be compensated for reviewing documents related solely to financial matters not relevant to the suitability of the parents as to custody, visitation, or child support. The guardian ad litem shall have access to the child's school records and medical records. The guardian ad litem may petition the family court for the medical records of the parties;

(b) meeting with and observing the child on at least one occasion;

(c) visiting the home settings if deemed appropriate;

(d) interviewing parents, caregivers, school officials, law enforcement, and others with knowledge relevant to the case;

(e) obtaining the criminal history of each party when determined necessary; and

(f) considering the wishes of the child, if appropriate;

(3) advocating for the child's best interest by making specific and clear suggestions, when necessary, for evaluation, services, and treatment for the child and the child's family. Evaluations or other services suggested by the guardian ad litem must not be ordered by the court, except upon proper approval by the court or by consent of the parties;

(4) attending all court hearings related to custody and visitation issues, except when attendance is excused by the court or the absence is stipulated by both parties. A guardian must not be compensated for attending a hearing related solely to a financial matter if the matter is not relevant to the suitability of the parents as to custody, visitation, or child support. The guardian

must provide accurate, current information directly to the court, and that information must be relevant to matters pending before the court;

(5) maintaining a complete file, including notes. A guardian's notes are his work product and are not subject to subpoena; and

(6) presenting to the court and all parties clear and comprehensive written reports including, but not limited to, a final written report regarding the child's best interest. The final written report may contain conclusions based upon the facts contained in the report. The final written report must be submitted to the court and all parties no later than twenty days prior to the merits hearing, unless that time period is modified by the court, but in no event later than ten days prior to the merits hearing. The ten-day requirement for the submission of the final written report may only be waived by mutual consent of both parties. The final written report must not include a recommendation concerning which party should be awarded custody, nor may the guardian ad litem make a recommendation as to the issue of custody at the merits hearing unless requested by the court for reasons specifically set forth on the record. The guardian ad litem is subject to cross-examination on the facts and conclusions contained in the final written report. The final written report must include the names, addresses, and telephone numbers of those interviewed during the investigation.

(B) A guardian ad litem may submit briefs, memoranda, affidavits, or other documents on behalf of the child. A guardian ad litem may also submit affidavits at the temporary hearing. Any report or recommendation of a guardian ad litem must be submitted in a manner consistent with the South Carolina Rules of Evidence and other state law.

HISTORY: 2008 Act No. 361, Section 2.

SECTION 63-3-840. Mediation prohibition.

A guardian ad litem must not mediate, attempt to mediate, or act as a mediator in a case to which he has been appointed. However, nothing in this section shall prohibit a guardian ad litem from participating in a mediation or a settlement conference with the consent of the parties.

HISTORY: 2008 Act No. 361, Section 2.

SECTION 63-3-850. Compensation.

(A) At the time of appointment of a guardian ad litem, the family court judge must set forth the method and rate of compensation for the guardian ad litem, including an initial authorization of a fee based on the facts of the case. If the guardian ad litem determines that it is necessary to exceed the fee initially authorized by the judge, the guardian must provide notice to both parties and obtain the judge's written authorization or the consent of both parties to charge more than the initially authorized fee.

(B) A guardian appointed by the court is entitled to reasonable compensation, subject to the review and approval of the court. In determining the reasonableness of the fees and costs, the court must take into account:

- (1) the complexity of the issues before the court;
- (2) the contentiousness of the litigation;
- (3) the time expended by the guardian;
- (4) the expenses reasonably incurred by the guardian;
- (5) the financial ability of each party to pay fees and costs; and
- (6) any other factors the court considers necessary.

(C) The guardian ad litem must submit an itemized billing statement of hours, expenses, costs, and fees to the parties and their attorneys pursuant to a schedule as directed by the court.

(D) At any time during the action, a party may petition the court to review the reasonableness of the fees and costs submitted by the guardian ad litem or the attorney for the guardian ad litem.

HISTORY: 2008 Act No. 361, Section 2.

SECTION 63-3-860. Disclosure.

A guardian ad litem appointed by the family court in a custody or visitation action must, upon notice of the appointment, provide written disclosure to each party:

- (1) of the nature, duration, and extent of any relationship the guardian ad litem or any member of the guardian's immediate family residing in the guardian's household has with any party;
- (2) of any interest adverse to any party or attorney which might cause the impartiality of the guardian ad litem to be challenged;
- (3) any membership or participation in any organization related to child abuse, domestic violence, or drug and alcohol abuse.

HISTORY: 2008 Act No. 361, Section 2.

SECTION 63-3-870. Removal.

A guardian ad litem may be removed from a case at the discretion of the court.

HISTORY: 2008 Act No. 361, Section 2.p

SECTION 63-7-310. Persons required to report.

(A) The following persons must report in accordance with this section when, in such person's professional capacity, he has received information that gives him reason to believe that a child has been or may be abused or neglected as defined in Section 63-7-20: a physician, nurse, dentist, optometrist, medical examiner, or coroner, or an employee of a county medical examiner's or coroner's office, or any other medical, emergency medical services, mental health, or allied health professional, member of the clergy including a Christian Science Practitioner or religious healer, clerical or nonclerical religious counselor who charges for services, school teacher, counselor, principal, assistant principal, school attendance officer, social or public assistance worker, substance abuse treatment staff, or childcare worker in a childcare center or foster care facility, foster parent, police or law enforcement officer, juvenile justice worker, undertaker, funeral home director or employee of a funeral home, persons responsible for processing films, computer technician, judge, and a volunteer non-attorney guardian ad litem serving on behalf of the South Carolina Guardian Ad Litem Program or on behalf of Richland County CASA.

(B) If a person required to report pursuant to subsection (A) has received information in the person's professional capacity which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect if committed by a parent, guardian, or other person responsible for the child's welfare, but the reporter believes that the act or omission was committed by a person other than the parent, guardian, or other person responsible for the child's welfare, the reporter must make a report to the appropriate law enforcement agency.

(C) A person, as provided in subsections (A) and (B), who reports child abuse or neglect to a supervisor or person in charge of an institution, school, facility, or agency is not relieved of his individual duty to report in accordance with this section. The duty to report is not superseded by an internal investigation within the institution, school, facility, or agency.

(D) Except as provided in subsection (A), a person who has reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect may report, and is encouraged to report, in accordance with this section. A person, as provided in subsection (A) or (B), who reports child abuse or neglect to a supervisor or person in charge of an institution, school, facility, or agency is not relieved of his individual duty to report in accordance with this section. The duty to report is not superseded by an internal investigation within the institution, school, facility, or agency.

(E) Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found.

(F) Nothing in this section shall be construed as requiring a person under the age of eighteen to be a mandated reporter pursuant to subsection (A).

HISTORY: 2008 Act No. 361, Section 2; 2010 Act No. 227, Section 1, eff upon approval (became law without the Governor's signature on June 8, 2010); 2018 Act No. 222 (H.4705), Section 1, eff May 18, 2018.

Effect of Amendment

The 2010 amendment in subsection (A), added reference to "school attendance officer", "foster parent", "juvenile justice worker", and "volunteer non-attorney guardian ad litem serving on behalf of the South Carolina Guardian Ad Litem program or on behalf of Richland County CASA"; and rewrote subsection (C).

RULE 1.0: TERMINOLOGY

- (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
- (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client or other person to appreciate the significance of the matter in question.
- (d) "Depository institution" means any bank, credit union or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or any successor insurance corporation(s) established by federal or state law.
- (e) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association, or in a legal services organization; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association.
- (f) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or which has a purpose to deceive.
- (g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (i) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (j) "Person" includes an individual, corporation, company, limited liability company, association, trust, partnership and any other organization or entity.
- (k) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- (l) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (m) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (n) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.
- (o) "Serious crime" denotes any felony; any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.
- (p) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
- (q) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of

evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(r) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (e) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction or conduct which has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a), 1.7(b), and 1.18(d). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or

implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b), 1.9(a), and 1.18(d). For a definition of "writing" and "confirmed in writing," see paragraphs (r) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (r).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.8(l), 1.10(e), 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including electronic information, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including electronic information, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Last amended by Order dated November 17, 2021.

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment**Legal Knowledge and Skill**

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer must reasonably believe that the service of the other lawyer(s) will contribute to the competent and ethical representation of the client, and the lawyer may be required to obtain the informed consent of the client under other Rules. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections and professional conduct rules of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including a reasonable understanding of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit information related to the representation of a client, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Last amended by Order dated November 17, 2021.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) recognizes that the client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. A lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. The decisions specified in paragraph (a), such as whether to make or accept an offer of settlement of a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may have special obligations in dealings with a beneficiary. However, under S.C. Code Ann. § 62-1-109, the representation of a fiduciary does not necessarily create any duties or obligations to other interested persons.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a sham transaction such as, for example, a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer should consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a practitioner's death or disability, it is the better practice, and the duty of diligence may require, that each lawyer or law firm prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See Rule 1.19.

Amended by Order dated February 11, 2013, effective July 1, 2013.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(g), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or

assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(g).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Last amended by Order dated August 10, 2016.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Comment**General Principles**

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(g) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [27].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

Interest of Person Paying for a Lawyer's Service

[11] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[12] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[13] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[14] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[15] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(q)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[16] Informed consent is defined in Rule 1.0(g). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information should include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [28] and [29] (effect of common representation on confidentiality).

[17] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[18] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(r) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for

the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. The better practice is to include within any writing the risks, advantages and alternatives discussed as a matter of full disclosure. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[19] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[20] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[21] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[22] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[23] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

[23a] A lawyer serving as a part-time prosecutor is not necessarily disqualified from simultaneously representing other civil or criminal defense clients in private practice. If the prosecutions handled by the lawyer are limited in nature and scope, the lawyer may be able to represent other clients in criminal or civil matters that are not related to any of the cases that the lawyer has prosecuted.

Nonlitigation Conflicts

[24] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[25] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client also may be unclear. The issue is addressed in S.C. Code Ann. § 62-1-109. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[26] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[27] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[28] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[29] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[30] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[31] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[32] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[33] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Last amended by Order dated April 15, 2015.

RULE 2.4: LAWYER SERVING AS THIRD PARTY NEUTRAL

(a) A lawyer serves as a third party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client.

(c) When one or more of the parties in a mediation is a current or former client of the neutral lawyer or the neutral's law firm, a lawyer may serve as a neutral only if the matter in which the lawyer serves as a neutral is not the same matter in which the lawyer or law firm represents or represented the party and all parties give informed consent confirmed in writing.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute resolution processes, lawyers often serve as third party neutrals. A third party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third party neutrals generally or to lawyers serving as third party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike non-lawyers who serve as third party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus paragraph (b) requires a lawyer neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves a third party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute resolution processes are governed by the Rules of Professional Conduct. When the dispute resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(q)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third party neutral and other parties is governed by Rule 4.1.

Last amended by Order dated April 15, 2015.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

- (a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Office of Disciplinary Counsel in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.
- (b) A lawyer who is disciplined or transferred to incapacity inactive status in another jurisdiction shall inform the Office of Disciplinary Counsel in writing within fifteen days of discipline or transfer.
- (c) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (d) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office in other respects shall inform the appropriate authority.
- (e) This Rule does not require disclosure of information otherwise protected by Rule 1.6.
- (f) Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Comment

- [1] Self regulation of the legal profession requires, under some circumstances, that members of the profession report themselves to disciplinary authorities in order to protect the interests of the profession, the public, and the judicial process. Paragraphs (a) and (b) set forth the limited circumstances under which a lawyer is required to self-report. Any lawyer admitted to practice in South Carolina has a duty to self-report under paragraphs (a) and (b). The disciplinary procedures for handling matters giving rise to mandatory self-reports are set forth in Rules 17 and 29, RLDE, Rule 413, SCACR.
- [2] Self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct by another lawyer. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. The South Carolina version of paragraph (d) modifies the model version by specifically including "honesty" and "trustworthiness" to parallel the requirement of paragraph (c).
- [3] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.
- [4] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the Office of Disciplinary Counsel unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.
- [5] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client lawyer relationship.
- [6] Paragraph (f) encourages lawyers to seek assistance from the South Carolina Bar Lawyers Helping Lawyers Committee, from a South Carolina Bar law office management assistance program, or from an equivalent county bar association program without fear of being reported for violating the Rules of

Professional Conduct. Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (c) and (d) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Last amended by Order dated October 23, 2019.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) commit a criminal act involving moral turpitude;
- (d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (e) engage in conduct that is prejudicial to the administration of justice;
- (f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. The South Carolina version of this Rule also specifically includes criminal acts involving moral turpitude as professional misconduct. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.



South Carolina Bar

Continuing Legal Education Division

Military Parenting Plan Considerations for GALs

Mary Fran Quindlen

CHAPTER 15

FINANCIAL SUPPORT OF FAMILY MEMBERS

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CHAPTER 15

FINANCIAL SUPPORT OF FAMILY MEMBERS

15000. SCOPE This chapter establishes Marine Corps policy regarding the treatment of family members of Marines in need of financial support. This chapter is punitive in nature, and violations of this order are punishable under the UCMJ, and may subject the violator to adverse administrative action. The activity responsible for this chapter is the Legal Assistance Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps (JAL) (703) 614-1266 / DSN 224-1266.

15001. POLICY

1. The Marine Corps will not serve as a haven for personnel who fail to provide adequate and continuous support to their family members. Marines shall comply fully with the provisions of separation agreements and court orders addressing the support of family members. Absent such agreements or court orders, and conditioned upon a complaint of nonsupport to a commanding officer, the support standards set forth in this chapter shall be enforced. For purposes of this chapter, the phrase "court orders" shall include administrative child support orders and their functional equivalents. For purposes of this chapter, the phrase "commanding officer" means a Special Court Martial Convening Authority or higher.

2. Preferably, the amount of support to be provided to family members should be established by a written agreement between the parties, or be adjudicated in the civilian courts. Nevertheless, because family support issues are closely aligned with readiness, morale, discipline, and the reputation of the service, mandatory interim financial support standards are needed. Assistance in obtaining written support agreements and court orders in these matters is available from local legal assistance offices.

3. Final divorce decrees and written agreements in which spousal support is not awarded or mentioned, or is affirmatively waived, eliminates the obligation to support spouses under this chapter.

4. The obligation to support a biological or adopted minor child under this chapter is not eliminated by a final court order, such as a decree of divorce, or a written agreement, unless the documents specifically negate the obligation to pay child support. The fact that a divorce decree is silent relative to support of a minor child does not effect the obligation of the Marine to provide support for the child under this chapter.

5. The support standards set forth in this chapter apply only to a Marine's spouse, minor biological children and minor adopted children. For purposes of this chapter, "minor" means less than 18 years of age. In addition, all children born in wedlock are presumed to be the biological children of the Marine and the Marine's spouse. The standards set forth herein do not extend to stepchildren or other DoD-recognized dependents of the Marine. There is no duty of support as between active duty military spouses without children. In addition, the application of these standards shall commence only after the commanding officer has received a complaint of nonsupport, and the commanding officer has issued a support order in substantial compliance with the form attached hereto at Figure 15-2.

15002. PUNITIVE PROVISIONS

1. Marines will not violate any of the following:

a. The financial dependent support provisions of a court order.

b. The financial support provisions of a written agreement addressing the issue of dependent support. (Note: a marital settlement agreement worksheet which is used to prepare an agreement does not constitute a written financial support agreement for purposes of this chapter) or

c. If neither a court order nor a written agreement exists, the interim financial support standards of Paragraph 15004, and orders issued thereunder by a commanding officer.

2. This paragraph is punitive in nature. Marines who fail to comply with this paragraph are subject to punishment under the UCMJ, as well as to adverse administrative action.

15003. COMPLAINTS OF INADEQUATE SUPPORT

1. All complaints alleging inadequate support of family members shall be directed to the commanding officer of the Marine concerned. All Marines who receive complaints of inadequate support shall immediately forward the complaint to the commanding officer, and advise the party making the complaint that the commanding officer is the appropriate authority to take action in the matter. In the absence of extraordinary circumstances, the commanding officer will meet with the Marine and take appropriate action under this chapter within 10 working days of receiving the complaint. If the Marine who is the subject of the complaint is not assigned to the command receiving the request for support, the commanding officer will forward it to the commanding officer having authority to take action, and will inform the complaining party of the action taken as soon as possible. If the commanding officer is unable to initiate action within 10 working days, the commanding officer shall so advise the party seeking support.

2. When a complaint alleging inadequate support of family members is received, the commanding officer will inform the Marine about the nature of the complaint and shall encourage the Marine to consult with a legal assistance attorney. After the Marine has had the opportunity to consult with counsel, the commanding officer will then meet with the Marine, and determine the content of an order or warning, if any, to be given to the Marine to foster compliance with this chapter.

3. In instances where a request for support is made for a child born out of wedlock, the Marine shall provide support under this chapter only when paternity is established by court or administrative order or formal written acknowledgement by the Marine. Prior to responding to paternity allegations, the Marine shall be directed to consult with a legal assistance attorney regarding the full consequences of an admission of paternity. Notably, some states hold that an admission of paternity creates a legal presumption that paternity is established, and that based upon such an admission, a court may order the payment of child support.

15004. INTERIM FINANCIAL SUPPORT STANDARDS

1. In cases where the amount of support has not been fixed by

court order or written agreement, and upon a complaint of nonsupport to a commanding officer by or on behalf of a family member entitled to support (as set forth in Paragraph 15001.5), interim support per supported family member shall be the greater of the fixed amount of support reflected in the center column of the chart below, or the pro-rated share of whatever BAH or OHA (Overseas Housing Allowance) to which the Marine is currently entitled, as shown in the chart below, per month. Note that BAH that is credited to the Marine for government housing, but is not actually paid in cash, is not counted for purposes of this chapter. Under no circumstances shall the total amount of support required exceed 1/3 of the Marine's gross military pay, per month. For purposes of this order, gross military pay is defined as the total of all military pay and allowances before taxes or any other deductions. The amount calculated under the chart below is presumed to be the correct amount of support to be paid to a family member. A Support Calculation Worksheet is provided at Figure 15-1.

Total Number of Family Members Entitled to Support	Minimum Amount Of Monthly Support per Requesting Family Member	Share of Monthly BAH/OHA per Requesting Family Member
1	\$350	1/2
2	\$286	1/3
3	\$233	1/4
4	\$200	1/5
5	\$174	1/6
6 or more	\$152	1/7 or etc.

2. In calculating the total number of family members entitled to support, the commanding officer shall count the complaining family member(s) and all other family members as defined in Paragraph 15001.5 that: a) the Marine is supporting under court order, written agreement, or order under this chapter (not party to the complaint of nonsupport); and b) minor biological or adopted children that reside with the Marine whom the Marine is supporting. For example, if the Marine is paying support for a child from a previous marriage, and the current spouse requests support under this chapter, there are two family members in need of support, and the Marine should be ordered to pay the spouse \$286.00 or 1/3 of his BAH, per month, whichever is greater (up to 1/3 of his gross military pay).

3. The Marine may request the commanding officer to deviate from the amount of spousal support required under Paragraph 15004.1. If the facts of the particular case are consistent with one of the reasons for modification as set forth in Paragraph 15005.4, the commanding officer may decrease or terminate spousal support to be paid, only after consulting with the appropriate staff judge advocate. However, except for situations described under Paragraph 15005.4d, support for a minor child shall not be decreased from the amount required in Paragraph 15004.1. Financial support established by a commanding officer under this chapter shall continue until such time as a written agreement is reached, a court order is obtained, or the commanding officer modifies or terminates the support order. This scale is not intended for use outside the Marine Corps or as part of any civilian judicial proceeding. Deviation from the amounts provided in Paragraph 15004.1 is not authorized except as provided in Paragraph 15005.4.

15005. MODIFICATION OF INTERIM FINANCIAL SUPPORT REQUIREMENTS

1. A commanding officer has discretion (but is not required) to reduce or eliminate the interim financial support standards under certain circumstances as listed in Paragraph 15005.4, only after consulting with the appropriate staff judge advocate. A commanding officer has no authority to reduce or eliminate the interim financial support standards in any situation not listed in Paragraph 15005.4. Note that while a commanding officer may reduce or in certain cases, completely eliminate a support requirement under this chapter, reduction of support below "BAH diff" may render the Marine ineligible for BAH under applicable regulations. See Department of Defense Financial Management Regulation (DoDFMR), Volume 7A, Paragraph 260406.B for guidance on BAH entitlement.

2. A commanding officer must be satisfied by a preponderance of the evidence that the underlying intent of this chapter, to provide adequate and continuous support to family members, would be furthered before he or she may reduce or eliminate the interim financial support standards established herein. Before granting relief, the commanding officer may attempt to contact the family member requesting support for whatever additional information may be necessary to make an informed decision on the matter.

3. The Marine has the burden of coming forward with sufficient information and documents (for example, receipts, tax returns, pay vouchers, court orders, etc.) to establish a basis for a commanding officer's action under this paragraph.

4. Situations warranting consideration of reduction or elimination of financial support requirements.

a. The gross income of the spouse exceeds the gross military pay of the Marine (including allowances). The income of the non-service member spouse will be based on his or her wages, before deductions are taken for taxes, voluntary allotments, and garnishments, together with income from all other sources, such as interest, dividends, and profits derived from property in that spouse's possession. This does not relieve the Marine from the requirement to provide financial support for his or her adopted or biological minor children.

b. Interim financial support has been provided to the spouse for a continuous and uninterrupted period of 12 months. A commanding officer may reduce or eliminate the interim financial support requirements to support a spouse if: i) the parties have been separated for 12 months or longer; and ii) the Marine has made the financial support required in Paragraph 15004 for the entire 12 months (including instances where the Marine has voluntarily complied with this Chapter in the absence of a complaint for support to a commanding officer); and iii) the Marine has not acted in any manner to avoid service of process or otherwise to prevent a court from ruling on the issue of support. This does not relieve the Marine from the requirement to provide financial support for his or her adopted or biological minor children.

c. The Marine has been the victim of a substantiated instance of abuse by a spouse seeking support. A commanding officer may reduce or eliminate the interim financial support requirements to support a spouse if an instance of abuse committed by the complaining spouse against the Marine has been substantiated by either a family advocacy case management team at Level II or higher, or a court as evidenced by a judgment amounting to a conviction, or by issuance of a permanent restraining order (or similar order) against the complaining spouse. This does not relieve the Marine from the requirement to provide financial support for his or her adopted or biological minor children.

d. The Marine is paying regular and recurring obligations (such as rent or consumer debts) of the family members requesting support of sufficient magnitude and duration as to justify a reduction or elimination of support specified herein. If the commanding officer elects to give credit for such payments, they should be limited to the extent that such payments do not benefit the Marine, and should continue for as long as support is paid under this chapter.

15006. FORM AND TIMING OF FINANCIAL SUPPORT PAYMENTS

1. Unless otherwise required by court order or by written financial support agreement, a financial support payment will be made directly to the family member in one of the following ways:

- a. Cash with receipts.
- b. Check.
- c. Money order.
- d. Electronic transfer.
- e. Voluntary allotment.

2. Unless otherwise required by a court order or by a written financial support agreement, a financial support payment shall be due on the first day of the month in which the financial support payment pertains.

Support Calculation Worksheet in the case of

_____, USMC

1. Enter the date the complaint was received: _____
(Refer the Marine to Legal Assistance)

2. Enter the total number of family members entitled
to support (2a-d): _____

INCLUDE ALL OF THE FOLLOWING:

a. Non-military spouse requesting support: _____

b. Biological or adopted minor children on
whose behalf financial support is
requested: _____

c. Family members that reside with the Marine
that the Marine supports (i.e., spouse and
biological or adopted minor children): _____

d. Family members that do not reside with the
Marine that the Marine supports (i.e., spouse
and biological or adopted minor children),
that the Marine already supports under prior
order or written agreement: _____

3. Enter the number of persons requesting support
from Lines 2a and 2b above: _____

4. Locate the number from **Step 2** of this Worksheet on the left column of the USMC Support Table. Highlight the other two columns to the right of this number on the same line. Use this line for all support calculations in this case.



USMC SUPPORT TABLE

Total Number of Family Members Entitled to Support	Minimum Amount Of Monthly Support per Requesting Family Member	Share of Monthly BAH/OHA per Requesting Family Member
1	\$350	1/2
2	\$286	1/3
3	\$233	1/4
4	\$200	1/5
5	\$174	1/6
6 or more	\$152	1/7 or etc.



5. Multiply the number in **Step 3** of this Worksheet times the dollar figure in the center column of the USMC Support Table from the line that was selected in Step 4. Enter the amount:

\$ _____

6. If the Marine receives BAH, multiply the number in **Step 3** of this Worksheet times the fraction in the right column of the USMC Support Table from the line that was selected in Step 4. Multiply the adjusted fraction times the BAH received. Enter the share of BAH for the requesting family members:

\$ _____

Figure 15-1.--Support Calculation Worksheet

7. Select the larger dollar amounts from Steps 5 and 6. This is the amount of support presumed to be correct under the MCO. The total amount of support for all persons in Step 2 may not exceed 1/3 of the Marine's gross military pay.

\$ _____

8. The Marine may request reduction of the amount of support calculated under Step 7 only under limited circumstances. Reduction of support is entirely discretionary on the part of the commanding officer. See Paragraph 15005.4d for details.

9. After consulting with the appropriate staff judge advocate, should the commanding officer choose to deviate from the required amount pursuant to Paragraph 15005.4d for a reduction of support, enter the new amount of support due:

\$ _____

From: Commanding Officer,
To:

Subj: ORDER OF SUPPORT

Ref: (a) MCO P5800.16C (LEGADMINMAN), Chapter 15

1. On _____, this Command received a complaint from _____, alleging that since that time you did not provide an amount of support sufficient for the needs of your family.
2. On _____, you were counseled regarding this matter, and your obligations under the reference. At that time, you were afforded the opportunity to request that the support requirements of the reference be modified, and to provide reasons therefor.
3. Since there is no support agreement or order regarding this matter, you are ordered, per the reference, to pay _____ the sum of \$_____ per month, on the first of each month, as support. Support payments will be made by _____. This order will remain in full force and effect until such a support agreement or judicial order is obtained, or unless sooner modified by this Command.

Army Regulation 608–99

Personal Affairs

**Family
Support, Child
Custody, and
Parentage**

**Headquarters
Department of the Army
Washington, DC
13 November 2020**

UNCLASSIFIED

SUMMARY of CHANGE

AR 608–99
Family Support, Child Custody, and Parentage

This major revision, dated 13 November 2020 --

- o Simplifies responsibilities at every echelon (para 1–4).
- o Clarifies the ability of human resources personnel to disclose certain information related to Soldiers when consistent with AR 25–22 (para 1–4*b*(2)).
- o Clarifies that this regulation does not alter baseline administrative individual readiness standards for worldwide deployment (para 1–7*c*(3)).
- o Clarifies the authority to enforce German court orders through garnishment by Army finance offices when Soldiers are stationed in Germany (para 1–10*b*).
- o Updates guidance related to parentage inquiries to account for the fact that a legal parent may be someone other than a biological parent (para 2–2).
- o Provides guidance related to email, text messages, and social media with regard to written financial support agreements (para 2–3*b*).
- o Establishes new guidance related to Army enforcement of ambiguous written financial support agreements (para 2–3*b*(2)).
- o Clarifies guidance pertaining to the enforceability of foreign financial support court orders (para 2–4*b*).
- o Clarifies that interim financial support required by this regulation does not constitute alimony for federal income tax purposes (para 2–6*a*).
- o Establishes new guidance related to calculating interim financial support for Soldiers stationed overseas who receive basic allowance for housing solely on account of unaccompanied Family members residing in the U.S. (paras 2–6*d* and 2–6*e*).
- o Establishes new guidance for calculating interim financial support when a battalion-level commander or higher has relieved a Soldier of the obligation to provide support to a Family member (para 2–6*d*(1)(*c*)).
- o Incorporates Army Directive 2020–04, Enhanced Interim Financial Support, pertaining to enhanced interim financial support for spouses and changes the computation formula for Enhanced Interim Financial Support (para 2–6*f*).
- o Reduces the authority to relieve Soldiers of certain regulatory support requirements on the basis of fundamental fairness from the brigade-level to the battalion-level commander (paras 2–12 thru 2–14).
- o Simplifies command obligations in response to Family support, child custody, and parentage inquiries (chap 3).
- o Incorporates policy contained in DoDI 5525.09 pertaining to cooperation with state and local officials in enforcing certain court orders relating to overseas Servicemembers (para 3–7*d*).
- o Replaces the term “paternity” with “parentage” (throughout).

- o Replaces the term (and acronym for) “basic allowance for housing II” with term (and acronym for) “basic allowance for housing Reserve Component/transit” (throughout).
- o Recognizes and provides guidance pertaining to the role of state child support enforcement agencies (throughout).

Personal Affairs

Family Support, Child Custody, and Parentage

By Order of the Secretary of the Army:

JAMES C. MCCONVILLE
General, United States Army
Chief of Staff

Official:


KATHLEEN S. MILLER
Administrative Assistant
to the Secretary of the Army

History. This publication is a major revision.

Summary. This regulation sets forth Army policy on financial support of Family members, parentage, and child custody. It prescribes Army policy on financial support of Family members, child custody and visitation, parentage, and related matters. Also, it implements DoDI 5525.09 with regard to Soldiers and Family members stationed or residing outside the United States on court-related requests for assistance arising from financial support, child custody and visitation, parentage, and related cases.

Applicability. This regulation applies to the Regular Army, the Army National Guard/Army National Guard of the

United States, and the U.S. Army Reserve, unless otherwise stated. Specifically, it applies to the Regular Army, including cadets at the U.S. Military Academy; (2) The U.S. Army Reserve on active duty pursuant to orders for 30 days or more; (3) All members of the Army National Guard of the United States on active duty for 30 days or more; (4) Members of the Army National Guard on active duty for 30 days or more pursuant to orders under Title 32, United States Code, except for the punitive provisions of this regulation; and (5) Soldiers receiving full or partial pay and allowances while confined at the U.S. Disciplinary Barracks or other confinement facilities. This regulation applies during mobilization.

Proponent and exception authority. The proponent of this regulation is The Judge Advocate General. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency, or its direct reporting unit or field operating agency in the grade of colonel or the civilian equivalent. Activities may request a waiver to this regulation by providing justification that includes a full analysis of the expected benefits and must include

formal review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the requesting activity and forwarded through higher headquarters to the policy proponent. Refer to AR 25–30 for specific guidance.

Army internal control process. This regulation contains internal control provisions in accordance with AR 11–2 and identifies key internal controls that must be evaluated (see appendix C).

Supplementation. Supplementation of this regulation and the establishment of command and local forms are prohibited without prior approval from The Judge Advocate General (DAJA–ZA), usarmy.pentagon.hqda-ot-jag.mbx.la@mail.mil.

Suggested improvements. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to the Office of The Judge Advocate General (DAJA–LA), usarmy.pentagon.hqda-ot-jag.mbx.la@mail.mil.

Distribution. This publication is available in electronic media only and is intended for the Regular Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve.

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*This publication supersedes AR 608–99, dated 29 October, 2003 and AD 2020-04 is rescinded upon publication of this AR.

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Chapter 1 General

1-1. Purpose

This regulation sets forth Department of the Army (DA) policy, responsibilities, and guidance on financial support of Family members, child custody and visitation, parentage, and compliance with court orders regarding these and related matters. This regulation preempts all other regulations on these matters within the DA. This regulation should not be construed to create any right, benefit, or entitlement, substantive or procedural, enforceable by law or in equity, by a party against the United States, its agencies, its officers, or any other person. This regulation will not be construed to create any right to judicial review involving compliance or noncompliance with this regulation by the United States, its agencies, its officers, or any other person.

1-2. References and forms

See appendix A.

1-3. Explanation of abbreviations and terms

See the glossary.

1-4. Responsibilities

a. The Chief, Legal Assistance Policy Division, Office of The Judge Advocate General, on behalf of The Judge Advocate General (TJAG), will—

(1) Advise and assist Headquarters, Department of the Army (HQDA) agencies, commanders, staff judge advocates (SJAs), judge advocates, and DA civilian attorney employees on all matters addressed by this regulation.

(2) Provide guidance regarding the scope and nature of legal assistance services provided to Soldiers and their Family members on financial support, child custody and visitation, parentage, and related cases.

(3) Authorize exceptions on a case-by-case basis to the provisions of this regulation, if not inconsistent with the requirements set by statute, prescribed by executive order, mandated by applicable case law, or required by higher authority.

b. The Commanding General, U.S. Army Human Resources Command and special branch managers, on behalf of the Deputy Chief of Staff, G-1 will—

(1) Adhere to the assignment, reassignment, and deletion considerations contained in this regulation.

(2) Consistent with AR 25-22, disclose information pertaining to a Soldier's current commander, rank, and present duty assignment to dependents alleging nonsupport.

c. Commanders of Army commands/Army service component commands, direct reporting units will—

(1) Monitor compliance with this regulation and actions taken in response to inquiries under this regulation.

(2) Respond to all requests for assistance from government officials based on court orders and all other inquiries received under this regulation.

(3) Establish procedures to ensure that subordinate commanders and Soldiers within their commands are thoroughly familiar with the provisions of this regulation.

(4) Take other actions, as appropriate, to enforce the provisions of this regulation.

1-5. Records management (recordkeeping) requirements

The records management requirement for all record numbers, associated forms, and reports required by this regulation are addressed in the Army Records Retention Schedule-Army (RRS-A). Detailed information for all related record numbers, forms, and reports are located in Army Records Information Management System (ARIMS)/RRS-A at <https://www.arims.army.mil>. If any record numbers, forms, and reports are not current, addressed, and/or published correctly in ARIMS/RRS-A, see DA Pam 25-403 for guidance.

1-6. Legal assistance client services files, records, and forms

Files, records, and forms relating to this regulation do not include those maintained pursuant to AR 27-3, with regard to legal assistance client services. The maintenance and disposition of all such files, records, and forms are governed by that regulation and those regulations cited therein.

1-7. Management of personal affairs

a. The Army recognizes the transient nature of military duty. This regulation, however, prohibits the use of a Soldier's military status or assignment to deny financial support to Family members or to evade court orders on financial support, child custody and visitation, parentage, and related matters.

b. Soldiers are required to manage their personal affairs in a manner that does not bring discredit upon themselves or the U.S. Army. This responsibility includes—

(1) Maintaining reasonable contact with Family members so that their financial needs and welfare do not become official matters of concern for the Army (see para 2-1).

(2) Conducting themselves in an honorable manner with regard to parental commitments and responsibilities (see chap 2).

(3) Providing adequate financial support to Family members (see paras 2-3 through 2-9).

(4) Complying with all court or child support enforcement agency (CSEA) orders (see paras 2-2, 2-4, and 2-11).

c. Commanders and their staffs have a responsibility, when consistent with other military requirements, to ensure that any action or inaction on their part does not encourage or facilitate violations of court orders or avoidance of a judicial resolution of issues relating to parentage, child custody, or support by Soldiers and Family members.

(1) In addition to the considerations contained in AR 614-100, AR 614-200, and AR 600-8-11, Human Resources Command and special branch managers may consider during the assignment process, or when evaluating requests for deletion or deferment, whether a Soldier's assignment, or continued assignment, outside of the United States will adversely affect the legal rights of others in pending court actions, or will result in a repeated or continuing violation of an existing court order.

(2) This paragraph does not prohibit a commander from assisting a Soldier to invoke the protections of the Servicemembers Civil Relief Act.

(3) This paragraph does not modify the baseline administrative individual readiness standards for worldwide deployment established in AR 600-8-101. No provision in this regulation requires a Soldier to be classified as non-deployable.

d. The policies of this regulation are solely intended as interim measures until pertinent issues are resolved in court or settled by agreement among the parties involved.

e. Soldiers are entitled to the same legal rights and privileges in state courts as civilians. This regulation is not intended to be used as a guide by courts in determining any of the following:

(1) The existence or amount of a Soldier's financial support obligations.

(2) The existence or extent of a Soldier's child custody or visitation rights.

(3) The existence or extent of a Soldier's rights or obligations in adjudicating parentage claims.

1-8. Penalties

Personnel subject to the Uniform Code of Military Justice (UCMJ) who fail to comply with paragraph 2-5 or 2-11 are subject to punishment under the UCMJ as well as to adverse administrative action and other adverse action authorized by applicable sections of the United States Code or Federal regulations. Paragraphs 2-5 and 2-11 are fully effective at all times, and a violation of either paragraph is separately punishable as a violation of a lawful general regulation under UCMJ, Art. 92 even in the absence of a prior complaint from a Family member or counseling by a commander. These paragraphs and other provisions of this regulation may also be the basis for a commissioned, warrant, or noncommissioned officer to issue a lawful order to a Soldier. This regulation provides guidance but is not punitive as to Title 32-status members of the Army National Guard.

1-9. Entitlement to military allowances

a. The financial support requirements of this regulation, in the absence of a court order or written support agreement, are stated in amounts equal to one of the following based on the Soldier's pay grade (see the DoD 7000.14-R, volume 7A, chapter 26):

(1) Basic allowance for housing (BAH): A military housing allowance based on the geographic duty location, pay grade, and dependency status.

(2) BAH Reserve Component/Transit (RC/T): The BAH allowance without consideration of the geographic duty location-the equivalent of the former basic allowance for quarters (often referred to as non-locality BAH).

(3) BAH-WITH: The BAH rate for a Soldier with dependents.

(4) BAH-WITHOUT: The BAH rate for a Soldier without dependents.

(5) BAH RC/T-WITH: The BAH RC/T rate for a Soldier with dependents.

(6) BAH RC/T-WITHOUT: The BAH RC/T rate for a Soldier without dependents.

(7) BAH-DIFF: The difference between the BAH RC/T-WITH and the BAH RC/T-WITHOUT for a Soldier's pay grade.

b. A Soldier's obligation to provide financial support to Family members under this regulation is not contingent upon whether the Soldier is entitled to, or receiving, any form of BAH. A Soldier will comply with the obligations of this regulation even if the BAH RC/T is greater than the BAH for their geographic duty location. Except as provided in paragraphs 2-13b(2) through 2-13b(4), the actual receipt or nonreceipt of BAH-WITH, BAH-WITHOUT, or BAH-DIFF has no relationship to that obligation.

c. Nothing in the regulation governs eligibility for BAH. Eligibility for BAH is established by federal law and DoD policy (currently contained in DoD 7000.14-R).

1-10. Availability of remedies based on court order

a. In certain circumstances, court and CSEA orders can be wholly or partially enforced by the Defense Finance and Accounting Service (DFAS), through garnishment (see Section 659, Title 42, United States Code (42 USC 659) and, Part 581, Title 5, Code of Federal Regulations (5 CFR 581)) or involuntary allotment (see 42 USC 665). Contact the DFAS Garnishment Law Directorate for current policies and procedures.

b. Within the Federal Republic of Germany (FRG), FRG court orders may be separately enforceable through garnishment by Army finance offices pursuant to the terms of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) Supplementary Agreement with Germany. Such garnishments terminate upon the Soldier's reassignment outside of the FRG.

c. The availability of these and other remedies to a Family member, based on an existing or potential court order or other basis, has no relationship to a Soldier's obligations under this regulation, or to a commander's responsibility to enforce the provisions of this regulation.

1-11. Role of legal assistance attorneys

a. Pursuant to AR 27-3, attorneys providing legal assistance may assist Soldiers and Family members on legal problems and needs involving financial support, child custody and visitation, parentage, and related matters. Unless otherwise authorized by AR 27-3, a person pursuing a parentage claim against a Soldier, or a child born out of wedlock before parentage is established or formally acknowledged, is not entitled to legal assistance. Once parentage has been established, the child is eligible for legal assistance under AR 27-3. A legal assistance attorney may then assist in establishing a child support obligation on behalf of that child or collecting child support on behalf of that child. Exceptions or variations from client eligibility requirements may be authorized pursuant to AR 27-3.

b. An attorney providing legal assistance may not assist both spouses involved in a domestic dispute or both parties involved in any dispute over financial support, child custody or visitation, parentage, or related matters. Attorneys from the same Army legal office may be precluded in certain instances from providing legal assistance to both parties (see AR 27-3 and AR 27-26).

c. The rules regarding conflicts of interest and imputed disqualification may also prevent a particular attorney from providing legal advice to a commander, or a member of the commander's staff, on the requirements of this regulation in certain cases. However, this prohibition would not prevent an attorney who is properly providing legal assistance to a client from advocating that client's position to the appropriate commander. The attorney has the responsibility to inform the commander of the attorney's role in situations where such a distinction may not be clear to the commander (see AR 27-3).

Chapter 2

The Legal Obligations of Soldiers

Section I

General

2-1. Obligations to geographically separated Family members

a. A Soldier is required to provide financial support to Family members. This obligation is frequently complicated when the Soldier is geographically separated from the Family. In the majority of these situations, the Soldier and the Family can manage the financial support without command involvement. These arrangements may include joint checking accounts or voluntary allotments to the Family as appropriate.

b. The commander must become involved when the parties are unable to agree on a proper method to provide financial support to the Family members. This obligation does not arise until a Family member or an authorized representative of the Family member complains to the command that the Soldier is failing to provide proper support.

c. Soldiers are expected to keep reasonable contact with Family members, as well as with others who have a legitimate need to know their location, to minimize the total number of inquiries to their commanders and other Army officials on financial support, child custody and visitation, parentage, and related matters. Within the parameters of the law, Soldiers will, whenever possible, resolve all such matters so that these personal problems do not become official matters of concern for their commanders or other Army officials. When this is not possible, Soldiers should promptly seek legal advice from an attorney providing legal assistance or from a civilian lawyer in private practice.

2-2. Obligations in response to parentage inquiries

a. This regulation applies to Soldiers who are the legal parent of a child. Within the United States, legal parentage is determined according to state law. Depending on the state, legal parentage may arise through legal presumptions associated with marriage at the time of the child's birth, voluntary acknowledgments of paternity or parentage, and administrative or judicial orders. A legal parent may be someone other than the biological parent or birth parent. This is especially true in cases involving adoption, same-sex marriage, surrogacy, and egg or sperm donation.

b. A foreign court order establishing paternity or parentage will be honored if the court had proper jurisdiction. If the financial support provisions of such a foreign court order are unenforceable under paragraph 2-4c, the Soldier will be required to provide support under the provisions of paragraph 2-6. Commanders should seek legal advice from their servicing SJA office before determining whether the foreign court has proper jurisdiction.

c. Determinations of legal parentage made by non-judicial foreign governmental entities will be recognized when the foreign parentage determination has been recognized and enforced by a court within the United States, or the United States has agreed in a treaty or international agreement to honor parentage determinations of a particular foreign nation.

d. Questions concerning a Soldier's status as a legal parent should be referred to the servicing Office of the Staff Judge Advocate.

e. Once parentage is determined pursuant to paragraphs 2-2a, 2-2b, 2-2c, and 2-2d, financial support will be calculated according to the provisions of chapter 2, section II.

f. A Soldier who admits legal parentage and agrees to provide financial support may, under certain circumstances, obtain BAH-DIFF (see DoD 7000.14-R).

g. Even if a Soldier admits parentage (not as part of a state process establishing the Soldier as a legal parent under state law) and agrees to provide financial support, they may terminate financial support at any time for any reason in the absence of a court order, subject to local law or international agreements. However, in this instance, a Soldier who is receiving BAH-WITH based solely on the financial support provided on behalf of the acknowledged child will immediately notify the appropriate military finance office so that excess BAH payments to which the Soldier is not entitled may be stopped.

Section II

Obligations to Provide Financial Support to Family Members

2-3. Financial support by agreement

a. *Oral financial support agreement.* It is not the Army's policy to become involved in disputes over the terms or enforcement of oral financial support agreements. Where an oral agreement exists and is being followed, the Army will not interfere. When a dispute arises over the terms of an oral agreement, the parties are not in agreement, and there is no agreement for the purposes of this paragraph (see para B-2).

b. *Written financial support agreement.* If a signed written financial support agreement exists, the amount of financial support specified in the agreement controls (see para B-2). A written financial support agreement is any written document (such as a separation agreement or property settlement agreement, a letter, email, or a series of letters or emails) evidencing an intent to create a binding financial support agreement. Ordinarily, informal forms of written communication (for example, text messages and social media posts) do not demonstrate an intent to create a binding agreement.

(1) If a written agreement is silent on an amount of financial support, the financial support requirements of paragraph 2-6 apply (in the absence of a court order or other written financial support agreement that does require a specific amount of financial support).

(2) Commanders will apply the terms of the agreement as written and will avoid making interpretations that depart from the clear meaning of the agreement. Commanders may rely on other existing documents to determine the specific financial support obligation; that is, if the agreement requires the Soldier to “pay the rent,” the commander may consult the lease agreement to determine the amount of the support obligation. Additionally, in order to be enforceable under this regulation, there must be no major dispute as to the meaning of the material terms of the agreement. If portions of the agreement are so ambiguous that the intent of the parties cannot be determined, or if it is clearly apparent that there was no meeting of the minds, the commander is not required by this regulation to enforce the contested provisions. Depending on the individual facts and circumstances of the case, the commander may also find that the entire agreement is unenforceable. These types of disputes are best resolved by state courts – not Army commanders. Commanders should seek legal advice from their servicing SJA office if they have any questions concerning the terms, or enforceability, of a written agreement.

(3) If, after a written financial support agreement is signed, a court grants a divorce to the parties signing the agreement, the financial support agreement will not be enforced under this regulation unless the agreement has been approved, ratified, or otherwise incorporated within the divorce decree or, by its specific language, the separation agreement continues beyond the divorce. In cases where the divorce decree does not approve, ratify, or incorporate a prior written financial support agreement of the parties or the separation agreement does not continue by its specific language, the following applies:

(a) A Soldier is not required to provide financial support to a former spouse unless required to do so by court order.

(b) A Soldier is not required to provide financial support to their children beyond the amount required in paragraph 2–6, unless required to do so by court order (see also para 2–14).

(4) With regard to a written financial support agreement that has not been approved, ratified, incorporated within a divorce decree, or continued by its specific language, a Family member may, depending on the applicable rules of law, seek a court judgment for arrearages resulting from a Soldier's breach of the agreement or specific performance of the agreement with regard to future payments due.

2–4. Financial support required by court or Child Support Enforcement Agency order

a. Domestic orders. Soldiers will comply with the financial support provisions of all state court or CSEA orders (see para 2–5 and para B–3). Failure of a Soldier to comply with a financial support or related provision of a state court or CSEA order (for example, provision of a court order directing a division of property or payment of a particular expense) may also be the basis for a lawful order from a commander to comply with such provision.

b. Foreign orders.

(1) A Soldier is not required by this regulation to comply with a foreign court order on financial support except in the following situations:

(a) The foreign court order has been recognized and enforced by a court within the United States. State courts may recognize foreign court orders under the provisions of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, separate bilateral agreements between states and foreign countries, or common law comity principles.

(b) The United States has agreed in a treaty or international agreement to honor valid financial support orders entered by the courts of a particular foreign nation.

1. The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance creates mechanisms by which the federal government and U.S. states may recognize foreign court orders. For purposes of this regulation, however, this convention, alone, is not a sufficient basis for a commander to order a Soldier to comply with a foreign court order. Foreign court orders from countries party to the convention must first be processed and recognized as valid under the convention by either the U.S. Office of Child Support Enforcement, or a U.S. state child support enforcement agency.

2. North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) Supplementary Agreement with Germany creates an independent international legal requirement for U.S. Army commanders to secure compliance with German civil judgments and legally enforceable decisions by German government authorities relating to Soldiers stationed in the FRG. Accordingly, with regard to Soldiers assigned to and present for duty within the FRG, commanders will enforce FRG court orders for financial support as well as voluntary acknowledgements of support submitted to German government agencies that have equal effect to a court order under German law.

3. While an apostille issued pursuant to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, provides sufficient guarantee of the authenticity of a foreign court order, it does not by itself provide a basis for a commander to order a Soldier to comply with a foreign court order.

4. While a SOFA or other international agreement, may recognize that a Soldier present for duty within that country is subject to host-nation civil jurisdiction, that recognition alone is an insufficient basis for a commander to order a Soldier to comply with a foreign court order.

(2) Nevertheless, Soldiers who fail to comply with the financial support provisions of a foreign court order, regardless of whether it is enforced by this regulation, do so at their own peril. This is particularly true if the Soldier is within the jurisdiction of the foreign court or if the foreign court order is later recognized and enforced by a court within the United States.

(3) With regard to the financial support provision of a foreign court order entered by a court of a nation whose orders the United States has not agreed to recognize, or that has not been recognized and enforced by a court within the United States, a Soldier is in compliance with this regulation if they are providing financial support in an amount required by the foreign court order or by this regulation, whichever is less.

c. Orders without financial support provisions. An order without a financial support provision is one that contains no language directing or suggesting that the Soldier provide financial support to some or all Family members on a periodic or other continuing basis. Court or CSEA orders may be silent as to financial support for one or more Family members due to jurisdictional or other issues. For example a state child support enforcement agency may have the jurisdiction to order child support but not spousal support. As a result, orders that are silent regarding support, should not automatically be interpreted to mean that financial support was considered, but rejected. Accordingly, when a court or CSEA order is silent regarding the support requirements for one or more Family members, the Soldier will provide support to the un-addressed Family members according to paragraph 2–6, unless relieved of that obligation by the battalion-level commander pursuant to paragraphs 2–12 through 2–14.

2–5. Punitive provisions regarding financial support

a. Soldiers will not violate any of the following:

(1) The financial support provision of a state court or CSEA order, or a foreign court order enforceable under paragraph 2–4*b*.

(2) The financial support provision of a written financial support agreement as described in paragraph 2–3 in the absence of a court order.

(3) The financial support requirements of paragraph 2–6 in the absence of a written financial support agreement or a court order containing a financial support provision.

b. This paragraph is punitive in nature (see para 1–6). Commanders are responsible for the enforcement of this paragraph (see para 3–8).

c. A Soldier cannot fall into arrears without violating this regulation. Although the collection of arrearages based on violations of subparagraphs 2–5*a*(1) and 2–5*a*(2) may be enforced in court, there is no legal means to collect arrearages based on violations of subparagraph 2–5*a*(3). Nevertheless, in all cases, Soldiers should be encouraged, but not ordered, to pay arrearages. Additionally, a Soldier who falls into arrears may be punished under the provisions of UCMJ, Art. 92 for failing to make the support payment required by subparagraphs 2–5*a*(1), 2–5*a*(2), or 2–5*a*(3) at the time that the support obligation was originally due. Punishment in such instances is based on failure to provide financial support when due, not for failure to pay arrearages.

2–6. Financial support required in the absence of a financial support agreement or court order

a. Application. This paragraph establishes requirements for interim financial support (paras 2–6*d* and 2–6*e*) and enhanced interim financial support for spouses (para 2–6*f*). Both types of support only apply in the absence of a financial support agreement or a court order containing a financial support provision and until such an agreement is signed or such an order is issued. Allegations or even proof of desertion, adultery, or other marital misconduct, or criminal acts on the part of a spouse will not excuse a Soldier's obligation to comply with the provisions of this regulation unless a battalion-level commander, or higher, has released the Soldier under the provisions of paragraphs 2–12 through 2–14. The interim financial support required to be paid by this paragraph does not constitute an "alimony or separate maintenance payment" under Sections 71 or 215 of the Internal Revenue Code (26 USC).

b. Pro-rata share. Under this paragraph, when the term "pro-rata share" is used with regard to BAH RC/T–WITH, the amount of each such share of BAH RC/T–WITH is calculated using the equation in figure 2–1.

$$\text{pro-rata share} = \frac{1}{\text{total number of supported family members}} \times \text{applicable BAH RC/T - WITH rate}$$

Figure 2–1. Pro-rata share equation

c. Calculation. The "total number of supported Family members" in the denominator of the fraction in figure 2–1 includes all Family members (regardless of residence) except the following:

- (1) A Soldier's former spouse, regardless of whether the Soldier is providing financial support to the former spouse.
- (2) A Soldier's present spouse who is on active duty in one of the military services, unless financial support is required by a court order or written financial support agreement (see para 2–6d(4)).
- (3) A Family member for whom the Soldier is not required to provide financial support under this regulation or for whom the Soldier has been released by their commander from the regulatory requirement to provide financial support pursuant to paragraphs 2–12 through 2–14.

d. Single Family units. (See para B–4.)

(1) *Family unit not residing in government Family housing.* Except in the situations addressed in paragraphs 2–6d(1)(a), 2–6d(1)(b), and 2–6d(1)(c), the Soldier will provide financial support in an amount equal to the Soldier's BAH RC/T–WITH to the Family unit.

(a) When a Soldier stationed overseas receives BAH solely on behalf of unaccompanied Family members who reside in the United States, the actual amount of BAH paid to the Soldier on behalf of those dependents will be used to calculate the support requirement for those dependents, if it is greater than the BAH RC/T–WITH rate.

(b) Where one member of the Family unit has a court or CSEA order for support (frequently issued by a local CSEA that has no jurisdiction to order spousal support), and the other members of the Family unit are not addressed in that or any other support order, the Soldier must comply with the court order regarding support to that Family member. The remaining Family members will be provided a pro-rata share of the BAH RC/T–WITH (see para 2–4c). The pro-rata share will be paid to the other Family members even if they reside with the Family member receiving support pursuant to a court or CSEA order, and even if the court or CSEA ordered amount is in excess of BAH RC/T–WITH.

(c) Where the Soldier has been released by their commander from the regulatory requirement to provide financial support to one or more dependents of the Family unit pursuant to paragraphs 2–12 through 2–14, the amount of support required by paragraph 2–6d(1) will be reduced by the pro-rata share of each Family member whom the Soldier has been released from supporting.

(2) *Family unit residing in government Family housing.* While the Soldier's Family members are residing in government Family housing, the Soldier is not required to provide additional financial support unless required by paragraph 2–6f (enhanced interim financial support for spouses). When the supported Family member(s) move(s) out of government Family housing, the Soldier will provide BAH RC/T–WITH.

(3) *Family members within the Family unit residing at different locations.* The Soldier will provide a pro-rata share of BAH RC/T–WITH to each Family member not residing in government Family housing. The Soldier is not required to provide additional support for Family members residing in government Family housing.

(4) *Soldier married to another person on active duty in one of the military services.* In the absence of a written financial support agreement or a court order containing a financial support provision, a Soldier is not required to provide financial support to a spouse on active duty in one of the military services. With regard to a Soldier's child or children (from that marriage or a prior marriage), a Soldier will provide the following financial support in the absence of a written financial support agreement or a court order containing a financial support provision:

(a) If the Soldier does not have custody of any children, and the children do not reside in government quarters, the Soldier will provide BAH–DIFF to the military member having custody of the child or children.

(b) If the Soldier does not have custody of any children, and the children reside in government quarters, the Soldier is not required to provide financial support to the military member having custody of the child or children.

(c) If the Soldier has custody of one or more children, the Soldier is not required to provide financial support for a child or the children in the custody of the other military member.

e. Multiple Family units. (See para B–5.)

- (1) A Soldier will provide financial support for each Family unit and Family member in the following manner:

(a) Family members covered by court orders will be provided financial support in accordance with those court orders.

(b) Family members covered by financial support agreements will be provided financial support according to those agreements.

(c) Family members residing in government Family housing who are not covered by either a court order or a financial support agreement will not be provided additional financial support unless required by paragraph 2-6f (enhanced interim financial support for spouses).

(d) Each Family member not residing in government Family housing and who is not covered by a court order or a financial support agreement will be provided a pro-rata share of BAH RC/T-WITH. When a Soldier stationed overseas receives BAH solely on behalf of unaccompanied Family members who reside in the United States, the actual amount of BAH paid to the Soldier on behalf of those dependents will be used to calculate the support requirement for those dependents, if it is greater than their pro-rata share of BAH RC/T-WITH.

(e) If the Soldier's present spouse is on active duty in one of the military services, the requirements of paragraph 2-6d(4) apply.

(2) The amount of financial support provided pursuant to a financial support agreement or a court order covering one or more Family units or members does not affect the calculation of the pro-rata financial support required under this regulation for the financial support of any other Family units or members not covered by such agreement or order (see para B-5a).

f. Enhanced interim financial support for spouses.

(1) Enhanced financial support is temporary and designed to provide for sustenance and additional necessary expenses that initially arise when the Soldier and spouse separate, or when the time to obtain a court order is prolonged because of a lack of access to appropriate courts of competent jurisdiction. Enhanced interim financial support for spouses will be provided by the Soldier in addition to the interim support required by paragraphs 2-6d and 2-6e. Enhanced interim financial support payments will not be made to spouses who are Servicemembers of any component while serving on active duty.

(2) Enhanced interim financial support payments will be made in an amount equal to 25% of the BAH RC/T-WITH for the following periods:

(a) For those spouses residing in a location subject to the jurisdiction of a state court able to order financial support, the Soldier will make a one-time transitional support payment in conjunction with the first 30 days of interim support provided pursuant to paragraphs 2-6d or 2-6e. If the Soldier fails to make this one-time payment when due, the Soldier's commander is authorized to order the Soldier to make this payment when the command becomes aware of the deficiency.

(b) For all other spouses, the Soldier will make this enhanced interim support payment for the period of time the Soldier is providing support pursuant to paragraphs 2-6d or 2-6e and the spouse does not have access to a state court with jurisdiction to order spousal support.

(3) Soldiers may not satisfy enhanced interim support payment requirements by directly paying non-government housing expenses on behalf of spouses pursuant to paragraph 2-9d or by any other in-kind financial support without the written approval of the supported spouse.

(4) Paragraph 2-8 applies to enhanced interim financial support. However, the support will only apply to a 30 day period for those spouses residing in a location subject to the jurisdiction of a state court able to order financial support. The spouse may elect to receive two proportional payments over two months, or one lump sum payment on the first of the month for the previous month.

2-7. Initiation and termination of financial support obligations

a. Initiation.

(1) Unless otherwise required by a court order, court-ordered support will be effective as of the date of the order.

(2) Unless otherwise required by the terms of the written financial support agreement, the support obligation will begin on the day that the last necessary party signed the agreement.

(3) In the absence of a court order or a written financial support agreement, the support obligation will begin on the date that the parties cease living together in the same dwelling in either of the following events:

(a) Either party voluntarily leaving the residence.

(b) The Soldier being ordered out of the residence, subject to paragraph 2-6d(2).

(4) It will be presumed that the Soldier is complying with the support obligation until a Family member or a Family member's legal representative makes a complaint to the command, or authorized representative of the command, that the Soldier is not complying with the support obligation.

(5) A Soldier's obligation to pay BAH RC/T-WITH to the Family members will begin on the date that the Family members vacate government Family housing. The obligation to make this support payment begins even if the Soldier has not cleared government Family housing and is not entitled to draw BAH-WITH.

b. Termination.

(1) Any obligation to pay court-ordered support will terminate only in accordance with the terms of the court order.

(2) Any obligation to pay support pursuant to the terms of a written financial support agreement will terminate only in either of the following events:

(a) Pursuant to the terms of the agreement.

(b) Upon the effective date of a court order terminating the marriage or establishing a financial support obligation.

(3) Support provided pursuant to the requirements of paragraph 2-6 will terminate upon any of the following events:

(a) Upon the effective date of a financial support agreement.

(b) Upon the effective date of a court order terminating the marriage or establishing a financial support obligation.

(c) By the action of a commander relieving the Soldier of a support obligation under the provisions of paragraphs 2-12 through 2-14. Such termination will be effective upon the date release is granted.

(d) Upon the date the Soldier and supported Family member elect to no longer live apart.

2-8. Financial support obligations for less than a full month

Absent specific terms in a court order or a financial support agreement, a Soldier's support obligation beginning or terminating on other than the first or last day of the month will be calculated for that month based on a pro-rata daily share.

2-9. Form and timing of financial support payments

a. Unless otherwise required by court order or by a written financial support agreement, a financial support payment may be made in any of the ways listed in subparagraphs 2-9a(1) through 2-9a(7) as long as the payment reaches the adult Family member concerned, or the adult having custody of the child concerned, by the date required in paragraphs 2-9b and 2-9c. A Soldier seeking to make payment by allotment must make payments by alternative means until the allotment takes effect.

(1) Cash.

(2) Check.

(3) Money order.

(4) Electronic fund transfer.

(5) Voluntary allotment.

(6) Involuntary allotment.

(7) Garnishment (or wage assignment).

b. Unless otherwise required by a court order or by a written financial support agreement, a financial support payment made in cash, check, or money order will be personally delivered to the individual identified in paragraph 2-9a, not later than the first day of the month following the month to which the financial support payment pertains. Soldiers making cash payments may have to prove that the payment was made and should obtain a receipt or other proof that the payments were made (see para 3-4a(2)).

c. Unless otherwise required by a court order or by a written financial support agreement, a financial support payment by check or money order, not personally delivered in accordance with paragraph 2-9b, will be deposited in the U.S. mail with proper postage affixed, addressed to the individual identified in paragraph 2-9a, and postmarked not later than the first day of the month following the month to which the financial support payment pertains.

d. As an exception to paragraph 2-9a, a Soldier may comply with the financial support requirements of paragraphs 2-6d and 2-6e (but not paragraph 2-6f, absent written approval by the supported spouse) by directly paying non-government housing expenses on behalf of Family members if the Family members are residing in non-government housing.

(1) Non-government housing expenses are limited to—

(a) Rent (including payments to privatized housing on a military installation)(see para B-4f).

(b) The principal and interest payments due on any outstanding loan secured by a mortgage on a home in which the Family is residing and the real property taxes and property insurance due under an escrow agreement covering the same property.

(c) Essential utilities such as gas, electricity, and water.

(2) Non-government housing expenses do not include expenses described in paragraph 2-9d(1) for which the Soldier is not legally responsible by reason of contract, lease, or loan agreement. Authorized expenses also do not include

other housing costs, such as telephone or cable television charges, regardless of whether or the Soldier is legally responsible for their payment.

(3) To the extent that the monthly financial support requirements of this regulation exceed the monthly non-government housing expenses paid by a Soldier for their supported Family members, payment for any shortfall will be made as required by paragraph 2-9a. To the extent that the monthly non-government housing expenses paid by a Soldier exceed the monthly financial support requirements of this regulation, no credit is authorized under this regulation for any financial support payment due—

(a) In any subsequent month.

(b) For the same month with regard to any Family member residing elsewhere.

e. All other financial support in kind, such as payments made relating to non-government housing expenses not included in paragraph 2-9d(1), automobile loans and insurance, or charge accounts, made to others on behalf of supported Family members requires the written approval of the supported Family members in order to be credited as indicated in paragraph 2-9d.

Section III

Obligations regarding Child Custody and Visitation

2-10. General

a. 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.

b. Soldiers will comply with the provisions of all applicable court orders, laws, and treaties regarding child custody and visitation, and related matters, regardless of the age of the children concerned. The punitive provisions of paragraph 2-11, however, apply only to violations relating to unmarried children under the age of 14 years. Nevertheless, a Soldier who disobeys a court order on child custody, regardless of the age of a child, may be subject to civil and criminal sanctions by civil authorities. The content of a court order on child custody may also be the basis for a lawful order from a Soldier's commander (see para 3-6b(3)).

2-11. Punitive provisions regarding child custody

a. A Soldier relative who is aware that another person is a lawful custodian of an unmarried child under the age of 14 years will not wrongfully—

(1) Abduct, take, entice, or carry the child away from the lawful custodian.

(2) Withhold, detain, or conceal the child from the lawful custodian.

b. The fact that joint legal custody of a child has been awarded to both parents by a court does not preclude violation of this paragraph by a Soldier parent who is not authorized physical custody of that child by a court order or who is authorized only visitation with that child by a court order.

c. A Soldier relative is a Soldier who is the parent, stepparent, grandparent, brother, sister, uncle, aunt, or one who has at some time in the past been the lawful custodian of the child.

d. It is not a violation of this paragraph if the Soldier at the time of the alleged offense was authorized to have physical custody of the child to the exclusion of others pursuant to a valid court order.

Section IV

Release from Specific Regulatory Requirements

2-12. General

a. A battalion-level commander, or higher, must be satisfied by a preponderance of the evidence that the underlying intent of this regulation would be furthered before that commander may release a Soldier from a requirement imposed by this regulation (see para 1-7).

b. A battalion-level commander, or higher, may reconsider and change any decision they, or a prior commander, has made under this paragraph.

c. Before granting relief—

(1) A commander, or an officer acting on their behalf, should attempt to contact the affected Family member for whatever additional information may be necessary to make an informed decision on this matter.

(2) A Soldier has the burden of coming forward with sufficient information and documents (for example, tax returns, pay vouchers, court orders, written financial support agreements) to establish a basis for a commander's action

under paragraphs 2–13 or 2–14. This burden may also be met if, in reply to a personal letter or telephone call from the commander or an officer acting on their behalf, a spouse refuses to provide the documents in their possession that may support or rebut the Soldier's claim.

(3) Prior to granting release under this section, the commander must obtain a written legal opinion from the servicing SJA office, that a release is legally sufficient and complies with the requirements of this regulation, applicable laws, legally effective court orders, and written financial support agreements.

2–13. Situations warranting release from regulatory spousal support requirements

a. A battalion-level commander may release a Soldier under their command from the regulatory requirement to provide spousal support pursuant to paragraphs 2–5a(3) and 2–6. This provision may not be used to relieve a Soldier of any child support requirement. This does not give the commander authority to release a Soldier from the requirement to provide support required by a court order or a written financial support agreement.

b. Relief under this paragraph may include any of the following:

- (1) A release from the total support requirement.
- (2) Release from the interim support requirements of paragraphs 2–6d and 2–6e, but not the enhanced interim financial support requirement of paragraph 2–6f, or vice versa.
- (3) A reduction in the amount of the monthly support requirement.
- (4) A credit towards the regulatory support requirement.

c. A battalion-level commander, or higher, must be satisfied by a preponderance of the evidence that the Soldier should be released from the support requirement as a matter of fundamental fairness.

d. Situations which may warrant relief include, but are not limited to, the following:

- (1) The income of the spouse exceeds the military pay of the Soldier.
- (2) The Soldier has been the victim of substantial abuse by the spouse.
- (3) The supported Family member is in jail.
- (4) Regulatory support has been provided to the spouse for 18 months.
- (5) A court with the jurisdiction to order financial support for the spouse has issued one or more orders, none of which contain a financial support provision.

(6) The spouse has acted in a manner to cause divorce proceedings to be unreasonably prolonged.

e. Additionally, the requirement to provide enhanced interim financial support for spouses (see para 2–6f) should routinely be waived when all of the following criteria are met:

- (1) The Soldier and spouse have lived apart for 30 days and the spouse resides outside the jurisdiction of any state court with jurisdiction to order support.
- (2) The Soldier has paid the required enhanced interim financial support for at least one 30-day period.
- (3) The spouse is a citizen of the host nation or it is otherwise appropriate for a host nation court of competent jurisdiction to order spousal support. (This criterion requires more of a connection to the host nation than mere presence in compliance with military orders).

f. Relief should not be granted when the Soldier is receiving BAH–WITH solely on the basis of providing financial support to that spouse, unless the Soldier agrees to terminate BAH–WITH effective the date released from the support obligation.

2–14. Situations warranting release from regulatory child support requirements

A battalion-level commander may release a Soldier from the regulatory requirement to provide financial support to a child pursuant to paragraphs 2–5a(3) and 2–6 if all of the following criteria are met:

- a.* The Soldier is the lawful custodian of the child.
- b.* The child, without the Soldier's consent, is in the custody of another person who is not the lawful custodian of the child.
- c.* And the Soldier is diligently pursuing legal means to obtain physical custody of the child.

Chapter 3 Command Responses to Inquiries

3–1. General

a. For purposes of this regulation, an inquiry is any telephone call, letter, facsimile transmission, email, or other form of communication from, or clearly on behalf of, an affected Family member that requests information, expresses dissatisfaction, states a protest, makes a complaint or claim for money, or asks for other relief about financial support,

child custody or visitation, parentage, or related case involving a Soldier or Family member that is addressed, forwarded, or otherwise communicated to HQDA or any subordinate command or activity.

b. Family support, child custody, or parentage inquiries will be directed to the company-level commander of the Soldier concerned. In many instances civilian Family members initially direct inquiries to legal assistance attorneys, inspector general offices, or other Army agencies either because they do not know the Soldier's current unit of assignment, or because they do not know the inquiry should be directed to the company-level commander. In order to facilitate this coordination, Department of the Army Human Resources personnel are authorized to disclose a Soldier's current unit of assignment to other DA personnel. This information may only be disclosed to third parties, to include the inquiring Family member, if consistent with the guidance contained in AR 25–22.

3–2. Investigations

a. Upon receipt of an inquiry concerning an assigned Soldier, the commander will determine if additional information is necessary to resolve the issues presented.

b. If additional information is required, the commander will initiate a preliminary inquiry or administrative investigation, whichever is most appropriate under the circumstances, according to the procedures contained in AR 15–6.

c. In the alternative, the commander (or someone acting on behalf of the commander), may inform the Soldier of the nature of the Family support, child custody, or parentage inquiry without conducting an inquiry or administrative investigation, in order to determine whether the Soldier wishes to voluntarily take the requested action, or provide the requested support. Prior to approaching a Soldier suspected of any criminal offense, the Soldier should be advised of their rights under UCMJ, Art. 31.

3–3. Standard requirements for all replies

a. The responsible commander will provide complete and accurate information in a timely manner in reply to all inquiries under provisions of this regulation (see para 1–4*c*). The responsible commander should send a reply in response to each inquiry within a reasonable time of receipt and/or upon completion.

b. Each reply to an inquiry should contain the specific information required by paragraphs 3–4 through 3–7, as appropriate, together with the following information:

(1) The name, rank, organization, and contact information for the responsible commander.

(2) A statement as to whether the Soldier has authorized the release outside the DoD of information obtained from a system of records. The Soldier's decision regarding the release of information should be recorded on DA Form 5459 (Authorization to Release Information from Army Records on Nonsupport/Child Custody/Paternity Inquiries).

(3) If the Soldier consents, a statement as to whether the Soldier admits that they have an obligation to take certain action under this regulation and, if so; the nature of that action and, if not; why not.

c. Replies to inquiries should also provide information that is helpful and responsive to all the questions asked to the extent that such information is releasable pursuant to AR 25–22.

3–4. Financial nonsupport inquiries

a. If an AR 15–6 proceeding is initiated, the investigation or inquiry should address the following, as appropriate:

(1) If a Soldier denies they have an obligation to provide financial support to a spouse or children for any reason, the investigation will determine why the Soldier believes they do not have a financial support obligation to the Family member(s) in question.

(2) If the Soldier admits the obligation, but asserts that they have been providing financial support as required by this regulation, the investigating officer (IO) should request the Soldier provide proof of such payments. Cancelled personal checks and leave and earnings statements reflecting voluntary allotments are acceptable proof. Bank records showing electronic funds transfers are also acceptable proof, when combined with other evidence showing the Family member has access to the receiving bank account.

(3) If a commander determines that the Soldier has failed to comply with this regulation in the past, for whatever reason, or indicates any unwillingness to comply with this regulation in the future, the commander will order the Soldier to comply with this regulation. The order should specify—

(*a*) That financial support is to be provided not later than the first day of the next month (see para 2–9).

(*b*) The exact amount of financial support to be provided, as required by this regulation, and the continuing nature of the financial support to be provided (for example, provided each month).

(*c*) The person(s) to whom the financial support is to be provided.

(*d*) The method of payment (for example, voluntary allotment, personal check, electronic funds transfer, or money order).

(4) Regardless of the Soldier's immediate response to the order, the commander should consider taking appropriate action against the Soldier for failure to provide financial support when due, in violation of this regulation (see para 2–5c). The commander should also make efforts to eliminate future or continuing violations (see para 3–8).

(5) If a Soldier has been or is receiving allowances on behalf of dependents, without supporting those dependents, the commander should notify the appropriate finance office so that excess allowances may be stopped, and recouped in accordance with DoD 7000.14–R.

b. In replying to an inquiry alleging financial nonsupport, the commander will provide the information required by paragraph 3–3 and, to the extent permitted by AR 25–22, the following:

(1) A statement as to whether the Soldier admits that they have a financial support obligation to the Family member in question and, if not; why not.

(2) If the commander determines that the Soldier has no financial support obligation under this regulation to the Family member(s) in question, the commander should advise the person making the inquiry why no financial support is required.

(3) If the commander determines that the Soldier has a financial support obligation under this regulation to the Family member(s) in question, a statement as to whether the Soldier admits that they failed to provide financial support as required by this regulation.

(a) If the Soldier admits the obligation but asserts that they have been providing financial support as required by this regulation, the commander will provide a summary of such payments including the dates and amounts of the checks or money orders sent, and the address the payments were mailed to; or if a voluntary allotment was initiated on behalf of the Family member, the date the allotment was initiated, the amount and effective date of the voluntary allotment.

(b) If the Soldier admits that they failed to provide financial support, the commander will provide a complete summary of the reason(s), if any, provided by the Soldier for violating this regulation and the immediate steps that the Soldier will take to comply with this regulation in the future.

3–5. Parentage inquiries

a. The commander will follow the procedures in paragraph 3–4 in responding to inquiries where a court order already exists identifying the Soldier as a legal parent.

b. If parentage has not been legally established, the commander should take the following actions, as appropriate:

(1) Inform a Soldier who is the subject of a parentage inquiry of their legal and moral obligations, if any, and refer them to an attorney for legal assistance if they have questions about their legal rights. A referral to legal assistance is appropriate regardless of whether the Soldier admits parentage. A commander will urge the Soldier to provide financial support to the child if, after legal consultation, the Soldier admits parentage.

(2) In cases where a Soldier admits parentage and agrees to provide financial support, the commander should—

(a) Assist the Soldier in obtaining either BAH–WITH or BAH–DIFF, as appropriate, on behalf of the child if the Soldier is not already drawing BAH on behalf of another Family member.

(b) Assist the Soldier in filing for a voluntary allotment for the child.

(c) Assist the Soldier or mother of the child with enrolling the child in the Defense Enrollment Eligibility Reporting System and TRICARE, and if necessary obtaining a military identification card for the child (see AR 600–8–14).

(3) In cases where a Soldier has provided financial support for the child in the past but now denies parentage or has stopped or decreased the amount of financial support being provided, the commander should follow the procedures in paragraph 3–6.

c. In replying to an inquiry alleging parentage, the commander will provide the information required by paragraph 3–3 and, to the extent permitted by AR 25–22, the following:

(1) In cases where a Soldier refuses to answer questions about a parentage inquiry, denies parentage, or admits parentage but refuses to provide financial support, the reply to the inquiry will indicate this fact and inform the person making the inquiry that issues of parentage and financial support can only be resolved by a court or CSEA having jurisdiction over the Soldier.

(2) In cases where a Soldier admits parentage and agrees to provide financial support, the reply to the person making the inquiry will reflect the Soldier's response. The reply should also indicate the amount of financial support that will be provided to the child, together with the effective date and means of payment.

3–6. Child custody inquiries

a. If an AR 15–6 proceeding is initiated, the investigation or inquiry should address the following, as appropriate:

(1) If the Soldier denies they, or someone acting on the Soldier's behalf, has physical custody of the child(ren) in question, the IO should check this response against other sources of information, such as the Soldier's military records, government Family housing records, and supervisors and friends.

(2) If a Soldier denies having a legal obligation to give up physical custody of, or grant visitation with, the child(ren), the IO should determine why the Soldier believes they do not have a legal obligation to do so.

(3) If the Soldier has no legal right to physical custody of the child(ren), the commander will order the Soldier to comply with this regulation. Regardless of the Soldier's response to the order, the commander may take appropriate action against the Soldier for violating this regulation, if such violation has occurred (see paras 2–11 and 3–8).

(4) Commanders will not take physical custody of a child, and they will not order a Soldier to give up physical custody of a child to anyone other than the child's lawful custodian (see para 3–7c).

b. In replying to an inquiry about child custody, visitation, or a related matter, the commander will provide the information required by paragraph 3–3 and, to the extent permitted by AR 25–22, the following:

(1) A statement as to whether the Soldier admits they, or someone acting on the Soldier's behalf, has physical custody of the child(ren) in question.

(2) If the commander determines that neither the Soldier nor someone acting on the Soldier's behalf has physical custody of the child(ren) in question, the commander will inform the person making an inquiry of their determination.

(3) If the Soldier or someone acting on the Soldier's behalf has physical custody of the child(ren) in question, a statement as to the Soldier's intention regarding the request to give up physical custody of, or to grant visitation with, the child(ren).

(a) If the Soldier has no legal right to physical custody of the child(ren), the commander will advise the person making the inquiry that the Soldier has been ordered to return the child(ren) to the lawful custodian.

(b) If the commander determines that the Soldier or someone acting on their behalf has the legal right to physical custody of the child(ren), the commander should advise the person making the inquiry of their determination.

3–7. Other inquiries

a. Soldiers and their Family members are expected to obey the law, including court orders that enforce the law. Soldiers and their Family members should comply with all provisions of court orders, including those granting or denying visitation, dividing marital property, providing access to medical care, and other such provisions.

b. Commanders should take appropriate action, including those listed in paragraph 3–8, when the noncompliance of a Soldier or Family member with such provisions becomes an official matter of concern within the Army. In particular, commanders will consider the actions listed in paragraph 3–8b(2) with regard to Soldiers and Family members stationed outside of the United States who, without lawful basis, violate any provision of a court order.

c. A Soldier who is the lawful custodian of a child should not be ordered to comply with a provision granting visitation to a noncustodial parent. Obtaining relief in such matters should be left to the courts. However, commanders will consider the actions listed in paragraph 3–8b(2) with regard to Soldiers stationed outside of the United States who, without lawful basis, deny visitation to noncustodial parents residing in the United States.

d. Consistent with AR 190–9, AR 630–10, and DoDI 5525.09, commanders will cooperate with state courts and state and local officials in enforcing criminal court orders relating to Army personnel stationed outside the United States, as well as their Family members who accompany them, who have been charged with, or convicted of, a felony in a court, have been held in contempt by a court for failure to obey a court's order, or have been ordered to show cause why they should not be held in contempt for obeying the court's order. If a request for assistance from a state court or state or local official pertains to a felony or to contempt involving the unlawful or contemptuous removal of a child by a Soldier, the General Court-Martial Convening Authority (GCMCA) will take prompt action to cooperate with the state or local entity and expeditiously return the Soldier to the United States at government expense, unless an exception is granted by the Undersecretary of Defense for Personnel and Readiness. All procedures in DoDI 5525.09 will be followed.

3–8. Enforcement

a. Commanders should seek the advice of the servicing SJA office on measures that may be taken to enforce compliance with, and punish violations of, this regulation under applicable Federal, state, or foreign laws. Commanders should also notify appropriate law enforcement authorities when apprehension or criminal investigation is warranted.

b. Commanders will ensure that actions they take enhance the enforcement of this regulation. Commanders will also avoid taking actions that enable or foster the efforts of Soldiers to evade the requirements of this regulation, or the application of laws, or the enforcement of court orders addressed by this regulation.

(1) In this regard, commanders will take lawful actions designed to—

(a) Eliminate repeated or continuing violations of court orders and this regulation.

(b) Ensure that financial support is provided to Family members on a continuing basis in accordance with this regulation.

(c) Enable children to be returned to the parent or lawful guardian entitled to custody.

(d) Facilitate the approval of leave for Soldiers to attend hearings to determine parentage or financial support to a Family member.

(2) Outside of the United States, the commanders, in their efforts to enforce compliance with this regulation, may, in addition to other measures, recommend or initiate actions in appropriate cases to—

(a) Terminate the command sponsorship of a civilian Family member and order their advance return to the United States (see AR 55–46).

(b) Request host-nation authorities, in accordance with applicable international agreements and established procedures, to remove a civilian Family member from the host nation. This measure will not be used without first revoking the civilian Family member's command sponsorship and obtaining legal advice from the servicing SJA office. Release of the civilian Family member to host-nation authorities must be coordinated with the servicing SJA office and military law enforcement authorities.

(c) Curtail or refuse to extend a Soldier's military tour of duty outside of the United States.

c. Commanders will take appropriate actions against Soldiers who fail to comply with this regulation or lawful orders issued based on this regulation. These actions include, but are not limited to—

(1) Counseling.

(2) Admonition.

(3) Memorandum of reprimand (see AR 600–37).

(4) Barring Soldier from reenlistment (see AR 601–280).

(5) Administrative separation from the service (see AR 600–8–24 or AR 635–200).

(6) Nonjudicial punishment under UCMJ, Art. 15.

(7) Court-martial.

d. Violations of the financial support requirements of paragraph 2–5 or the child custody provisions of paragraph 2–11 of this regulation may be charged as violations of UCMJ, Art 92. These and other provisions of this regulation may also be the subject of lawful orders issued by commissioned or noncommissioned officers. Failure to obey such orders may be charged as violations of UCMJ, Art. 90, 91, or 92, as appropriate (see para 3–3). The commander will consider the actions listed in paragraph 3–8b(2) with regard to Soldiers and Family members residing outside of the United States, who, without justification or excuse, avoid efforts on the part of others to resolve these issues in a U.S. court having jurisdiction.

Appendix A

References

Section I

Required Publications

AR 15–6

Procedures for Administrative Investigations and Boards of Officers (Cited 3–2*b*.)

AR 25–22

The Army Privacy Program (Cited in paras 1–4*b*(2).)

AR 27–3

The Army Legal Assistance Program (Cited in paras 1–6.)

AR 27–26

Rules of Professional Conduct for Lawyers (Cited in para 1–11*b*.)

DoD 7000.14–R, volume 7A, chapter 26

Financial Management Regulation: Housing Allowances (Cited in para 1–9*a*.)

DoDI 5525.09

Compliance with Court Orders by Service Members and DoD Civilian Employees, and Their Family Members Outside The United States (Cited on title page) (Available at <https://www.esd.whs.mil/>.)

Section II

Related Publications

A related publication is a source of additional information. The user does not have to read it to understand this publication.

AR 11–2

Managers' Internal Control Program

AR 20–1

Inspector General Activities and Procedures

AR 25–30

Army Publishing Program

AR 25–400–2

The Army Records Information Management System (ARIMS)

AR 55–46

Travel Overseas

AR 190–9

Absentee Deserter Apprehension Program and Surrender of Military Personnel to Civilian Law Enforcement Agencies

AR 600–8–11

Reassignment

AR 600–8–14

Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel

AR 600–8–24

Officer Transfers and Discharges

AR 600–8–101

Personnel Readiness Processing

AR 600–37

Unfavorable Information

AR 601–280

Army Retention Program

AR 614–100

Officer Assignment Policies, Details, and Transfers

AR 614–200

Enlisted Assignments and Utilization Management

AR 630–10

Absence Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings

AR 635–200

Active Duty Enlisted Administrative Separations

DA Pam 25–403

Guide to Recordkeeping in the Army

Hague Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents, 5 October 1961 (Available at <https://www.hcch.net/en/instruments/conventions/>.)

Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance, 23 November 2007 (Available at <https://www.hcch.net/en/instruments/conventions/>.)

Hague Convention on Service Abroad of Judicial or Extrajudicial Documents in Civil or Commercial Matters, 15 November 1965 (Available at <https://www.hcch.net/en/instruments/conventions/>.)

NATO SOFA Supplementary Agreement with respect to Foreign Forces stationed in the Federal Republic of Germany, 29 March 1998 (Available at <https://www.aepubs.eur.army.mil/references/>.)

UCMJ, Article 15

Commanding officer's non-judicial punishment (Available at <https://jsc.defense.gov/>.)

UCMJ, Article 31

Compulsory self-incrimination prohibited (Available at <https://jsc.defense.gov/>.)

UCMJ, Article 90

Willfully disobeying superior commissioned office (Available at <https://jsc.defense.gov/>.)

UCMJ, Article 91

Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer (Available at <https://jsc.defense.gov/>.)

UCMJ, Article 92

Failure to obey order or regulation (Available at <https://jsc.defense.gov/>.)

5 CFR 581

Processing Garnishment Orders for Child Support and/or Alimony (Available at <https://www.ecfr.gov/>.)

26 USC

Internal Revenue Code

42 USC 659

Consent by United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations (Available at <https://uscode.house.gov/>.)

42 USC 665

Allotments from pay for child and spousal support owed by members of uniformed services on active duty (Available at <https://uscode.house.gov/>.)

Section III

Prescribed Forms

Unless otherwise indicated, DA forms are available on the Army Publishing Directorate (APD) website (<https://armypubs.army.mil>).

DA Form 5459

Authorization to Release Information from Army Records on Nonsupport/Child Custody/Paternity Inquiries (prescribed in para 3–3*b*(2).)

Section IV**Referenced Forms**

Unless otherwise indicated, DA forms are available on the Army Publishing Directorate (APD) website (<https://armypubs.army.mil>).

DA Form 11–2

Internal Control Evaluation Certification

DA Form 2028

Recommended Changes to Publications and Blank Forms

Appendix B

Examples of Parentage and Support Cases

B-1. Financial support in parentage cases

a. Example 1. A Soldier acknowledged parentage of a child born out of wedlock and had been providing voluntary support. The voluntary acknowledgment of parentage was not part of a state process establishing the Soldier as a legal parent under state law. Legal parentage has not been established by any domestic or foreign governmental entity. The mother of the child has written the Soldier's commander and asserts that the Soldier is not providing financial support for the child. In response to his commander's questions as to why he is not providing financial support, the Soldier claims that he no longer believes he is the father of the child. Pursuant to paragraph 2-2a, the Soldier is not required by this regulation to provide financial support to the child in the absence of a court order requiring him to do so. The Soldier's reasons for not providing financial support are irrelevant. Pursuant to paragraphs 3-4a(5) and 3-5b(3), the commander should contact the appropriate finance office to ensure that the Soldier is not receiving BAH-WITH based solely on the support of the child.

b. Example 2. Assume the same facts as in example 1, except that the acknowledgment of parentage consisted of an agreement to being named as a legal parent on the birth certificate when the child was born a year ago. The Soldier has not raised any subsequent challenge to the validity of the birth certificate. The state law where the birth occurred will determine resolution of the support issue. If, as in many states, agreeing to being listed as a legal parent on the birth certificate and not challenging the document within a specified number of days is the judicial equivalent of a court order establishing parentage, then there would be a legal order establishing parentage pursuant to paragraph 2-2a. The Soldier would have an obligation to provide support to that dependent child. Since there is no court order establishing the amount of the child support, the Soldier will provide the appropriate support required under paragraph 2-6.

c. Example 3. A woman in the FRG obtains a judgment in an FRG court as a result of a parentage action declaring a Soldier to be the father of the woman's child and ordering him to pay 500 Euros per month in child support. The FRG court acquired jurisdiction over the Soldier, who is assigned for duty within the FRG, in accordance with the NATO SOFA Supplementary Agreement with the FRG. The Soldier is required by paragraphs 2-2b, 2-4b, and 2-5a(1) to provide financial support to the child in the dollar equivalent of 500 Euros per month. In addition, while stationed in Germany, the Soldier may have the dollar equivalent of 500 Euros withheld from his pay each month if he fails to voluntarily comply with the FRG court order (by virtue of the U.S. Army honoring and implementing the FRG court garnishment order pursuant to the governing international agreement).

d. Example 4. Assume the same facts as in example 3, except that now the Soldier, pursuant to his request, has been reassigned to an Army installation in the United States. The German order establishing parentage remains valid; however, the financial support portion of the order will not be enforceable (see para 2-4b). The Soldier has an obligation to provide support to that dependent child. Since there is no court order establishing the amount of child support, the Soldier should provide the appropriate support required under paragraph 2-6. The Soldier will be in compliance with this regulation if he provides either the support required by paragraph 2-6 or the support specified in the court order. If the mother gets the German court order adopted by a United States court, the order will be binding upon the Soldier and he must comply with the financial support provisions of the order.

B-2. Financial support by financial support agreement

a. Example 1. A Soldier's spouse and child move out of privatized housing on the installation. There is no court order. The Soldier's spouse and the child move into the spouse's parents' home in another state. One week later, in an email to the Soldier's commander, the spouse complains that the Soldier orally agreed to provide the spouse an amount that exceeds the Soldier's BAH-WITH. In response to the commander's questions, the Soldier states that the agreed amount was less than BAH-WITH. There is no longer a functional agreement between the parties as to the appropriate level of support. In accordance with paragraphs 2-3a, 2-5a(3), and 2-6, the commander should direct the Soldier to send his spouse BAH RC/T-WITH, and a one-time enhanced interim financial support payment in the amount of BAH-DIFF.

b. Example 2. Assume the same facts as in example 1, except in this case the Soldier, in response to the commander's questions, shows the commander a copy of a letter he wrote and sent to his spouse in which he offered to pay his spouse an amount less than BAH-WITH. Unless the Soldier can present a signed letter from his spouse agreeing, in unequivocal language, that payment of that amount is acceptable, the commander should direct the Soldier to provide the regulatory support required by paragraph 2-6. If the Soldier presents a signed letter from his spouse agreeing, in

unequivocal language, that payment of the lesser amount is acceptable, the commander should direct the Soldier to pay that amount in accordance with paragraphs 2–3b and 2–5a(2).

c. Example 3. A Soldier's spouse and two children reside in privatized housing on the installation. The Soldier and his spouse have both signed a marital separation agreement in which the Soldier has agreed to pay his spouse spousal and child support in an amount equal to BAH–WITH plus \$1,000 per month. The Soldier now refuses to pay the full amount of support stated in the agreement because his Family has not yet vacated their quarters and the Soldier is still paying an allotment in the amount of BAH–WITH to the privatized housing company. The spouse complains to her husband's commander. The commander should initiate an inquiry under the provisions of AR 15–6 to obtain more information. During the course of the inquiry, the IO discovers that the Soldier believes part of his financial obligation is covered by the voluntary allotment of BAH–WITH for rent, and that he is only obligated to pay an additional cash payment in the amount of \$1,000; while the spouse asserts that under the agreement the Soldier is obligated to pay BAH–WITH, plus \$1,000, in addition to the continuing voluntary allotment. The commander, in consultation with their legal advisor, may find that this agreement is too ambiguous to be enforceable as to the BAH–WITH payment, and may decline to order the Soldier to pay anything more than the uncontested amount of \$1,000 until the voluntary allotment to housing is terminated (see para 2–3b(2)).

d. Example 4. A Soldier and his spouse sign a marital separation agreement that provides that she will receive financial support in an amount equal to one-half of the Soldier's BAH–WITH until she remarries. The agreement does not provide that it will be merged into any subsequent divorce judgment or otherwise indicate that it will continue beyond the divorce. The Soldier has no children. Thereafter, the spouse obtains a divorce decree that does not reference the marital separation agreement. The court ordered no alimony. She now complains to the Soldier's commander that she is not receiving financial support as provided in the agreement. In accordance with paragraph 2–3b(3)(a) the Soldier is not required by this regulation to provide financial support to his spouse since the agreement was not incorporated in the divorce decree. Upon divorce she is no longer a Family member under the regulation nor is she entitled to financial support in the absence of a court order. The result is the same if the court was without jurisdiction to order the Soldier to pay alimony.

B–3. Financial support by court order

a. Example 1. A Soldier and his spouse separate. At the time of separation they resided in Virginia, where the Soldier is assigned for military duty. The Soldier is also domiciled in Virginia. The spouse returns, together with their one child, who was born in Virginia, to the home of the spouse's parents in the FRG. The Soldier obtains a divorce from the spouse in the United States. The court does not order financial support, and there is no written financial support agreement. The spouse now requests through the Soldier's commander in Virginia that the spouse be provided BAH–WITH for the spouse and their child. The Soldier has one Family member (the child) to support. In accordance with paragraphs 2–4c, and 2–6b, 2–6c, and 2–6d(3), the commander should direct the Soldier to provide his child BAH RC/T–WITH.

b. Example 2. Assume the same facts as in example 1, except in this case the spouse also has obtained a divorce decree in a FRG court. The FRG court has also issued an order, mailed to the Soldier in the United States, directing him to pay child support in an amount equal to twice his BAH–WITH. In accordance with paragraphs 2–4b, and 2–6b, c and d(3), the commander should direct the Soldier to pay BAH RC/T–WITH unless the FRG court order has been recognized and enforced by a court within the United States.

B–4. Financial support in single Family units

a. Example 1. Two married Soldiers have three children. One child resides with the first Soldier and two reside with the second Soldier. There is no court order or written financial support agreement. Neither spouse has a financial support obligation to the other under this regulation (see para 2–6d(4)(c)).

b. Example 2. Assume the same facts as in example 1 of this except that all three children reside with the first Soldier, and the second Soldier, now residing in a private apartment, is being paid BAH–WITH by the Army. Pursuant to paragraphs 2–5a(3) and 2–6d(4)(a), the second Soldier must pay BAH–DIFF to the first Soldier on behalf of the children. If the second Soldier fails to pay this amount, the second Soldier may, in addition to receiving disciplinary action, lose her entitlement to BAH–WITH. (In this case, DFAS may cancel her entitlement to BAH–WITH and recoup past payments of BAH–DIFF because she is providing less than adequate financial support to her Family members and, therefore, is only entitled to BAH–WITHOUT (see para 1–7c)).

c. Example 3. A civilian spouse separates from a Soldier on 15 June and moves out of government Family housing into an apartment of his own. The Soldier is in the field at the time and is unable to clear government quarters until 31 July. The Soldier has no other dependents. There is no court order or written financial support agreement. The Soldier is required to provide his spouse with one-half (15/30 as the pro-rata calculation) of the BAH RC/T–WITH amount

for the month of June and the full amount of the BAH RC/T–WITH for the subsequent months. It does not matter that the Soldier will not be eligible for BAH–WITH until 1 August. Additionally, the Soldier must provide enhanced interim financial support to the spouse as required by paragraph 2–6f (see paras 2–5a(3), 2–6d(1), 2–7a(3)(a) and (5), 2–8, and 2–9).

d. Example 4. A Soldier and his spouse decide to separate. They have one child. There is no agreement, and the spouse and child continue to reside in government quarters. The Soldier is required to provide enhanced interim financial spousal support under paragraph 2–6f.

e. Example 5. Assume the same facts as in example 4 except that on-post quarters are managed by a private contractor. The Soldier has signed a lease with the private contractor and established an allotment to the contractor in an amount equal to his BAH–WITH. If the Soldier’s BAH–WITH is equal to, or more than, the BAH RC/T–WITH for his grade, he has no financial support obligation to pay interim financial support to either the wife or child under paragraphs 2–6d or 2–6e of this regulation, but does have a requirement to provide enhanced interim financial support under paragraph 2–6f. If the BAH–WITH is less than the appropriate BAH RC/T–WITH, the Soldier must also pay that difference to the spouse to fulfill the interim support obligation.

f. Example 6. A Soldier is assigned on an unaccompanied tour overseas. The Soldier receives BAH–WITH solely on account of her spouse and child who remain in the United States. Absent an agreement or court order to the contrary, the Soldier must provide support in the amount of the actual BAH–WITH rate, if it is higher than the BAH RC/T–WITH for her grade (see para 2–6d(1)(a)).

g. Example 7. A Soldier is currently serving an overseas tour and is accompanied by his current spouse and child who live in privately leased housing on the local economy. The Soldier separates from his spouse and moves into the barracks. The Soldier must provide support in the amount of BAH RC/T–WITH for his spouse and child. If the Soldier’s overseas housing allowance (OHA) and utility allowance are greater than or equal to that amount, he may satisfy this portion of his regulatory requirement by continuing to pay the rent and utilities using his allowances (see para 2–9d). Pursuant to paragraph 2–6f, however, the Soldier must also provide a cash payment to his spouse in the amount of BAH–DIFF, as enhanced interim financial support.

h. Example 8. Assume the same facts as Example 7, except the Soldier’s spouse and child are sent back to the United States as an Early Return of Dependents, and the Soldier begins to receive BAH–WITH solely on account of those dependents. The Soldier is required to provide support equal to the actual BAH–WITH rate, or BAH RC/T–WITH rate, whichever is greater (see para 2–6d(1)(a)). Because the spouse is back in the United States and has access to state courts, the Soldier may petition his battalion commander to be relieved of the paragraph 2–6f enhanced interim financial support requirement (BAH–DIFF) (see para 2–13e).

i. Example 9. A Soldier has been separated from her spouse, who also has custody of their child for over six months, and has been making interim support payments in the amount of BAH RC/T–WITH. The Soldier learns that her spouse just obtained new employment and makes substantially more money than her. The Soldier’s battalion commander relieves her of the requirement to provide a pro-rata share of support to the spouse (see para 2–13). The Soldier is now only obligated to provide support in the amount of one-half of BAH RC/T–WITH as interim financial support for her child (see para 2–6d(1)(c)).

B–5. Financial support in multiple Family units

a. Example 1. A Soldier is divorced and has three children from that marriage. The Soldier is required by a court order to pay \$300 per month in financial support for these children and \$100 per month in alimony to his former spouse. The Soldier has remarried and has two more Family members (spouse and child) living in non-government housing. The Soldier has separated from his current spouse. The current spouse and child are living in a private apartment. There is no court order or written financial support agreement pertaining to the Soldier’s second marriage. The Soldier now has a total of five Family members for whom he is required to provide financial support under this regulation. (Pursuant to para 2–6b and c(1), a former spouse is not considered a Family member in determining the pro-rata shares of BAH RC/T–WITH of Family members.) In accordance with the court order, the Soldier must pay a total of \$400 to his former spouse and to the children from that marriage. He must also provide financial support to his present spouse and their child in an amount equal to two-fifths of BAH RC/T–WITH (see paras 2–5a(1) and (3), and 2–6e).

b. Example 2. A Soldier in the Illinois National Guard has one child from a previous marriage. There is no written financial support agreement. The court that granted the Soldier a divorce did not have personal jurisdiction over his former spouse to decide such issues as custody or financial support of the child. The Soldier has remarried and has a spouse and two children living in non-government housing. The Soldier has separated from his current spouse. There is no court order or written financial support agreement pertaining to the Soldier’s second marriage. The Soldier has been called up for active duty pursuant to Title 32, United States Code. Under this regulation the Soldier has no

enforceable financial support obligation, even if his active duty extends beyond 29 days. Members serving under Title 32 are subject to state law. This regulation provides guidance but is not punitive as to Title 32-status members of the National Guard (see “applicability” section and para 1–7).

c. Example 3. Assume the same facts as in example 2 except that the Soldier was called up for active duty for 30 days or more pursuant to orders issued under the authority of Title 10, United States Code. This regulation would now apply to him. In that event, the Soldier would have a total of four Family members for whom he must provide financial support under this regulation (these Family members are the child by a previous marriage and the present spouse and two children). The child of the former marriage should receive 1/4 of the BAH RC/T–WITH, and the current spouse should receive 3/4 of the BAH RC/T–WITH as support for herself and the two children (see “applicability section and paras 2–5a(3) and 2–6b, 2–6c(1), and 2–6e(1)).

d. Example 4. A Soldier has two children from a previous marriage. The Soldier is required by court order to pay \$200 per month for these children. Also, the Soldier is required to pay \$75 per month for support of another child in accordance with a court order declaring him to be the father of that child. He has remarried and has a spouse and three children residing in government Family housing. The Soldier has separated from his current spouse and children and has moved into the barracks. There is no court order or written financial support agreement pertaining to the Soldier's second marriage. The Soldier now has a total of seven Family members that he must support under this regulation. In accordance with the court orders, he must pay the children from his previous marriage \$200 per month and the other child \$75 per month. He has no obligation to provide his spouse and the children from his present marriage a portion of BAH RC/T–WITH since they reside in government Family housing, but must provide enhanced interim financial support under paragraph 2–6f (see paras 2–5a(1) and (3), 2–6e(1) and 2–6f).

e. Example 5. A Soldier is married to an airman in the Regular Air Force. They have two children from this marriage, both of whom reside with the airman-spouse in a private apartment. The Soldier has moved out of the apartment. There is no court order or written financial support agreement pertaining to the marriage. The Soldier adopted a child during a previous marriage, who resides with his former spouse, for whom he is required by court order to pay \$150 per month. The Soldier has a total of three Family members for whom he is required to provide financial support. The Soldier will pay \$150 per month in accordance with the court order for the adopted child. On behalf of the two children from his current marriage, he will pay BAH–DIFF. Under paragraph 2–6d(4) the Soldier has no financial support obligation to his current spouse (the airman), and the airman is not counted in determining the pro-rata shares of the supported children. Because the current spouse is an airman in the Regular Air Force, enhanced interim financial support is not required (see para 2–6f(1)). The financial support obligation of the airman to her Family members is determined in accordance with Air Force instructions (see paras 2–5a(1) and (3), and 2–6e(1)(e) and (2)).

f. Example 6. A Soldier has a child from a prior relationship with a CSEA order requiring \$500 per month to be paid as child support. The Soldier is currently serving an overseas tour and is accompanied by his current spouse and two children who live in privately leased housing on the local economy. The Soldier separates from his spouse and moves into the barracks. The Soldier has a total of four Family members for whom he is required to provide financial support. The Soldier will pay \$500 per month in accordance with the CSEA order for the child from the prior relationship. The Soldier must provide support in the amount of 3/4 of the BAH RC/T–WITH rate for his current spouse and two children. If the Soldier's OHA and utility allowance are greater than or equal to that amount, he may satisfy this portion of his regulatory requirement by continuing to pay the rent and utilities using his allowances. Pursuant to paragraph 2–6f, however, the Soldier must also provide a cash payment to his current spouse in the amount of BAH–DIFF, as enhanced interim financial support (see paras 2–5a(1), 2–5a(3), 2–6b, 2–6c(1), 2–6e(1)(a), 2–6e(1)(d), 2–6f, and 2–9d).

Appendix C

Internal Control Evaluation

C–1. Function

The function covered by this checklist is compliance with legal assistance pursuant to AR 608–99 and AR 11–2.

C–2. Purpose

The purpose of this checklist is to assist commanders in evaluating their key internal controls. It is not intended to cover all controls.

C–3. Instructions

Answers must be based on the actual testing of key internal controls (for example, document analysis, direct observation, sampling, and simulation). Answers that indicate deficiencies must be explained and corrective action indicated in supporting documentation. These internal controls must be evaluated at least once every 5 years. Certification that this evaluation has been conducted must be accomplished on DA Form 11–2 (Internal Control Evaluation Certification).

C–4. Test questions

a. General command responsibilities.

- (1) Are Family support, child custody, or parentage inquiries directed to the company-level commander in accordance with paragraph 3–1, AR 608–99?
- (2) Do commanders become involved in enforcing this regulation when a Family member complains that a Soldier is failing to provide financial support in accordance with AR 608–99, paragraph 2–1?
- (3) Do commanders respond to inquiries in a timely manner, in accordance with AR 608–99, paragraph 3–3?
- (4) When additional information is required, are AR 15–6 preliminary inquiries or administrative investigations initiated pursuant to AR 608–99, paragraph 3–2?
- (5) Do commanders require Soldiers to comply with written financial support agreements and/or court or CSEA orders as required by AR 608–99, paragraphs 2–3 through 2–5?
- (6) Are questions concerning a Soldier’s legal obligations referred to the servicing SJA in accordance with paragraphs 2–2d, 2–3b(2), and 3–8?
- (7) When required to be paid, is financial support correctly calculated according to AR 608–99, paragraph 2–6?
- (8) Are requests for relief from support requirements routed to and acted on by battalion-level commanders as required by AR 608–99, paragraphs 2–12 through 2–14?
- (9) Do commanders take appropriate action to enforce this regulation in accordance with AR 608–99, paragraph 3–8?

b. Financial nonsupport inquiries. Do commanders comply with the provisions of AR 608–99, paragraph 3–4 when responding to financial nonsupport inquiries?

c. Parentage inquiries. Do commanders comply with the provisions of AR 608–99, paragraph 3–5 when responding to parentage inquiries?

d. Child custody inquiries. Do commanders comply with the provisions of AR 608–99, paragraph 3–6 when responding to child custody inquiries?

e. Cooperation with state and local officials. Do GCMCAs take prompt action to respond to requests for assistance from state and local officials in cases involving the unlawful removal of a child by a Soldier in accordance with AR 608–99, paragraph 3–7, and DoDI 5525.09?

C–5. Supersession

Not applicable.

C–6. Comments

Help make this a better tool for evaluating management controls. Submit comments to The Judge Advocate General (DAJA–LA), usarmy.pentagon.hqda-otjag.mbx.la@mail.mil.

Glossary

Section I

Abbreviations

AR

Army regulation

ARIMS

Army Records Information Management System

DA

Department of the Army

DFAS

Defense Finance and Accounting Service

DoD

Department of Defense

DoDI

Department of Defense Instruction

GCMCA

General Court-Martial Convening Authority

HQDA

Headquarters, Department of the Army

IO

investigating officer

NATO

North Atlantic Treaty Organization

OHA

overseas housing allowance

SJA

Staff Judge Advocate

SOFA

Status of Forces Agreement

TJAG

The Judge Advocate General

UCMJ

Uniform Code of Military Justice

USC

United States Code

Section II

Terms

Arrearage

The total amount of money a Soldier may owe a Family member for prior months in which the Soldier failed to comply with the financial support requirements of a court order, a financial support agreement, or this regulation. A support obligation becomes an arrearage if it was not paid by the date that the obligation was due.

Child custody

The physical custody of a child or children. Child custody does not include visitation.

Child support enforcement agency order

An administrative order issued by a governmental entity, recognized as valid and enforceable under applicable state law.

Command sponsorship

The state or condition of being a command sponsored dependent as defined in AR 55–46.

Court order

As used in this regulation a court order includes any final, temporary, or interlocutory order, including an ex parte order, issued by a court within the United States, by a judge or any other judicial official, such as a judge pro tem, magistrate, commissioner, or master. A court order also includes a stay of a court order. With regard to parentage, a court order also includes any document that is granted the equivalent effect of a court order under applicable state law. In many cases, consenting to be named a legal parent on a birth certificate, or acknowledging parentage in an affidavit will have the legal effect of a court order if the alleged parent fails to challenge the document within a specified number of days. In those cases, the documents will be treated as a court order establishing parentage.

Enhanced interim financial support

Support, in the amount of BAH–DIFF a Soldier is required to provide under certain circumstances to a spouse under paragraph 2–6f of this regulation.

Family member

For the purpose of this regulation only, a Family member includes—*a.* A Soldier's present spouse. (A former spouse is not a Family member.) *b.* Any minor children for whom the Soldier is a legal parent, so long as the Soldier's duty to provide financial support has not been terminated by court or CSEA order, or by a written financial support agreement. *c.* Any adult for whom the Soldier is a court-appointed legal guardian (for example, a disabled or incapacitated adult child, sibling, or parent). It does not include financial support voluntarily provided to a child 18 years of age or older or to some other person.

Family unit

For the purpose of this regulation only, a Family unit includes any of the following: *a.* A Soldier's present spouse and any children from that marriage for whom the Soldier is required to provide financial support. *b.* One or more children from a prior marriage for whom the Soldier is required to provide financial support. *c.* One or more children born out of wedlock from a prior relationship for whom a Soldier is required to provide financial support.

Financial support

The amount of money or support in kind provided to one's Family members on a periodic or other continuing basis in accordance with a written or oral support agreement, court order, or this regulation. Financial support includes court-ordered spousal support (or alimony) and child support but does not include any division of marital or non-marital property between spouses or former spouses or financial payments made as part of a property settlement.

Financial support requirement

The amount of financial support a Soldier is required to pay to their Family members under this regulation.

General court–martial convening authority

The Army officer who, by virtue of command, exercises general court-martial convening authority over a Soldier who (or whose Family member) is the subject of a request for assistance from a government official or the subject of any inquiry received under this regulation.

Geographically separated Family member

A situation in which a Soldier is assigned at an installation different from the location at which their Family member is attempting to obtain assistance under this regulation.

Government Family housing

Any government-owned or government-leased housing occupied by a military member and one or more of their Family members for which, because of such occupancy, the military member loses entitlement to BAH under the Department of Defense Joint Travel Regulations. This does not include on-post housing that the Soldier leases from a government-approved private contractor (note: Soldiers who lease Family housing from an on-post privatized housing contractor do not forfeit BAH; rather they receive full BAH, and simultaneously pay the same amount via voluntary allotment to the privatized housing contractor).

Interim financial support

Support a Soldier is required to provide to a Family member by paragraphs 2–6*d* or 2–6*e* of this regulation, expressed as a proportion of BAH RC/T–WITH.

Lawful custodian

A person authorized, either alone or with another person or persons, to have physical custody of a minor child by court order. In the absence of a court order to the contrary, the mother of a child born out of wedlock is deemed the “lawful custodian” of that child for the purpose of this regulation.

Legal assistance

Legal advice, counseling, and other help provided to eligible clients on their personal legal affairs under provisions of AR 27–3 or comparable regulations or instructions of the Air Force, Navy, Marine Corps, or Coast Guard.

Legal assistance attorney

A judge advocate, or civilian attorney employee within the Department of Defense, who, as to a particular case, is providing legal assistance to an eligible client pursuant to AR 27–3 or comparable regulations or instructions of the Air Force, Navy, Marine Corps, or Coast Guard.

Minor children

Unmarried children under 18 years of age who are not on active duty with the Armed Forces.

Multiple Family units

Two or more Family units.

Non–government housing

Any housing that is not government housing.

Personal jurisdiction

The power of a court over one of the parties in a case to order one of the parties to pay financial support to their Family members or to direct one of the parties to do an act or refrain from doing an act (for example, relating to child custody or visitation, physical restraining orders) under sanction of the court’s contempt power. Due process requirements of notice and opportunity to be heard must be satisfied. The usual manner of obtaining personal jurisdiction over a party is by serving process on the person of the party or by certified mail, return receipt requested.

Preponderance of the evidence

The degree of proof that leads one to find that the existence of a fact in issue is more probable than not.

State court

Any court within the 50 states, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, or the Virgin Islands.

United States

The 50 States, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the Virgin Islands.

Section III**Special Abbreviations and Terms****BAH**

basic allowance for housing (at either the with- or without-dependents rate)

BAH RC/T

basic allowance for housing Reserve Component/transit (at either the with- or without-dependents rate)

BAH RC/T–WITH

basic allowance for housing Reserve Component/transit at the with-dependents rate

BAH RC/T–WITHOUT

basic allowance for housing Reserve Component/transit at the without-dependents rate

BAH–DIFF

difference in amount between basic allowance for housing Reserve Component/transit at the with-dependents rate and basic allowance for housing Reserve Component/transit at the without-dependents rate

BAH-WITH

basic allowance for housing at the with-dependents rate

BAH-WITHOUT

basic allowance for housing at the without-dependents rate

CSEA

Child Support Enforcement Agency

FRG

Federal Republic of Germany

UNCLASSIFIED

PIN 004407-000

MILPERSMAN 1754-030

SUPPORT OF FAMILY MEMBERS

Responsible Office	BUPERS (BUPERS-00J)	Phone:	DSN COM FAX	882-3166 (901) 874-3166 (901) 874-2615
MyNavy Career Center		Phone: Toll Free E-mail: MyNavy Portal:		1-833-330-MNCC (6622) askmncc@navy.mil https://my.navy.mil/

References	(a) 37 U.S.C. § 403 (b) Public Law 93-647 (c) Uniform Code of Military Justice (d) BUPERSINST 1610.10E
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- Policy.** The Navy will not act as a haven for personnel who disregard or evade obligations to their legal family members. All Service members must provide adequate and continuous support for their lawful family members and comply fully with the provisions of separation agreements and valid court orders. Any failure to do so which brings discredit upon the Navy may be cause for administrative or disciplinary action, which may include the initiation of court-martial proceedings and may ultimately lead to separation from the Navy.
- Sufficient Support.** Every person has an inherent natural and moral, as well as a legal obligation, to support his or her legal family members. In many states, the failure to support one's legal family member is a criminal offense. What is adequate or reasonably sufficient support is a highly complex and individual matter dependent on numerous factors and may be resolved only in a civil court of competent jurisdiction. Some of the salient factors that may be taken into account are the pay, private income, and resources of the person and the family members; the cost of necessities and everyday living expenses; financial obligations of the family members; and the expenses and financial obligations of the person in relation to his or her income.
- Navy Limitations.** The Department of the Navy (DON) is vested neither with the statutory authority nor in possession of the facilities to adjudicate matters that are of a purely civil

nature. In all cases involving Navy Service members, it is desired that the amount of support to be given for family members be established by mutual agreement between the parties concerned or be adjudicated in the civil courts.

4. **Support**

a. In those cases where the amount of support has not been fixed by competent court order or mutual agreement, the support scale set forth below **may** be used as a guide until such time as a mutual agreement is reached or a court order obtained. This scale is intended only as an interim measure and as a guide to the extent that major factors affecting the ability to provide support, the resolution of which cannot await a decision of the civil courts or the eventuality of a mutual agreement, may be considered to affect equitable adjustments to the support scale. Because of the inherent arbitrary and temporary nature of the support scale set forth below, it is not intended to be used as a basis for any judicial proceeding. To do so would lend excessive credence to an administrative tool, which has been designed for use only internally within the Navy.

Number of family members and amount of support to be provided in the absence of a mutual agreement or court order:	
Spouse only	1/3 gross pay
Spouse and one minor child	1/2 gross pay
Spouse and two or more children	3/5 gross pay
One minor child	1/6 gross pay
Two minor children	1/4 gross pay
Three minor children	1/3 gross pay

NOTE: Per reference (a), gross pay will include basic pay and any basic allowance for housing (BAH) or overseas housing allowance (OHA) to which the Service member is entitled, but does not include hazardous duty pay, sea or foreign duty pay, incentive pay, or basic allowance for subsistence (BAS). In the case of OHA, the command may take into consideration high housing costs that are directly reimbursed but create an inequitable ratio and adjust the amount equal to what BAH would be where the receiving party lives to use that amount as part of the gross pay to make the calculation above.

b. The above guide **may** be referred to only as a basic instrument or means for determining the amount of support to be provided for a complaining family member. For example, if a Service member presently has a spouse and child and a complaint

of non-support or insufficient support is received on behalf of two children of a former marriage, in the absence of an agreement or court ruling, the Service member should provide about one-fourth of his or her gross pay for the two children of the former marriage. If the complaint is on behalf of the present spouse and child, the Service member should provide about one-half of his or her gross pay for the spouse and child. The indication of three-fifths gross pay for a spouse and two or more children is applicable only when the family members are in the same household. If a Service member has a spouse and four or more children, he or she should be advised of his or her moral obligation to contribute more than three-fifths of his or her gross pay.

5. Legal Obligation

a. The laws of most jurisdictions in the United States impose a legal obligation upon a person to support his or her spouse. Exemptions from support of a lawful spouse may be in the form of an order of a civil court of competent jurisdiction, relinquishment by the spouse, mutual agreement of the parties or a waiver of the naval support requirement granted by **Director, Dependency Claims, Navy Military Pay Operations, a division of Defense Finance and Accounting Services (DFAS)**.

b. If the Service member feels that he or she has grounds for a waiver of support of his or her spouse, **Director, Dependency Claims, Navy Military Pay Operations, DFAS**, acting under the policy guidance of Commander, Navy Personnel Command (COMNAVPERSCOM), may grant such a waiver for support of a spouse, but not children, on the basis of evidence of desertion without cause, physical abuse, or for infidelity on the part of the spouse.

c. A Service member may submit a request for a waiver of support of his or her spouse to the following address:

<p>Defense Finance and Accounting Service Cleveland Center Code PMMACB 1240 East Ninth Street Cleveland, OH 44199</p>
--

A request must include a complete statement of the facts, including substantiating evidence and comments or recommendation

of the commanding officer (CO). Substantiating evidence may consist of the following:

(1) An affidavit of the Service member, relative, disinterested person, public official, or law enforcement officer. Affidavits of the Service member and relatives should be supported by corroborative evidence. All affidavits must be based upon personal knowledge of the facts. Statements of hearsay, opinion, and conclusion are not acceptable as evidence.

(2) Written admissions by the spouse contained in letters written by him or her to the Service member or other persons.

(3) Waiver requests submitted on grounds of physical abuse must be corroborated by evidence including the following types: medical reports; police reports; and statements from witnesses, chaplains, counselors, or social workers.

6. **BAH and OHA**

a. Family members, for whom BAH and or OHA may be payable, are defined by law. Service members are expected to comply with the terms of court orders or divorce decrees by courts of competent jurisdiction, which adjudge payments of alimony, even though BAH or OHA is not payable.

b. Entitlement of Service members to BAH and or OHA on behalf of family members is provided by statute. No Service member will be denied the right to submit a claim or application for BAH or OHA and no command may refuse or fail to forward such a claim or application. In cases involving parents, Service members should furnish an estimate of the dependency situation to the best of their knowledge. COs should not contact parents for dependency information to include in the Service member's application. This delays the application and serves no useful purpose; as such, cases are thoroughly investigated by the Navy family allowance activity. That activity obtains dependency affidavits from the parents. Any person, including a Service member or family member, who obtains an allowance or allotment by fraudulent means is subject to criminal prosecution.

7. **Desertion or Misconduct.** The duty of a person to support his or her minor children is not affected by desertion or other misconduct on the part of the spouse. The obligation to support a child or children is not affected by dissolution of the

marriage through divorce unless the judicial decree or order specifically negates the obligation of either person to support a child or children of the marriage. The fact that a divorce decree is silent relative to support of minor children or does not mention a child or children will not be considered as relieving the Service member of his or her inherent obligation to provide support for the child or children of the marriage. In many cases, the courts may not be cognizant of the existence of a child or children or may not have jurisdiction over the child or children. A commander has discretion to withhold action for alleged failure to support a child or children under the following conditions:

a. Where the location and welfare of the child or children concerned cannot be ascertained.

b. Where it is apparent that the person requesting support for a child does not have physical custody of the child or children.

8. **Adopted Child.** The natural parents of an adopted child are relieved of the obligation to support the child since this obligation is assumed by the adoptive parents. A Service member who contemplates the adoption of a child or children should be aware of the legal obligation to provide continuous support for the child or children during their minority.

9. **Noncompliance.** Noncompliance with court-ordered child support and or alimony could result in the garnishment of the Service member's pay under reference (b).

10. **Minor Children.** Service members who have minor children and who contemplate divorce should be informed of the advisability of having support provisions incorporated in the court order or divorce decree to preclude later disputes. Courts and attorneys are occasionally misled into placing provisions in separation agreements and decrees to the effect that the Service member will pay whatever amount the Military Services pay or require to be paid for support of the child or children. Ambiguous phrases should be avoided. No attempt will be made to break down any BAH with respect to how much would be applicable for a spouse, child, or other dependent. Such ambiguous orders of support or agreements will be considered the same as if they were silent with respect to the amount of support to be provided. The interests of all concerned will be better served if the amount of support to be provided is settled

in fixed terms by agreement or court order at the time of separation.

11. **Commander's Responsibilities - Non-Support Complaints Involving Enlisted Personnel**

a. The responsibility of every commander is to make sure all enlisted personnel under his or her command are informed of Navy policy and expectations regarding support of family members and the possible consequences of separation for misconduct for failure to discharge their just obligations. Married personnel at sea or stationed overseas must be counseled and encouraged to make provisions for continuous allotments to their dependents in amounts sufficient to enable their spouses to meet the family obligations at home.

b. Upon receipt of a complaint alleging that an **enlisted** member is not adequately supporting his or her lawful spouse and or children, the Service member must be interviewed and informed of the DON policy concerning support of family members. Counseling may be documented via NAVPERS 1070/613, or any other form of written counseling that specifically addresses the complaint of non-support. In the absence of a determination by a civil court or a mutual agreement of the parties, the support guide in subparagraph 4a above is applicable. Service members must be advised of their legal and moral obligations as well as their rights in the matter. Service members must be informed that their naval careers may be in jeopardy if they do not take satisfactory action. Service members may become ineligible to reenlist or extend their enlistment. If a member is not adequately supporting their dependent(s), they may be subject to administrative or disciplinary action that may result in their separation from the Navy.

c. Justifiable complaints of non-support or insufficient support against an enlisted member, with no indication of satisfactory progress toward establishing an acceptable solution, will be considered as evidence of misconduct. In such cases, action may be taken as specified in the appropriate Military Personnel Manual (MILPERSMAN).

12. **Non-Support Complaints Involving Officers**

a. Complaints of Non-support. Complaints of non-support or insufficient support concerning **officers** must be acted on by the

CO, after advising the officer concerned of his or her rights in the matter, as follows:

(1) Upon receipt of a written complaint alleging that an officer of his or her command is not adequately supporting his or her legal spouse and or children, the commander must have the officer interviewed for the purpose of instructing him or her as to DON's policy concerning support of family members. Counseling may be documented via [NAVPERS 1070/613](#), or any other form of written counseling that specifically addresses the complaint of non-support.

(2) When the complaint is received directly from the family member concerned or a legal representative, the commander must inform the other party of receipt of complaint and promptly advise the writer of DON's policy in matters of this nature, and that appropriate action will be taken.

(3) When a complaint is received via senior naval authority (usually COMNAVPERSCOM), forward the complaint to the Command whose Commanding Officer is the appropriate authority to take action. .

b. Disregard for Court Order, Mutual Agreement, or MILPERSMAN. If, in the opinion of the CO, the officer concerned has repeatedly disregarded the provisions of a valid court order, the terms of a current mutual agreement, or the provisions of this article in such a manner as to bring discredit upon the naval service, the commander may consider non-judicial punishment or recommendation for court-martial.

c. Action of the Officer Concerned

(1) Response to Correspondence Alleging Non-Support. Upon receipt of correspondence alleging his or her failure to contribute adequately to the support of his or her legal spouse and or children, and on the request of his or her CO, the officer concerned may execute a statement setting forth the following:

(a) Amount and method of contributions to legal family members during the 12-month period preceding receipt of complaint,

(b) Amount being contributed monthly as of date of receipt of complaint.

(c) Amount to be contributed monthly in the future and the method by which payments will be made.

(d) If amounts are less than that provided in the support guide in subparagraph 4a above, state the reasons.

(e) Further information pertinent to the matter, which the officer desires to call to NAVPERSCOM attention.

(f) Whenever possible, a certified copy of any pertinent court order or voluntary mutual agreement should be appended.

(2) Support Guide. In the absence of a determination by a civil court or a mutual agreement of the parties, the support guide in subparagraph 4a above is applicable.

13. **Fitness and Evaluation Reports.** Fitness and evaluation reports may reflect disregard of the provisions of this article if such disregard has brought discredit upon the naval service, has interfered with performance, or raises questions concerning the advisability of promotion, advancement, or selection for specific assignments. Fitness and evaluation reports may not be used as punishment or in lieu of appropriate disposition under reference (c). Comments in fitness and evaluation reports must pay due regard to the prohibitions in reference (d) against discussing the activities of a spouse or family member. All reports mentioning non-support of family members must be treated as adverse and referred to the officer or enlisted member reported on for a statement.

**BY ORDER OF THE
SECRETARY OF THE AIR FORCE**

**DEPARTMENT OF THE AIR FORCE
INSTRUCTION 36-2906**



13 MAY 2021

Personnel

**PERSONAL FINANCIAL
REPPONSIBILITY**

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

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This publication implements Air Force Policy Directive (AFPD) 36-29, *Military Standards*. It has been developed in collaboration between the Deputy Chief of Staff for Manpower, Personnel and Services (AF/A1), the Chief Human Capital Officer (SF/S1), the Chief of the Air Force Reserve (AF/RE), and the Director of the Air National Guard (NGB/CF). It provides guidance and procedures for managing and processing allegations of delinquent financial obligations. This instruction applies to members of the Regular Air Force (RegAF), Space Force, Air Force Reserve (AFR) and Air National Guard on Title 10 orders who have delinquent financial obligations. This instruction requires the collection and or maintenance of information protected by the Privacy Act of 1974 authorized by Title 10 United States Code (USC) Section 9013, Secretary of the Air Force; 5 USC § 301, Departmental Regulations; Title 37, USC, Pay and Allowances of the Uniformed Services; and Executive Order (EO) 9397, Numbering System for Federal Accounts Relating to Individual Persons. The applicable System of Records Notice F036 AF PC C, Military Personnel Records System applies and are available online at <https://dpclld.defense.gov/Privacy/SORNs/>. Ensure all records generated as a result of processes prescribed in this publication adhere to Air Force Instruction (AFI) 33-322, *Records Management and Information Governance Program*, and are disposed in accordance with the Air Force Records Disposition Schedule, which is located in the Air Force Records Information Management System. Refer recommended changes and questions about this publication to the Office of Primary Responsibility using Air Force (AF) Form 847, *Recommendation for Change of Publication*; route AF Forms 847 from the field through the appropriate functional chain of command. This publication may be supplemented at any level, but all direct supplements must be routed to the office of primary responsibility of this publication for coordination prior to the certification and approval. All Major Command-level supplements must

be approved by the Human Resource Management Strategic Board prior to certification and approval. The authorities to waive wing/unit level requirements in this publication are identified with a Tier (“T-0, T-1, T-2, T-3”) number following the compliance statement. See Department of the Air Force Instruction (DAFI) 33-360, *Publications and Forms Management*, for a description of the authorities associated with the Tier numbers. Submit requests for waivers through the chain of command to the appropriate Tier waiver approval authority, or alternately, to the requestor’s commander for non-tiered compliance items. Compliance with the attachments in this publication is mandatory.

SUMMARY OF CHANGES

This publication has been revised and needs to be completely reviewed. Major changes include clarification of the Basic Allowance for Housing – Differential Rate, the addition of guidance on pro-rata financial support calculations, and corrected tiering. Administrative adjustments such as adding the purpose of the publication and additional references is also included.

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Chapter 1

OVERVIEW

1.1. Overview. Personal financial responsibility applies to all RegAF, AFR, and Air National Guard members on Title 10 orders who have delinquent financial obligations. It provides procedures for managing, and processing allegations of delinquent financial obligations.

1.2. Purpose. This instruction establishes guidelines for managing and processing allegations of delinquent financial obligations. Federal law authorizes allotments from RegAF, AFR, and Air National Guard members military pay to satisfy certain financial obligations. Military members are expected to pay their just financial obligations. AFI 1-1, *Air Force Standards*, includes general guidance on personal financial responsibility as one element of a strong Air Force culture. Attachments **2 and 3** of this publication contain fact sheets on federal policy and guidelines related to military personal indebtedness to aid both commanders and members.

Chapter 2

ROLES AND RESPONSIBILITIES

2.1. Major Commands, Field Operating Agencies and Direct Reporting Units will: monitor and guide subordinate units, including comprehensive instructions about personal financial management in teaching guides or course curricula. **(T-3)**.

2.2. Installation Commanders will: obtain the advice of and coordinate with the installation staff judge advocate, the military personnel flight (MPF) commander, the accounting and finance officer, and the inspector general to develop responses to high-level, executive, and Congressional inquiries. **(T-2)**.

2.3. Unit Commanders will:

2.3.1. Review and assess financial responsibility complaints in conjunction with legal review of documentation and respond to complainants within 15 days for Air Reserve Component (ARC) and 60 days for Air National Guard (ANG). **(T-3)**. As appropriate, include with the responses a copy of the fact sheets in this instruction (Attachments **2 and 3**). **(T-3)**.

2.3.1.1. Advise members and complainants of Air Force policy, including the fact that the Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness. **(T-3)**.

2.3.1.2. Monitor complaints until resolved. **(T-3)**.

2.3.1.3. Provide no information to complainants regarding administrative or disciplinary action contemplated or taken against the members. **(T-3)**.

2.3.2. Refer members who demonstrate financial irresponsibility to the local Airman and Family Readiness Center for financial management education and information. **(T-3)**. For non-located ARC locations, refer members to the nearest installation with full Center services, utilize Joint Force Support Assistance Program and Military Family Life Consultant support, use DoD-provided certified personal financial counselors if available, or other certified financial counselors available through on base (e.g., installation bank or credit union) or off base (Federal, State or local agencies or nonprofit consumer credit counseling organizations) resources. **(T-3)**.

2.3.3. Refer members to a legal assistance provider in nonsupport cases or when members may have legal standing to contest the indebtedness. **(T-3)**.

2.3.4. Consider and, if appropriate, initiate administrative or disciplinary action against members who continue to demonstrate financial irresponsibility. **(T-3)**.

2.3.5. Respond to inquiries from the Air Force Personnel Center, Special Programs Team (AFPC/DP2SSM), 550 C Street West, JBSA-Randolph, TX 78150-4747, with the following information.

2.3.5.1. Member's military status and position.

2.3.5.2. Whether the member agree to release information protected by 5 USC § 552a, *Records Maintained on Individuals*, also referred to as the Privacy Act of 1974. **(T-3)**.

2.3.5.3. Name, address, and telephone number of unit commander and of the person preparing the inquiry. (T-3).

2.3.6. Review all available facts surrounding the transaction forming the basis of the complaints, when addressing debt complaints against members. Include the members' legal rights and obligations, and any defenses or counterclaims the members may have. (T-3).

2.4. The Force Support Squadron will:

2.4.1. Assign a section in the Force Support Squadron to process personal financial responsibility complaints. (T-3).

2.4.2. Forward financial responsibility complaints to the member's unit commander for action if the member is RegAF, a traditional reservist, or guard member. (T-3).

2.4.3. Forward financial responsibility complaints for members not assigned to a unit within the appropriate MPF. (T-3).

2.4.4. Send complaints involving AFR members assigned to Headquarters Individual Reservist Readiness & Integration Organization (HQ RIO) to HQ RIO, 18420 E. Silver Creek Avenue, Building 390, MS 68, Buckley AFB, CO 80011. (T-3). For all others, refer to [paragraph 2.4.2](#).

2.4.5. Advise the complainant that the Air Force cannot assist with individuals no longer under its jurisdiction, such as members who have separated or retired from the service. (T-3).

2.4.6. Advise complainants who want to contact a military member about indebtedness to request the member's military address from AFPC, Military Records Section (AFPC/DP1ORM) Air Force Worldwide Locator, AFPC/DP1ORM, 550 C Street West Suite 50, JBSA – Randolph, TX 78150. Commercial creditors will be charged \$3.50 for locator service. (T-3). Additional information is available at: <https://www.afpc.af.mil/Support/Worldwide-Locator/>. AFPC/DP1ORM will advise the creditor in writing if they are unable to release a member's address. (T-3).

2.4.7. Recommend that AFPC/DP1ORM discontinue processing complaints when complainants refuse or repeatedly fail to comply with this instruction. (T-3).

2.4.8. Provide complainants with the Defense Finance and Accounting Service address and phone number upon request. (T-3).

2.4.9. Report cases of fraudulent, misleading or deceptive business practices to the Armed Forces Disciplinary Control Board according to AFI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations* (available at: <https://armypubs.army.mil/>, Army Regulation 190-24), and AFPC/DP2SSM. (T-3).

2.5. The Office of the Staff Judge Advocate will:

2.5.1. Advise commanders on how to apply policy to individual cases involving financial support of dependents, garnishments, and involuntary allotments for financial support based upon court orders. (T-3).

2.5.1.1. Advise commanders on the procedures involved in processing involuntary allotment cases, including assisting the commander in determining whether demands of military duty support a decision to disapprove the application for involuntary allotment. **(T-3)**.

2.5.1.2. Advise commanders on appropriate administrative or disciplinary action in cases of fraud, deceit, criminal conduct, or persistent financial irresponsibility. **(T-3)**.

2.5.2. Provide legal assistance to military members on issues of financial responsibility under federal and state laws, including 15 USC §§ 1692-1692p, *Debt Collection Practices*; 10 USC § 1408, *Payment of Retired or Retainer Pay in Compliance with Court Orders*; and 50 USC §§ 3901-4043, *Servicemembers Civil Relief Act* (additional information available at: <https://scra.dmdc.osd.mil/>). **(T-3)**.

2.5.2.1. Arrange for the provision of legal assistance to members who choose to contest applications for involuntary allotments for civil debts. **(T-3)**.

2.5.2.2. Coordinate on Congressional inquiries and special action cases involving allegations of non-support or financial irresponsibility. **(T-3)**.

2.6. The Airman and Family Readiness Center and Personal Financial Management Program Manager will: Provide military members and their families with financial management education, information, and referral services. **(T-3)**. AFR installations' Airman and Family Readiness offices refer members to qualified community-based financial management personnel. For the Air National Guard, the Airman and Family Readiness Program Managers may provide financial counseling or refer to the nearest active duty location, Joint Force Support Assistance Program/Military Family Life Consultant, or other off-base agencies.

2.7. Military Members will:

2.7.1. Pay their just financial obligations in a proper and timely manner. **(T-3)**. Members may be held responsible via administrative, nonjudicial, or judicial action for failure to provide financial support or meet financial obligations.

2.7.2. Comply with the requirements imposed by this instruction, including the requirement to respond to applications for involuntary allotments of pay within the suspense dates established by Defense Finance and Accounting Service or the commander. **(T-3)**.

2.8. Defense Finance and Accounting Service:

2.8.1. Refers RegAF, AFR, Air National Guard, retired members and creditors seeking assistance with garnishments, statutory allotments for child and spousal support, or involuntary allotments for civil debts to the following: Garnishment Law Directorate-HGA, PO Box 998002, Cleveland, OH 44199-8002; online at <https://www.dfas.mil/garnishment/customerservice/>; or via phone at the following toll free number: 1-888-332-7411.

2.8.2. Provides automated information for collecting a commercial debt from a military member at: <http://www.dfas.mil/garnishment/milcommdebt/debtcollect.html>.

CHAPTER 3

MANAGING FINANCIAL RESPONSIBILITY ALLEGATIONS AND COMPLAINTS

3.1. Commander Response to AFPC. When responding to an AFPC/DP2SSM request for information concerning a non-support case, commanders will include a copy of the reply sent to the complainant and the following information: **(T-3)**.

3.1.1. If applicable, a copy of the court order. **(T-3)**.

3.1.2. Evaluation of the degree of compliance by the member. **(T-3)**.

3.1.3. Date, amount, and method of prior support payments. **(T-3)**.

3.1.4. Proposed date, amount, and method of payment for future support payments. If paying by allotment, include the effective date of the first payroll deduction. **(T-3)**.

3.1.5. Basic Allowance for Housing (BAH) amounts received by the member and the basis of receipt (i.e., spouse, child, child in custody of former spouse). **(T-3)**.

3.1.6. If applicable, action anticipated or taken in accordance with Air Force policy. **(T-3)**.

3.2. In Cases Alleging Nonsupport of Family Members, commanders will:

3.2.1. Advise members they are expected to provide adequate financial support to the family member(s). **(T-3)**. Advise the family member(s) of procedures family member may implement to obtain involuntary collection of support through garnishment or statutory allotments. **(T-3)**. See fact sheet in [Attachment 2](#).

3.2.2. Upon receipt of a complaint of non-support from a dependent, require member to provide proof of adequate financial support. **(T-3)**.

3.2.3. Assess BAH entitlements by working with the Financial Operations Flight and informing members they may not receive BAH at the with-dependent (non-locality) rate. **(T-3)**. Refusal to support family members will result in termination of BAH entitlement at the with-dependent (non-locality) rate. **(T-3)**.

3.2.4. The Air Force will recoup the with-dependent (non-locality) rate BAH received by the member during periods of non-support. **(T-2)**.

3.2.5. Counsel members to pay their just debts, including complying, as appropriate, with court orders and judgments for the payments of alimony or child support. In the absence of court orders or judgments, counsel members on complying with the dependent support requirements in [Chapter 4](#) of this AFI. The monetary requirement to support family members in the amount determined by the provisions of [Chapter 4](#) begin on the date of separation, not the date it is discovered the member is not complying. **(T-3)**.

3.3. In Cases Alleging Paternity, commanders will:

3.3.1. Counsel the member concerning the allegations. **(T-3)**.

3.3.2. If the member denies paternity, inform the claimant accordingly and advise that the Air Force does not have the authority to adjudicate paternity claims. **(T-0)**.

3.3.3. If a member acknowledges paternity, advise member of their financial support obligations. **(T-3)**. Refer the member to the MPF for guidance on eligibility of an identification card for the child, to the local Financial Operations Flight for with-dependent (locality) rate financial support information, and to the servicing legal office for advice on the member's legal rights and obligations to the child(ren). **(T-3)**.

3.3.4. If the case involves a member assigned to Headquarters Individual Reservist Readiness and Integration Organization (HQ RIO), send the order or any information to HQ RIO at 18420 E. Silver Creek Avenue, Building 390, MS 68, Buckley AFB, Colorado 80011. **(T-3)**. For specific guidance on eligibility of dependents, contact the Total Force Service Center. For financial support information, contact the member's servicing reserve pay office. **(T-3)**.

3.3.5. If the case involves a member released from the Air Force who retains no military affiliation, return the case to the complainant advising them of the fact. **(T-3)**.

3.4. In Cases Alleging Personal Financial Indebtedness of a Civil Nature, commanders will:

3.4.1. Advise members of Air Force policy, stating that members are expected to pay their just financial obligations in a proper and timely manner. **(T-3)**. Further advise the member that failure to pay just debts may result in the creditor obtaining a court judgment, which could result in an involuntary allotment from the member's military pay. **(T-3)**.

3.4.2. Advise the claimant that the Air Force has no authority to resolve disputed claims or to require members to pay a private debt without a civil judgment. **(T-3)**.

3.4.3. Refer the claimant to the Defense Finance and Accounting Service (in accordance with [paragraph 2.8.1](#)) to obtain DD Form 2653, *Involuntary Allotment Application*, if the complaint is supported by a court judgment or if the complainant is attempting to serve legal documents upon the Air Force. **(T-3)**.

3.4.4. Ensure the procedures described on DD Form 2654, *Involuntary Allotment Notice and Processing*, are followed if Defense Finance and Accounting Service forwards an involuntary allotment application package that includes a DD Form 2654 and supporting documentation. These documents are completed by the unit commander and member, and maintained by Defense Finance and Accounting Service. **(T-3)**.

3.4.5. Promptly determine if the member is assigned or attached to the commander's unit. **(T-3)**. If not, the commander will immediately complete and return the DD Form 2654 to Defense Finance and Accounting Service, indicating that the member is not available to process an involuntary allotment for the reasons shown in Section II of the form. **(T-3)**.

3.4.6. If the member is assigned to the commander's unit, the commander will consider granting a reasonable extension of time for the member to submit a response to Defense Finance Accounting Service within the time designated by Defense Finance and Accounting Service officials. **(T-3)**. In such cases, the commander will complete Section II of DD Form 2654 to reflect the new suspense date and promptly return a copy of the form to Defense Finance and Accounting Service. **(T-3)**.

3.4.7. Provide the member a copy of the involuntary allotment package and counsel the member in accordance with Section III of DD Form 2654 if the member is available to respond to the involuntary allotment package. **(T-3)**.

3.4.8. The member will complete Section IV of DD Form 2654 and return it to Defense Finance and Accounting Service if the member does not contest the involuntary allotment. **(T-3)**. If the member refuses to respond or fails to respond by the authorized suspense date, the commander will note that fact in Section V of DD Form 2654 and return the form to Defense Finance and Accounting Service. **(T-2)**. Defense Finance and Accounting Service processes the involuntary allotment.

3.4.9. The member submits a completed DD Form 2654 with supporting documentation back to the commander within 15 days if the member contests the allotment for any reason other than demands of military duty. **(T-3)**. The commander will forward the member's response to Defense Finance and Accounting Service for further review and final determination. **(T-3)**.

3.4.10. If the member asserts that the demands of military duty prevented the member from appearing at pertinent judicial proceedings, and that absence forms the basis for the judgment ordering the allotment, determine whether the member's assertion is true. **(T-3)**.

3.4.11. Document commander's decision in Section V of DD Form 2654. **(T-3)**. Return the completed form to Defense Finance and Accounting Service within the time allotted (usually within 90 days from the date Defense Finance and Accounting Service mailed the DD Form 2654 to the commander, unless the commander granted an extension of time). **(T-3)**. The commander's decision about military demands is binding on Defense Finance and Accounting Service.

3.4.12. Designate in Section V of DD Form 2654 the name and address of the appellate authority in cases where the commander determines demands of military duty caused the absence of the member from the judicial proceeding. **(T-3)**. Within the Air Force, the appellate authority is the immediate Air Force superior commander of the commander who made the initial decision. There is no appeal from the appellate authority's decision.

CHAPTER 4

GUIDANCE TO MEMBERS FOR SUPPORT IN THE ABSENCE OF AN AGREEMENT OR COURT ORDER

4.1. Members will provide financial support to a spouse or child or any other dependent. (T-3). Members also comply with the financial support provisions of a court order or written support agreement. **(T-3)**. In the absence of a financial support agreement or a court order containing a financial support provision and until such an agreement is signed or such an order is issued, military members will provide financial support using the following provisions: **(T-3)**.

4.1.1. Pro-rata share. This formula applies when the member is receiving additional allowances for support for his or her dependents, but only if the member is NOT married to an active duty spouse. When using the term “pro-rata share” with regard to non-locality pay BAH– with Dependents (non-locality) rate, the amount of each such share is calculated using the equation in **Figure 4.1** This formula applies even in situations where the servicemember is OCONUS and receiving allowances for a spouse living CONUS.

Figure 4.1. Pro-Rata Share Formula.

$\text{Pro-rata share} = \frac{1}{\text{Total number of supported family members}} \times \text{Applicable basic allowance for housing - w/dependent (non-locality) rate}$
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4.1.2. Calculation. The “total number of supported family members” in the denominator of the fraction of **Figure 4.1** includes all family members (regardless of residence) except the military member and the following:

4.1.2.1. A member’s former spouse, regardless of whether the member is providing financial support to the former spouse.

4.1.2.2. A family member to whom the military member is not required to provide financial support under this instruction or from whom the military member has been released by his or her squadron commander of the requirement to provide financial support. A squadron commander may release a member under his or her command from the requirement to provide support only in the following situations:

4.1.2.2.1. An order issued by a court without jurisdiction. With regard to the requirement to comply with a court order establishing paternity or regarding child custody, a squadron commander may release a member from either of these requirements if the court issuing the order clearly was without jurisdiction to do so. A squadron commander may release a member from the requirement to comply with a court order regarding the financial support of family members if:

4.1.2.2.1.1. The court issuing the order clearly was without jurisdiction to do so; and

4.1.2.2.1.2. The member, with regard to those supported family members, at all times has been complying with any of the following: the financial support provisions of another court order; the financial support provisions of a written financial support agreement; or the financial support provisions of **paragraph 4.1**

of this instruction.

4.1.2.3. A court order without a financial support provision. A court order without a financial support provision is one that contains no language directing or suggesting that the member provide financial support to family members on a periodic or other continuing basis. An order that directs only nominal financial support to family members on a periodic or other continuing basis is still a financial support order. An order that directs financial support on a periodic or other continuing basis, but does not mention an amount, is still a financial support order. Where financial support is directed, but an amount is not indicated in a court order, the member will provide financial support in accordance with **paragraph 4.1** of this instruction. (T-3). If, however, a court order is silent (i.e., contains no provisions whatsoever) as to the obligation of a member to provide financial support to his or her family members, the squadron commander may release a member from the requirement to provide financial support for those family members if each of the following is true:

- 4.1.2.3.1. A judicial proceeding concerning the marriage (for example, legal separation, divorce, annulment), a child, or the children from that marriage (for example, for financial support, child custody, visitation) has been initiated.
 - 4.1.2.3.2. The court has jurisdiction over the member and the spouse or other person having custody of the children and the authority to order financial support of the family members concerned.
 - 4.1.2.3.3. The court has issued one or more orders, none of which contains a financial support provision.
 - 4.1.2.3.4. There is no written financial support agreement or other court order requiring financial support of the family members concerned.
 - 4.1.2.3.5. The member is not receiving BAH-with Dependents (non-locality) rate based solely on the financial support of the family members concerned or agrees to terminate such allowance effective upon the date released from the support obligation.
- 4.1.2.4. The income of the member's spouse exceeds the military pay of the member. This subparagraph authorizes a squadron commander to release a member from the requirement to provide financial support to his or her spouse, but not from the requirement to provide financial support to the children from that marriage. This provision does not give the squadron commander authority to release a member from the requirement to provide support required by a court order or a written financial support agreement. The squadron commander may release a member from providing financial support to spouse if both of the following paragraphs apply:
- 4.1.2.4.1. The monthly income of the supported spouse exceeds the monthly military pay of the member; and
 - 4.1.2.4.2. The member is not receiving BAH-with Dependents (non-locality) rate solely on the basis of providing financial support to that spouse or agrees to terminate allowances effective upon the date released from the support obligation.
- 4.1.2.5. For purposes of determining whether a commander should release a member from this instruction's requirement to provide financial support to his or her spouse, a member's military pay refers to the basic pay authorized under the law for a member based on his or

her pay grade and time in service before deductions are taken for taxes, voluntary and involuntary allotments, garnishment, and other such matters. Military pay does not include military allowances or wages from off-duty employment. The income of the non-service member spouse will be based on his or her wages before deductions are taken for taxes, voluntary allotments, and garnishments, together with income from all other sources, such as interest, dividends, and profits derived from property in that spouse's possession. **(T-3)**.

4.1.2.6. This member has been the victim of substantial abuse. This subparagraph authorizes a squadron commander to release a member from the requirement to provide financial support to his or her spouse, but not from the requirement to provide financial support to the children from that marriage. This does not give the squadron commander authority to release a member from the requirement to provide support required by a court order or a written financial support agreement. With regard to the requirement to provide financial support for a spouse, a squadron commander may release a member from this requirement if all of the following provisions apply:

4.1.2.6.1. An instance of abuse committed by the supported spouse against the member has been substantiated by either of the following: a family advocacy case management team; or a court as evidenced by a judgment amounting to a conviction or by the issuance of a permanent restraining order (or a temporary restraining order then in effect) against the supported spouse;

4.1.2.6.2. The instance of abuse did not involve a mutual affray or an act of physical abuse by the member against his or her spouse (substantiated by a family advocacy case management team or court judgement or order); and

4.1.2.6.3. The member is not receiving BAH– with Dependents non-locality (rate) based solely on the basis of providing financial support to that spouse or agrees to terminate such allowance effective upon the date released from the support agreement.

4.1.2.7. The supported family member is in jail. This subparagraph authorizes a squadron commander to release a member from the requirement to provide financial support to a family member who is incarcerated in any penal institution, regardless of the reason for his or her incarceration. This does not give the squadron commander authority to release a member from the requirement to provide support required by a court order or a written financial support agreement. With regard to the requirement to provide financial support for a spouse, a squadron commander may release a member from this requirement if both of the following provisions apply:

4.1.2.7.1. The family member presently is in jail; and

4.1.2.7.2. The member is not receiving BAH–with Dependents (non-locality) rate based solely on the basis of providing financial support to that spouse or agrees to terminate such allowance upon the date released from the support agreement.

4.1.2.8. Required support has been provided to the spouse for 18 months. This subparagraph authorizes a squadron commander to release a member from the requirement to provide financial support to his or her spouse, but not from the requirement to provide financial support to the children from that marriage. This does not give the squadron commander authority to release a member from the requirement to provide support required by a court order or a written financial support agreement. With regard to the

requirement to provide financial support for a spouse, a squadron commander may release a member from this requirement if all of the following provisions apply:

- 4.1.2.8.1. The member and spouse have been separated for 18 months.
- 4.1.2.8.2. The member has made financial support required by this instruction for the entire 18 months.
- 4.1.2.9. Civilian courts are available and would have jurisdiction to order financial support. A foreign court will meet this requirement only if its judgment would have continuing effect even if the Airman leaves the jurisdiction. **(T-3)**.
- 4.1.2.10. The member has not acted in any manner to avoid service of process or otherwise to prevent a court from ruling on the issue of support.
- 4.1.2.11. The member is not receiving BAH-with Dependents (non-locality) rate based solely on the basis of providing financial support to that spouse or agrees to terminate such allowance effective upon the date released from the support agreement.
 - 4.1.2.11.1. The supported child is in custody of another who is not the lawful custodian. This subparagraph authorizes a squadron commander to release a member from the requirement to provide financial support to his or her child if the child is in custody of another person who is not the lawful custodian of the child. With regard to the requirement to provide financial support for family members, a squadron commander may release a member from this requirement regarding a particular child if all of the following provisions apply:
 - 4.1.2.11.2. The member is the lawful custodian of the child;
 - 4.1.2.11.3. The child, without the member's consent, is in the custody of another person who is not the lawful custodian of the child; and
 - 4.1.2.11.4. The member is diligently pursuing legal means to obtain physical custody of the child.

4.1.3. **Single-family units:**

- 4.1.3.1. A family unit or spouse not residing in government family housing. The member will provide financial support in an amount equal to the BAH-with Dependents (non-locality) rate to the family unit or spouse. **(T-3)**.
- 4.1.3.2. Family unit residing in government family housing. While the member's family members are residing in government family housing, the member is not required to provide additional financial support. When the supported family member(s) move(s) out of government family housing, the member will provide BAH-with Dependents (non-locality) rate to the family unit. **(T-3)**.
- 4.1.3.3. Family members within the family unit residing at different locations. The member will provide a pro-rata share of BAH-with Dependents (non-locality) rate to each family member not residing in government family housing. **(T-3)**. The member is not required to provide additional support for family members residing in government family housing.

4.1.3.4. Member married to another person on active duty or full-time orders in the RegAF or other military services. In absence of a written financial support agreement or a court order containing a financial support provision, a member is not required to provide financial support to a spouse on active duty or full time orders in the RegAF or in one of the military services. With regard to the member's child or children (from that marriage or a prior marriage), a member will provide the following financial support in the absence of a written financial support agreement or a court order containing a financial support provision **(T-3)**:

4.1.3.4.1. If the member does not have custody of any children, and the children do not reside in government quarters, the member will provide Basic Allowance for Housing-Differential (BAH-Diff) to the military member having custody of the child or children. **(T-3)**.

4.1.3.4.2. If the member does not have custody of any children, and the children reside in government quarters, the member is not required to provide financial support to the military member having custody of the child or children.

4.1.4. Multiple family units:

4.1.4.1. A member will provide financial support for each family unit and family member in the following manner. **(T-3)**:

4.1.4.1.1. Family members covered by court orders will be provided financial support in accordance with those court orders. **(T-3)**.

4.1.4.1.2. Family members covered by financial support agreements will be provided financial support according to those agreements. **(T-3)**.

4.1.4.1.3. Family members residing in government family housing who are not covered by either a court order or a financial support agreement will not be provided additional financial support. **(T-3)**.

4.1.4.1.4. Each family member not residing in government family housing and who is not covered by a court-order or a financial support agreement will be provided a pro-rata share of BAH-with Dependents (non-locality) rate. **(T-3)**.

4.1.4.1.5. If the member's present spouse is RegAF or on full-time active duty orders in one of the military services, the requirements of [paragraph 4.1.3.4](#) of this instruction apply. **(T-3)**.

4.1.5. Shared custody arrangements. In situations in which the member would otherwise be required to pay the pro-rata share (that is, no exceptions to providing the pro-rata share apply), but the member and the spouse share custody of their dependent children, the following rules apply: The spouse will receive his or her pro-rata share. If the spouse has custody of the children for 3 days a week, and the military member has custody for 4 days a week, the military member will pay $\frac{3}{7}$ th of the non-locality BAH-with Dependents (non-locality) rate for each additional dependent. **(T-1)**. For example, an E-5 military member and the non-military spouse have two children. In this situation, the military member will pay the spouse his or her pro-rata share (or one-third) of the non-locality BAH-with Dependents (non-locality) rate. **(T-3)**. If the non-military spouse had full custody of the two children, each child would be entitled to one-third of the non-locality BAH-with Dependents (non-locality) rate. Since the non-military

spouse only has custody 3 days a week, the military member will pay $3/7^{\text{th}}$ of the one-third pro-rata share for each shared custody child. **(T-3)**. Therefore, if the non-locality BAH-with Dependents (non-locality) rate was \$900, the spouse would receive one-third, or \$300. Each child's pro-rata share is also \$300. $3/7^{\text{th}}$ of \$300 is \$128.57. Accordingly, the military member would pay \$557.14 per month (or \$300 + \$128.57 + \$128.57) rather than the full \$900 per month.

4.2. Pro-rata financial support calculation. The amount of support provided in accordance with a financial support agreement or a court order involving one or more family units or members does not affect the calculation of the pro-rata share required under this instruction. Accordingly, this does not affect the financial support of any other family units or members not covered by such agreement or order.

4.3. Other Circumstances. When the provisions described above do not meet the specific facts of the member, and there is no legal separation agreement or court order, the member must provide a support amount that is at least equal to the BAH-Diff rate applicable to the member's grade. **(T-3)**. If the commander determines the BAH-Diff is not adequate in the member's specific situation, the commander may refer to the individual's state child support guidelines to determine how much additional support is required.

JOHN A. FEDRIGO
Principal Deputy Assistant Secretary
(Manpower and Reserve Affairs)

Attachment 1**GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION*****References***

Executive Order (EO) 9397, *Numbering System for Federal Accounts Relating to Individual Persons*, 23 November 1943

5 CFR Part 581, *Processing Garnishment Orders for Child Support and/or Alimony*

32 CFR Part 54, *Allotments for Child and Spousal Support*

32 CFR Part 113, *Indebtedness Procedures of Military Personnel*

5 USC § 301, *Departmental Regulations*

5 USC § 552a, *Records Maintained on Individuals*

5 USC § 5520a, *Garnishment of Pay*

10 USC § 1408, *Payment of Retired or Retainer Pay in Compliance with Court Orders*

15 USC § 1692-1692p, *Debt Collection Practices*

42 USC §§ 659-660, 665, *Child Support and Establishment of Paternity*

50 USC §§ 3901-4043, *Servicemembers Civil Relief Act*

DoD 7000.14R, *Financial Management Regulation*, December 2019

DoDI 1344.09, *Indebtedness of Military Personnel*, 8 December 2008

AFI 1-1, *Air Force Standards*, 7 August 2012

AFI 33-322, *Records Management and Information Governance Program*, 23 March 2020

DAFI 33-360, *Publications and Forms Management*, 1 December 2015

AFI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations*, 27 July 2006

AFPD 36-29, *Military Standards*, 11 April 2019

Title 37, *United States Code, Pay and Allowances of the Uniformed Services*

Privacy Act of 1974 (5 U.S.C. § 552)

Hatch Act Reform Amendments of 1993

Title IV-D of the Social Security Act

Child Support Enforcement and Paternity Establishment Program (42 USC § 651 et seq.)

Prescribed Forms

None

Adopted Forms

DD Form 2653, *Involuntary Allotment Application*

DD Form 2654, *Involuntary Allotment Notice and Proceeding*

AF Form 847, *Recommendation for Change of Publication*

Abbreviations and Acronyms

AF—Air Force

AFB—Air Force Base

AFI—Air Force Instruction

AFPC—Air Force Personnel Center

AFPD—Air Force Policy Directive

AFR—Air Force Reserve

ARC—Air Reserve Component

BAH—Diff—Basic Allowance for Housing-Differential

CFR—Code of Federal Regulations

DoDI—Department of Defense Instruction

EO—Executive Order

JBSA—Joint Base San Antonio-Randolph

MPF—Military Personnel Flight

OPR—Office of Primary Responsibility

RC—Reserve Component

RegAF—Regular Air Force

US—United States

Terms

Active Duty—Full-time duty in the active military service of the United States, including active duty or full-time training duty in the Reserve Component. The term active duty for a period of more than 30 days means active duty under a call or order that does not specify a period of 30 days or less.

Air Reserve Component—The component of the United States Air Force that includes the AFR and Air National Guard.

Basic Allowance for Housing—US based allowance prescribed by geographic duty location, pay grade, and dependency status. It provides uniformed service members equitable housing compensation based on housing costs in the local civilian housing markets with the US when government quarters are not provided.

Basic Allowance for Housing-Differential (BAH-Diff)—Paid to a Service member assigned to single-type Government quarters and who qualifies for a BAH solely due to paying sufficient child support. The BAH-Diff is a fixed rate and is the difference between the with-dependent Basic Allowance for Quarters (BAQ) rate and the without-dependent BAQ rate as of December 31, 1997 based on the Service member's grade and increased each year by the average pay raise percentage.

Commander—A commissioned officer who, by virtue of rank and assignment, exercises command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a "command." This designation is used in all Air Force organizations authorized to be led by a commander, except the US Air Force Academy, which is commanded by a superintendent, a school or academic organizations, which may be commanded by commandants.

Demands and exigencies of military duty—A military assignment or mission-essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a member of the Military Services from appearance at a judicial proceeding or prevents the member from being able to respond to a notice of application for an involuntary allotment. Exigency of military duty is normally presumed during periods of war, national emergency, or when the member is deployed.

Divorce—Dissolution of marriage that completely severs the marital relationship, as opposed to limited divorce, legal separation, or so-called divorce from table and bed or bed and board. A divorce includes an annulment.

Family Member—For the purpose of this instruction only, a family member includes: (1) An Airman's present spouse (former spouse is not a family member); (2) An Airman's minor children from the present marriage; (3) An Airman's children by any former marriage if the Airman has a current obligation to provide support to that child (a family member does not include the child of an Airman who has been legally adopted by another person); (4) Minor children born out of wedlock to: (a) a female Airman; (b) a male Airman if evidenced by a court order, or the functional equivalent of a court order, identifying the Airman as the father or if the Airman is providing support to the child under the terms of this regulation; (5) Any other person (for example, parent, stepchild) for whom the Airman has a legal obligation to provide financial support under the applicable law. This includes court orders directing the Airman to provide financial support to a child 18 years of age or older or to some other person. It does not include financial support voluntarily provided to a child 18 years of age or older or to some other person.

Family Unit—For the purpose of this instruction only, a family unit includes any of the following: (1) An Airman's present spouse and any children from that marriage for whom the Airman is required to provide financial support. (2) One or more children from a prior marriage for whom the Airman is required to provide financial support. (3) One or more children born out of wedlock from a prior relationship for whom an Airman is required to provide financial support.

Financial Support—The amount of money or support in kind provided to one's family members on a periodic or other continuing basis in accordance with a written or oral support agreement, court order, or this instruction. Financial support includes court-ordered spousal support (or alimony) and child support. It does not include any division of marital or nonmarital property between spouses or former spouses or financial payments made as part of a property settlement.

Financial Support Agreement—An oral or written agreement between spouses to provide financial support. There is no requirement that the written financial support agreement appear in any specific form. Any signed document, or group of documents, that evidences the party's agreement to the terms of support will be sufficient. **(T-3)**. Examples of a written financial support agreement include, a separation agreement or property settlement agreement or a letter or a series of letters signed and evidencing an agreement to provide financial support. A written financial support agreement also includes a written agreement expressly relieving the Airman of the obligation to provide financial support to a spouse. If an amount is specified, that amount must be at least equal to the BAH–Differential Rate. **(T-3)**.

Legal Process—Any writ, order, summons, or other process in the nature of garnishment directed to the United States Air Force which is issued by a court of competent jurisdiction within any State, territory, or possession of the United States; a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement that requires the United States to honor such process; or an authorized official pursuant to an order of such court of competent jurisdiction or pursuant to state or local law.

Minor Children—Unmarried children under 18 years of age who are not on active duty with the Armed Forces.

Multiple Family Units—Two or more family units.

Non-Locality Basic Allowance for Housing Rates—The amount defined by Joint Travel Regulations, paragraph 10012, *Transit Housing Allowance* or paragraph 10014, *RC Rate*, as applicable.

Personal Financial Indebtedness of a Civil—A financial indebtedness relating to or stemming from an administrative military action, a military judicial action, or non-military criminal proceedings by action or suit in a civilian courts.

Privacy Act—(5 U.S.C. § 552), Hatch Act Reform Amendments of 1993 and Title IV-D of the Social Security Act, Child Support and Establishment of Paternity (42 USC § 651 et seq).

Attachment 2

FACT SHEET: GARNISHMENT OF PAY AND STATUTORY ALLOTMENTS AGAINST MILITARY PAY FOR CHILD SUPPORT AND ALIMONY OBLIGATIONS

A2.1. Methods of Involuntary Collection of Military Pay. This fact sheet addresses the general procedures involved in the two methods of involuntarily collecting military pay from a military member for child support and spousal support (alimony): garnishment and statutory allotments.

A2.2. Garnishment of Military Pay. (Refer to 42 USC § 659-660, *Child Support and Establishment of Paternity* and 5 CFR Part 581, *Processing Garnishment Orders For Child Support and/or Alimony*, to review laws pertaining to garnishment of military pay):

A2.2.1. Federal law authorizes legal process (garnishment) against the pay of Air Force members to enforce child support and alimony in accordance with State law. Garnishments may be placed against the pay of Reg AF, Reserve, Guard and retired military members of the Air Force.

A2.2.2. The procedure to obtain a garnishment order is determined by state law. However, federal law determines how the garnishment order is applied to military pay, i.e., how service of process is accomplished, the type of pay subject to garnishment, etc.

A2.2.3. Unless state law specifies a lesser amount, federal law provides a limit of 50 percent of the member's aggregate disposable earnings for any workweek if the member is currently supporting a second family (spouse or child) and 60 percent if the member is not supporting a second family. The percentage may be increased by 5 percent if the arrearage is 12 weeks or more.

A2.2.4. Legal documents should clearly show that the garnishment order was issued for child support or alimony or both. Garnishment orders are not honored for payments or transfers of property by one spouse to another for purposes of a marital property settlement or for the division of retired pay resulting from divorce or legal separation.

A2.2.5. Sufficient identifying information must accompany the legal process in order for the Air Force to implement the order. At a minimum, the information includes the following: the member's full name, date of birth, Social Security number, current military status and, if known, the member's current assignment.

A2.2.6. Garnishment orders may be submitted by mail to Garnishment Operations-HGA, P.O. Box 998002, Cleveland OH 44199-8002. Requests may also be faxed to 877-622-5930 (toll free). Call 888-DFAS411 (Defense Switching Network 332-7411) for additional information.

A2.3. Statutory Allotments for Child Support and Alimony. (Refer to 42 USC § 665, *Child Support and Establishment of Paternity* and 32 CFR Part 54, *Allotments for Child and Spousal Support* to review laws pertaining to statutory allotments for child support and alimony):

A2.3.1. Federal law authorizes allotments from active duty military pay in order to satisfy child support and alimony obligations. Alimony alone does not qualify under this law. These statutory allotments may only be paid from active duty pay.

A2.3.2. A statutory allotment may be initiated when child support and alimony payments are at least 2 months in arrears. The allotment is initiated by furnishing the Defense Finance and Accounting Service Center a written notice from a court or state agency administering the child support program under Title IV-D of the Social Security Act, Child Support and Establishment of Paternity (42 USC § 651 et seq.). The notice is signed by an authorized official and contains the following information:

A2.3.2.1. A statement that the person signing the request is an agent or attorney of a state that has a Title IV-D plan with authority under the plan to collect money owed by a military member as child support or child support and alimony. The request may also be signed by an agent of the court issuing the order.

A2.3.2.2. The statement includes the military member's full name, Social Security number, the dates that the current support terminates for each child, and the exact name and address of the allotment payee. The statement also shows the total amount of the allotment to be taken and specifies the amount to be paid each month for current support and the arrearage.

A2.3.2.3. The statement is supported by a recently certified copy of the original court order awarding support and a court order which specifies the amount of the arrears and those payments made to liquidate such arrears.

A2.3.3. Allotments cannot exceed 50 percent of a member's pay and allowances if the member is supporting a second family. If the member is not supporting a second family, the allotment may not exceed 60 percent. The percentage may be increased by 5 percent if the arrearage is 12 weeks or more.

A2.3.4. After Defense Finance and Accounting Service receives the request, Defense Finance and Accounting Service notifies the member's commander. The commander will then notify and counsel the member. The member has 30 days to cure the arrearage or to submit evidence that the arrearage is an error. If not, Defense Finance and Accounting Service will ordinarily implement the allotment 30 days after the member's notification. Payments begin at the end of the month in which the allotment is to be effective.

Attachment 3

FACT SHEET: PERSONAL INDEBTEDNESS AND INVOLUNTARY ALLOTMENTS FOR CIVIL DEBTS

A3.1. Involuntary Allotments. This fact sheet addresses the general procedures involved in resolving allegations of indebtedness and initiating involuntary allotments against military pay for civil debts.

A3.2. Air Force Policy. Military members are expected to pay their just financial obligations in a proper and timely manner. When necessary, commanders will counsel members about their financial responsibilities. However, Air Force components have no legal authority to arbitrate or resolve personal disputes over debts or except as provided in **paragraph A3.4**, to require a member to pay or to divert any part of a member's pay to satisfy a private debt.

A3.3. Disputes over Indebtedness. Whenever possible, disputes over indebtedness should be resolved through amicable means by the parties involved. Claimants desiring to contact a military member about indebtedness may, in most cases, obtain the member's military address by contacting the member's department of Service (i.e., Army, Navy, Air Force, or Marine Corps) locator service.

A3.3.1. For Air Force members, the military locator service may be contacted at: AFPC/DP1ORM, 550 C Street West Suite 50, JBSA – Randolph, TX 78150. Additional information is available at: <http://www.afpc.af.mil/Air-Force-Worldwide-Locator>. The service charges a reasonable fee for the research service. The Air Force does not charge for locator service on Air Force active duty or retired personnel. In situations where the Service is unable to release information about the military member (i.e., members assigned at overseas installations or at classified locations), the Service forwards correspondence from the claimant to the member at no additional cost.

A3.4. Involuntary Allotments for Civil Debts. Creditors whose bona fide efforts to collect a debt have failed may seek relief by applying for an involuntary allotment of pay pursuant to the *Hatch Act Reform Amendments of 1993* pursuant to 5 USC § 5520a, *Garnishment of Pay, as implemented by Department of Defense Instruction (DoDI) 1344.09, Indebtedness of Military Personnel* and AFI 36-2906.

A3.4.1. A creditor may initiate this process against any member of the RegAF, AFR, or Air National Guard. Involuntary allotments are not taken from retired or disability pay. The application is initiated by submitting a DD Form 2653, supported by a certified copy of a judgment issued by a civil court and any other certifications required by the Department of Defense Instruction, to the appropriate Department of Defense agency. The DD Form 2653 may be obtained from Defense Finance and Accounting Service.

A3.4.2. The creditor's application certifies certain state and federal procedural requirements have been satisfied prior to obtaining the judgment, including satisfaction of the procedural requirements of the Servicemembers Civil Relief Act.

A3.4.3. Upon proper receipt of a complete application package, Defense Finance and Accounting Service will forward a copy of the application to the member and the member's commander along with a DD Form 2654, *Involuntary Allotment Notice and Processing*. The member has 90 days from the date Defense Finance and Accounting Service mails the package

in which to respond to the application. The member's time to respond to the action may be extended by the member's commander for good cause. If the member and commander fail to respond to the notice from Defense Finance and Accounting Service within the allotted time, and application is otherwise valid, Defense Finance and Accounting Service may automatically process the involuntary allotment on the 15th calendar day after the date a response was due.

A3.4.4. If the member consents to the allotment, the commander will return the package to Defense Finance and Accounting Service. The allotment commences within 30 days. If the member contests the application, the member may seek legal assistance and submits supporting evidence refuting the validity of the application within 15 days to his or her commander, who then forwards the response to Defense Finance and Accounting Service.

A3.4.5. Defense Finance and Accounting Service officials will make the final decision on any issues or defenses raised by the member except for the issue of whether "military demands and exigencies" adversely impacted the member. A "military exigency" is defined in DoDI 1344.09 to be a military assignment or mission-essential duty that because of its urgency, importance, duration, location or isolation, necessitates the member to be absent from an appearance at a judicial proceeding, or prevents the member from being able to respond to notice of an involuntary allotment action. Exigency of military duty is normally presumed during periods of war, national emergency, or when the member is deployed. The member's unit commander will decide whether the defense of military demand is valid and the commander's decision on this issue is binding on Defense Finance and Accounting Service. Commanders return the application to Defense Finance and Accounting Service indicating their decision on the DD Form 2654. If the commander finds the military demands defense is valid, Defense Finance and Accounting Service will return the application to the creditor without further action.

A3.4.6. If the involuntary allotment application is denied based upon the commander's determination that military demands adversely impacted the member's ability to respond to the legal action, Defense Finance and Accounting Service will give the creditor the name and address of the appellate authority listed on the DD Form 2654 by the commander. In the Air Force, the appellate authority is the immediate Air Force superior commander to the commander who made the initial decision. The creditor may appeal the denial to the appellate authority, who makes the final decision within 30 days of receiving the appeal and who responds directly to the creditor. The appellate authority's decision may not be appealed. If the appeal is granted, the creditor must submit a written request to Defense Finance and Accounting Service, along with a copy of the appellate authority's decision, to start the allotment.

A3.4.7. Involuntary allotments are taken only from pay that is subject to involuntary allotment as defined by 32 CFR Part 113, *Indebtedness Procedures of Military Personnel*, Section 113.3 (c), *Pay subject to involuntary allotment*. Pay subject to allotment includes basic pay and certain other payments, but not allowances, reimbursements for expenses, or separation pay. The maximum amount of pay that may be taken is the lesser of 25 percent of the member's pay subject to involuntary allotment or the maximum amount authorized by the applicable state's law, in accordance with 32 CFR § 113.4(b). Other debts (e.g., income tax withholding, government debts, military fines and forfeitures, family support obligations) take priority over allotments for civil debts pursuant to 32 CFR § 113.4(c).

A3.4.8. Defense Finance and Accounting Service is the designated agency to receive involuntary allotment applications on Air Force, Army, Navy, and Marine Corps personnel. For further information contact Defense Finance and Accounting Service at the following address: Attn: Garnishment Operations, Defense Finance and Accounting Service, Cleveland Center, P.O. Box 998002, Cleveland, OH 44199-8002, or call commercial 888-332-7411, option 3 for additional information. For faster service, please fax your documentation to: 877-622-5930. Please ensure members name and SSN# are referenced.



COMDTCHANGENOTE 1600
22 OCT 2020

COMMANDANT CHANGE NOTICE 1600

Subj: CH-3 TO THE DISCIPLINE AND CONDUCT, COMDTINST M1600.2

1. PURPOSE. This Commandant Change Notice publishes a change to Discipline and Conduct, COMDTINST M1600.2.
2. ACTION. All Coast Guard unit commanders, commanding officers, officer-in-charge, deputy/assistant commandants, and chiefs of headquarters staff elements must comply with the provisions of this Commandant Change Notice. Internet release is authorized.
3. DIRECTIVES AFFECTED. With the addition of this Commandant Change Notice, Discipline and Conduct, COMDTINST M1600.2, is updated.
4. DISCLAIMER. This guidance is not a substitute for applicable legal requirements, nor is it itself a rule. It is intended to provide operational guidance for Coast Guard personnel and is not intended to nor does it impose legally-binding requirements on any party outside the Coast Guard.
5. MAJOR CHANGES. Paragraph 3.C.1.5. is added (and subordinate paragraphs 6 and 7 are renumbered) to assign responsibility to COs/OICs for notifying the next superior in the chain of command of final action on a hazing and bullying inquiry, and requiring COs/OICs to provide reasons for their findings. New section 3.C.2 is added to establish procedures for filing complaints and inquiries of Anti-Harassment and Hate Incidents (AHHI), including convening orders, selection of investigating officers, confidentiality, logistical support, legal review of the investigative report, final action and forwarding the final action memo.
6. ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS.
 - a. The development of this Instruction and the general policies contained within it have been thoroughly reviewed by the originating office in conjunction with the Office of Environmental Management, Commandant (CG-47). This Instruction is categorically

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excluded under current Department of Homeland Security (DHS) categorical exclusion DHS (CATEX) A3 from further environmental analysis in accordance with the U.S. Coast Guard Environmental Planning Policy, COMDTINST 5090.1 and the Environmental Planning (EP) Implementing Procedures (IP).

b. This Instruction will not have any of the following: significant cumulative impacts on the human environment; substantial controversy or substantial change to existing environmental conditions; or inconsistencies with any Federal, State, or local laws or administrative determinations relating to the environment. All future specific actions resulting from the general policy in this Instruction must be individually evaluated for compliance with the National Environmental Policy Act (NEPA) and Environmental Effects Abroad of Major Federal Actions, Executive Order 12114, Department of Homeland Security (DHS) NEPA policy, Coast Guard Environmental Planning policy, and compliance with all other applicable environmental mandates.

7. DISTRIBUTION. No paper distribution will be made of this Commandant Change Notice. An electronic version will be located on the following Commandant (CG-612) web sites. Internet: <http://www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-C4IT-CG6-/The-Office-of-Information-Management-CG-61/aboutCGDS/>, and CGPortal: <https://cgportal2.uscg.mil/library/directives/SitePages/Home.aspx>.
8. PROCEDURE. If maintaining a paper library, remove and replace the following pages of Discipline and Conduct, COMDTINST M1600.2

<u>Remove</u>	<u>Replace</u>
Table of Contents 3-6	Table of Contents 3-6 to 3-8

9. RECORDS MANAGEMENT CONSIDERATIONS. This Commandant Change Notice has been evaluated for potential records management impacts. The development of this Commandant Change Notice has been thoroughly reviewed during the directives clearance process, and it has been determined there are no further records scheduling requirements, in accordance with Federal Records Act, 44 U.S.C. 3101 et seq., National Archives and Records Administration (NARA) requirements, and the Information and Life Cycle Management Manual, COMDTINST M5212.12 (series). This policy does not have any significant or substantial change to existing records management requirements.
10. FORMS/REPORTS. The forms referenced in this Commandant Change Notice are available in USCG Electronic Forms on the Standard Workstation or on the Internet: <http://dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-C4IT-CG-6/The-Office-of-Information-Management-CG-61/Forms-Management/>; and CG Portal at <https://cgportal2.uscg.mil/library/forms/SitePages/Home.aspx>.

COMDTCHANGENOTE 1600

11. REQUESTS FOR CHANGES. Units and individuals may recommend changes via their chain of command using the Coast Guard memorandum to:
HQSPolicyandStandards@uscg.mil.

/D. M. NAVARRO/
Director of Military Personnel



COMDTCHANGENOTE 1600
29OCT2018

COMMANDANT CHANGE NOTICE 1600

Subj: CH-2 TO THE DISCIPLINE AND CONDUCT, COMDTINST M1600.2

1. PURPOSE. This Commandant Change Notice publishes a change to Discipline and Conduct, COMDTINST M1600.2.
2. ACTION. All Coast Guard unit commanders, commanding officers, officer-in-charge, deputy/assistant commandants, and chiefs of headquarters staff elements must comply with the provisions of this Commandant Change Notice. Internet release is authorized.
3. DIRECTIVES AFFECTED.
 - a. With the addition of this Commandant Change Notice, Discipline and Conduct, COMDTINST M1600.2, is updated.
 - b. Coast Guard Policy on the Possession of Firearms and/or Ammunition by Coast Guard Military Personnel, COMDTINST 10100.1 is hereby cancelled.
4. DISCLAIMER. This guidance is not a substitute for applicable legal requirements, nor is it itself a rule. It is intended to provide operational guidance for Coast Guard personnel and is not intended to nor does it impose legally-binding requirements on any party outside the Coast Guard.
5. MAJOR CHANGES. Incorporate updated policy for the Lautenberg Amendment, No Contact Orders, and Military Protective Order (MPO) into Chapter 4, Chapter 5, and Chapter 6.
6. ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS.
 - a. The development of this Commandant Change Note and the general policies contained within it have been thoroughly reviewed by the originating office in conjunction with the Office of Environmental Management, Commandant (CG-47). This Commandant Change Note is categorically excluded under current Department of Homeland Security

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COMDTCHANGENOTE 1600

(DHS) categorical exclusion (CATEX) A3 from further environmental analysis in accordance with "Implementation of the National Environmental Policy Act (NEPA)", DHS Instruction Manual 023-01-001-01 (series).

- b. This Commandant Change Note will not have any of the following: significant cumulative impacts on the human environment; substantial controversy or substantial change to existing environmental conditions; or inconsistencies with any Federal, State, or local laws or administrative determinations relating to the environment. All future specific actions resulting from the general policy in this Commandant Change Note must be individually evaluated for compliance with the National Environmental Policy Act (NEPA), Department of Homeland Security (DHS) and Coast Guard NEPA policy, and compliance with all other applicable environmental mandates.
7. DISTRIBUTION. No paper distribution will be made of this Commandant Change Notice. An electronic version will be located on the following Commandant (CG-612) web sites. Internet: <http://www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-C4IT-CG-6-/The-Office-of-Information-Management-CG-61/aboutCGDS/>, and CGPortal: <https://cgportal2.uscg.mil/library/directives/SitePages/Home.aspx>.
8. PROCEDURE. If maintaining a paper library, remove and replace the following pages of Discipline and Conduct, COMDTINST M1600.2
- | | |
|---------------|-----------------|
| <u>Remove</u> | <u>Replace</u> |
| TOC | TOC |
| | Pages 4-1 – 6-4 |
9. RECORDS MANAGEMENT CONSIDERATIONS. This Commandant Change Notice has been evaluated for potential records management impacts. The development of this Commandant Change Notice has been thoroughly reviewed during the directives clearance process, and it has been determined there are no further records scheduling requirements, in accordance with Federal Records Act, 44 U.S.C. 3101 et seq., National Archives and Records Administration (NARA) requirements, and the Information and Life Cycle Management Manual, COMDTINST M5212.12 (series). This policy does not have any significant or substantial change to existing records management requirements.
10. FORMS/REPORTS. The forms referenced in this Commandant Change Notice are available in USCG Electronic Forms on the Standard Workstation or on the Internet: <http://dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-C4IT-CG-6/The-Office-of-Information-Management-CG-61/Forms-Management/>; and CG Portal at <https://cgportal2.uscg.mil/library/forms/SitePages/Home.aspx>.
11. REQUESTS FOR CHANGES. Units and individuals may recommend changes via their chain of command using the Coast Guard memorandum to: HQS-PolicyandStandards@uscg.mil.

M. W. SIBLEY /s/
Rear Admiral, U.S. Coast Guard
Acting Director of Reserve and Military Personnel



COMDTCHANGENOTE 1600
19 APR 2017

Subj: CH-1 TO THE DISCIPLINE AND CONDUCT, COMDTINST M1600.2

1. PURPOSE. This Commandant Change Notice publishes a change to the Discipline and Conduct, COMDTINST M1600.2.
2. ACTION. All Coast Guard unit commanders, commanding officers, officer-in-charge, deputy/assistant commandants, and chiefs of headquarters staff elements must comply with the provisions of this Commandant Change Notice. Internet release is authorized.
3. DIRECTIVES AFFECTED. With the addition of this Commandant Change Notice, Discipline and Conduct, COMDTINST M1600.2, is updated.
4. DISCLAIMER. This guidance is not a substitute for applicable legal requirements, nor is it itself a rule. It is intended to provide operational guidance for Coast Guard personnel and is not intended to nor does it impose legally-binding requirements on any party outside the Coast Guard.
5. MAJOR CHANGES.
 - a. Establish new criteria for Pretrial Confinement previously announced in COMDT COGARD WASHINGTON DC 122006Z JUN 15/ALCOAST 248/15.
 - b. Provide guidance for Interpersonal Relationships in the Coast Guard.
 - c. Expand upon current definition and description of hazing previously announced in COMDT COGARD WASHINGTON DC 110540Z JAN 17/ANC 008/17. Introduce the definition of bullying which has not been previously discussed or codified. Identify key reporting requirements when an allegation of hazing or bullying is made or when hazing and/or bullying is suspected.

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6. ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS.

- a. The development of this Commandant Change Notice and the general policies contained within it have been thoroughly reviewed by the originating office in conjunction with the Office of Environmental Management, and are categorically excluded (CE) under current USCG CE # 1 and 33 from further environmental analysis, in accordance with Section 2.B.2. and Figure 2-1 of the National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts, COMDTINST M16475.1 (series).
- b. This Directive will not have any of the following: significant cumulative impacts on the human environment; substantial controversy or substantial change to existing environmental conditions; or inconsistencies with any Federal, State, or local laws or administrative determinations relating to the environment. All future specific actions resulting from the general policies in this Commandant Change Notice must be individually evaluated for compliance with the National Environmental Policy Act (NEPA), Council on Environmental Policy NEPA regulations at 40 CFR Parts 15001508, DHS and Coast Guard NEPA policy, and compliance with all other environmental mandates.

7. DISTRUBUTION. No paper distribution will be made of this Manual. An electronic version will be located on the following Commandant (CG-612) web sites. Internet: <http://www.uscg.mil/directives/>, and CGPortal: <https://cgportal2.uscg.mil/library/directives/SitePages/Home.aspx>

8. PROCEDURE. If maintaining a paper library, remove and replace the following pages of the Discipline and Conduct, COMDTINST M1600.2

<u>Remove</u>	<u>Replace</u>
TOC	TOC
Pages 1-1 (Chapter 1.B.) – 1-2 (Chapter 1.B.3)	Pages 1-2a – 1-2b
Pages 1-25 – 1-26	Pages 1-25 – 1-26
Pages 2-1 – 2-16	Pages 2-1 – 2-16
	Pages 3-1 – 3-8

9. RECORDS MANAGEMENT CONSIDERATIONS. This Commandant Change Notice has been evaluated for potential records management impacts. The development of this Commandant Change Notice has been thoroughly reviewed during the directives clearance process, and it has been determined there are no further records scheduling requirements, in accordance with Federal Records Act, 44 U.S.C. 3101 et seq., National Archives and Records Administration (NARA) requirements, and the Information and Life Cycle Management Manual, COMDTINST M5212.12 (series). This policy does not have any significant or substantial change to existing records management requirements.

COMDTCHANGENOTE 1600

10. FORMS/REPORTS. The forms referenced in this Commandant Change Notice are available in USCG Electronic Forms on the Standard Workstation or on the Internet:
<http://www.uscg.mil/forms/>; and CG Portal at
<https://cgportal2.uscg.mil/library/forms/SitePages/Home.aspx>.
11. REQUESTS FOR CHANGES. Units and individuals may recommend changes via their chain of command using the Coast Guard memorandum to:
HQSPolicyandStandards@uscg.mil.

KURT B. HINRICHS /s/
Rear Admiral, U.S. Coast Guard Reserve
Director of Reserve and Military Personnel



COMDTINST M1600.2
29 Sep 2011

COMMANDANT INSTRUCTION M1600.2

Subj: DISCIPLINE AND CONDUCT

- Ref:
- (a) Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended)
 - (b) Military Justice Manual, COMDTINST M5810.1 (series)
 - (c) Military Assignments and Authorized Absences, COMDTINST M1000.8 (series)
 - (d) Coast Guard Pay Manual, COMDTINST M7220.29 (series)
 - (e) Manual for Courts-Martial (MCM), United States (current edition)
 - (f) Personnel Security and Suitability Program, COMDTINST M5520.12 (series)
 - (g) Military Casualties and Decedent Affairs, COMDTINST M1770.9 (series)
 - (h) Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations, COMDTINST 1620.1 (series)
 - (i) Personnel and Pay Procedures Manual, PPCINST M1000.2 (series)
 - (j) United States Coast Guard Regulations 1992, COMDTINST M5000.3 (series)
 - (k) Military Separations, COMDTINST M1000.4 (series)
 - (l) Coast Guard Civil Rights Manual, COMDTINST M5350.4 (series) (m) Legal Assistance Program, COMDTINST 5801.4 (series)

1. PURPOSE. This Manual establishes Coast Guard policy and procedures concerning the Code of Conduct, Civil arrest and convictions, absentee and deserters, dissident and protest activities, and military corrections/confinement for all personnel.
2. ACTION. All Coast Guard unit commanders, commanding officers, officers-in-charge, deputy/assistant commandants, and chiefs of headquarters staff elements shall comply with the provisions of this Manual. No paper distribution will be made. Internet release is authorized.
3. DIRECTIVES AFFECTED. Chapter 8 of the Personnel Manual, COMDTINST M1000.6

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(series), is hereby cancelled. The Coast Guard Personnel Manual is being eliminated and reissued as a set of manuals (including this one) which will allow for more expedited review of updates and promulgation of policy changes.

4. DISCLAIMER. This document is intended to provide operational requirements for Coast Guard personnel and is not intended to nor does it impose legally-binding requirements on any party outside the Coast Guard.
5. PROCEDURES. No paper distribution will be made of this Manual. Official distribution will be via the Coast Guard Directives (CGDS) DVD. An electronic version will be located on the following Commandant (CG-612) web sites. Intranet: <http://cgweb.comdt.uscg.mil/CGDirectives/Welcome.htm>, Internet: <http://www.uscg.mil/directives/>, and CGPortal: <https://cgportal.uscg.mil/delivery/Satellite/CG612>.
6. BACKGROUND. This Manual promulgates policy regarding discipline and conduct for all personnel. These policies were previously contained in Chapter 8 of the Coast Guard Personnel Manual, COMDTINST M1000.6. References to commands and Headquarters offices have been updated to reflect the current Coast Guard organizational structure. Changes to policy in previously issued ALCOAST messages have been incorporated as well as legislatively mandated changes. References to other elements of the legacy Personnel Manual have been updated to reflect the newly promulgated Manuals.
7. DISCUSSION. Citation of the word 'article' as used in this Manual is in general terms of reference, e.g. to denote paragraph or section, and is not citing CFR, USC, UCMJ, etc except where so noted.
8. RECORDS MANAGEMENT CONSIDERATIONS. This Manual has been evaluated for potential records management impacts. The development of this Manual has been thoroughly reviewed during the directives clearance process, and it has been determined there are no further records scheduling requirements, in accordance with Federal Records Act, 44 U.S.C. 3101 et seq., National Archives and Records Administration (NARA) requirements, and the Information and Life Cycle Management Manual, COMDTINST M5212.12 (series). This policy does not have any significant or substantial change to existing records management requirements.
9. ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS.
 - a. The development of this Manual and the general policies contained within it have been thoroughly reviewed by the originating office in conjunction with the Office of Environmental Management, and are categorically excluded (CE) under current USCG CE # 33 from further environmental analysis, in accordance with Section 2.B.2. and Figure 2-1 of the National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts, COMDTINST M16475.1 (series). Because this Manual contains guidance on, and provisions for, compliance with applicable environmental mandates, Coast Guard categorical exclusion #33 is appropriate.
 - b. This directive will not have any of the following: significant cumulative impacts on the human environment; substantial controversy or substantial change to existing environmental conditions; or inconsistencies with any Federal, State, or local laws or administrative determinations relating to the environment. All future specific actions resulting from the general policies in this Manual

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must be individually evaluated for compliance with the National Environmental Policy Act (NEPA), Council on Environmental Policy NEPA regulations at 40 CFR Parts 1500-1508, DHS and Coast Guard NEPA policy, and compliance with all other environmental mandates.”

10. FORMS/REPORTS. The forms referenced in this Manual are available in USCG Electronic Forms on the Standard Workstation or on the Internet: <http://www.uscg.mil/forms/>; CGPortal at <https://cgportal.uscg.mil/delivery/Satellite/uscg/References>; and Intranet at <http://cgweb.comdt.uscg.mil/CGForms>.

R. T. HEWITT

Assistant Commandant for Human Resources

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CHAPTER 1 DISCIPLINE

1.A. Code of Conduct and Uniform Code of Military Justice for Members of the United States Armed Forces

1.A.1. General

1.A.1.a. Code of Conduct

Taking the oath of allegiance is the pivotal fact which changes an individual's status from that of a civilian to that of a member of the United States Armed Forces. There are a number of requirements and responsibilities which fall on the member at that time. One is adherence to the Code of Conduct for Members of the United States Armed Forces, Executive Order No. 10631 dated 17 August 1955 (as amended).

1.A.1.b. Uniform Code of Military Justice (UCMJ)

The substance of Article 137 of reference (a), Uniform Code of Military Justice, must be carefully explained to each new Coast Guard member at the time of entrance on active duty, or within six days thereafter.

1.A.2. Code of Conduct for Members of the United States Armed Forces

Section 1

By virtue of the authority vested in me as President of the United States, and as Commander in Chief of the Armed Forces of the United States, I hereby prescribe the Code of Conduct for members of the Armed Forces of the United States which is attached to this order and hereby made a part thereof. All members of the Armed Forces of the United States are expected to measure up to the standards embodied in this Code of Conduct while in combat or in captivity. To ensure achievement of these standards, members of the Armed Forces liable to capture must be provided with specific training and instruction designed to better equip them to counter and withstand all enemy efforts against them, and must be fully instructed as to the behavior and obligations expected of them during combat or captivity. The Secretary of Defense (and the Secretary of The Department of Homeland Security with respect to the Coast Guard except when it is serving as part of the Navy) must take such action as is deemed necessary to implement this order and to disseminate and make the said Code known to all members of the Armed Forces of the United States.

Section 2

- I. I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.
 - II. I will never surrender of my own free will. If in command I will never surrender the members of my command while they still have the means to resist.
 - III. If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.
 - IV. If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.
 - V. When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.
 - VI. I will never forget that I am American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.
-

1.A.3. Uniform Code of Military Justice

A complete text of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended) and reference (e), Manual for Courts-Martial, United States, must be made available to a member on active duty upon their request, for the member's personal examination. Specific articles to be explained include Articles 2, 3, 7-15, 25, 27, 31, 38, 55, 77-134, and 137-139. In addition, service members will be informed of the Coast Guard policy on sexual conduct.

1.A.4. Training

1.A.4.a. Code of Conduct

The Code of Conduct for members of the United States Armed Forces shall be carefully explained to each member upon entry into active duty. This training shall be conducted prior to completion of recruit training, graduation from Officer Candidate School or

graduation from the Academy, as appropriate. The Code shall be explained again to enlisted members after six months of active duty and upon the time(s) of reenlistment.

1.A.4.b. Uniform Code of Military Justice

Article 137 shall be explained again after the member has completed six month of active duty, and periodically thereafter, including upon reenlistment. This brief shall be documented on an Administrative Remarks, Form CG-3307, entry in the members Personnel Data Record (PDR).

1.B. Civil Arrest and Conviction

1.B.1. General Information

- a. Granting Leave. Article 2.A.17.b of reference (c), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series), covers prohibition from granting leave in connection with arrest by civilian authorities.
- b. Deductible Time. Reference (d), Coast Guard Pay Manual, COMDTINST M7220.29 (series), covers deductible time due to arrest by civilian authorities.
- c. Delivering Members to Civilian Authorities. Reference (e), Manual for Courts-Martial, and reference (b), Military Justice Manual, COMDTINST M5810.1 (series), governs delivering Coast Guard members to civilian authorities.
- d. Reserves. The provisions of this Article apply equally to reservists, regardless of members' reserve status at the time of the civil arrest or conviction.
- e. Delegation of Requirements. The administrative requirements imposed by this Article and reference (f), Personnel Security and Suitability Program, COMDTINST M5520.12 (series), shall not be delegated to units below the Sector level.

1.B.2. Report of Arrest

1.B.2.a. Notification of Civil Arrest

Any Coast Guard member arrested or detained by civil authorities shall immediately advise their commanding officer or officer of the day and state the facts concerning such arrest and detention. Notifications of civil arrest shall be made using Personnel Security Action, Form

CG-5588, as required by reference (f), Personnel Security and Suitability Program, COMDTINST M5520.12 (series).

1.B.2.b. Required Reports

When it is anticipated that final action by civil authorities will occur within a few days of the arrest, reference (f), Personnel Security and Suitability Program, COMDTINST M5520.12 (series) authorizes submission of a single report covering the arrest and subsequent action. When final action by the civil authorities will be delayed, an arrest report will be made promptly and followed by a final action report. In prolonged cases, interim reports should be submitted at 30-day intervals as required by reference (f), Personnel Security and Suitability Program, COMDTINST M5520.12 (series).

1.B.2.c. Notification of Next of Kin

- (1) Member Over 21 Years of Age. When an enlisted member is awaiting trial in a civil court and charged with the commission of a felony, the commanding officer should impress upon the member the desirability of informing his or her parents, spouse, or guardian as appropriate, of the circumstances.
- (2) Member Under 21 Years of Age. In those cases where the member is under 21 years of age, and where it appears that the parents, spouse, or guardian will not be otherwise informed of the proceedings, the commanding officer should inform the parents, spouse, or guardian, by letter or other form of communication, of the details considered pertinent and proper under the circumstances.

1.B.3. Report of Civil Conviction

1.B.3.a. Required Reports

All civil convictions shall be reported as required by reference (f), Personnel Security and Suitability Program, COMDTINST M5520.12 (series).

1.B.3.b. Submission of Reports

A copy of the Personnel Security Action, Form CG-5588, used to report any civil conviction shall be submitted to Commander (CG PSC-OPM) or (CG PSC-EPM), as applicable, and (CG PSC-PSD-MR). This form shall be retained in accordance with the Information and Life Cycle Management Manual, COMDTINST M5212.12.

1.B.4. Disciplinary Action after Civil Arrest and Trial

1.B.4.a. Coast Guard Policy

- (1) Courts-Martial after Civil Trial. Coast Guard policy is against trial by court-martial for the same act(s) for which a member has already been tried by a state or foreign country; see Article 3.B.4. of reference (b), Military Justice Manual, COMDTINST 5810.1 (series).
- (2) Reserve Specific. Normally, reservists are subject to reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), only while performing inactive or active duty. However, the Coast Guard may impose administrative measures on reservists, regardless of reserve status, for discrediting acts or behavior identified through civilian law enforcement apprehension, arrest, or conviction, or through other evidence. These measures include, but are not limited to performance evaluations, documentation of substance or alcohol abuse, separation and suspension of driving privileges, etc.

1.B.4.b. Performance Evaluations

Actions resulting in a civil court conviction bring discredit upon the Coast Guard and, except for minor traffic violations, shall be reflected in the performance evaluations of both officer and enlisted members. A description of the unacceptable conduct shall be set forth in the performance evaluation rather than merely referencing, without elaboration, the fact of conviction. For example; if a member stabbed a person, the circumstances surrounding the stabbing should be described, not the legal conclusion that the member assaulted a person. The underlying conduct, not merely the fact of conviction, reflects negatively on the Coast Guard.

1.B.5. Acceptance of Coast Guard Personnel from Civil Authorities when Civil Charges are Pending**1.B.5.a. Granting Leave**

Members released on bail or their own recognizance may be made available for trial as dictated by Article 2.A.17.a. of reference (c), Military Assignments and Authorized Absence COMDTINST M1000.8 (series).

1.B.5.b. Release to Coast Guard

Normally, it is desirable to have Coast Guard members placed in the Coast Guard's custody rather than remaining in jail. Commanding officers shall contact the civil authorities concerning the member's release. Members released to Coast Guard custody must be made available to civil authorities on demand.

1.B.5.c. Prior to Release

Before arranging for the release of a member to Coast Guard custody, consideration should be given to the following factors:

- (1) The nature of the alleged offense(s);
- (2) The physical and mental condition of the accused;
- (3) The impact of the member's presence on the unit; and
- (4) The unit's ability to ensure the member will be available at the request of the civilian authorities.

1.C. Absentees and Deserters

Detailed procedures for carrying out these policies are in reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series).

1.C.1. Unauthorized Absence of Officers

In all cases of unauthorized absence, extended unexplained absence, or extended unexplained failure to report in compliance with official orders, the commanding officer shall notify Commander (CG PSC-OPM) of the facts and circumstances. Appropriate documents must be submitted, as the unauthorized absence of an officer results in loss of pay and allowances. If it is manifest that the absentee does not intend to report or return to Coast Guard jurisdiction, the commanding officer will further notify the district commander or the immediate superior in command, as appropriate, and request advice or aid with a view of initiating all practicable and reasonable local action to return the absentee to Coast Guard jurisdiction.

1.C.2. Unauthorized Absence of Enlisted Personnel**1.C.2.a. Absentee**

- (1) Definition. The term "absentee" denotes any member not classified administratively as a deserter who is absent without authority from their unit, organization, or other place of duty where they are required to be present.
- (2) Length of Absentee. Any enlisted member absent from the Coast Guard without authority will normally be carried as an absentee during the first 29 days of their absence.

- (3) Reasons for Required Administrative Actions. Commands are responsible for following the procedures in reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series) when an enlisted member has been absent for any of the following reasons.
- (a) Unauthorized absence from a permanent unit or temporary duty (TDY) unit for a period in excess of 24 hours.
 - (b) Failure to report in compliance with permanent change of station (PCS) orders.
 - (c) Failure to report in compliance with temporary duty under instruction (TEMDUINS) orders.
 - (d) Failure to report in compliance with temporary duty (TDY) orders.
 - (e) Unauthorized absence at time of sailing of cutter.

1.C.2.b. Deserter

- (1) Definition. The term "deserter" denotes a member who has been administratively declared a deserter on the 30th day of absence, or at any time during the first 29 days of absence when one or more of the following conditions exists:
- (a) When the intent to remain away from the Service is evident from circumstances attendant on the absence.
 - (b) When the absence was evidently entered into to avoid hazardous duty or to shirk important service as defined in reference (e), Manual for Courts-Martial (MCM), United States (current edition), Part IV, Article 9.c.(2)(a).
 - (c) Where it is known that the member, concealing their existing obligation to the Coast Guard, has enlisted or accepted appointment in another Service.
- (2) Required Administrative Actions. Commands are responsible for the following actions and shall follow the procedures in reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series) when an enlisted member has been declared a deserter.
- (a) On the 31st day of absence, or in those cases where the member is earlier declared to be a deserter, the member's commanding officer shall issue a Deserter/Absentee Wanted by the Armed Forces, Form DD-553. The command with administrative control of the member's unit will furnish necessary data, where the Personnel Data Record (PDR) is not at the unit.

- (b) At the time the Deserter/Absentee Wanted by the Armed Forces, Form DD-553, is issued, the commanding officer shall appoint an inventory board, as prescribed in Article 11.A.11.b.(2) of reference (g), Military Casualties and Decedent Affairs, COMDTINST M1770.9 (series), and cause the absentee's personal effects to be collected and inventoried. Inventory shall be recorded on Personnel Effects Inventory and Disposition, Form CG-3853. (see Article 1.C.7 of this Manual.)
- (c) Entry in the PDR.
- (d) Closing the health record.
- (e) Complying with the rules covering dependents receiving medical care.
- (f) Making an entry in the PDR of an enlisted member who is mentally irresponsible.
- (g) Notification to next of kin.
- (h) Inventorying and disposing of deserter's personal affects (if not previously done).
- (i) Disposition of records.

1.C.2.c. Apprehension of Absentees and Deserters

Absentees and deserters may be apprehended by authorized members of the Armed Forces under the circumstances prescribed by Article 7(b) of reference (a), Uniform Code of Military Justice and reference (e), Manual for Courts-Martial, (MCM), United States (current edition)). Any civil officer having authority to apprehend offenders under the laws of the United States, the District of Columbia, a State, Territory, Commonwealth, or Possession may summarily apprehend a deserter from the Armed Forces and deliver them into custody of those forces (Article 8 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, and reference (e), Manual for Courts-Martial (MCM), United States (current edition)). United States authorities may apprehend absentees and deserters in foreign countries only when authorized by an international agreement with the country concerned or by agreement with appropriate local authorities when such agreement is within the purview of an existing international agreement. In this latter case, careful consideration must be given to possible international implications and adverse foreign reactions. Where apprehension cannot be accomplished, or in any case where doubt exists as to apprehension authority, a report of the facts shall be forwarded to Commander (CG PSC-EPM-1) for resolution. Outside the jurisdiction of the U. S., commanding officers shall take such initial actions as the local situation may warrant,

within the primacy of international agreements, to secure cooperation in apprehension of members absent without leave.

1.C.2.d. Termination of Period of Absence or Desertion

The period of absence of absentees or deserters is terminated by their delivery or surrender to, or apprehension by, an activity or organization of the Armed Forces, provided that military control over them is exercised by the act of competent authority of any Armed Force having knowledge of their status and identity. For purposes in which the duration of unauthorized absence is a factor under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, but not for administrative purposes, the period of absence of absentees or deserters is terminated by their apprehension by civil authority if the apprehension is made at the request of competent authority of the Armed Forces through issuance of the Deserter/Absentee Wanted by the Armed Forces, Form DD-553, or by other means.

1.C.2.e. Complete and Accurate Recordkeeping to Ensure a Prompt Trial

The Commandant requires that every effort be made to bring returned absentees and deserters promptly to trial. To accomplish this desired end, strict compliance with instructions and procedures with respect to preparation and submission of reports and entries in the PDR is necessary. The PDR, in absentee cases, is often the only evidence available; therefore, it is essential that it contain definite entries setting forth all the facts in the case.

1.C.2.f. Unit to Which Absentee or Deserter is Attached

The Commandant considers that, as a general rule, an individual is attached to that unit which carries their records, except in the following cases:

- (1) A person who absents them self or deserts while assigned on board a Coast Guard cutter for transportation between stations is considered attached to the transporting cutter.
- (2) A person who absents them self or deserts while en route to the next Coast Guard unit to which ordered to report is considered attached to the unit to which ordered to report.

1.C.3. Return of Absentee or Deserter

1.C.3.a. General Information

When reporting the return of an absentee or deserter, the following general provisions apply.

- (1) Surrender or apprehension of an individual at a unit within regularly assigned district:
Should an individual surrender to or be apprehended at a unit within their regularly assigned district, the district commander will take whatever action deemed necessary to

return the member to their place of duty, including the issuance and funding of travel order numbers if appropriate. This is considered part of the district commander's discretionary authority, and there is no need to refer to the Commandant for other than information purposes.

- (2) Surrender of an Individual to a Unit Outside Regularly Assigned District: If an individual surrenders to a unit outside their regularly assigned district, the district commander in which the member's regular unit is located will order the member's return, issuing a travel order number chargeable to the member's pay account if required. Again, the Commandant is advised for information purposes only.
- (3) Apprehension of an Individual Outside Regularly Assigned District: Commander (CG PSCEPM) will take the necessary action in all cases to return an individual who is apprehended outside their regularly assigned district, issuing and funding travel order numbers as necessary for the apprehended individual and escort.

1.C.3.b. Return of an Absentee or Deserter to a Unit Not Having Adequate Facilities for Retention

When an absentee or deserter surrenders to, or is apprehended by, or delivered to a cutter or shore unit, which does not have adequate facilities for the retention of the absentee or deserter;

e.g., general mess and quarters, or safekeeping facilities in the case of apprehension or delivery, disposition will be requested from the officer having operational control of the area or the district commander, as appropriate, and custody of the absentee or deserter will not be accepted until receipt of instructions in the specific instance. The minimal facilities of a shore unit must be equal to or exceed those of a fully operative Coast Guard station, and those afloat must be equal to or exceed those of a WLM class cutter in order to be considered as adequate facilities for retention of absentees or deserters.

1.C.3.c. Action by Commander of District from Which Absent

Upon receipt of notification of the surrender of an absentee or deserter, the commander of the district from which absent shall issue a travel order number chargeable to the individual's pay account and direct the individual's return to a selected unit in their district for disciplinary action. The unit chosen to take disciplinary action shall be at the discretion of the district commander. If the member has been temporarily assigned to a unit other than their regular unit for disciplinary action, assignment instructions shall be requested from Commander (CG PSC-EPM) for all enlisted members.

1.C.3.d. Reporting Return of Absentee or Deserter

Commands are responsible for following the procedures in reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series), when reporting the return of an absentee or deserter in the following categories.

- (1) Return to unit from which absent.
- (2) Return to unit within the same district from which absent.
- (3) Surrender of absentee or deserter to unit outside of the district from which absent.
- (4) Apprehension or delivery of absentee or deserter to unit outside of the district from which absent.
- (5) Return of absentee or deserter to a unit of a section or group.
- (6) Return of an absentee or deserter to a unit not having adequate facilities for retention.

1.C.3.e. Payment of Reward or Reimbursement of Expenses

Instructions concerning the procedures to be followed and conditions under which payments of rewards or reimbursement of expenses incurred incidental to the return to military control of absentees, deserters, or escaped military prisoners are contained in the Comptroller Manual Volume I (Accounting), COMDTINST M7300.4 (series).

1.C.4. Absentees and Deserters from other Branches of the Armed Forces

1.C.4.a. When a Form DD-553 Received

When copies of Deserter/Absentee Wanted by the Armed Forces, Form DD-553, are received by the Coast Guard from other branches of the Armed Forces, commanding officers will utilize available personnel and facilities to the maximum extent practical to effect apprehension, with emphasis on persons who have been absent less than 30 days.

1.C.4.b. When a Member Surrenders or is Delivered

When an absentee or deserter from the Army, Navy, Air Force, or Marine Corps surrenders, is delivered to, or apprehended by a Coast Guard unit follow the procedures in reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series).

1.C.5. Delivery by Civil Authorities

1.C.5.a. Prior to Accepting an Absentee or Deserter

Before accepting delivery of an absentee or deserter by civil authorities, the commanding officer will obtain satisfactory assurance from the appropriate civil authorities, as well as the member, that no criminal charges are pending and will so report in the message prepared in accordance with procedures in reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series). When charges are pending in any court a full report with copies of all correspondence with civil authorities shall be forwarded to Commander (CG PSC-EPM-2), and no action will be taken pending receipt of instructions.

1.C.5.b. When Civil Charges are Made after Custody of Member

When civil charges are made after custody of an absentee or deserter has been accepted, the provisions of the Manual for Courts-Martial (MCM), United States (current edition), will apply.

1.C.5.c. Information Provided to Civil Authorities

No assurance shall be given civil authorities that an absentee or deserter will be tried by military court for violations of Federal or State laws, or that any particular individual will be retained in, or discharged from, the Service.

1.C.6. Removal of Marks of Desertion**1.C.6.a. Mark of Desertion**

An enlisted member of the Coast Guard is not a deserter until they have legally been found guilty by a court-martial on the charge of desertion. Entry of a mark of desertion in an enlisted member's PDR is merely a matter of administration and is not intended to constitute a conclusive determination of the fact as to whether or not they are a deserter. Further, the Coast Guard may bring a person to trial by court-martial for unauthorized absence which resulted in a mark of desertion being entered in their PDR.

1.C.6.b. When Removal is Authorized

Commanding officers shall remove, as an erroneous entry, the mark of desertion from the enlisted member's PDR whose record was closed for desertion but who subsequently has been tried and convicted of unauthorized absence, or has been acquitted. All other cases regarding the removal of marks of desertion shall be referred to Commander (CG PSC-EPM-2) for action. Cases falling in this category are:

- (1) Mentally Incompetent. Determination by a medical board that the individual was mentally incompetent at the time of absence.

- (2) Error of Fact or Law. Determination by the Commandant that the entry of the mark of desertion was the result of an error of fact or law.

1.C.7. Disposition of Personal Effects of Absentees or Deserters

1.C.7.a. Held at Member's Unit

The personal effects of an absentee or deserter shall be held at the member's unit, or at the unit to which transferred under Article 1.C.2. of this Manual, for three months. After three months, they are to be disposed of in accordance with Article 1.C.7.c. of this Manual.

1.C.7.b. When Member Returns

An absentee or deserter, who returns within three months, may have personal effects returned at their own expense. If the absentee or deserter returns after three months, the personal effects may be forwarded to them at their own expense, provided the effects are at the time still in Coast Guard custody.

1.C.7.c. Disposition of Personnel Effects

If an absentee or deserter has not returned at the end of three months, the personal effects will be disposed of by one of the following methods:

- (1) Next of Kin Can Be Determined. If the next of kin, heir, or legal representative can be determined per Article 1.K.2.h. of reference (g), Military Casualties and Decedent Affairs, COMDTINST M1770.9 (series), personal effects may be shipped to the next of kin, heir, or legal representative at no expense to the Government on a collect on delivery basis on a commercial Bill of Lading. However, shipment on a collect on delivery basis will be made only upon receipt of the ultimate consignee's agreement to accept the shipment on a collect on delivery basis. If the ultimate consignee fails to accept or to call for the collect on delivery shipment, the transportation agency then will be advised by the cognizant command to dispose of the shipment in accordance with the transportation agency's tariff regulations without recourse to payment by the Coast Guard.
- (2) Next of Kin Cannot Be Determined. If the next of kin, heir, or legal representative cannot be determined, or if that individual has not agreed to accept the personal effects on a collect on delivery basis, the effects will be shipped to the Coast Guard Supply Center, Baltimore, MD, on a Government Bill of Lading. The cost of the shipment will be charged against the pay account of the absentee or deserter. The officer issuing the Government Bill of Lading will ascertain the cost of the shipment and will prepare a Pay Adjustment Authorization, Form DD-139, against the pay account of the owner of the effects. A notation of the request for checkage and to whom forwarded will be entered

on the original and all copies of the Government Bill of Lading. The Pay Adjustment Authorization, Form DD-139, and a copy of the Government Bill Lading will be forwarded to the Pay and Personnel Center. A copy of the accomplished DD-139 will be forwarded to the office effecting payment of the shipment under the Government Bill of Lading.

1.C.8. Reduction of Absenteeism Problems

1.C.8.a. Establish a Program of Education

Since unauthorized absenteeism is one of the most costly problems with which the Coast Guard must contend, it is essential that this type of offense be kept to an absolute minimum. Each commanding officer shall study this problem in his or her own command and establish a positive and continuing program of education and indoctrination to combat it. The absentee rate may be reduced appreciably by assuring, at all levels, that certain well established principles of leadership are soundly applied. Officers and petty officers must know and treat their people as individuals. No request, no matter how trivial, should be disapproved without an explanation of the reasons therefore. Members must be made to feel they can discuss their problems with their superiors at any time, since domestic and marital troubles, both real and imagined, are frequent causes of unauthorized absence. All members should be informed of available facilities of the Red Cross, Coast Guard Mutual Assistance, and other social agencies for assistance in alleviating family difficulties. All members must be taught to realize that by absenting themselves they do a great disservice to themselves and their families. They should be impressed with the seriousness of unauthorized absenteeism as regards loss of possible privileges, pay, and future promotion.

1.C.8.b. Action Taken

Commanding officers shall take prompt, consistent, and uniform disciplinary action in accordance with prescribed procedures and standards. For most minor absence offenses, a liberal application of nonjudicial punishment, administered promptly, has a highly beneficial effect.

1.D. Dissident and Protest Activities

1.D.1. Policy

The right of expression of a member of the Coast Guard should be preserved to the maximum extent possible, consistent with good order, discipline, and the national security. On the other hand, no commanding officer should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of the unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commanding officer.

1.D.2. Specific Guidelines

1.D.2.a. Possession and Distribution of Printed Materials

- (1) Authority of the Commanding Officer. The commanding officer is not authorized to prohibit the distribution of a specific issue of publication distributed through official outlets such as post exchanges and military libraries. In the case of distribution of publications through other than official outlets, a commanding officer may require that prior approval be obtained for any distribution on a military installation in order that he or she may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a Coast Guard mission. When he or she makes such a determination, the distribution will be prohibited.
- (2) Impounding Prohibited Material. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the commanding officer determines that an attempt will be made to distribute.
- (3) Criticism of Government Policy. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

1.D.2.b. Off-Post Gathering Places

- (1) Establishing "Off-Limits" Areas. In accordance with reference (h), joint Army Regulation 190-24 which encompasses Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations, COMDTINST 1620.1 (series) of the same title, commanding officers shall establish "off-limits" areas to help maintain good order and discipline, health, morale, safety, and welfare of service members.

- (2) Establishing Temporary "Off-Limits" Areas. As per this joint regulation, commanders retain substantial discretion to declare establishments or areas temporarily off-limits to personnel of their respective command in emergency situations. Temporary off-limits restrictions issued by Commands in emergency situations will be acted upon by reference (h), Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations, COMDTINST M 1620.1 (series) as a first priority. As a matter of policy, a change in ownership, management, or name of any off-limits establishment does not, in and of itself, revoke the off-limits restriction.
- (3) Maintaining an "Off-Limits" List and Violations of "Off-Limits" Policy. In addition, service members are prohibited from entering establishments or areas declared off-limits. Violations of this regulation may subject the member to disciplinary action under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946. Commands shall maintain an established listing of "off-limits" locations and service members shall be made aware of these locations.

1.D.2.c. Servicemen's Organizations

Commanding officers are not authorized to recognize or to bargain with a so-called "servicemen's union".

1.D.2.d. Publication of "Underground Newspapers"

Members writing for publication may not be pursued during duty hours, or accomplished by the use of Government or non-appropriated fund property. While publication of "underground newspapers" by military personnel off-post, on their own time and with their own money and equipment, is not prohibited, if such a publication contains language, the utterance of which is punishable under Federal law, those involved in the printing, publication, or distribution may be disciplined for such infractions.

1.D.2.e. On-Post Demonstrations and Similar Activities

The commanding officer of a Coast Guard unit shall prohibit any demonstration or activity at the unit which could result in interference with or prevention of orderly accomplishment of the mission of the unit, or present a clear danger to loyalty, discipline, or morale of the troops. It is a crime for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or re-enter an installation after having been barred by order of the commanding officer. (18 U.S.C. § 1382)

1.D.2.f. Off-Post Demonstrations by Members

Members of the Armed Forces are prohibited from participating in off-post demonstrations when they are on duty, or in a foreign country, or when their activities constitute a breach of law and order, or when violence is likely to result, or when they are in uniform in violation of the Uniform Regulations, COMDTINST M1020.6 (series).

1.D.2.g. Grievances

The right of members to complain and request redress of grievances against actions of their commanding officers is protected by Article 138 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946. In addition, a member may petition or present any grievance to any member of Congress (10 U.S.C. § 1034). An open door policy for complaints is a basic principle of good leadership, and commanding officers should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action.

1.D.3. Prohibition on Extremist and Criminal Gang Activity

1.D.3.a. Extremist Activity

- (1) Advocacy. Coast Guard military personnel must not actively advocate supremacist doctrine, ideology, or causes, including those that advance, encourage, or advocate illegal discrimination based on race, creed, color, sex, religion, ethnicity, national origin or that advance, encourage, or advocate the use of force, violence, or criminal activity or otherwise advance efforts to deprive individuals of their civil rights.
- (2) Participation. Coast Guard military personnel must reject active participation in criminal gangs pursuant to section 544 of Public Law 110-181 and in other organizations that advocate supremacist doctrine, ideology, or causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin; advocate the use of or use force, violence, or criminal activity; or otherwise engage in efforts to deprive individuals of their civil rights. Active participation in such gangs or organizations is prohibited. Active participation includes the prohibitions in Article 1.D.3.c. of this Manual or otherwise engaging in activities in furtherance of the objective of such gangs or organizations that are detrimental to good order, discipline, or mission accomplishment or are incompatible with military service.

1.D.3.b. Extremist Organizations and Criminal Gangs

Extremist organizations and activities are ones that advocate racial, gender, or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin; or advocate the use of or use force or violence or unlawful means to deprive individuals of their rights under the United

States Constitution or the laws of the United States, or any State, by unlawful means. A criminal gang means an ongoing group, club, organization, or association of multiple persons that has among its primary purposes the commission of one or more criminal offenses under Federal or State law, or the laws of the jurisdiction in which it operated, or whose members engage or have engaged within the past five years in a continuing series of offenses. An extremist organization may but need not be a criminal gang, and a criminal gang may but need not be an extremist organization.

1.D.3.c. Prohibitions

Coast Guard military personnel are prohibited from taking any of the following actions in support of criminal gangs and extremist organizations or activities. Penalties for violations of these prohibitions include the full range of statutory and regulatory sanctions, both criminal (reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946) and administrative. These prohibitions are punitive in nature and constitute a lawful general order. Failure to comply with these prohibitions can result in disciplinary action, including nonjudicial punishment or courtmartial, for violation of Article 92 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946:

- (1) Participating in public demonstrations or rallies or attending a meeting or activity with the knowledge that the demonstration, rally, meeting or activity involves a criminal gang or extremist organization or cause when on duty, when in uniform, when in a foreign country (whether on or off duty or in or out of uniform), when it constitutes a breach of law and order, when it is likely to result in violence, or when in violation of off limits sanctions or a commanding officer's order.
- (2) Fund raising activities.
- (3) Recruiting or training members (including encouraging other military personnel to join).
- (4) Creating, organizing, or taking a visible leadership role in such an organization or activity.
- (5) Distributing literature on or off a military installation, including the internet, the primary purpose and content of which concerns advocacy or support of criminal gangs or extremist causes, organizations, or activities; and the literature presents a clear danger to the loyalty, discipline, or morale of Coast Guard or other Armed Forces personnel, or the distribution would materially interfere with the accomplishment of a Coast Guard or other military mission.
- (6) Prohibited conduct:

- (a) Committing any intentional act, including conduct or speech, when on duty, when in uniform, at any time when aboard a military vessel or installation, when utilizing a government communications system, or when communicating with another member of the armed forces, which:
 - [1] Is motivated, in whole or in part, by the offender's bias against the race, color, sex, religion, national origin, disability, or sexual orientation of a person or persons; and
 - [2] Places a person having such status in reasonable apprehension of bodily harm, or reasonably interferes with efficient performance of military duties, or the maintenance of good order and discipline within the Coast Guard; and
 - [3] Intentionally selects a person or persons motivated by the offender's bias in paragraph 1.D.3.c.6.a.[1], or, under the circumstances, is reasonably perceived by the person or persons having such status to be intentionally selecting them based on that bias.
- (b) For the purposes of paragraph 1.D.3.c.6.a., conduct or speech may include but are not limited to the display, presentation, creation or depiction of:
 - [1] A noose, a swastika, or any other symbol widely identified with oppression or hatred, irrespective of size, type or how it is displayed or presented;
 - [2] Other symbols that would reasonably be construed to encourage oppression or hatred; or
 - [3] Photographs, images, or other printed or electronic material that would reasonably be construed to be evidence of oppression or hatred.

1.D.3.d. Command Authority Regarding Extremist and Criminal Gang Activity

Commanding Officers have the authority to prohibit military personnel from engaging in or participating in any other activities that the commanding officer determines will adversely affect good order and discipline or morale within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from unaccompanied personnel housing, to place areas or activities off-limits (see reference (h), Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations, COMDTINST 1620.1 (series)), or to order military personnel not to participate in those activities that are contrary to good order and discipline or morale of the unit or pose a threat to health, safety, and security of Coast Guard or other Armed Forces personnel or a Coast Guard or other military installation. Commanding

Officers should consult their servicing Staff Judge Advocate before imposing such sanctions unless consultation would cause an unreasonable delay in the circumstances.

1.D.3.e Command Options for Dealing with Extremist or Criminal Gang Activity

In addition to reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946 (as amended), action under Article 92 – violation for failure to obey a lawful general order or regulation for a violation of the prohibitions, a Commanding Officer’s options for dealing with extremist or criminal gang activity include:

- (1) UCMJ Action. Possible violations depending on the circumstances include the following:
 - (a) Article 116—Riot or breach of peace.
 - (b) Article 117—Provoking speeches or gestures.
 - (c) Article 134—General article, specifically, conduct which is prejudicial to good order and discipline or service discrediting.
- (2) Separation from Service. Involuntary separation for unsatisfactory performance or misconduct.
- (3) Reenlistment. Bar to reenlistment.
- (4) Other. Other appropriate administrative or disciplinary action.

1.D.3.f Command Responsibility Regarding Extremist Organizations and Criminal Gangs

Any military personnel’s involvement with or in a criminal gang or extremist organization or activity (such as membership, receipt of literature, or presence at an event) could threaten the good order and discipline of a unit. In any case of apparent military personnel involvement with or in criminal gangs or extremist organizations or activities, whether or not violative of the prohibitions in Article 1.D.3.c above, commanding officers must take positive actions to educate military personnel, putting them on notice of the potential adverse effects that participation in violation of Coast Guard policy may have upon good order and discipline in the unit and upon their military service. These positive actions include:

- (1) Educating. Educating Coast Guard military personnel regarding the Coast Guard’s equal opportunity policy. Commanding Officers will advise members of their command that criminal gangs’ and extremist organizations’ goals are inconsistent

with Coast Guard core values and with the service's goals, beliefs, and values concerning equal opportunity.

- (2) Negative Consequences. Advising military personnel that participation prohibited by this order in criminal gangs or extremist organizations or activities may:
- (a) be taken into consideration when evaluating their overall duty performance, to include appropriate remarks on evaluation reports;
 - (b) be taken into consideration when selections for positions of leadership and responsibility are made;
 - (c) result in removal of security clearances, where appropriate;
 - (d) result in a bar to reenlistment, where appropriate.
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1.E. Court Memorandums, Punitive Letters of Censure, and Administrative Corrective Letters

1.E.1. Censure

Censure is a general term applicable to any form of adverse reflection upon individual character, conduct, performance, or appearance. Censure is a prerogative of command or administrative superiority, but certain exercises of the power of censure are governed by statute, regulations, and instructions. Censure includes both punitive and non-punitive measures.

1.E.2. Punitive Letters of Censure

1.E.2.a. Disposition

Instructions for the issuance of punitive letters of censure, as a result of Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, are contained in reference (b), Military Justice Manual, COMDTINST M5810.1 (series). One copy of the punitive letter of censure, issued under Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, with a copy of the individual's acknowledgment of receipt, shall be forwarded to Commander (CG PSC-OPM) or (CG PSC-EPM), as appropriate. This punitive letter shall be held until the appeal period specified by Part V, Paragraph 7 of reference (e), Manual for CourtsMartial (MCM), United States (current edition) expires. Upon expiration of the appeal period, the punitive letter shall be inserted into the member's CG Personnel Service Center (PSC) electronically imaged personnel data record (EI-PDR).

1.E.2.b. Appeals

If the member receiving the punitive letter of censure chooses to appeal, Commander (CG PSCOPM) or (CG PSC-EPM) shall be notified by the officer who imposes punishment. The letter shall not be entered into the member's official Headquarters record until the appeal has been decided. If after action on the appeal, a punitive letter of censure remains effective, the authority who acts on the appeal shall forward a copy of the action on the appeal to Commander (CG PSCOPM) or (CG PSC-EPM), as appropriate, for attachment to the Headquarters copy of the punitive letter of censure, and filing in the member's official Headquarters record. If the appeal is granted, and a punitive letter of censure no longer remains effective, a copy of the action on appeal shall be forwarded to Commander (CG PSC-OPM) or (CG PSC-EPM), as appropriate, and the punitive letter of censure shall not be placed in the Headquarters record.

1.E.3. Court Memorandums

Commanding officers shall forward the original of all Court Memorandums to Commander (CG PSC-OPM) or (CG PSC-EPM) as appropriate. (See reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series).) The original of all Supplemental Court Memorandums shall be similarly forwarded. The Court Memorandums shall be subsequently filed in the individual's official record.

1.E.4. Administrative Letters of Censure

1.E.4.a. Purpose

Administrative letters of censure are intended to serve as a corrective measure. Commanding officers and warrant officers are authorized to use administrative measures of censure in furthering the efficiency of their commands and such censure may be administered either orally or in writing. It is not to be considered as punishment for an offense.

1.E.4.b. For Officers

Administrative letters of censure shall not be included in the unit files or in any of the official records of the recipient, nor shall they be quoted in nor appended to fitness reports. No command shall forward any non-punitive censure, or copy thereof, to the Commandant or district commander. However, the facts upon which an administrative letter is based may be the basis for adverse marking or comments in the next fitness report of an officer.

1.E.4.c. For Enlisted

Although not forbidden by law or regulation, it is felt that administrative letters of censure to enlisted members are not appropriate since more practical methods of correction are available.

1.F. Military Corrections and Confinement

1.F.1. Purpose and Nature of Military Corrections

1.F.1.a. Definition

The term "Military Corrections" as used in this section refers to the entire array of formal programs committed to the confinement, care, and rehabilitation of military members awaiting trial or serving Courts-Martial sentences to confinement, along with the resources and administrative support comprising those programs. The system of formal correctional programs established by the Armed Forces is conducted within military correctional or confinement facilities. 10 U.S.C. § 951 authorizes the Secretaries of the Armed Forces to establish and staff military correctional facilities for the purpose of punishing and rehabilitating military offenders. The philosophy of military corrections is based on recognition of the fact that punishment alone, whether it be confinement or some other form, is seldom corrective. Since Federal law makes rehabilitation a mandatory mission of military correctional centers, the highly-professional correctional programs developed by the Departments of the Navy, Army, and Air Force commonly provide for intensive counseling, specialized work assignments, medical and psychiatric counseling, training and education, and an achievement and conduct incentive system. The Armed Forces provide these correctional programs and resources in response to the task assigned to them by Congress, namely to establish within military confinement facilities corrections programs designed to assist willing offenders to reform their conduct by providing the opportunity to achieve either honorable restoration to duty or return to civilian life as useful citizens. Nevertheless, confinement remains first and foremost a punishment. Offenders leave the military correctional center with Federal conviction and prisoner records. Confinement is punishment because it denies the prisoner liberty and privileges and imposes separation from family, friends, and most normal activities. It further implies a loss of social status and inevitable post confinement social and professional handicaps. This section deals primarily with confinement imposed as a court-martial sentence-the administration of which is the purpose of the Military Corrections System. That system is staffed by both military and civilian career correctional specialists.

1.F.1.b. DoD Military Correctional System

Because the number of Coast Guard prisoners serving confinement at any given time is relatively small, the Secretary of the Department of Homeland Security has not invoked the statutory authority to establish a military corrections system within the Coast Guard. Accordingly, the Coast Guard has no capability to administer confinement within the Service, but relies instead on the resources of the other Armed Forces, principally the Navy. This section provides guidance to Coast Guard commanding officers and convening authorities who become participants in the DoD Military Correctional System upon ordering offenders into military confinement. While the Departments of the Navy, Army, and Air Force have traditionally conducted their own separate military correctional programs and developed their own cadre of professional correctional specialists, the Secretary of Defense has directed the Armed Forces to strive for uniformity in the treatment of offenders, administration of military justice and in the conduct of military corrections programs. Nevertheless, full uniformity

has yet to be achieved and the professional orientation of the Navy's military corrections program continues to conform most closely to Coast Guard requirements. Therefore, every effort will be made to confine Coast Guard prisoners at Naval brigs whenever these facilities are reasonably available. This section will primarily deal with utilizing Naval brigs. The terms "Correctional Center" and "Correctional Facility" refer to other than Navy DoD Military correction programs and may be substituted by the reader in the place of "Naval brig" when utilizing other DoD facilities. Naval brigs will accept Coast Guard prisoners at no cost, without requiring reciprocal staff augmentation and without the need for joint-Service agreements provided space is available. Exhibit 1.F.1. of this Manual contains a Navy Confinement Designation Chart to facilitate selection of a Naval brig. Policy governing the designation of places of confinement when Navy or other DoD correctional facilities are not available is contained in Article 1.F.4. of this Manual.

1.F.1.c. Professional Correctional Programs

Contrary to myth, the professional correctional programs which have been evolving over recent years have not rendered military confinement a pleasant experience. The military correctional center remains first and foremost a Federal prison. It also should be realized that no correctional program - no matter how elaborate - can rehabilitate the prisoner who is unable or unwilling to undertake the substantial personal commitment and effort required to initiate his or her own rehabilitation. Nevertheless, the military correctional system can and does render a valuable service to the Armed Forces and to society. Court-Martial convening and reviewing authorities should be mindful of the purpose, capabilities and limitations of military corrections when acting on sentences to confinement at hard labor.

1.F.2. Definitions

1.F.2.a. Adjudged Prisoner

Person serving a sentence to confinement as adjudged by court-martial.

1.F.2.b. Aggregation of Sentences

When a prisoner has two or more sentences to confinement standing to be served, the several sentences will be aggregated to determine the rate of earning good conduct time and parole eligibility date.

1.F.2.c. Apprehension

The taking of a person into custody. A person who is lawfully apprehended may be subjected only to that degree of physical restraint necessary to secure custody.

1.F.2.d. Arrest

The moral restraint and suspension from duty imposed upon a person by oral or written orders of competent authority, limiting the person's personal liberty pending the disposition of charges. The restraint imposed is binding, not by physical force but by virtue of the moral and legal obligation to obey the order of arrest. A person in arrest cannot be required to perform full military duty or any duties involving the exercise of command or the bearing of arms. If placed on duty inconsistent with arrest status, the arrest is thereby terminated. Persons in arrest may be required to do ordinary cleaning or policing within the limits of arrest.

1.F.2.e. Beginning Date of Confinement

A term of confinement served as sentence of a court-martial begins to run from the date the sentence is adjudged by the court, whether or not the person is placed in confinement, except that any period for which a sentence to confinement has been suspended or deferred shall be excluded in computing the service of the term of confinement. The day of commitment and the day of release are both considered full days of confinement for sentence computation.

1.F.2.f. Brig

Within the Department of the Navy, a Naval brig is a place of confinement established at a local command of the shore establishment and approved by the Secretary of the Navy as a Naval place of confinement. Naval brigs normally can accommodate both pretrial and sentenced confinement. Also, a Naval place of confinement aboard ships of the Navy included in the original construction or added during an authorized conversion. Although some Coast Guard ships have spaces referred to as brigs, none are certified as places of confinement and hence shall not be employed for either pretrial or sentenced confinement.

1.F.2.g. Clemency

Clemency is that action - other than correction of legal error - of an officer responsible for taking official action on the findings and sentence of courts-martial which results in the mitigation, remission, or suspension of all or any part of the unexecuted portion of a sentence. (See Article 1.F.6.d. of this Manual for a definitive policy.)

1.F.2.h. Clemency Board

The Clemency Board, as used herein, refers to a permanent group of senior commissioned officers who review the records of all courts-martial referred to the

Commandant of the Coast Guard for residual clemency action. The Clemency Board renders nonbinding recommendations to the Commandant as to whether or not residual clemency should be granted.

1.F.2.i. Computation of Sentences

Sentences will be computed as provided for in the Department of the Navy Corrections Manual.

1.F.2.j. Confinement

The physical restraint of a person. As used herein, confinement normally means punishment imposed as a sentence of a court-martial. (See Article 1.F.3.a. of this Manual.)

1.F.2.k. Continuity of Sentences

A sentence to confinement is continuous until the term expires.

1.F.2.l. Correctional Centers or Facilities

A DoD confinement center or facility other than a Naval brig at which a formal correctional program for sentenced prisoners is conducted.

1.F.2.m. Correctional Custody

Correctional custody is a nonjudicial punishment imposed at mast under Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, which may extend to physical restraint of a person during duty hours, non-duty hours, or both and may include extra duty or hard labor.

1.F.2.n. Correctional Custody Unit (CCU)

Navy locally funded and staffed space in which to administer a program calculated to induce a modification in attitude and behavior upon minor or first-time offenders by use of a balanced program of punitive measures, directive counseling, restraining, and work assignments. (See Article 1.F.10. of this Manual.)

1.F.2.o. Detention

Detention is a term used in some instances to refer to pretrial confinement, confinement awaiting rehearing, or emergency short-term restraint imposed by a commanding officer.

1.F.2.p. Detention Center

A confinement facility operated by a Service of the DoD specifically for detention of persons. Detention centers are not designated as correctional centers or facilities or Naval brigs, meaning that these facilities may not be designated as the place of confinement for sentenced prisoners. When detention centers are utilized for emergency detention of personnel, the provisions of Article 1.F.9. of this Manual shall be followed.

1.F.2.q. Dischargee

A prisoner sentenced to a discharge which is not suspended, or who will be separated administratively after completion of confinement or of the appeals process, as appropriate. (See Article 1.F.8.b. of this Manual.)

1.F.2.r. Disposition Boards

These boards, also referred to as local boards, are internal review boards established within Naval brigs and comprised of designated staff members of the brig. These boards consider for appropriate institutional endorsement the parole and/or clemency petitions from eligible prisoners confined at the specific Naval brig. (See Article 1.F.6.d. of this Manual.)

1.F.2.s. Extra Good Time (in Confinement)

A deduction from the term of a prisoner's sentence to confinement based on a genuine offer of exceptionally meritorious service in the performance of duty connected with institutional operations.

1.F.2.t. Full Term

The entire sentence to confinement without reduction for good conduct time.

1.F.2.u. Good Conduct Time in Confinement

A deduction made from the term of a prisoner's sentence for good conduct based on faithful observance of all the rules and regulations of the brig. (See Article 1.F.6.c. of this Manual.)

1.F.2.v. Magistrate (Military)

A commissioned officer appointed by a district commander to hold a neutral and detached hearing in each case of pretrial confinement to determine whether an accused

may and should be retained in pretrial confinement. Definitive guidance is contained in reference (b), Military Justice Manual, COMDTINST M5810.1 (series).

1.F.2.w. Naval Clemency and Parole Board

The Naval Clemency and Parole Board is a permanent board established by precept of, and reporting to, the Secretary of the Navy. The Board's composition includes representatives from the Bureau of Naval Personnel, Marine Corps, Navy Judge Advocate General, and the Bureau of Medicine and Surgery. The Board is authorized to render only parole determinations for Coast Guard offenders. The Board has no authority to adjudicate Coast Guard clemency cases, but may render advisory recommendations.

1.F.2.x. Parole

Parole, as authorized by 10 U.S.C. § 952, is a form of conditional release from confinement granted to carefully selected individuals who have served a portion of their sentences in confinement and whose release under supervision is considered to be in the best interest of the prisoner, the Service and society. (See Article 1.F.6.e. of this Manual.)

1.F.2.y. Parole Officer

An officer assigned to the Naval brig charged with the investigation, evaluation, and processing of requests for parole and the maintenance of necessary records of parolees.

1.F.2.z. Parolee

A prisoner conditionally released from confinement on parole as defined above.

1.F.2.aa. Parole Violator Term

The unexpired term of a sentence to confinement to be served by a prisoner who has violated parole. This term will be the difference in days between the actual date of release on parole and the full term date of sentence adjusted for good conduct time earned after return to confinement.

1.F.2.bb. Probation

Probation constitutes the set of conditions under which competent authority agrees to suspend execution of a sentence. As such, probation amounts to specification of the reciprocal terms of conduct, performance, and achievement with which an accused must comply to justify continuance of suspension.

1.F.2.cc. Probation Violator Term

The unexpired term of a confinement sentence remaining to be served by a person whose suspension of execution of sentence has been duly vacated. This term will be the difference in days between the actual date of release on probation and the full-term release date of the sentence adjusted for good conduct time earned after return to confinement.

1.F.2.dd. Probation Officer

An officer of the Federal Probation Service who has supervision over a prisoner on parole for the purpose of helping the parolee make a socially acceptable adjustment.

1.F.2.ee. Restoree

A prisoner not sentenced to or scheduled for discharge, and who will be restored to full duty status upon release from confinement.

1.F.2.ff. Restriction

Moral restraint imposed upon a person by oral or written order of competent authority limiting the person's freedom to a specific area. Restriction may or may not include suspension from duty.

1.F.2.gg. Sentenced Prisoner

A prisoner whose sentence has been ordered into execution following the appropriate level of review. (See rules 1101 and 1113 of reference (e), Manual for Courts-Martial (MCM), United States (current edition).)

1.F.2.hh. Notification of Next of Kin

In cases where a member is to be tried by general court-martial or special court-martial, the commanding officer should impress upon the member the desirability of informing his/her parents, spouse, or guardian, as appropriate, of the circumstances. In those cases where a member is under 21 years of age, the commanding officer, when deemed appropriate, should inform the parents, spouse, or guardian, by letter or other form of communication, of the details considered pertinent and proper under the circumstances.

1.F.3. Pretrial Confinement

1.F.3.a. Policy

Pretrial confinement should be ordered only after careful consideration of and strict compliance with the provisions of Rules of Courts-Martial 304 and 305 of reference (e), Manual for Courts-Martial (MCM), United States (current edition). The decision to order personnel into pretrial confinement is an important decision. A person shall not be retained in confinement solely on the basis of impending administrative discharge proceedings. Confinement pending trial should be ordered only when necessary because it is foreseeable that either the prisoner will not appear at trial or pretrial hearing, or the prisoner will engage in serious criminal misconduct, and that less severe forms of restraint are inadequate.

- (1) Article 10, Uniform Code of Military Justice, 10 U.S.C. § 801-946 Restrictions. A person will not be ordered into pretrial confinement without first being informed of the specific wrong of which he or she is accused. Upon confinement, every effort should be exerted either to bring the member to trial without delay or to dismiss the charges and release the person. It should be noted that the continuance of a person in pretrial confinement is in every case subject to the provisions of the Coast Guard Military Magistrate Program. (See Article 1.F.3.b. of this Manual.)

- (2) Restraint of Persons Charged with Offenses. Article 13 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, prohibits punishment for alleged offenses prior to trial and conviction thereon. In practice, the U. S. Court of Military Appeals has held that when a person is confined awaiting trial, Article 13 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, also prohibits comingling of that person with sentenced prisoners for a given work program or activity, thereby requiring Naval briggs to segregate these two categories of confinees. Pretrial confinement therefore serves no corrective purpose. Article 13 also prohibits the use of excessive measures of restraint upon persons awaiting trial. Because segregation often amounts to solitary confinement, briggs sometimes permit pretrial confinees to waive their Article 13 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, rights thereby enabling the person's participation in the correctional programs and activities conducted (for sentenced persons) at the brig. Waiver is a serious step which should not be undertaken without careful consideration. Prior to departure for pretrial confinement, the offender should be advised of the nature and purpose of his or her Article 13 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, rights and the implications of waiving those rights.

1.F.3.b. Military Magistrate Program

A neutral and detached magistrate must hold a hearing in each case of pretrial confinement to determine whether an accused should be retained in pretrial confinement.

Compliance with the provisions of the Military Magistrate Program as contained in Section 2-C-4 of reference (b), Military Justice Manual, COMDTINST M5810.1 (series), is mandatory.

1.F.3.c. Places of Confinement for Persons Awaiting Trial

The proper place for restraining persons awaiting trial by court-martial is a military correctional or detention center operated by any of the Department of Defense services. Facilities of the Navy will be employed whenever possible. When operational or logistical circumstances prohibit this, the commanding officers may request authority from Commandant (CG-122) to confine the member on a short-term basis (72 hours or less) in a civilian facility as provided for in Article 1.F.4.c. of this Manual. (See Article 2.C.4.m. of reference (b), Military Justice Manual, COMDTINST M5810.1 (series)). It is the responsibility of the commanding officer or convening authority to determine the degree of restraint to which an accused should be subjected prior to trial. This determination should reflect careful observance of the provisions of Article 9(d), 10 and 13, UCMJ , and Rules 304 and 305 of reference (e), Manual for Courts-Martial (MCM), United States (current edition). Suitable alternatives may include: no restraint, arrest, or restriction in lieu of arrest. In certain cases non-judicial punishment may serve military discipline just as effectively as trial by court-martial.

1.F.3.d. Short Term Confinement Facilities

Certain DoD services operate short-term confinement facilities (usually for restraint for periods of 30 days or less) devoted solely to detention of persons awaiting trial. Coast Guard commanding officers are authorized to use such facilities only for pretrial confinement on a space-available basis. These facilities are neither staffed nor operated as military correctional centers or brig and for this reason will never be designated as places of confinement for persons sentenced to confinement by courts-martial. These facilities are known in the Navy as detention centers.

1.F.4. The Pre-confinement Phase - Designating Places of Confinement and Duty Status of Personnel Undergoing Disciplinary Action

1.F.4.a. General

Whenever confinement is ordered by an appropriate authority (i.e., an officer empowered to order a court-martial sentence to confinement into execution) that officer shall designate a military correctional center or facility as the place of confinement. An appropriate brig of the Navy is preferred. Naval Brig, Naval Station Norfolk, Virginia will be designated as the place of confinement in every case in which enlisted members are sentenced by court-martial to periods of confinement exceeding one year. Officers

sentenced to confinement are normally confined at the Disciplinary Barracks, Ft. Leavenworth, KS. These prisoners will be transferred to U. S. Coast Guard Support Center (T&A), Portsmouth, Virginia for temporary duty for discipline or confinement purposes. Coast Guard personnel confined awaiting trial or serving court-martial sentences to confinement will not be confined on board Coast Guard units ashore or afloat.

1.F.4.b. Pre-Designation Liaison with Military Confinement Facility

- (1) Use of U. S. Navy Brigs. Prior to designating a place of confinement, the offender's commanding officer should establish informal telephone liaison with the commanding officer of the desired Naval brig in order to ascertain whether space will be available. (See Article 1.F.4.d. of this Manual.) If the response is in the negative, similar inquiries should be directed to all other Navy or Marine Corps brigs within reasonable travel distance. Should this still fail to secure space, assistance shall be requested from Commandant (CG-122).

- (2) Joint-Service Agreements for Use of Army or Air Force Facilities. In locations where Navy or Marine Corps brig facilities are nonexistent or subject to frequent shortfalls, district commanders, overseas commanders and commanding officers of Headquarters units are authorized to enter into local joint-Service agreements for military confinement center or facility services (for confinement of one year or less) with the appropriate Army or Air Force commander in their area. Statutory authority is contained in Articles II(a) and 58(a) of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Copies of any written agreements shall be furnished to Commandant (CG-122). Before executing agreements to provide for confinement of Coast Guard prisoners in Army or Air Force facilities, it should be ascertained whether the orientation of the correctional program and regimen conducted are suitable for Coast Guard personnel. When designating Army or Air Force facilities as the place of confinement, it is particularly important during predesignation liaison to determine whether the correctional facility commanding officer has established special requirements or preferences concerning prisoner escort or transport, prisoner estimated time of arrival, required clothing, personal health and comfort items, the confinement order, and records. No joint-Service agreement entered into under the provisions of this Article shall commit the Coast Guard to augment the staff of DoD correctional centers as a precondition for providing correctional services. In the absence of a local joint-Service agreement, Army and Air Force correctional centers or facilities (and some Marine Corps brigs) will ordinarily accept Coast Guard prisoners only if space and resources are available and consistent in every case with the discretion of the unit commander involved. Whenever a member of the Coast Guard is confined pending trial (pretrial confinement), the provisions of reference (b), Military Justice Manual,

COMDTINST M5810.1 (series), shall be followed even though a non-Navy facility may have been designated as the place of confinement (detention). Coast Guard personnel confined in facilities of another Service become subject to the military control of that Service and shall be subject to the regulations prescribed by that Service for its own prisoners under the same confinement circumstances.

1.F.4.c. Confinement in Civilian Facilities

Commanding officers may find it necessary to confine military personnel in civilian facilities under either of two following circumstances:

- (1) Pretrial Confinement. When a commanding officer deems pretrial confinement necessary but no military correctional or detention facility is available, authority may be requested from Commandant (CG-122) to confine the accused in a civilian jail or prison. Requests shall be made by message and shall include the identity of the offender and alleged offense, the estimated duration of confinement being requested and identity of the civilian facility preferred, if any. Authority will ordinarily be granted provided the civilian facility requested has been certified by the U. S. Bureau of Prisons as approved for the confinement of Federal offenders. This authority will ordinarily permit confinement of the prisoner at the civilian facility until the military magistrate has reviewed the case as provided for in Article 1.F.3.b. of this Manual. Each case of this nature shall be made the subject of a separate request. Authority granted to confine one individual in a civilian jail or prison shall not be construed as authorization for confinement of any other persons. In certain other situations, it may also be necessary for civil authorities to retain Coast Guard personnel not under Coast Guard control (stragglers, deserters, those with civil charges pending) for longer periods in jail. The return of these individuals to Coast Guard control as soon as practicable is desirable, except where the return would be contrary to safety or good order and discipline. Prolonged confinement in a civilian jail is particularly undesirable.
- (2) Emergency Situations. Situations arise periodically which demand that a commanding officer immediately restrain a member to prevent loss of life, injury to their person or others or serious loss of property. Where local circumstances warrant such short-term (normally not more than 24 hours) restraint may be accomplished in a civilian jail.

1.F.4.d. Designation of Places of Confinement for Adjudged Prisoners

When a convening authority orders a sentence to confinement at hard labor into execution including temporary confinement pending final disposition of the case upon completion of review under Article 66 or Article 69(a) of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended) - his or her action will designate the

place of confinement on the basis of the time remaining to be served to fulfill the sentence. Designation shall be a brig selected in accordance with the Confinement Designation Chart which is contained in Exhibit 1.F.1. The chart is based on an evaluation of each brig's capability for confining prisoners with varying lengths of sentences. These capability evaluations have been made by the Chief of Naval Personnel on the basis of area needs, space, and staffing of support facilities availability.

1.F.4.e. Re-designation and Transfer

The majority of instances involving re-designation of the place of confinement or the transfer of a prisoner to a different confinement facility are routine in nature. Illustrative is the situation following a change in the reason for confinement occurring upon adjudgement of a sentence to confinement against a member had been held in pretrial confinement prior to court-martial proceedings. Transfers both in and outside the continental United States (OCONUS) will proceed at the earliest practicable time following the convening authority action, and from outside CONUS following convening authority action. Transfers will not be made when internal disciplinary action by the correctional facility is pending. Unnecessary delay in prisoner transfer should be avoided and will not be a basis for re-designation of the place for confinement. When a prisoner is transferred from a cutter to a shore brig, care should be taken to ensure simultaneous transfer of appropriate records and belongings. Non-routine re-designations and transfers, by contrast, are those not deriving from the normal sequence of trial events or execution of sentence, but rather from special circumstances arising during the course of confinement. Requests for non-routine re-designation or transfer may be initiated by the convening authority or commanding officer of the prisoner, by the prisoner personally, by the commanding officer of the brig, Commandant (CG-122) or the Chief of Naval Personnel. Non-routine re-designation or transfer actions will be coordinated by Commandant (CG-122). Upon learning of a need or request for non-routine re-designation or transfer, convening authorities or commanding officers shall transmit a request to Commandant (CG-122). The transmittal shall include all pertinent background and justification for the change along with a recommendation for an alternate place of confinement selected from the current Confinement Designation Chart.

1.F.4.f. Women

Women service members are subject to confinement according to the same guidelines and under the same circumstances warranting confinement of male service members. Women service members shall not be confined in a military facility designated for male personnel only. Those brigs capable of confining women service members are indicated in Exhibit 1.F.1. Entry into correctional centers operated by the Army and Air Force is coordinated by Commandant (CG122). In certain cases, it may be necessary to resort to civilian facilities. Commandant (CG-122) maintains a list of local civilian facilities approved by the U. S. Bureau of Prisoners for the confinement of women. Local

commanding officers desiring to effect either pretrial or sentenced confinement of women prisoners shall contact Commandant (CG-122) by message for advice as to the appropriate military or civilian facility to be used in an individual case. All costs associated with confinement in a civilian facility will be borne by the district of the command making the request.

1.F.4.g. Officers

Officers shall not be confined in close company with enlisted prisoners. If it is necessary to confine an officer awaiting trial or under exigent circumstances, the restraint should be carried out through confinement to quarters or other suitable place. If required, an adequate guard may be posted. An officer sentenced to confinement shall normally be confined to facilities within the jurisdiction of the officer convening the court-martial until the sentence is ordered executed. Where local facilities are inadequate, a message for designation of a place of confinement shall be forwarded to Commandant (CG-122) furnishing justification for an exception to policy. The message should also indicate whether deferment of confinement has been requested and the action thereon. When an approved sentence to dismissal has been executed, the individual may be confined with and otherwise handled as an enlisted prisoner.

1.F.4.h. Military Duty Status of Personnel Awaiting Trial by Court-Martial

- (1) Accused persons awaiting trial by court-martial (whether or not pretrial confinement is ordered) shall remain attached to their parent command unless the parent command:
 - (a) is an operational unit whose scheduled deployment would delay trial preparations and preclude access to the accused's records;
 - (b) is a small command lacking the administrative capability to prepare for trial; or
 - (c) is a remote command whose distance from necessary military justice services would hamper timely preparation for trial.
- (2) When one or more of the foregoing situations exist, the command having assignment authority over the accused may direct his or her transfer for TDY for disciplinary action to an appropriate command which can accommodate temporary duty status personnel. It is stressed, however, the temporary transfer of persons awaiting trial is intended to facilitate preparation for trial. Transfer must not be used as an excuse to delay preparations for trial, consistent with the right of an accused to speedy trial. When it is known at the time of transfer or subsequently becomes apparent that extraordinary circumstances will prohibit bringing an accused person transferred in accordance with this Article to trial in less than 60 days, the command having

assignment authority over the accused will designate the accused member's duty status as TEMDUINS for disciplinary action. Similarly, should it be known at the time such transfer is ordered that the person awaiting trial is unlikely to be returned to the parent command after trial, transfer will be ordered as TEMDUINS for disciplinary action. Competent authority to order TDY or TEMDUINS transfers of persons awaiting trial is the command normally having transfer authority over that person. Competent authority is Commander (CG PSC-EPM). For officer personnel, competent authority is Commander (CG PSC-OPM). When apprehended or surrendering deserters are returned to Coast Guard custody, Commander (CG PSC-EPM) will designate the individual's command assignment and duty status in accordance with the provisions of Article 1.C.3. of this Manual. When the apprehended or surrendering deserter is an officer, Commander (CG PSC-OPM) will so designate. The authority under which persons may be ordered into TDY or TEMDUINS status and/or transferred while awaiting trial pursuant to this article terminates effective with completion of a court-martial or resolution of the charges by other means. Persons found guilty and sentenced to confinement and/or punitive discharge shall be administered as provided for in Article 1.F.4.i. of this Manual. All others will be ordered to a permanent unit to resume regular duties.

1.F.4.i. Military Duty Status of Persons Sentenced to Confinement by Court-Martial

- (1) Sentences Less Than 90 Days. Persons sentenced to confinement of less than 90 days shall normally be placed in a TDY status for the duration of confinement unless:
 - (a) The member was also sentenced to a punitive discharge, or
 - (b) The assignment authority otherwise considers it unlikely that the offender will be ordered to return to his or her parent command after release from confinement.
- (2) Sentences 90 Days or More. Coast Guard members with sentences to confinement of 90 days or more, or with an unsuspended punitive discharge approved by the convening authority shall be assigned to:

Unit	OPFAC	Servicing SPO
Commanding Officer U. S. Coast Guard Pay & Personnel Center 444 S.E. Quincy Street Topeka, KS 66683-3591 Toll Free 1-866-772-8724	53-47400	53-47400-02

- (3) Convening Authority Responsibilities. Assignment to PPC (SES) does not alter, expand, or reduce the convening authority's responsibilities under reference (a),

Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended) with respect to the member, see R.C.M 1107(a) of reference (e), Manual for Courts-Martial (MCM), United States (current edition).

- (4) Required Appellate Leave Procedures. The procedures for required appellate leave are found in Article 2.A.21.e. of reference (c), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series).

1.F.4.j. Changes in Status

Whenever the reason for placing a person in TDY or TEMDUINS status changes, the command having assignment authority over the person will, upon notification by the individual's command, reevaluate the situation and order a change in status and/or assignment if appropriate. For example, should an accused person who had been transferred on TDY to another unit pending trial subsequently be convicted by court-martial and sentenced to three months confinement, the status would be changed to TEMDUINS, and transfer to a different unit for post-trial administrative processing may be ordered if warranted. The commanding officer holding a member's Personnel Data Record will be his or her commanding officer for all administrative functions and purposes.

1.F.4.k. Action Required Prior to Delivery of Prisoners

Delivery of prisoners to Naval brigs should be planned to provide for the prisoner's arrival at the brig during working hours. Should exceptional circumstances preclude this, appropriate prior liaison with the commanding officer of the designated brig will be initiated by the controlling Coast Guard command. Upon designation of place of confinement, a designation message confirming all details shall be transmitted to the appropriate brig, listing as information addressees: Commandant (CG-122) and Commander (CG PSC-OPM) or (CG PSC-EPM) as appropriate; the Coast Guard and Naval districts involved; the parent command of the designated brig; and all Coast Guard commands having administrative responsibility for the member (including the member's servicing SPO and ACO). An estimated time of arrival (ETA) for the prisoner should be included and updated by message or telephone as necessary. The message should also specifically detail the prisoner's pay status, (e.g., whether or not an adjudged automatic forfeiture of pay and allowances is in effect), and shall identify the servicing SPO who maintains the member's pay and personnel records. If a non-duty-hour ETA has been agreed to by the brig, details should be confirmed in the designation message.

1.F.4.l. Movement and Escort of Prisoners and Offenders

The movement and escort of persons undergoing disciplinary action, or of newly apprehended offenders, shall be accomplished in strict compliance with the provisions of Articles 1.G.4 and 1.G.5. of this Manual.

1.F.4.m. Pre-Confinement Physical Examination

Prior to accepting members for confinement, Navy policy requires certification that the member is physically fit for confinement. Specifically, the signature of a medical officer attesting to a prospective prisoner's fitness for confinement is required at the bottom of the Confinement Order, Form DD-2707. (See Article 1.F.5.a. of this Manual.) Normally, the certification may be rendered by the medical facility tasked to provide routine medical support to the command. When this is not possible, the nearest available military medical officer or contract physician should certify fitness for confinement. When emergency circumstances preclude conduct of a pre-confinement physical examination, details should be discussed with the commanding officer of the brig during the pre-designation telephone liaison required by Article 1.F.4.b. of this Manual. This liaison should be used to clarify details of the certification of fitness for confinement in every case.

1.F.5. Confinement Orders and the Process of Confinement

1.F.5.a. Confinement Order

- (1) General. The brigs listed on the current Confinement Designation Chart (Exhibit 1.F.1. of this Manual) will receive Coast Guard prisoners provided space is available. Commanding officers of brigs are authorized to establish a maximum prisoner population that shall not be exceeded. Coast Guard units using the brig are obliged to comply with the brig's local administrative and operational instructions. The officer ordering confinement must in every case provide a written order of confinement, with offenses indicated and properly signed. Form NAVPERS 1640/4 will be used for this purpose. The signed order should specify the nature of the offense(s) charged against the prisoner and reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), article under which each offense is charged for confinement.
- (2) Contents of the Confinement Order. A Confinement Order may be prepared by or signed by the member's commanding officer or other officer designated for that purpose by the commanding officer. The "Remarks" section of the Confinement Order should note specifically any physical or behavioral abnormalities of which the brig should be aware. Examples would be: Diagnosed or suspected suicidal tendencies or any limitations to normal activity. The "Remarks" section should also identify by name and phone number, the commanding officer of the prisoner's reporting unit. Care should be taken in completing the offense portion of the order

since the details thereof will assist the brig in proper evaluation of the prisoner and may influence the custody classification assigned. The term safekeeping is not a reason for confinement and shall not be used as a substitute for an offense. When the reason for confinement changes; e.g., when a prisoner who has been confined pending trial (pretrial) for an alleged violation of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), subsequently is convicted by court-martial and sentenced to confinement, a new confinement order shall be prepared reflecting the change of status. This confinement order shall be delivered to the brig at the time the prisoner is reconfined.

When a place of confinement is redesignated or a transfer is authorized as provided in Article 1.F.4.e. of this Manual, a new confinement order may be required as determined by the circumstances and the desires of the commanding officer of the brig.

- (3) Confinement Start Date. If confined by sentence of court-martial, the order shall show the date confinement begins (if other than date adjudged) and by what authority imposed.

1.F.5.b. Notification of Confinement Status

Following trial, the convening authority shall notify the commanding officer operating the brig, in writing, of the charges and specifications of which the accused has been convicted, and the sentence. Likewise, the convening and supervisory authorities shall promptly inform the commanding officer of the brig by certified true copies of their action in the case. Complete and current official information concerning a prisoner's legal status is essential to the brig's planning for adequate security measures and program participation. When an action is promulgated by a court-martial order or supplementary order, a certified true copy thereof will serve as the written notice required above.

1.F.5.c. DNA Collection and Analysis Requirements

- (1) Authority. Section 10 U.S.C. § 1565 requires the Military Departments and the Department of Homeland Security to collect DNA sample from each member of the armed forces under their jurisdiction who has been convicted of a “qualifying military offense” (QMO) listed in Exhibit 1.F.3. This requirement does not include any member in the custody of the Federal Bureau of Prisons or under the supervision of a Federal probation office. The U. S. Army Criminal Investigation Laboratory (USACIL) will analyze the sample and send the results to the Federal Bureau of Investigation for inclusion in its Combined DNA Index System (CODIS).
- (2) Definition. A QMO conviction is defined as the findings of guilty by a general or special court-martial that include a QMO after the court-martial convening authority

has taken action under Article 60 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). The requirement to collect DNA samples does not apply to the findings of a summary court-martial or a proceeding under Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended).

- (3) Staff Judge Advocate Responsibilities. Staff Judge Advocates (SJA) shall determine if a member has been convicted of a QMO. A list of UCMJ offenses determined to be a QMO is contained in Exhibit 1.F.3. Every convening authority action containing QMO's must have "DNA processing required IAW 10 U.S.C. § 1565" annotated in bold on the top of the first page of the initial promulgating order. SJAs shall ensure that a copy of each annotated promulgated order is provided to the USACIL and, as applicable, the correctional facility and/or unit to which the convicted member is assigned.

Send promulgating orders to:

U. S. Army Criminal Investigation Laboratory
ATTN: CODIS Lab
4553 N. 2nd Street
Forrest Park, GA 30297-5122

- (4) Collecting DNA Samples from Members Already in Confinement. Members in confinement at the time the convening authority's promulgating order is signed will have their blood extracted either at the correctional facility or be taken to a local dispensary. Each DoD correctional facility will identify and collect DNA samples from all of its prisoners who have a QMO conviction regardless of Service affiliation. The correctional facility will ensure that the member's confinement file reflects that a DNA sample has been collected.
- (5) Collecting DNA Samples from Members on Appellate Leave. For members who have been released from confinement and remain on active duty, the cognizant Staff Judge Advocate will coordinate with the nearest correctional facility and service member's parent command to ensure they are sent to have their DNA sample extracted.
- (6) Collecting DNA Samples from Members Not in Confinement. The statute requires DNA extraction from all members convicted of a QMO who remain subject to military jurisdiction as established by Article 2 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). For those members still on active duty, and not in confinement, the member's command must identify whether they have been convicted of a QMO, then coordinate with the nearest correctional facility or dispensary to secure a DNA sample.

- (7) Correctional Representatives or Command Representatives will ensure that all DNA samples are collected by qualified medical personnel using the kits provided by USACIL and in accordance with the accompanying instructions. The sample must be sent to USACIL to be analyzed and the results will be sent to the Federal Bureau of Investigation for inclusion in its CODIS. The sender will notify the USACIL by letter that the sample has been mailed. The notification shall include only the name of the individual from whom the sample was taken, the kit number, and the location from which the sample is being mailed. The USACIL will confirm receipt of the sample and notify the sender if problems are encountered that require the DNA sample to be redrawn. The USACIL can be contacted at (404) 469-7023. The correctional facility or command representative responsible for ensuring that a DNA sample is collected from a member with a QMO conviction will ensure that the member is given a card informing him or her that if the conviction for each QMO is reversed during appellate review, the member may request, via chain of command, that the USACIL expunge the DNA analysis from CODIS. The USACIL will provide preprinted cards as part of the collection kit.
- (8) Processing of Expungement Request. Upon receipt of expungement request, the USACIL will, for each QMO conviction, request the member's command or representative to provide a certified copy of a final order establishing that the conviction was overturned. Additionally, the USACIL will determine whether the requester has a conviction for qualifying Federal offense (42 U.S.C. § 14135a), or qualifying District of Columbia offense (42 U.S.C. § 14135b) before taking action to expunge the record based on a QMO. Only in those cases where the USACIL has verified that the requester has no other qualifying military, Federal, or District of Columbia conviction will it expunge the DNA analysis from CODIS. When a DNA analysis is expunged, the DNA sample maintained at the USACIL will be destroyed.
- (9) Questions. Any question concerning the above policy shall be directed to Commandant (CG122).

1.F.5.d. Records

A prisoner shall be transferred with his or her health record, prescribed court records, including the report of trial, and copies of any Personnel Data Record (PDR) pages which may be requested by the commanding officer of the brig at the time of the predesignation liaison. In all court-martial cases certified true copies of his or her court-martial order will be forwarded to the designated place of confinement as required by reference (b), Military Justice Manual, COMDTINST M5810.1 (series). The report of trial shall include a statement of the number of days of pretrial confinement, any judicially ordered credit for unlawful pretrial confinement, and the provisions of any pretrial agreement binding upon the convening authority. Whenever a convening authority or Officer

Exercising General Court-Martial Jurisdiction deems that PDR information which has been requested by the brig is essential to the Coast Guard's review of the case, copies of the appropriate pages will be retained for the review, vice the PDR itself.

1.F.5.e. Uniforms

Prisoners shall be delivered in the appropriate Service Dress uniform. During the predesignation telephone liaison, the officer ordering (or arranging for) confinement should determine the requirements of the commanding officer of the brig concerning the items and amount of clothing to accompany the prisoner on delivery. As a guide, however, the regular prison uniform at Navy and Marine Corps brigs is the properly marked working uniform of the prisoner's own Service, including protective footwear. The Navy considers bath towels and handkerchiefs as part of the prisoner's seabag. Accordingly, an adequate supply of each should accompany the prisoner upon delivery. It should be noted that brigs are unable to provide spare items for the Coast Guard uniform. Accordingly, it is important that the prisoner be delivered with a sufficiently full seabag to sustain his/her needs during the anticipated period of confinement. A prisoner delivered without the proper uniforms will be required to purchase whatever Navy or Marine Corps uniform items may happen to be available, provided the prisoner is in a pay status. The prisoner will have the option of paying cash or having the purchase charged against his or her pay account, whether or not the charge will result in overpayment. Prisoners in non-pay status who are delivered to the brig without the necessary prisoner uniforms will be loaned whatever Navy or Marine Corps items of clothing can be provided.

1.F.5.f. Health and Comfort

While Naval brigs will provide enlisted prisoners in a non-pay status with health and comfort issues at Government expense; e.g., toilet articles, laundry items, grooming items, tobacco, postage, writing materials, and other necessities to maintain personal comfort, hygiene, and military appearance, all other prisoners will be required to purchase these items. A prisoner is considered to be in a non-pay status if:

- (1) All pay has been stopped either as the result of an adjudged sentence or by operation of the automatic forfeiture provisions of Article 58B of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended).
- (2) Confined awaiting trial by a foreign court under the conditions set forth in reference (d), Coast Guard Pay Manual, COMDTINST M7220.29 (series).
- (3) The member is serving post-trial confinement and his or her enlistment has expired. (reference (d), Coast Guard Pay Manual, COMDTINST M7220.29 (series)).

- (4) The member is awaiting determination of separation because of fraudulent enlistment. Commanding officers and convening authorities should identify the health and comfort items that should accompany a prisoner upon delivery at the time of the pre-designation liaison. If the prisoner has these items, or is confined during working hours and can obtain them, the items should accompany the prisoner upon delivery to confinement. It is the responsibility of the prisoner's commanding officer to ensure that prisoners have an adequate supply of health and comfort items upon commitment. When exigent circumstances require that a prisoner be confined without the necessary health and comfort items, the brig will issue essential items during processing for commitment. Thereafter, the brig will provide each prisoner with a periodic resupply of consumable items. The initial supply should be adequate for one month's average use, but may be prorated if the regular replacement, or the prisoner's release, will be in less than a month. Any items on the following list will normally be approved in adequate quantities:

Laundry Bag	Comb	Soap, Bath
Blades, Razor	Deodorant, Stick Type	Soap or Powder, Laundry
Box, Soap	*Handkerchiefs	Toothpaste or Powder
Brush, Shaving	Razor, Safety or Electric	*Towels, Bath
Brush, Tooth	Sandals, Bath	Writing Materials and
Clipper, Nail	Shoe shining Gear	Postage
Cloths, Face	Smoking Material and Matches	

*Handkerchiefs and bath towels are available in Navy retail clothing stores and are considered as items of clothing for Navy prisoners, rather than as health and comfort items.

1.F.5.g. Military Pay and Allowances

While in military confinement, the prisoner's pay and personnel records shall be maintained by the appropriate servicing SPO. The designation message required by Article 1.F.4.k. of this Manual shall indicate the prisoner's pay status and identify the SPO who handles the prisoner's pay and personnel records. The commanding officer of the brig must be advised of changes in a prisoner's pay status, such as automatic forfeiture or execution of an adjudged sentence to forfeiture. The member's SPO must be kept apprised of the member's confinement status so that appropriate pay and confinement-related documents can be prepared.

1.F.5.h. Delivery of Prisoners

Delivery of prisoners to brigs should be planned to provide for the prisoner's arrival at the brig during working hours. Should exceptional circumstances preclude this, appropriate prior liaison will be initiated by the controlling Coast Guard commanding officer with the commanding officer of the brig.

1.F.5.i. Prisoner Escorts and Transportation of Prisoners

Members designated to serve as prisoner escort should be mature, responsible officers, chief warrant officers, or petty officers, who are well qualified by training and/or experience for the assignment, as required by Chapter 1.G. The appointment and conduct of escorts and the movement of prisoners shall be in strict compliance with the policy contained in Article 1.G.

1.F.6. The Corrections Phase**1.F.6.a. Policy**

Upon arrival of a sentenced prisoner at a brig, the military corrections process discussed in Article 1.F.1. of this Manual comes fully into play. Congress has tasked the military corrections system to strive toward both punitive and rehabilitative goals. For rehabilitative purposes, the Armed Force operating the correctional center or Naval brig is responsible for conducting an adequately supported corrections program designed to enhance the offender's ability to reorient his or her own behavior, at least to the extent of preparation for successful and productive integration back into either military or civilian society. Inasmuch as the Coast Guard does not operate its own brigs, this Article deals primarily with command responsibilities relating to Coast Guard prisoners confined in Naval brigs and with the avenues to statutory and administrative relief which are open to the offender.

1.F.6.b. Command Responsibilities during Confinement: Command Visits

Naval brigs are authorized and funded primarily to rehabilitate offenders for resumption of productive service in the case of restorees, or for productive integration back into society at large in the case of discharges. Accordingly, contemporary military corrections programs place a heavy emphasis on rehabilitation through provisions of specialized, incentive weighted counseling and training conducted in an environment oriented toward rehabilitation. As part of the rehabilitative process the Navy makes involvement and support of the parent organization mandatory. Regular Service visitation and/or contact is required by all commands, including Coast Guard and Marine Corps commands, utilizing Naval brigs for either pretrial or sentence confinement. Command visitation is encouraged where Army or Air Force facilities may be utilized as well. Specifically:

(1) Pre-trial Confinement and Confinement Less Than 90 Days.

- (a) Commanding officers will establish a visitation program to provide for visiting offenders in confinement at least weekly pre-trial and monthly post-trial. The commanding officer may designate a commissioned officer or senior petty officer to act in his or her behalf. When the parent command is a Coast Guard operational command which is deployed, the district commander or shoreside operational commander, as appropriate, should arrange for the visits to be conducted by a commissioned or senior petty officer from his or her staff. If the commanding officer deems appropriate, he or she may augment the command visitation program by calling on the capabilities of special program personnel such as a chaplain, the senior enlisted advisor, or civil rights counselor. The requirement for command visitation applies to all Coast Guard commands ordering prisoners into confinement, whether the confinee is attached only for TEMDUINS or is a member of the permanent party.
- (b) The prisoner visitation requirement potentially imposes an unreasonable travel burden on some Coast Guard commands. As a general guide, commanding officers are authorized to waive physical visitation when the one-way travel time between the unit and the brig normally exceeds 2 hours, or when genuine operational or administrative priorities preclude visitation. The command, however, must ensure that the prisoner is visited at least monthly by a Coast Guard representative and that the brig has the name of a reliable, single point of contact both for the prisoner and for the needs of the brig. In between visits, the command should maintain a liaison with the prisoner and the commanding officer of the brig by mail, telephone, or both.
- (2) Confinement Greater Than 90 Days and Prisoners with Unsuspended Punitive Discharges. It is a very rare circumstance that a member awarded long-term confinement returns to his or her unit. While the prisoner is entitled to certain administrative support from the parent Service, the rehabilitation process does not require the same level of face-to-face contact with the prisoner.
- (a) Upon entry into confinement, the prisoner is transferred PCS to PPC. Prior to releasing the prisoner to PPC, the member's parent command or the convening authority shall ensure that the following data is available:
- [1] The prisoner's expected release date (assuming good behavior).
 - [2] A determination of the prisoner's post-release transportation entitlement (e.g., to the last point of active service, home of record, place of enlistment, or home of selection).
 - [3] Other entitlements authorized to the prisoner (i.e., movement of household goods, dependent travel).

- [4] An accounting line for travel and transportation for the prisoner, any dependents and any personal effects authorized for relocation. Where the prisoner's sentence is likely to span multiple fiscal years, the convening authority shall provide a point of contact for obtaining a current accounting line to be used at the time of release.
- (b) The primary source of on-site rehabilitative assistance for long-term prisoners will be the commanding officer of the confinement facility to which the prisoner is assigned. Commanding Officer, PPC shall make a representative of his or her command available on-site within 24 hours of receiving a request from the commanding officer of the confinement facility. Commanding Officer, PPC shall respond to any need for administrative support immediately upon receiving such a request from the commanding officer of the confinement facility.
- (c) Commanding Officer, PPC will function as the long-term prisoner's commanding officer for the purpose of the Article 138 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), complaint process and will so inform the prisoner in writing during the prisoner's first week assigned to confinement. The prisoner shall be informed of the procedure for contacting PPC to address personal or logistical concerns (pay, obtaining health and wellbeing items, uniform availability, movement of personal effects and dependent support). Commanding Officer, PPC, or his or her representative shall maintain contact with the prisoner by mail or telephone weekly during the first month of confinement and at least monthly thereafter for the duration of the confinement. Commanding Officer, PPC shall seek targets of opportunity (e.g., extending the TDY of any PPC military member who is on temporary duty in close proximity to a brig housing a long-term Coast Guard prisoner) to achieve a target of visiting each of PPC's prisoners at least quarterly.
- (3) Appellate Process. Commanding Officer, PPC's designation as Commanding Officer for prisoners in long-term confinement remains primarily administrative for the purposes of providing logistics support. This designation does not alter the responsibility of the convening authority or the Chief Counsel to perform such duties as are necessary to bring the case to an orderly conclusion under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), and the Federal appellate process.
- (4) Command Visitation. Command visitation of all prisoners or offenders will be made at least weekly in all cases where confinement in a civilian facility has been authorized.

1.F.6.c. Reduction in Confinement by Reason of Good Conduct

- (1) Good Conduct Time. Coast Guard prisoners serving confinement sentences in Naval briggs automatically have the opportunity to earn reduction-in-sentence (to confinement) as a reward for satisfactory conduct during confinement. To secure uniformity in computing this reduction for all prisoners in the Navy Correctional Program, the policy of the Department of the Navy shall be followed and Coast Guard prisoners accorded the same opportunity to earn good conduct time as those from the Navy Department. Good conduct time shall be computed beginning on the day the sentence commences to run, to be credited as earned and computed monthly as follows:
 - (a) Five days for each month of the sentence if the sentence is less than one year.
 - (b) Six days for each month of the sentence, if the sentence is at least one year but less than three years.
 - (c) Seven days for each month of the sentence, if the sentence is at least three years but less than five years.
 - (d) Eight days for each month of the sentence, if the sentence is at least five years but less than ten years.
 - (e) Ten days for each month if the sentence is ten years or more.
- (2) Crediting Good Conduct Time. The law provides that each sentenced prisoner may earn a specified number of days per month according to the total length of the sentence.
- (3) Forfeiture and Restoration of Good Conduct Time. The commanding officer of the brig may direct forfeiture of any or all of the good conduct time previously credited pursuant to a prisoner's misconduct in confinement. Similarly, the commanding officer of a brig may restore all or any part, except time forfeited because of parole or probation violation, of the good conduct time previously ordered forfeited either by him or herself or by a previous commanding officer.
- (4) Extra Good Conduct Time. The commanding officer of the Naval brig may reduce the term of a prisoner's sentence for good conduct based on faithful observance of all the rules and regulations of the brig.
- (5) Credit for Pretrial Confinement. The correctional facility will reduce the sentence to confinement by applying the appropriate credit required both by administrative regulation and judicial order for pretrial confinement in accordance with its regulations.

1.F.6.d. Suspension or Remission of Unexecuted Portion of Sentence

Provisions relating to the powers of court-martial convening authorities and of supervisory authorities to remit or to suspend unexecuted portions of sentences are set forth in Rule 1108 of reference (e), Manual for Courts-Martial (MCM), United States (current edition).

(1) Clemency. Clemency is an action taken by duly constituted authority to reduce the amount or severity of a court-martial sentence. It is the Commandant's policy to extend to persons convicted by courts-martial whatever clemency may represent the best interests of the Coast Guard and the individual. Clemency may consist of mitigation, remission, or suspension of a sentence in whole or in part. Mitigation usually is a reduction in the amount of the sentence. It may also take the form of a change in the kind of punishment from that adjudged to another authorized punishment which is another authorized punishment which is less severe (confinement to restriction, forfeiture of pay to detention of pay, dishonorable discharge to bad conduct discharge). An adjudged punishment can never be increased in severity. Remission of punishment amounts to a reduction or cancellation of unexecuted portions of a sentence, but not to a change in the nature thereof. Suspensions are stays of execution of unexecuted portions of a sentence with provisions for automatic remission at the successful completion of a specified term of probation. It should be noted that clemency in no way affects an approved conviction. Rather, a grant of clemency merely represents an administrative relaxation of the terms of an adjudged sentence. The following commanding officers are authorized to remit, mitigate, or suspend any part or amount of the unexecuted part of any sentence (grant clemency) under the authority of Article 74(a) of the Code:

- (a) The Commandant, except while a case is being reviewed by the Coast Guard Court of Criminal Appeals or the U. S. Court of Appeals for the Armed Forces.
- (b) The officer exercising general court-martial jurisdiction over the accused, but only to those parts of a sentence which do not include a punitive discharge, except while a case is being reviewed by a supervisory authority other than him or herself, the Coast Guard Court of Criminal Appeals, or the U. S. Court of Appeals for the Armed Forces.
- (c) In addition to his or her authority contained in reference (e), Manual for Courts-Martial (MCM), United States (current edition), the immediate commanding officer of the accused, in cases where a punitive discharge has previously been approved, but only as to those parts of the sentence which do not include the punitive discharge, except while a case is being reviewed by the supervisory

authority, the Coast Guard Court of Criminal Appeals, or the U.S. Court of Appeals for the Armed Forces.

- (2) Clemency Action by the Convening Authority. When acting on the findings and sentence of a court-martial, the Convening Authority is authorized by Article 60 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), reference (e), Manual for Courts-Martial (MCM), United States (current edition), and reference (b), Military Justice Manual, COMDTINST M5810.1 (series), in his or her sole discretion, to set aside findings of guilty, change findings to guilty of a lesser included offense, and to approve, disapprove, commute, or suspend any part of the sentence.
- (3) Clemency Action by the Commanding Officer or Officer Exercising General Courts-Martial Jurisdiction over the Member. **Except while the member's case is being reviewed by the** Coast Guard Court of Criminal Appeals or the Court of Appeals of the Armed Forces, any Officer Exercising General Court-Martial Jurisdiction over a member is authorized to remit or suspend any unexecuted part of that member's sentence, other than a punitive discharge or a sentence approved by the President. If a punitive discharge has been previously approved, the immediate commanding officer of the member may also exercise the authority described above, subject to the same limitations. See Enclosure (9) of reference (b), Military Justice Manual, COMDTINST M5810.1 (series).
- (4) Clemency Power of the Coast Guard Commandant. The Secretary of Homeland Security has delegated to the Commandant of the Coast Guard the authority contained in Article 74(a) of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), to grant residual clemency, as provided in Enclosure (9) of reference (b), Military Justice Manual, COMDTINST M5810.1 (series). The Secretary reserves this authority in cases in which appellate review is not complete. Pursuant to authority in 10 U.S.C. § 953, a Coast Guard Clemency Board automatically reviews courts-martial cases that include an unsuspended punitive discharge to determine whether they merit remission or suspension of any unexecuted portions of a court-martial sentence. When an enlisted member sentenced to a punitive discharge waives appellate review of his or her court-martial conviction in accordance with RCM 1110 of reference (e), Manual for Courts-Martial (MCM), United States (current edition), the punitive discharge may be executed by the Officer Exercising General Court-Martial Jurisdiction (OEGCMJ) if the record is forwarded to the OEGCMJ in accordance with RCMs 1112(e) and 1113 and the execution of the sentence is approved. In all other cases no court-martial sentence to a punitive discharge may be executed before the Coast Guard Clemency Board, Commandant, or Secretary as appropriate has reviewed it. Reviewing authorities recommend or determine clemency on the basis of equity and good conscience. Factors affecting clemency include: the nature and circumstances of the offense(s); the defendant's

military and civilian history; potential value to the Service or society at large; conduct in confinement; contrition; sincerity in motivation for rehabilitation; social factors including hardship, psychological or personality factors; sentence disparity; and pure mercy.

(a) Residual Clemency Review. In keeping with the delegation of clemency authority under Article 74(a) of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), when appellate review is complete, the Clemency Board will review every court-martial record whose sentence includes an unsuspended punitive discharge to determine whether that sentence should be executed (no clemency) or to recommend remitting, mitigating, or suspending the punitive discharge sentence (granting residual clemency). The Clemency Board's review also automatically embraces consideration for clemency of any other remaining unexecuted portions of the sentence, such as the remainder of a term of confinement, as well as any petition for clemency provided to it for consideration. Residual clemency review normally will immediately follow completion of the legal review process.

(b) Petitions for Clemency. Petitions for clemency are not required, and exhaustion of the appellate process and other remedies under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended) must occur before the Clemency Board will consider such a petition. Nevertheless, persons convicted by courts-martial may petition for clemency of the unexecuted portions of their sentences, even if their approved sentences do not extend to punitive discharge. Any petition will generally be considered simultaneously with the automatic clemency review, if applicable. Although no specific form for such petitions is required, petitions need not be considered, and may be returned to the member without action, if they do not meet the following minimum requirements:

- [1] Petitions must be forwarded to Commandant (CG-122) and must arrive within 60 days after the sentence and conviction is final under Rule for Court-Martial 1209 of reference (e), Manual for Courts-Martial (MCM) United States (current edition).
- [2] Petitions must state the specific relief requested, and the specific reasons why the member believes such relief to be appropriate.
- [3] Where the case has been previously reviewed by the Clemency Board, the petition must identify new facts or circumstances justifying a second review or reconsideration.

- [4] Petitions must include sufficient evidence to support the request. Such evidence must be in writing and may include documents and citations to specific sections of the record of trial.

(c) Commandant (CG-122):

- [1] Will review all petitions for clemency to insure compliance with Article 1.F.6.d.(4)(b) of this Manual.
- [2] Will establish a Clemency Board in accordance with Article 1.F.2.h. of this Manual consisting of a panel of at least three senior officers.
- [3] Will forward all petitions that are in compliance with this Article, and all records of trial received that include an unsuspended punitive discharge, to the Clemency Board or to other appropriate officials.
- [4] May return petitions that are not in compliance with this Article to the member.
- [5] May forward other matters, as appropriate, to the Clemency Board.
- [6] Will, in any case in which the review required by this section has been completed and clemency action has not been ordered, issue a statement to that effect, and forward the record of trial to Commandant (CG-0946) for further processing.
- [7] Will, in any case in which clemency action has been ordered, take action as necessary to implement that order.
- [8] Will ensure compliance with crime victims' rights to information about convicting, sentencing, incarcerating, and releasing offenders, as mandated by law, throughout the clemency process. See Article 2-R of reference (b), Military Justice Manual, COMDTINST M5810.1 (series).

(d) The Coast Guard Clemency Board. The Coast Guard Clemency Board shall:

- [1] Will review all court-martial cases or petition submitted to it for a recommendation by proper authority.
- [2] Will forward its recommendation to Commandant (CG-12) via Commandant (CG122).

(e) Commandant (CG-12). Commandant (CG-12):

- [1] may take final action to approve a recommendation to deny residual clemency and will then return the record to Commandant (CG-0946). If Commandant (CG-12) does not concur with a Clemency Board recommendation to grant clemency Commandant (CG-12) will provide an endorsement and forward the matter to Commandant for final action.
- [2] will forward a case or petition to the Commandant or to the Secretary, with an appropriate endorsement, if:
 - [a] The Secretary or Commandant has indicated a desire to make the clemency decision personally.
 - [b] Law or regulation reserves authority to act in the case to higher officials. These include cases that are still pending completion of appellate review or cases where the sentence extends to death or the dismissal of an officer or Academy cadet.
 - [c] The case involves violations of national security.
 - [d] The Clemency Board or Commandant (CG-12) recommends clemency action or personal consideration by the Secretary or Commandant.

(5) Clemency Consideration for Persons in Confinement. The Coast Guard retains clemency authority over all Coast Guard offenders, including Coast Guard prisoners confined in military correctional centers or facilities, including Naval brigs, of the Department of Defense. Nevertheless, the prisoner's conduct in confinement, attitude, and rehabilitation progress represent valuable information to a Coast Guard convening or reviewing authority considering clemency. Accordingly, Navy or Marine Corps commanding officers of Naval brigs are prepared to act on requests of any Coast Guard convening or reviewing authority or of the prisoner personally to provide a Prisoner Evaluation Report, NAVPERS 1640/13, concerning the accused in question. In the event the brig considers clemency warranted with respect to any unexecuted portion of the sentence including an unsuspended sentence to punitive discharge, the brig's non-binding report will recommend accordingly. Prisoner Evaluation Reports are ordinarily prepared annually for all prisoners in long-term confinement (exceeding six months), but can be provided at any time upon request.

1.F.6.e. Parole

Parole, as defined in Article 1.F.2.x. of this Manual, may be granted to carefully selected individuals. 10 U.S.C. § 952 authorizes the Secretaries of the respective Armed Forces to establish a system of parole for prisoners in military confinement facilities. Parole as a

modification of the conditions under which a sentence to confinement may be administered constitutes an element of military corrections process. The Coast Guard has not established a military corrections (confinement) system of its own but relies rather on support from the U. S. Navy for long-term confinement. It is nevertheless desirable that the parole opportunities for Coast Guard prisoners confined in Naval brigs be equal to and consistent with those accorded the Navy and Marine Corps prisoners with whom they share the confinement experience.

Accordingly, the Secretary of Homeland Security has delegated the authority to the Secretary of the Navy to adjudicate parole requests and to administer parole for Coast Guard prisoners confined in Naval brigs in precisely the same manner as for prisoners from the Navy Department. It is stressed in this regard, that parolees remain in the legal custody and under the control of the commanding officer of the Naval brig until the expiration of the full-term or aggregate terms of the sentence to confinement, without credit for good time allowance. Within the Navy Department, the Secretary of the Navy has tasked the Naval Clemency and Parole Board with responsibility for determination of parole requests. Petitioners for parole have appeal rights to the Director, Navy Council of Review Boards. Note that these provisions permit Navy determination of Coast Guard prisoners' parole requests only. Clemency powers on the contrary remain resident in appropriate Coast Guard authorities as provided for in Article 1.F.6.d. of this Manual.

- (1) Eligibility. A military prisoner with an unsuspended sentence to punitive discharge or dismissal shall be eligible for parole consideration by the Naval Clemency and Parole Board as follows:
- (a) Sentence or aggregate sentence of:
 - [1] More than one year and not more than three years, who has served one-third of the term of confinement, but in no case less than six months; or
 - [2] More than three years who has served not less than one year. If not considered earlier, the prisoner will become eligible for consideration after serving one-third of the approved or affirmed sentence or aggregate sentence, or not more than ten years when the sentence is life or in excess of 30 years.
 - (b) Good time allowance will be excluded in computing eligibility for parole consideration.
 - (c) With respect to parole consideration of a prisoner whose sentence provides for contingent additional confinement in the event an approved sentence to fine is not paid, eligibility for parole shall be based on the basic term of confinement plus any additional contingent confinement incurred through failure to pay the fine. If the approved sentence provides for confinement only if a fine is not paid, a

prisoner confined in lieu of payment will become eligible for parole consideration after having served 6 months of the sentence to confinement in lieu of payment of the fine, and annually thereafter.

(d) Prisoners reconfined after revocation of parole may not ordinarily be considered again for parole until completing one year in reconfined status unless the brig commanding officer recommends earlier consideration.

(2) Preliminary Parole Consideration Procedures. Prior to becoming eligible for parole consideration, each prisoner is accorded the opportunity to request parole consideration by the parole officer within 90 days of the date of eligibility. The parole officer will provide the prisoner with the necessary assistance to develop a satisfactory tentative parole plan. Prisoners who do not desire parole when eligible, or prisoners whose previous requests for parole were disapproved, may request consideration prior to their next annual eligibility date with the approval of the commanding officer of the brig.

(3) Clemency and Parole Board Action.

(a) Requests for parole will be considered by a local clemency and parole board which is established within the brig. Following the local board's consideration and notwithstanding their recommendation, requests are forwarded to the Naval Clemency and Parole Board to arrive not less than 30 days prior to the prisoner's parole eligibility date. Requests may be considered as much as 120 days in advance of the eligibility date when that action will permit concurrent consideration of parole with annual Prisoner Evaluation Reports for clemency prepared in accordance with the provisions of Article 1.F.6 d.(5) of this Manual. In all cases the local board will forward the request along with a Court-Martial Progress Report. The recommendation of the local clemency and parole board will be endorsed by the commanding officer of the brig with such recommendation for approval or disapproval as he or she deems appropriate.

(b) Authority to approve or disapprove parole rests with the Naval Clemency and Parole Board.

(c) All parole determinations (favorable and unfavorable) will be published by the Naval Clemency and Parole Board

(d) Approval of parole is conditioned upon completion of a parole plan considered to be satisfactory by the commanding officer of the brig and acceptable to the probation officer.

- (e) The Naval Clemency and Parole Board will provide prisoners denied parole with written notification of the reasons for denial.
 - (f) The prisoner may file a written appeal of the Naval Clemency and Parole Board's decision to the Director, Navy Council of Review Boards.
- (4) Completion of Parole Plan. Prior to release of a prisoner on parole, the commanding officer of the brig will:
- (a) Request the probation officer to establish the validity of the residence arrangement, employment, and other elements of the tentative parole plan.
 - (b) Send a letter to the prospective employer requesting the execution of a Tender of Employment, and upon receipt thereof, provide a copy to the probation officer.
- (5) Employment Requirements. Unless a waiver is granted for justifiable reasons, no prisoner will be released on parole until satisfactory evidence has been furnished that he or she will be engaged in a reputable business or occupation. If every effort to obtain employment has been made without success, a waiver of employment may be granted for good and sufficient reasons.
- (6) Supervision of Parolees.
- (a) Normally, all official communication to a parolee should be addressed to or through the Federal probation officer supervising the parolee.
 - (b) The probation officer may authorize temporary leave for travel outside the established parole limits, not to exceed 20 days and may also extend or further restrict the parole limits as required for the adjustment and supervision of the parolee. Authority for travel which will take the parolee outside the continental limits of the United States, or the territory to which paroled, will not be given without prior approval of the Commandant.
- (7) Clemency Consideration. Parolees are eligible for and will continue to receive clemency consideration on their annual review dates. The Federal probation officer's report of the parolee's adjustment will be considered in these instances. This information will be included in the recommendation submitted to the Commandant for consideration.

1.F.7. The Release Phase

1.F.7.a. Final Release

The proper authority to release a member from confinement in a military correctional facility is the commanding officer of the correctional facility. Once a prisoner is confined, the prisoner passes beyond the control and power of release of the officer who initially ordered the confinement. Accordingly, it is important that Coast Guard commands utilizing a Naval brig be aware of the prisoner release authority vested in that facility's commanding officer by the Chief of Naval Personnel. The commanding officer of a Naval brig is authorized to effect the final release of a prisoner:

- (1) When requested by the prisoner's commanding officer or convening authority.
- (2) When ordered by a Coast Guard Military Magistrate as provided for in reference (b), Military Justice Manual, COMDTINST M5810.1 (series).
- (3) When the reason for confinement no longer exists.
- (4) For transfer to another brig, or to a medical facility when directed by proper authority.
- (5) Upon expiration of the term of confinement adjusted to reflect clemency, remission, or other action and further reduced by good conduct time earned.
- (6) When pretrial confinement exceeds 30 days and the continued confinement has not been approved in writing by the officer exercising general court-martial jurisdiction over the command which ordered the pretrial confinement.

1.F.7.b. Release Order

An Inmate's Release Order, Form DD-2718, shall be prepared, signed by the prisoner's commanding officer or his or her designee, and presented to the brig to request the final release of a prisoner. Upon release, this form will constitute the brig's receipt for the prisoner.

1.F.7.c. Temporary Absence

Upon written request of the prisoner's commanding officer or convening authority, Coast Guard prisoners will be released by brigs for periods of temporary absence without presentation of a Prisoner's Release Order for such purposes as investigation, trial, and medical or psychiatric evaluation. Similarly, a new Confinement Order is not required to effect return of a prisoner from temporary absence but a written receipt is required. The Receipt for Inmate or Detained Person, Form DD-2708, shall be used for this purpose.

1.F.7.d. Release Date

- (1) Computation and Request for Release. The release date is the day confinement is completed. It is arrived at by reducing the full-term of all sentences to confinement by proper credits and adjustments as described in Article 1.F.6.c. of this Manual. Commanding officers should request the release of prisoners only during normal working hours except under exigent circumstances. The purpose for this is to permit the brig to ensure that the individual receives adequate instruction and consideration for proper return to duty and to facilitate travel.
- (2) Release Dates on Weekend or Holidays. Similarly, except in genuine emergencies, brig will effect the release of prisoners whose release dates fall on a Saturday, Sunday, or national holiday on the workday immediately preceding such non-workday(s). Where exceptions are necessary, telephone liaison with the commanding officer of the brig is appropriate.
- (3) Retention Beyond Release Date. A prisoner shall not be held in confinement beyond his or her release date in order to complete administrative actions, to await transportation, to complete payment of forfeiture of pay or because of indebtedness to the Government.

1.F.7.e. Return of Personal Effects

Upon release or transfer the brig will return a prisoner's valuables and other personal effects to the released prisoner or the escort(s), as appropriate.

1.F.8. Confinement in Federal Institutions

1.F.8.a. Transfer to a Federal Institution

Sentenced prisoners may upon the completion of appellate review and provided the remaining unexecuted portions of the sentence include both an unsuspended punitive discharge and confinement of not less than 18 months be transferred to a Federal penal institution upon execution of the discharge. Action to transfer prisoners to a Federal penal or correctional institution normally will be initiated by the Department of the Navy, Commander, Navy Personnel Command (PERS-84) via the Department of the Army. Long-term confinement sentences will be served at U. S. Naval Brig, (Charleston or Miramar), or the Disciplinary Barracks, Ft. Leavenworth, KS by enlisted members and at the Disciplinary Barracks, Ft. Leavenworth, KS by officers.

1.F.8.b. Preparation of Discharge

Prisoners transferred to Federal institutions will be discharged from the Coast Guard in accordance with the provisions of the court-martial sentence. When Commander (CG

PSCEPM) orders the punitive discharge sentence executed (or Commander (CG PSCOPM) for officer prisoners), the command to which the prisoner has been administratively attached shall prepare the discharge to become effective on the date provided by the Commanding Officer/Commandant of the Navy or Army confinement facility. The senior guard or escort will deliver the discharge certificate to the Commanding Officer or Commandant of the Navy or Army confinement facility. At that time the prisoner becomes the responsibility of the Department of the Navy or Army for confinement purposes, but the Coast Guard remains administratively responsible for the prisoner until final release from confinement.

1.F.8.c. Final Court-Martial Promulgating Order

The Commandant will furnish certified copies of the final court-martial promulgating order, to the prisoner's commanding officer.

1.F.9. Local Restraint and Detention of Military Personnel

1.F.9.a. Difference between Confinement and Restraint

There is an important distinction to be made between confinement as used in this section and short-term, emergency restraint or detention. Coast Guard military personnel may be confined only pursuant either to a convening authority's approval of an adjudged court-martial sentence or when ordered into lawful pretrial confinement. In either of these cases, confinement will be carried out in Naval brigs or correctional centers of the other Armed Forces. (See Articles 1.F.3. and 1.F.4. of this Manual.)

1.F.9.b. Exigent Situations

Commanding officers nevertheless retain authority to order the local, temporary physical restraint or detention of military members in exigent situations. Exigent situations would normally include those in which a member's immediate physical restraint is essential to protect the individual, others, or property from serious harm or injury. Commanding officers may also detain persons accused or suspected of serious offenses to ensure their presence until transportation to a designated Naval brig can be arranged. Persons ordered into physical restraint, as provided for in this paragraph, shall be restrained in a space providing adequate habitability features, and provided with necessary health and comfort items. In the unusual circumstance in which a command envisions the compelling need to restrain a person locally for a period exceeding 48 hours, a specific message request for extension will be transmitted to Commandant (CG-122) stating the circumstances and justification for extension. Exceptions are granted only under grave circumstances.

1.F.10. Correctional Custody

1.F.10.a. General

It is Coast Guard policy that correctional custody as defined in Article 1.F.2. of this Manual constitutes a malleable tool of discipline by which commanding officers may impose upon minor or first-time offenders a balanced program of punitive measures, directive counseling, restraining, and work assignments which collectively are calculated to induce a modification in attitude and behavior. Wholly punitive elements of correctional custody including actual physical restraint, extra duties, and hard labor should be imposed only to the extent that these measures are calculated to enhance the rehabilitative aims of the punishment. While the exact combination of punitive and rehabilitative measures imposed is flexible, correctional custody must include both a punitive restriction of the offender's liberty and a program of rehabilitative counseling or restraining intended to correct the behavior or attitude defect which caused the offense. This unique combination distinguishes correctional custody from other non-judicial punishments and renders correctional custody similar in several respects to probation programs administered under civilian court systems. In both cases, a supervised offender is called upon personally to make the major rehabilitative effort while being involuntarily restricted to an environment intended to enhance that effort. Administration of correctional custody requires the availability of two command representatives: a supervisor (MAA) to maintain custody and supervise work details, hard labor or extra duties; and a counselor to guide and monitor the rehabilitative effort. The officer imposing correctional custody will monitor its administration through these designated command representatives. The administration of correctional custody imposes an acknowledged burden on the offender's command. Offenders not considered likely to benefit from that effort should not be awarded correctional custody.

1.F.10.b. Jurisdiction

The jurisdictional authority to impose correctional custody is no different than that governing the imposition of any other non-judicial punishment under Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Correctional custody will, however, be imposed only upon enlisted members in pay grade E-3 or below and subject to the limitations contained in Article 15(b) of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). It bears repeating that correctional custody is a non-judicial punishment option available to the officer imposing punishment. If factors such as unit size, operational requirements or unavailability of qualified supervisory personnel will preclude administration of correctional custody in the manner prescribed by this Article, the punishment should not be imposed. When circumstances such as unit size or prior involvement on the part of

the officer having immediate Article 15 authority under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), over an offender prompt his/her referral of the charges for disposition to the next superior in the chain of command, the provisions of reference (b), Military Justice Manual, COMDTINST M5810.1 (series), will apply.

1.F.10.c. Guidelines for the Imposition and Administration of Correctional Custody

- (1) Command Responsibility. Correctional custody (except when imposed upon recruit trainees) should be administered under conditions permitting the individual to continue his or her career field related duties while being subjected to intensive counseling and guidance, both on the job and after working hours. The total resources available to the command must be brought to bear in the effort to counsel and guide the offender in the discovery and correction of the behavior defects leading to the offense.
- (2) Correctional Custody Administered Similar to Parole. When deemed warranted by the situation, the officer imposing correctional custody may relax the conditions of restraint to a sufficient degree to permit the offender's duty hour or non-duty hour participation in a specific program of either military or civilian rehabilitation or retraining, excepting those programs prohibited by Article 1.F.10.c.(3) below. Examples of authorized programs might include: local alcohol or drug treatment or education programs, driver retraining programs, special military drill and motivational counseling, or group therapy programs. As a specific example, participation in meetings of a local chapter of Alcoholics Anonymous may be beneficial to offenders whose offenses have been alcohol-related and who desire to confront their problem. It must be stressed, however, that these various avenues to rehabilitation are just that and should not in themselves be cast in the light of punishment. Since correctional custody comprises both punitive and rehabilitative measures, a member ordered to participate in a rehabilitative program, on or off unit, as a part of correctional custody will nonetheless also be subjected to certain punitive measures such as restriction, extra duties, hard labor, or even physical segregation.
- (3) Prohibited Programs. Under no circumstances will conditions imposed as elements of correctional custody order an offender's participation in any formal military rehabilitation program (such as the Alcohol Rehabilitation Program) requiring medical diagnosis and/or allocation of a quota for entry.
- (4) Conditions To Be Defined Upon Imposition of Correctional Custody. It is required that the officer imposing correctional custody define the specific nature of the punitive and rehabilitative measures being imposed at the time the punishment is awarded.

(5) Restraint. Correctional custody is not to be awarded as a substitute for confinement, nor will it be administered in a manner amounting to confinement (See Article 1.F.2. of this Manual.) Custody may be effected by the presence of a designated supervisor. Note the distinction between supervisors and counselors: Supervisors for persons in correctional custody are master-at-arms (MAA) oriented personnel frequently assigned on a rotating watch basis. The primary requirement is for responsible continuity of supervision of custody and work. Counselors by contrast are responsible persons assigned (as a collateral duty) to guide an offender's rehabilitative course on an interpersonal level. A single counselor may be assigned to guide the rehabilitation of more than one person in correctional custody providing the interpersonal aspect of counseling is maintained. If the circumstances are sufficiently serious to warrant the offender's total physical isolation or deprivation of freedom, the charges might more appropriately be referred to trial by court-martial. It is also important not to confuse correctional custody with detention (See Article 1.F.9. of this Manual. Under no circumstances will correctional custody be imposed as physical incarceration in a detention cell. To the contrary, the degree of restraint imposed from case to case should be flexible, reflecting the circumstances in the case and representing only that degree appropriate to achieve the rehabilitative aims of the punishment. Correctional custody will not be imposed as a subterfuge to effect pretrial confinement for safekeeping. When segregation is imposed, the commanding officer may designate a space for the purpose which meets minimum standards of health, safety, and control including normal heating, lighting, ventilation, ready access to adequate drinking water and head facilities. A medical officer will inspect the space and certify in writing that it meets minimum standards.

1.F.10.d. Administration of the Punitive Aspects of Correctional Custody

(1) General Considerations. Correctional custody will normally be served within the command or under the supervision of the officer imposing the punishment. There are two exceptions to this rule. One major exception to this rule applies to those relatively few Coast Guard commands enjoying access to centralized or institutional correctional custody services of a DoD service by virtue of geographical location and/or inter-Service agreement. The Navy authorizes commanding officers of major Navy shore commands to utilize their own resources to provide local correctional custody segregation centers operated on a shared support basis for Navy commands in the proximity. See Article 1.F.10.d. of this Manual for specific guidance. Institutionalized correctional custody services also may be available at major Army or Air Force installations. In most cases, these will be locally established and supported. When available, Army or Air Force correctional custody facilities may be utilized provided the proposed place of segregation will preclude co-mingling of persons in correctional custody and court-martial prisoners, either sentenced prisoners or persons awaiting trial. The option of offering space-available support to neighboring Coast Guard commands is solely within the discretion of the installation's commander.

Navy and Marine Corps brigs will not accept persons serving correctional custody. Even when correctional custody is administered in a DoD centralized facility, the officer imposing the punishment retains responsibility for monitoring the offender's rehabilitation. Upon departure of a homeported vessel for other than local operations, individuals serving correctional custody at a local DoD facility must be returned to their ship.

NOTE: Special provisions apply to the administration of correctional custody imposed upon recruit trainees only at Training Center Cape May. (See Article 1.F.10.f. of this Manual.)

- (2) Criteria for Selecting Place for Administration of Correctional Custody Imposed Upon Nonrecruit Personnel. The proper administration of correctional custody on board the imposing unit presupposes the availability:
 - (a) of mature officers or petty officers to act as correctional custody counselors to guide and monitor the rehabilitative effort,
 - (b) of mature petty officers to act as supervisors to effect custody and ensure compliance with the terms of the punishment, and
 - (c) of space in which to administer the punishment.
- (3) When Correctional Custody is not a Viable Option. In the absence of these resources, correctional custody is not a viable non-judicial punishment option. Many Coast Guard units, both shore units and afloat, lack the space for on board administration of correctional custody leaving either of two possible options to be explored: obtaining support from the Navy (or other DoD service) or from a larger Coast Guard command. These options will be discussed in the next subparagraphs.
 - (a) Administration in Local Centralized Facilities of the Navy. The Navy authorizes commanding officers of its shore commands to establish and operate centralized correctional custody units on a locally funded and staffed basis. The Secretary of the Navy has directed that these spaces adhere to prescribed habitability and supervision standards which shall not include special security features. These standards are the equivalent to those prescribed for Coast Guard commands in Article 1.F.10.d.(2) of this Manual. Navy policy permits commanding officers operating centralized correctional custody units to extend participation to tenant and other local commands, including floating units homeported at or in the proximity and to assess participating commands for staff augmentation personnel and/or funds to share the burden of operation. Acceptance or refusal of Coast Guard offenders by such local Navy units is the sole prerogative of the Navy commanding officer. Commanding officers of Coast Guard commands located in

close proximity to major Naval shore commands may, upon authorization of the Coast Guard district commander, seek participatory space-available use of Naval correctional custody units either on the basis of a local agreement or case-by-case. Any staffing assessment levied by the Navy for this participation will be borne by the command involved subject to concurrence of the district commander (or commanding officer of a Headquarters unit) out of existing resource levels. Staff augmentation of Naval correctional custody centers will be provided only for periods during which Coast Guard personnel remain in the physical custody of the center. Augmentation is authorized only for U. S. Navy local correctional custody units. Local agreements to utilize correctional custody units of the Navy or other Services will be strictly local in scope. Exhibit 1.F.2 is a table of U. S. Navy Correctional Custody Units. Persons ordered into correctional custody at any DoD facility will be placed on temporary duty for disciplinary purposes. Any travel costs will be borne by the imposing command or district, as applicable. To the end that the rehabilitative objectives of correctional custody are achieved, commanding officers will monitor the progress of persons in correctional custody even when the punishment is administered in a correctional custody center of another Armed Force. This may best be done by designation of a correctional custody counselor who will visit the offender not less than weekly in the same manner as prescribed for persons in confinement (See Article 1.F.6. of this Manual)

- (b) Administration of Correctional Custody on Board Coast Guard Commands. In the vast majority of cases, Coast Guard commanding officers will be obliged to rely on Coast Guard resources to administer correctional custody. In assessing the capability of his or her resources and space, the commanding officer should remain aware that both the punitive and rehabilitative aspects of the punishment must be provided. With respect to punitive aspects of correctional custody, the officer imposing punishment should not permit the rehabilitative emphasis and objective of correctional custody to eclipse its purpose as punishment. Guidance is prescribed by the provisions of this subparagraph.

[1] Supervision. A supervisor will be designated to maintain custody of a person in correctional custody and to enhance the offender's adherence to all prescribed terms of the punishment. A supervisor will be assigned during non-duty hours, during any period in which the offender is serving the punishment in a special space or in segregation, and at any other time when the offender is not otherwise under continual, adequate supervision. A single supervisor may be designated to effect custody of several persons while in correctional custody (whereas correctional custody counselors will be assigned on a one-to-one basis). The presence of a supervisor is not required when adequate supervision is assured by virtue of assignment to a supervised work detail, training or counseling. Correctional custody supervisors

normally will be assigned through the daily unit watch list and will report to the senior officer, officer of the day or chief master at arms, as appropriate. Commanding officers may deem it advisable to segregate persons in correctional custody from their peers through separate berthing and messing arrangements. This may ordinarily be done by designating a separate barracks section in which the custody will be effected by the presence of the supervisor. The selection of mature, well qualified supervisors is therefore essential. Supervisors will not be armed but should wear a duty belt, brassard, or similar indication of official capacity. Whenever possible, correctional custody supervisors will be first class or chief petty officers but in every case must be senior in grade to any person in correctional custody. The supervisor will require compliance with local regulations governing persons serving correctional custody. The officer of the day or senior duty officer, as appropriate, shall make regular and unscheduled inspections of the space. Restraint of persons in correctional custody should not be maintained by force. The command's responsibility for preventing escape is limited to the designation of responsible fulltime supervision. Where several Coast Guard commands are located in the same geographical area (such as commonly may be the case at support centers, large groups and air bases) the senior commanding officer may designate a single facility for multi-command use on a shared support basis and centralize the custody supervisory function. Shared support means that the commanding officer of the parent or senior command may assess participating commands to provide qualified personnel for supervisor watch list augmentation on an as needed basis. Upon departure of a homeported vessel for other than local operations, individuals serving correctional custody at the local centralized facility must be returned to their ship. All support for consolidated administration of correctional custody, however, will derive from existing workforce and funding levels. Persons serving correctional custody in a consolidated facility operated by a different command will be placed in a TDY status.

- [2] Physical Facilities. Correctional custody in the very least implies restriction. When the situation warrants segregation of persons in correctional custody from other personnel of the unit during non-duty hours (or in the case of recruit trainees, during duty hours as well), the spaces designated for this purpose should be equivalent to those provided to other personnel of like pay grade on board the unit. The following guidelines apply: Under no circumstances will persons in correctional custody be incarcerated in a detention cell, whether on a full-time or part-time basis. The designation of spaces for segregation of personnel in correctional custody is a function of command but not extending to authority to construct places of confinement whether improvised or comprising permanent design features of the building. Correctional custody segregation should be imposed primarily because it is

considered essential to effective administration of the rehabilitation program. Custody will not be accomplished in spaces employing special security features such as locked doors, wire screens, body restraints, guard dogs, or armed guards. Spaces so designated shall meet minimum standards of health, safety, and control including normal heating, lighting, ventilation, and ready access to adequate drinking water and head facilities. A medical officer will inspect the space and certify in writing that it meets these minimum standards. When segregation facilities are created by designating a block of rooms or wing of a barracks building, security usually may be provided by controlled access through assignment of a supervisor (master at arms).

Under no circumstances will these spaces be employed for the confinement of persons awaiting trial by or sentenced to confinement pursuant to trial by courtmartial.

(c) Administration of the Punitive Aspects of Correctional Custody on Board Ship.

There is no bar to administration of correctional custody when underway. In fact, a major floating unit underway may well provide a most suitable environment for administration of this non-judicial punishment by virtue of the 24-hour availability of officers and senior petty officers qualified to serve as correctional custody counselors. It is recognized that restriction to limits has little meaning on board a ship underway. Commanding officers may nevertheless withhold privileges (such as the freedom to move about the ship, attendance at movies or happy hours, or berthing and messing with shipmates) and impose a specific regimen of extra duty, fatigue duty, hard labor, or some combination thereof. Inasmuch as persons in correctional custody remain in a duty status, they may be required to perform duty excepting that involving watchstanding, the bearing of arms or supervision of others. Physical segregation may be imposed, provided the ship has a space suitable for the purpose meeting humane standards for heat, light, ventilation, and physical amenities. This authority does not extend to imposition of solitary, full-time confinement in a locked space. Spaces employed should be neither less habitable nor substantially better than those provided all other persons in like pay grade on board the ship. Some older Coast Guard ships have spaces originally designed or identified as brigs. None of these spaces meet contemporary standards for humane incarceration and will not be employed to segregate persons in correctional custody. Prior to segregating a person in correctional custody aboard ship, the commanding officer will obtain the written certification from the embarked medical doctor to the effect that the space concerned meets acceptable habitability standards. If no medical doctor is embarked, the executive officer (as ship's medical officer) shall so certify. Segregation of persons undergoing correctional custody on board ship in no way diminishes the requirement for complying with the requirements to administer a rehabilitative program and to specify work or retraining assignments. In every instance, a mature member of the command will be assigned as correctional custody counselor. The ship's chief master at arms or designee may serve as

supervisor consistent with the guidance contained in Article 1.F.10.d of this Manual. Participation of persons undergoing correctional custody in unit drills and evolutions shall be determined by the commanding officer on the basis of recommendations made by the offender's counselor and with due regard for the specific duties to which the offender is tasked by the Watch, Quarter, and Station Bill.

1.F.10.d. Administration of the Correctional Aspects of Correctional Custody

The requirements for proper administration of the correctional (rehabilitative) aspects of the punishment are the same regardless of the place chosen for administration of the punitive measures. Accordingly, the provisions of this subparagraph apply equally whether the punishment is administered at a facility of another Armed Force, on board a Coast Guard shore unit, or afloat. It is a responsibility of command to monitor the offender's progress while in correctional custody through reports from the designated counselor.

- (1) Correctional Custody Counselor. Each offender will be assigned a correctional custody counselor, who may be assigned on a collateral duty basis. Mature petty officers in pay grades E-6 and above, as well as commissioned officers, may be appointed as counselors. The assigned counselor should interview the person, observe and keep an informal record of progress, and make recommendations to the commanding officer regarding eventual disposition. The counselor will be accorded the assistance of any other members of the command if their specialized assistance is needed in correcting the offender's behavior. Should the counselor conclude that a special training or a rehabilitation program external to the command is warranted, an appropriate recommendation shall be made to the commanding officer. (Every effort should be made to obtain these services if warranted.)
- (2) Work Assignments. A suitable work assignment will be selected in the form of continuation of normal duties, a temporary assignment or both. Work assignments may take the form of training or military duty but if the latter, may not include duty as a watchstander, the bearing of arms or supervision of others. The counselor should ensure that any work assignments which amount in fact to extra duties or hard labor are ordered only to the extent specifically imposed by the commanding officer at the time the punishment was awarded.
- (3) After-Hours Activities. A schedule of after-hours activities shall be established for persons in correctional custody. To the extent practical, these activities shall include assigned study, appropriate recreation, physical training, and participation in attitude building training and discussions. All activities selected should contribute toward the correctional objective.

1.F.10.f. Administration of Correctional Custody Imposed Upon Recruit Trainees at Training Centers

It should be borne in mind that correctional custody is an authorized but optional nonjudicial punishment which may be imposed upon military members charged with violations of the UCMJ pursuant to proceedings under Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), at captain's mast. As non-judicial punishment, correctional custody may be imposed only pursuant to NJP proceedings at mast, regardless of the fact that the accused member may not have completed recruit training. In short this paragraph concerns only those recruit offenders who are brought to mast for proceedings under Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). The case of recruit offenders against the UCMJ is somewhat unique, the rehabilitative task of non-judicial punishment being primarily orienting the offender to the Coast Guard and to the responsibilities inherent in military service, rather than correction of established military behavior traits. This concept is consistent with the overall philosophy of recruit training preferably accomplished as a valuable adjunct to training conducted in seclusion from peers and normal activities. Accordingly, it is appropriate to modify the correctional custody environment prescribed for non-recruit offenders to one which enhances intensive counseling and training on a full-time basis. In practical terms this contrasts with the policy for non-recruits who are considered to remain in a duty status while undergoing command custody. Commanding officer, Training Center Cape May is authorized to establish and operate formal correctional custody within the existing physical plant to administer the punishment when imposed upon recruit personnel. Staff supervisory, counseling, and training personnel will be designated members from the training center permanent party. Recurrent operating expenses incident to this function are elements of the Operating Expense Budget. Standards pertaining to supervision, physical space, habitability, security feature limitations, and mandatory rehabilitation program are the full equivalent of those prescribed for non-recruit personnel meaning that the spaces so designed will be no less habitable than the equivalent spaces provided (non-offender) recruit personnel. Most important, custody of recruits undergoing the punishment will be effected by the presence of the supervisory staff and not by confinement in locked cells or secure spaces. Neither corporal punishment nor the use of hand or leg restraining devices are authorized. A specialized correctional custody program is a mission within the capabilities of the permanent training staff. One mature member of the training staff shall be assigned to act as correctional custody counselor for each recruit upon whom the punishment is imposed, with duties as prescribed in Article 1.F.10.e. of this Manual. Under no circumstances will offenders awaiting trial (whether recruit or non-recruit) or prisoners serving court martial sentences to confinement be confined in correctional custody spaces authorized by this Article.

Exhibit 1.F.1. Confinement Designation Chart

U. S. NAVAL BRIGS

Sentence Category Disposition of Prisoner: Brig:	Length of Sentence:			
	90-180 Days		181 Days - One Year	
	Duty	Discharge	Duty	Discharge
Charleston	X	X	/3	/3
Corpus Christi	X	X	/6	/6
Great Lakes	X	X	X	X
Guam *	/2, 5	/2, 5	/5	/5
Guantanamo Bay *	/1, 3	/1, 3	/1, 3	/1, 3
Jacksonville	X	X	/3	/3
New London	/7	/7	/3	/3
Newport	X	X	/3	/3
Norfolk * *	X	X	X	X
Pearl Harbor *	X	X	/5	/5
Pensacola	X	X	/6	/6
Rota	/3	/3	/3	/3
San Diego	X	X	X	X
Seattle	X	X	/5	/5
Yokosuka	X	/2, 5	/5	/5
Camp Lejune	(Transfer personnel in accordance with joint-Service Agreement)			
Camp Pendleton				
Quantico				

Legend:

- All Brig's may accept prisoners for sentences for less than 90 days.
- * Indicates facilities for females; normally only pretrial at Guam and Guantanamo.
- ** Indicates long term facility for all sentences over one year.
- X Indicates prisoners are accepted in the sentence category.
- Numbers Indicate brig's to which prisoners originating in that geographic area are to be transferred.

/1 - Norfolk	/5	- Treasure Island
/2 - Pearl Harbor	/6	- Great Lakes

/3 – Philadelphia /7 - Newport
/4 - San Diego

Exhibit 1.F.2. U. S. Navy Correctional Custody Units (CCUs)

This exhibit provides the short title, mailing address, and commercial telephone number (unless indicated otherwise) for all U. S. Navy CCU's. If you need assistance with the confinement of a Coast Guard member, contact Commandant (CG-122).

Short Title	Mailing Address	Telephone
CCU NAS Jacksonville	Commanding Officer Naval Brig Box 64 Naval Air Station Jacksonville, FL 32212-0064	(904) 542-3314
NAVCONBRIG Charleston	Commanding Officer Naval Consolidated Brig 1050 Remount Rd Bldg. 3107 Charleston, SC 29406-3515	(843) 743-0306
Great Lakes Brig	Commanding Officer Navy Brig 2706 Sheridan Rd Bldg 914 Great Lakes, IL 60088-5130	(847) 688-2157
Guam Detention Facility	Senior Chief Petty Officer in Charge Naval Station Detention Facility Guam PSC 455 Box 199 FPO AP 96540-2900	011-671-339-2927
Guantanamo Bay PCF	Chief Petty Officer in Charge Naval Station Pretrial Confinement Facility GTMO PSC 1005 Box 98 FPO AE 09593-0098	011-53-99-2228
NAVCONBRIG Miramar	Commanding Officer Naval Consolidated Brig Miramar Suite 1 San Diego, CA 92145-5499	(619) 577-7000

CCU Norfolk	Commanding Officer Naval Brig 8251 Ingersill Street Norfolk, VA 23511-2699	(757) 444-5413
CCU Pearl Harbor	Commanding Officer Naval Brig Ford Island Box 56 Pearl Harbor, HI 96860-6050	(808) 472-9410
CCU Pensacola	Officer in Charge Naval Brig/CCU 541 John H Tower Rd Pensacola, FL 32508-5315	(850) 45`620
CCU Puget Sound	Commanding Officer Naval Submarine Base Bangor 2020 Guardfish St Silverdale, WA 98315-5000	(360) 315-4402
CCU Yokosuka	Officer in Charge U. S. Naval Brig PSC 473 Box 9 FPO AP 96349-1101	011-81-0468-21-1911 Ext. 7015

Exhibit 1.F.3. Qualifying Military Offenses under 10 U.S.C. § 1565

Court Martial Conviction. The findings of a general court-martial (10 U.S.C. § 818) or special court-martial (10 U.S.C. § 819) at the time of action of the court-martial convening authority pursuant to 10 U.S.C. § 860.

Offenses:	UCMJ Article	Title 10 Section
Murder	118	918
Voluntary Manslaughter	119	919
Rape	120	920
Carnal Knowledge	120	920
Forcible Sodomy	125	925
Sodomy With a Child	125	925
Aggravated Assault (with a dangerous weapon or other means or force likely to produce death or grievous bodily harm)	128	928
Aggravated Assault (in which grievous bodily harm was intentionally inflicted)	128	928
Indecent Assault	134	934
Indecent Acts With Another	134	934
Indecent Acts With a Child	134	934
Indecent Language to a Child	134	934
Pandering (By compelling or by arranging or by receiving consideration for arranging)	134	934
Prostitution Involving a Minor	134	934
Kidnapping	134	934
Robbery	122	922
Burglary	129	929
Housebreaking	130	930
Maiming	124	924
Arson	126	926
Assault With Intent to Commit Murder	134	934
Assault With Intent to Commit Rape	134	934
Assault With Intent to Commit Voluntary Manslaughter	134	934
Assault With Intent to Commit Robbery	134	934
Assault With Intent to Commit Sodomy	134	934
Assault With Intent to Commit Arson	134	934

Assault With Intent to Commit Burglary	134	934
Assault With Intent to Commit Housebreaking	134	934
Solicitation of Another To Commit a Qualifying Offense	134	934

1.G. Shore Patrol and Escort of Prisoners

1.G.1. Joint Control by Military Police and Shore Patrol

1.G.1.a. Agreement among the Services

By agreement between the Secretaries having jurisdiction over the military services, members of Navy, Coast Guard, and Marine Shore Patrols, Military Police, Air Police, and commissioned, noncommissioned, and petty officers of the Armed Services are authorized and directed to take corrective measures, including arrest if necessary, in the case of any member of the Armed Forces committing a breach of the peace, disorderly conduct, or an offense which reflects discredit upon the Service. Personnel arrested shall be returned to the jurisdiction of their respective Service as soon as practical.

1.G.1.b. Use of Judgment

Those exercising authority hereunder are enjoined to do so with judgment and tact. Particularly, arrest should not be resorted to when corrective measures will suffice.

1.G.1.c. Details for Coordination

The details for effecting this coordination shall be worked out jointly by the military and naval authorities in the various areas concerned. All commands are instructed to ensure that personnel are familiar with the provisions of this agreement.

1.G.2. Unit Shore Patrol

1.G.2.a. Definition

A shore patrol is a force of petty officers landed during liberty hours to maintain good order and discipline among personnel ashore, to render appropriate assistance to members of the Armed Forces, and to report to proper authority conditions or practices observed ashore which appear prejudicial to the welfare of personnel.

1.G.2.b. Guidance

A shore patrol shall be landed at the discretion of the senior officer present afloat, subject to any instructions issued by the senior military commander in the area. In general, a shore patrol should be landed whenever a large number of personnel are granted liberty in a foreign port or in a small United States port where there are limited civil police. The shore patrol should be landed at or prior to the time the majority of the liberty party is permitted ashore, and should be withdrawn after the expiration of regular liberty or the period of maximum activity.

1.G.2.c. Composition

The shore patrol should be composed of one mature petty officer for every 20 personnel, or fraction thereof, in the liberty party. A shore patrol officer may be designated at the discretion of the commanding officer. The uniform for shore patrol enlisted personnel shall be the uniform of the day, shore patrol brassard, web belt, first-aid pack, nightstick, and whistle. Officers shall wear the uniform of the day and shore patrol brassard.

1.G.2.d. Assignments

The shore patrol shall report to the senior shore patrol officer, Armed Forces Police Department Duty Officer, military or air police officer present, and shall be assigned in accordance with his or her instructions. In the event that there is no permanent shore patrol, military or air police, or Armed Forces Police Detachment Duty Officer, in the area, the commanding officer shall contact the civil law enforcement authorities and assign patrols after receiving their advice.

1.G.2.e. Jurisdiction

The shore patrol has jurisdiction over Coast Guard, Navy, Marine Corps, Army, and Air Force personnel unless otherwise prescribed by competent authority. The shore patrol has no jurisdiction over civilians and no authority to arrest or assist in the arrest of anyone not in the United States military or naval service. A person in the uniform of an Armed Service may be presumed to be in that Service; however, if he or she denies so being, the civil police shall be asked to detain the person until his or her status can be determined. The shore patrol shall cooperate fully with local, State, and Federal civil authorities in cases involving military personnel in infractions of civil laws and local ordinances. However, it has no authority to release to civil authority any person in the service placed under arrest by the shore patrol. The release of personnel to civil authority in all cases shall be effected in accordance with the provisions of reference (b), Military Justice Manual, COMDTINST M5810.1 (series). The shore patrol shall not enter private establishments, including dwellings and hotel rooms, in the performance of official duties unless accompanied by civil authorities who are authorized to make such entries, except under unusual circumstances when specifically requested by the owner or lessee or in an

emergency involving the safety of life or the good of the community, and then only when Service personnel may be involved.

1.G.3. General Instructions to Shore Patrol

1.G.3.a. Military Conduct and Etiquette

When on duty, members of the shore patrol are representatives of the Commandant and the commanding officer insofar as their appearance before the public is concerned. They shall be smart in appearance and adhere to all regulations and all customs of military etiquette and conduct.

1.G.3.b. Use of Alcohol

Members of the shore patrol are forbidden to partake of any intoxicating liquor, including beer and wine, at any time while on duty.

1.G.3.c. Liberty Parties

The shore patrol must always be mindful that liberty parties ashore are on liberty in the fullest sense of the word. Any demands upon liberty time which become necessary in the performance of shore patrol duties should be made courteously and promptly. Care should be used not to provoke arguments which may lead to subsequent trouble.

1.G.3.d. Purpose

The purpose of the shore patrol is as much to assist members on liberty as it is to apprehend offenders. Members should not be arrested for minor violations of regulations. In cases where a warning will suffice, the offender will be given such warning and it shall not be given in the form of a reprimand. The patrol should always strive to anticipate events and prevent members from becoming involved in situations which result in trouble. The shore patrol shall take the indicated action before arrest becomes necessary. When necessary, arrest should be made quickly and quietly and the offender should be removed at once to some spot away from the public attention. When making an arrest, the patrol should place a hand on the arm or shoulder of the offender and say in a clear voice:

“You are under arrest.”

1.G.3.e. Use of Nightstick

The patrol shall not mistreat or abuse members in its charge. The nightstick shall be used only for self protection or when the offender cannot be subdued otherwise, and then,

except in unusual circumstances, it shall be used to strike only the back of the legs, arms, or shoulders.

1.G.3.f. Confiscation of Identification Cards

Whenever identification cards are taken from personnel arrested by the patrol, they shall not be returned to the offender but shall be returned to the offender's commanding officer, with an arrest report if such is indicated.

1.G.3.g. Search of Prisoners

When necessary for the shore patrol to search a prisoner, two patrolmen shall be present, one of whom should be a chief petty officer or a commissioned officer. A statement listing the prisoner's effects, including the amount of cash, shall be made and signed by both parties.

1.G.4. Transport of Prisoners

1.G.4.a. General

(1) Definition of Prisoner. The term "prisoner," as used herein and in Article 1.G.5. of this Manual, will be conveyed to mean either persons who are currently subject to a valid confinement order, or persons being transported to a military facility after surrender or apprehension as suspects in alleged violations of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Persons are considered "prisoners" for the purpose of this section only if transported under escort. Situations involving transport of military members as prisoners under escort generally fall under one of two categories:

- (a) transport of absentees, deserters or other suspected offenders either back to their own commands or to such other commands as may be designated by competent authority, and
- (b) transport of persons already under the physical and/or administrative control of their own commanding officer or a court-martial convening authority to, from, or between correctional centers.

(2) Actions Upon Apprehension or Surrender of Absentees or Deserters. The actions required following the apprehension or surrender of absentees or deserters are contained in Articles 1.C.3. and 1.C.4. of this Manual. Absentees or deserters who voluntarily surrender at a unit other than their own command ordinarily will be permitted to proceed back to their own or designated command under their own

recognizance, unless in the judgment of the commanding officer of the unit reporting the surrender, transport under escort is warranted because of a likely risk of danger to life or property or of renewed escape from Coast Guard jurisdiction. In the latter case, the commanding officer of the command to which an absentee or deserter surrendered or was apprehended shall include escort recommendations as an element of his or her message notification to competent authority as designated in Article 1.C.7. of this Manual. This information should include a specific statement indicating whether escorts are deemed necessary, and whether multiple escorts, handcuff restraint, and/or armed escort is warranted pursuant to the guidance contained in this section. The provisions of this section do not apply to overseas activities and sections in Europe and Asia, or to operational units when on special detached duty with another Armed Force. Such cases frequently involve special considerations deriving from policies of the senior Armed Forces commander in the area, allied treaty requirements, and complex travel constraints. Whenever a requirement for escort of a Coast Guard prisoner arises in such cases, the commanding officer involved will promptly transmit a message to Commander (CG PSC-EPM) or (CG PSC-OPM) noting all relevant details and requesting advice. In all other situations, competent authority to order a person transported as a prisoner under escort in the case of an apprehended or surrendered absentee or deserter will be the command entity from which instructions are requested as provided for in Article 1.C.7. of this Manual. Such competent authority in the case of a member already under the control of his or her own command is the commanding officer of that command or the applicable court-martial convening authority. The Coast Guard command issuing the orders for transport of prisoners under escort shall be responsible for ensuring compliance with the provisions of this section. In cases where a prisoner is to be transported by means other than Government vehicle, commanding officers of Headquarters units may request the district commander (a) within whose district the Headquarters unit is geographically located to make appropriate transportation and escort arrangements. District commanders will be advised in any event, of the planned transport of prisoners entering, leaving, or traveling within the district confines, whether or not the district commander is the controlling command. In all cases, the transfer of prisoners will be accomplished in the most inconspicuous manner possible. The officer authorizing transport of a prisoner under escort shall prescribe the degree of security necessary to ensure the safe delivery of a prisoner in transit based on the recommendations of the local commanding officer presently having control or custody of the prisoner. The majority of military prisoners are offenders against military discipline and not vicious criminals posing a threat to personal safety of others or posing an ever-present escape threat. The presence of escorts and guards is usually sufficient to ensure safe delivery without incident. When the local commanding officer determines that the prisoner is a definite escape risk, the officer ordering transport may authorize the escort to use handcuffs. Under no circumstances shall this or any other restraint device be employed to fasten prisoners to fixed or stationary equipment such as a seat arm, strap, stanchion, or berth railing of any vehicle or conveyance.

1.G.4.b. Means of Travel

- (1) Government-Owned Bus or Other Vehicle. This is the preferred mode of transport wherever the distances involved permit. A single prisoner escort will never be required to act also as the driver. Vehicles employed should be in good mechanical condition to minimize the likelihood of breakdown while prisoners are embarked. If possible, the vehicle should be equipped with security screens for protection of the escorts and driver and to reduce the number of escorts required. Prisoners and escorts will be seated in adjoining seating positions and never in the same seat as the vehicle operator. Box lunches are recommended to minimize meal stops.
- (2) Government Air. Maximum use shall be made of spaces available on military aircraft including Military Airlift Command, administrative, proficiency, and Reserve training flights. Escort requirements and restrictions of the agency or command operating the flight will be adhered to.
- (3) Commercial Rail and Bus. While this mode of transport is authorized, it is considered the least desirable because of the transit time involved, need for additional escorts, the undesirability of exposing the prisoner to public view, and the security risk encountered at stops. Box lunches are advised to eliminate the need to escort the prisoner to public dining facilities. Prisoners and escorts will occupy adjoining seats. Where commercial bus is used for transport, passage should be arranged if possible on a conveyance having on-board toilet facilities. Prisoners should be seated in the rearmost passenger seat not adjoining any emergency exit, lounge area, or having access to any vital equipment, such as emergency brakes, of the conveyance unless directed to the contrary by the bus driver or train personnel. An escort shall always occupy the aisle seat.
- (4) Commercial Air. Prisoners who may become violent, abusive, or who may require handcuffing and armed escort will not be transported by commercial airline except as provided for below. The command which will issue the official travel orders for transport of a prisoner by commercial air will coordinate travel details with the applicable airlines in advance. Frequently, this will be the district commander, in which case commercial air travel arrangements will be initiated by the district commander (a). Foreign-flag commercial airlines will not be employed to transport prisoners of the United States. The Federal Aviation Administration (FAA) has promulgated rules and regulations pertaining to the transporting of firearms and prisoners aboard commercial aircraft which govern prisoner transport by this method. The Commandant's policy is consistent with these regulations which may not be contested by Coast Guard personnel. That policy is summarized in the following paragraphs which apply to all cases where prisoners under escort are transported by commercial airline. In addition, however, the policy contained in Article 1.G.5. of

this Manual applies to those uncommon cases where the security threat posed by a prisoner being transported by commercial air is sufficiently grave to warrant arming the escorts.

(a) FAA rules and regulations prohibit certified, commercial airlines from transporting a person in custody unless:

- [1] The airline had been notified at least one hour, or in an emergency, as soon as possible, before departure of the identity of the escorted person, the flight on which he or she will be carried, and whether the escorted person is considered dangerous by the Governmental entity having custody.
- [2] The escort has assured the airline that the escorted person does not have on or about his or her person any Article that could be used as a deadly or dangerous weapon which would be accessible to the prisoner while on board the aircraft. Additionally, the escort must ensure the airline that adequate restraining devices are readily available to be used in the event the escort determines that restraint becomes necessary.
- [3] The escorted person and escorts shall be boarded before all other enplaning passengers board, and deplaned after all other deplaning passengers have left the aircraft. The prisoner and the escorts will be seated in the rearmost passenger seats that are neither located in any lounge area, nor located next to or directly across from any aircraft exit.
- [4] At least one escort shall be seated between the escorted person and any aisle, and at all times accompany the escorted person and keep him or her under surveillance.
- [5] The airline is prohibited from carrying more than one escorted person who it has been notified is considered dangerous on an aircraft carrying other passengers. The airline is prohibited from serving food or beverages, or providing metal eating utensils to an escorted person unless authorized by the escort.
- [6] No prisoner or accompanying escort may drink any alcoholic beverage while on board the aircraft during a prisoner-transport flight.

(b) In order to minimize circumstances which lead to confusion of or disputes with on-site airline personnel, it is desirable to formalize arrangements well in advance of the transport. The recommendations of the airline concerning preferable flights for prisoner transfer, check-in procedures, etc., should be solicited and followed whenever practicable.

1.G.5. Prisoner Escorts**1.G.5.a. Prisoner Escorts**

Prisoner escorts should be mature, responsible petty officers or in unusual situations, commissioned or chief warrant officers who are well-qualified by training and/or experience for the assignment. Escorts should travel under official orders in all cases and be well-briefed prior to departure. Escorts will present a smart appearance and, except when special agents of Coast Guard intelligence serve as escorts, will wear the appropriate uniform. In cases when escorts are not special agents of Coast Guard intelligence, but a commercial carrier nonetheless specifically requests that escorts wear civilian attire, a business suit or sport coat with necktie may be authorized. Under no conditions will the prisoner or accompanying escorts consume any alcoholic beverage during the duration of the transport. Escorts are responsible for the appearance and conduct of prisoners in their custody. Stopovers should be avoided whenever possible. When unforeseen circumstances render stopover unavoidable, escorts are authorized to request temporary detention of the prisoner at any United States Military Correctional Facility, or Armed Forces Police or Shore Patrol organization having prisoner detention spaces available. As a last resort, temporary detention of the prisoner during an unavoidable stopover may be requested from local civilian law enforcement officials, in which case the escort shall promptly notify the commanding officer of the circumstances. Whenever the prisoner is turned over to a detention or confinement facility as provided for in this Article, the escort shall obtain a receipt for the prisoner.

1.G.5.b. Escort to Prisoner Ratio

The Coast Guard rarely has occasion to move groups of prisoners. The number of escorts required in any given case is a matter of command discretion. As a general rule, a minimum-risk prisoner being transported by Government vehicle for a short distance may be escorted by a single guard. Trips by Government vehicle of sufficient length to require escort relief, and all prisoner movements by any other means will require at least two, and possibly more escorts, with the exact number depending on the circumstances, and the regulations governing the operation of the carrier. If the prisoner being escorted is a female, at least one escort shall be a female commissioned, chief warrant, or petty officer.

1.G.5.c. Arming of Escorts

(1) General. Consistent with the rationale contained in Article 1.G.3. of this Manual, escorts need be armed only under rare, extreme cases involving maximum custody prisoners whose escape would pose a proximate threat to life or personal safety. As used in this section, "armed" is intended to convey the carriage of firearms. It should

be noted that while in the performance of official duties, military members of the United States Armed Forces may carry firearms, including concealed weapons, when expressly authorized to do so by an appropriate military authority regardless of state or local laws. The inherent authority of the sovereign as to its military services has long been recognized by case law. Additionally, limited statutory authority exists for Coast Guard military members to carry firearms. For example, commissioned, chief warrant, and petty officers of the Coast Guard, while performing customs duty, are "officers of the customs" by definition (19 U.S.C. § 1401 (1)), and as such, may carry firearms (26 U.S.C. § 7607). The general authority for commissioned, chief warrant or petty officers of the Coast Guard to carry and use firearms including concealed weapons while performing official duties, such as those incumbent on special agents of Coast Guard intelligence and designated prisoner escorts, however, rests in the fact that the Coast Guard is a military Service.

- (2) Limitations. The Commandant's policy and standards governing the carriage and use of weapons by authorized personnel are consistent with the policy and standards prescribed by the Secretary of Homeland Security governing the carriage and use of weapons by all authorized Department of Homeland Security (DHS) personnel, military and civilian, and by DHS contractor personnel providing law enforcement and security service to DHS facilities.

That policy concerning the carriage of firearms provides that no personnel shall be authorized to carry or use a firearm in performing official law enforcement and security duties until that person has been adequately trained and understands official policy and standards. The Commandant's policy on the use of firearms by commissioned, chief warrant or petty officers assigned to security duties including armed escort of prisoners is similar to that prescribed for the use of firearms by special agents of Coast Guard intelligence and is as follows:

- (a) A firearm may be discharged only as a last resort when in the considered opinion of the escort a danger of loss of life or serious bodily injury exists to him or herself or to another person.
- (b) Firing a weapon should be with the intent of rendering the person at whom the weapon is discharged incapable of continuing the activity prompting the escort to shoot.
- (c) Firing at a fleeing person will not be considered justified unless the escort has a reasonable cause to believe that the person considered for shooting poses a real threat to the life of the escort or others.
- (d) Firing from a moving vehicle or at a fleeing vehicle is prohibited.

- (e) Firing warning shots is prohibited. A firearm should be drawn only when the escort has a sufficient cause to expect it will be used and the escort is preparing for its use.
 - (f) The authority to bear firearms carries with it an obligation and responsibility to exercise discipline, restraint, and good judgment when using firearms. The escort must keep in mind that, when firing a weapon, a danger always exists to innocent parties.
 - (g) Whenever a firearm is drawn under operational conditions, a letter report shall be immediately furnished to Commandant (CG-2). Whenever a firearm is discharged under operational conditions, accidentally or otherwise, a board of investigation shall be convened. In cases where a special agent of Coast Guard intelligence is involved, the district commander (ole) should not act as investigating officer. (See Article 1.G.5.d.(3) of this Manual.)
- (3) Carrying of Firearms Aboard Commercial Aircraft. The Commandant's policy concerning the carrying of firearms aboard commercial aircraft is consistent with FAA rules and regulations, and may not be contested by Coast Guard personnel. Those elements of the FAA rules and regulations which are applicable to officials and employees of the United States prohibit a certified airline from permitting any person to have on or about his or her person or property, a dangerous or deadly weapon - either concealed or unconcealed - which is available to him or her while aboard an aircraft unless the following conditions are met:
- (a) The person having the weapon is an official or employee of the United States.
 - (b) The person having the weapon must be authorized to carry it and need to have the weapon available in connection with the performance of duty during the period between baggage check-in for the flight and baggage claim following deplaning
 - (c) The airline must be notified of the flight on which the armed person intends to have the weapon accessible at least one hour before departure, and in an emergency as soon as practicable before departure.
 - (d) The armed person must identify him or herself to the airline by presenting credentials that include a clear, full-face picture, signature, and the signature of the authorizing official of his or her Service or the official seal of Service. Badges, shields, or similar devices may not be accepted by airlines as the sole means of identification.
 - (e) The FAA rules and regulations further require the airline to ensure that the armed person is familiar with its procedures for the carriage of a deadly or dangerous

weapon aboard its aircraft prior to the time such person boards the aircraft. Further, the airline is required to ensure that the identity of the armed person is known to each law enforcement officer and each airline employee responsible for aircraft boarding security, and that the pilot in command of the aircraft is notified that the armed person will be on board and of the armed person's seat location in the cabin.

- (f) FAA Rules and Regulations also prohibit an airline from knowingly permitting any passenger to carry a deadly or dangerous weapon on board an aircraft in checked baggage, and similarly prohibits any passenger from checking baggage containing a deadly or dangerous weapon unless the passenger first has notified the airline that the weapon is in the baggage, that it is unloaded, and that the baggage is locked with the passenger retaining the only key. The airline is then required to carry such baggage in a space other than the flight crew compartment which is inaccessible to the passengers.
- (g) FAA Rules and Regulations prohibit any person having a deadly or dangerous weapon available from drinking alcoholic beverages while on board the aircraft.

1.G.5.d. Action by District Commanders Authorizing the Arming of Prisoner Escorts

The policy contained below applies only in those extraordinary cases in which a district commander ordering transport of a prisoner or a commanding officer or convening authority requesting such transport has determined that the prisoner's escape would pose a grave threat to life or personal safety. Such maximum custody prisoners may be transported under armed escort, in addition to which, no less than two escorts will be assigned and the prisoner restrained in handcuffs. Commanding officers of Headquarters units in the continental United States (INCONUS) deeming it necessary to transport a prisoner under armed escort will request that transportation arrangements and designation of escorts be accomplished by the district commander of the district within whose geographical limits the Headquarters unit is located. When a prisoner is transported under armed escort, at least one of the escorts must be qualified to serve as armed escort in accordance with the provisions of this Article, but only the qualified escort will in fact be armed. Escorts should not be armed when the necessary security can be ensured instead by assigning additional escorts or authorizing handcuff restraint, in that order. The use of handcuffs or arming escorts requires the written order of the officer ordering the transport. Armed prisoner escorts will not carry loaded weapons except when actually escorting prisoners. When prisoners are being escorted, weapons will be loaded but ammunition will not be carried in the chamber of the weapon. Armed prisoner escorts will take every precaution against providing the prisoner access to the weapon.

- (1) Procedures for Designating Armed Prisoner Escorts.

- (a) Responsibility for Determining Whether Armed Escorts Are Required. The transport of prisoners under armed escort shall in no case be arranged or controlled by any level of command below the district level. Where more than one district is involved, that district which issues orders for transport under armed escort will be the controlling district. When doubt exists as to which of two districts should initiate such action, Commander (CG PSC-EPM) or (CG PSC-OPM) will direct appropriate action. Frequently, in cases where transport of a maximum custody prisoner is contemplated, the prisoner's own district commander or convening authority will already have physical and/or administrative custody over the prisoner. Illustrative could be the case of a member who has been convicted of a violent felony by a military court-martial and who is awaiting transportation to the designated correctional facility. In such cases, the district commander (a) will be in a position to determine directly whether the degree of security needed will require transport under armed escort. In other cases, however, a remote district commander or commanding officer, who may or may not be located in the offender's own district will have physical custody of a prisoner whose return or movement has been directed. In such cases, the local commanding officer stands in the best position to judge the degree of security warranted during transport. Should the local commanding officer deem it necessary, consistent with the provisions of this Article, that the prisoner be transported under armed escort, he or she shall promptly transmit a message to the competent authority requesting advice and assistance. Commander (CG PSC-OPM) or (CG PSC-EPM) and any other district commander and commanding officer concerned shall be listed as information addressees. The message shall identify the prisoner, the anticipated travel, and plainly state that escort under armed escort is deemed essential to prevent grave risk to life or personal safety. The message shall additionally state whether the local commanding officer has access to personnel who are qualified in accordance with the provisions of Article 1.G.5.d.(2) of this Manual to serve as armed escort. If so, the message will identify the proposed escort(s) and list the qualifications possessed.
- (b) Actions of the District Commander. The district commander (a) shall be responsible for arranging the transport of prisoners under armed escort in compliance with the provisions of this Article. District commander (a) will conduct necessary liaison with the district commander (ole) with respect to the identification and certification of personnel to be designated to serve as armed prisoner escort. (See Article 1.G.5.d.(3) of this Manual.) When transport of a prisoner under armed escort is necessary, district commander (a) will determine and arrange for transport by the most advantageous mode of transportation consistent with the provisions of Article 1.G.4.b. of this Manual. In addition, the district commander (a) will attempt to identify any available personnel qualified to serve as armed prisoner escort in accordance with the provisions of Article 1.G.5.d.(2). of this Manual. In cases where a local commanding officer has been

able to identify potential and available armed escort personnel, the local commanding officer's recommendations may be included for consideration. The list of possible armed escorts, together with documentation of their qualifications will be referred to the district commander (ole) for review and approval. Should district commander (a) be unable to identify any possible escorts, assistance shall be requested from the district commander (ole). Upon approval or designation of armed escort personnel by district commander (ole), the district commander (a) can finalize travel arrangements and issue appropriate travel orders.

- (2) Sources for Armed Prisoner Escorts. Compliance with the Commandant's policy concerning the carriage and use of firearms, as well as with the regulations binding on armed escorts on board commercial aircraft as contained in Article 1.G.5.c.(3) of this Manual places a tremendous responsibility on personnel assigned as armed escort. Most personnel, notwithstanding their maturity, dependability, and leadership abilities cannot reasonably be expected to possess the training and experience required to qualify them for armed prisoner escort duty in the context of current regulations and policy. Accordingly, armed prisoner escorts will be obtained from the following sources in descending order of preference:
- (a) Pursuant to a request made to an organized Armed Forces Police Detachment or Shore Patrol Organization, if available in the area;
 - (b) A Coast Guard commissioned, chief warrant, or petty officer, who in the past has served as a fully-qualified special agent of Coast Guard intelligence, but who presently is serving in non-intelligence career specialty;
 - (c) A mature commissioned, chief warrant or petty officer in pay grade E-6 or above, of demonstrated sound judgment, who is now or has at some prior time been assigned to official security police or law enforcement duties, and who has successfully completed firearms qualification at the Air Force OSI or Treasury Schools;
 - (d) Such other specially-qualified commissioned, chief warrant or petty officer as may be designated by the district commander (ole).
- (3) Verification of Armed Prisoner Escort Qualifications. The district commander (ole) will verify whether Coast Guard personnel to be designated as armed prisoner escort possess the qualifications stipulated above. These qualifications are similar to those prescribed for special agents of Coast Guard intelligence as contained in the Coast Guard Investigations Manual, COMDTINST M5527.1 (series). Further, the district commander (a) in proposing a member for armed escort duty will be considered to have stipulated to the district commander (ole) that the proposed escort is familiar

with and can be expected to comply with the policy contained in Article 1.G.5.c. of this Manual. In the event the district commander (a) can identify no available and qualified personnel to serve as armed prisoner escort, the district commander (ole) may at his or her discretion detail a special agent of Coast Guard intelligence, if available, request escort assistance from the U. S. Department of Justice, or designate some other specially-qualified commissioned, chief warrant or petty officer whose training and experience, although different, is equivalent to that prescribed above.

- (4) Commanding Officer Judgment. It is stressed that the mere availability of personnel qualified to serve as prisoner escort does not justify the imposition of that degree of security. The decision to arm escorts should rest solely on the commanding officer's judgment that the prisoner's transport must be treated as a maximum custody case. Whenever Coast Guard personnel are detailed as armed prisoner escort, they shall be briefed thoroughly concerning the policy, rules, and regulations contained in this section.
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CHAPTER 2 CONDUCT

2.A. Interpersonal Relationships within the Coast Guard

2.A.1. General

2.A.1.a. Coast Guard Values

The Coast Guard attracts and retains highly qualified people with commonly shared values of honor, respect and devotion to duty. These values anchor our cultural and Service norms and serve as a common foundation for our interpersonal relationships within the Coast Guard.

2.A.1.b. Mission Success

We interact, communicate and work together as teams to accomplish our missions. Indeed, mission success depends on cultivating positive, professional relationships among our personnel. An environment of mutual respect and trust inspires teamwork, assures equal treatment, and grants Service members the opportunity to excel.

2.A.1.c. Leadership and Military Discipline

Professional interpersonal relationships always acknowledge military rank and reinforce respect for authority. Good leaders understand the privilege of holding rank requires exercising impartiality and objectivity. Interpersonal relationships which raise even a perception of unfairness undermine good leadership and military discipline.

2.A.1.d. Custom and Tradition

The Coast Guard has relied on custom and tradition to establish boundaries of appropriate behavior in interpersonal relationships. Proper social interaction is encouraged to enhance unit morale and esprit de corps. Proper behavior between seniors and juniors, particularly between officers and enlisted personnel, enhances teamwork and strengthens respect for authority.

2.A.1.e. Officers and Senior Enlisted

By long standing custom and tradition, commissioned officers, including warrant officers, have leadership responsibilities extending across the Service. Likewise, chief petty officers (E-7 to E9) have a distinct leadership role, particularly within their assigned command. Both provide leadership not just within the direct chain of command, but for a broader spectrum of the Service. Due to these broad leadership responsibilities, relationships involving officers or chief petty officers merit close attention.

2.A.2. Policy

2.A.2.a. Professional Work Environment

Coast Guard policy is to sustain a professional work environment which fosters mutual respect among all personnel, and in which decisions affecting personnel, in appearance and actuality, are based on sound leadership principles. Commanding Officers, officers-in-charge, and supervisors are expected to provide an environment which enhances positive interaction among all personnel through education, human relations training, and adherence to core values.

2.A.2.b. Positive Social Interaction

Coast Guard policy on interpersonal relationships has been crafted to be as gender-neutral as possible. However, this approach may obscure one important issue: the fundamental principle that interpersonal activities which are appropriate among men or among women are likewise appropriate among men and women. All members should be provided equal opportunity to participate in positive social interaction opportunities regardless of gender.

2.A.2.c. Acceptable Personal Relationships

As people work together, different types of relationships arise. Professional relationships sometimes develop into personal relationships. Service custom recognizes that personal relationships are acceptable provided they do not, either in actuality or in appearance:

- (1) Jeopardize the members' impartiality,
- (2) Undermine the respect for authority inherent in a member's rank or position,
- (3) Result in members improperly using the relationship for personal gain or favor, or
- (4) Violate a punitive Article of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), or
- (5) Violate any lawful order, regulation or policy regarding inappropriate and prohibited relationships, communications, conduct or contact established by competent military authority.

2.A.2.d. Assessing the Propriety

The great variety of interpersonal relationships precludes listing every specific situation that members and commands may encounter. While some situations are clearly discernible and appropriate action is easily identified, others are more complex and do not lend themselves to simple solutions. Evaluating interpersonal relationships requires sound judgment by all personnel. Factors to consider in assessing the propriety of a relationship include:

- (1) The organizational relationship between the individuals: whether one member can influence another's personnel or disciplinary actions, assignments, benefits or privileges;
- (2) The relative rank and status of the individuals: peers, officer and enlisted, CPO and junior enlisted, supervisor and subordinate, military and civilian, instructor and student; and
- (3) The character of the relationship; e.g., personal, romantic, marital.
 - (a) Personal relationship: Non-intimate, non-romantic association between two or more people such as occasional attendance at recreational or entertainment events (movies, ball games, concerts, etc.) or meals. (Does not involve conduct which violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended)).
 - (b) Romantic relationship: Sexual or amorous relationship. (Does not involve conduct which violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended)).
 - (c) Unacceptable relationship: Inappropriate and not allowed under Service policy. Resolution normally administrative. Relationship must be terminated or otherwise resolved once recognized.
 - (d) Prohibited relationship: Violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Resolution may be either administrative, punitive, or both as circumstances warrant.

Note: Exhibit 2.A.1 contains a matrix depicting common interpersonal relationships.

2.A.2.e. Violation of Service Policy

A relationship, including marriage, does not violate Service policy unless the relationship or the members' conduct fails to meet the standards set by this section, standards of conduct set by reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), or other regulations.

2.A.2.f. Unacceptable Romantic Relationships

Romantic relationships between members are unacceptable when:

- (1) Members have a supervisor and subordinate relationship (including periodic supervision of duty section or watchstanding personnel), or
- (2) Members are assigned to the same small shore unit (less than 60 members), or
- (3) Members are assigned to the same cutter (see note below), or

- (4) The relationship is between chief petty officers (E-7/8/9) and junior enlisted personnel (E-4 and below), or
- (5) The relationship is manifested in the work environment in a way which disrupts the effective conduct of daily business.

Note: The nature of operations and personnel interactions on cutters and small shore units makes romantic relationships between members assigned to such units the equivalent of relationships in the chain of command and, therefore, unacceptable. This policy applies regardless of rank, grade, or position. This policy applies to Reservists in an active status, whether or not on duty.

2.A.2.g. Prohibited Relationships, Communications, Conduct, and Contact

- (1) Policy. Coast Guard policy prohibits the following relationships, communications, conduct, or contact regardless of rank, grade, or position of the persons involved:
 - (a) Engaging in sexually intimate behavior aboard any Coast Guard vessel, or in any Coast Guard-controlled work place,
 - (b) Romantic relationships outside of marriage between commissioned officers and enlisted personnel. For the purposes of this paragraph, Coast Guard Academy (CGA) cadets and officer candidates (both OCS and ROCI) are considered officers.
 - (c) Personal and romantic relationships between instructors at entry level accession programs and other training commands, and students.
 - (d) Personal and romantic relationships between recruiters, Academy admission officers, Academy admission partners, or personnel assigned to a Military Entrance Processing Station (MEPS), and family members of students or prospective members. A prospective member is anyone who has a face-to-face meeting with one of the above representatives regarding becoming a member of the Armed Forces, regardless of whether the person eventually becomes a member of the Armed Forces. Individuals are considered prospective members until 365 days have elapsed since their last contact with a representative or upon physically reporting to his or her first duty assignment.
 - (e) Romantic relationships between instructors and certain former entry level accession students, as follows:
 - [1] Enlisted instructors at enlisted entry level accession programs may not have a romantic relationship with any individual who has graduated from, or who last attended, an entry level accession program within the preceding 365 days. Former enlisted entry level accession program instructors who transfer to a new unit have a continuing duty to abide by this prohibition in regards to those individuals who were

enrolled in enlisted accession training while the former instructor was assigned to the respective accession program.

[2] Officer instructors at officer entry level accession programs may not have a romantic relationship with any individual who has graduated from, or who last attended, an entry level accession program within the preceding 365 days. Former officer entry level accession program instructors who transfer to a new unit have a continuing duty to abide by this prohibition in regards to those individuals who were enrolled in officer accession training while the former instructor was assigned to the respective accession program.

(f) Romantic relationships between former recruiters who have transferred to a new unit and those prospective members who were engaged in the recruiting process while the former recruiter was assigned to recruiting duties. Individuals are considered prospective members until 365 days have elapsed since their last contact with a recruiter.

(2) Punitive Application. This provision is a punitive general regulation, applicable to all personnel subject to the Uniform Code of Military Justice without further implementation. A violation of this provision is punishable in accordance with Article 92 of the Uniform Code of Military Justice.

(3) Mandatory Processing for Administrative Separation.

(a) The following individuals must be processed for discharge:

[1] Any entry level accession program instructor who is found to have committed a substantiated violation of Article 2.A.2.g(1)(c) (prohibited personal or romantic relationship with a student). For the purposes of this paragraph, the following definitions apply:

[a] Entry level accession programs include, but are not limited to, recruit training, direct entry petty officer training (DEPOT), Officer Candidate School (OCS), Direct Commission Officer (DCO) School, Reserve Officer Candidate Indoctrination (ROCI), NOAA Basic Officer Training Class (BOTC), and the Coast Guard Academy.

[b] Instructors include personnel assigned or attached to duty at a facility or school that conducts an entry level accession program, and who exercise authority or control over, or supervise, students enrolled in an entry level accession program.

[c] Students include members enrolled in any entry level accession program. Such members are considered students until they report to their first duty assignment (including assignment to subsequent training, such as "A" School).

- [2] Any member who is found to have committed a substantiated violation of Article 2.A.2.g(1)(d) (prohibited personal or romantic relationship with a prospective member).
- (b) A violation is substantiated when it results in non-judicial punishment, or a courtmartial conviction that does not include a punitive discharge as part of its sentence. A violation may also be substantiated when the member's Commanding Officer makes a written determination by a preponderance of the evidence that a violation occurred. This written determination will be reviewed and endorsed by the Staff Judge Advocate. Separation processing for officers and enlisted personnel must be in accordance with Articles 1.A.14 or 1.B.17 (as appropriate) of reference (k), Military Separations, COMDTINST M1000.4 (series).
- (c) Examples. The relationships, communications, conduct, and contact between instructors and entry level accession program students, and between recruiters, Academy admission officers, Academy admission partners, or MEPS personnel, and prospective members, must at all times focus solely on mission accomplishment. The following is a non-exclusive list of prohibitions which, if violated, would require discharge processing under Article 2.A.2.g(3)(a) above.
- [1] Making or accepting sexual or romantic advances in any form of communication, including social media. This includes sexual advances towards family members of students or prospective members.
- [2] Any communications, conduct, or contact of a sexual or romantic nature, including sexual flirtation or innuendo.
- [3] Use of familiar and romantic terms of address (e.g. beautiful, sweetheart, hon, handsome) when addressing students and prospective members.
- [4] Visit by a recruiter to the dwelling of a prospective member, for other than official business.
- [5] Establishing a common household with a student or a prospective member. This does not prohibit shared accommodations for official purposes.

2.A.2.h. Family Relationships

Service members married to Service members, or otherwise closely related; e.g., parent and child, siblings, etc., must maintain requisite respect and decorum attending the official military relationship between them while either is on duty or in uniform in public. Members married to members or otherwise closely related must not be assigned in the same chain of command.

2.A.3. Examples of Appropriate and Unacceptable Relationships, Conduct, Contact and Communication

2.A.3.a. Acceptable Relationships

Examples of acceptable personal relationships include, but are not limited to:

- (1) Two crewmembers going to an occasional movie, dinner, concert, or other social event.
- (2) Members jogging or participating in wellness or recreational activities together.

2.A.3.b. Unacceptable Relationships

Examples of unacceptable relationships include, but are not limited to:

- (1) Supervisors and subordinates in private business together.
- (2) Supervisors and subordinates in a romantic relationship.

2.A.3.c. Unacceptable Conduct, Contact and Communication

Examples of unacceptable conduct, contact and communication include, but are not limited to:

- (1) Supervisors and subordinates gambling together.
- (2) Giving or receiving gifts, except gifts of nominal value on special occasions.
- (3) Changing duty rosters or work schedules to the benefit of one or more members in a relationship when other members of the command are not afforded the same consideration.
- (4) When between instructors and entry level accession program students, or between recruiters, Academy admission officers, Academy admission partners, or MEPS personnel, and prospective members:
 - (a) Soliciting or providing personal information to or from a student or a prospective member, including telephone number, social media profile, email address, or physical address, for other than official business.
 - (b) Using personal vehicles to transport students or prospective members, for other than official business.
 - (c) Providing alcohol to a student or a prospective member.
 - (d) Lending or borrowing money to/from a student or prospective member.

- (e) Employing a student or a prospective member for personal services.
-

2.A.4. Fraternization

2.A.4.a. Definition

Fraternization describes the criminal prohibition of certain conduct between officer and enlisted personnel set out in reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Interpersonal relationships between officer and enlisted personnel and fraternization are not synonymous. Fraternization does not apply exclusively to male-female relationships, but a much broader range of inappropriate conduct. (While not an exhaustive listing, see Article 2.A.3. of this Manual.) The elements of the offense of fraternization specified in reference (e), Manual for Courts-Martial (MCM), United States (current edition), are:

- (1) The accused is a commissioned or warrant officer, and
- (2) The accused officer fraternized on terms of military equality with one or more enlisted members in a certain manner, and
- (3) The accused knew the person to be an enlisted member, and
- (4) The association violated the custom of the Service that officers shall not fraternize with enlisted members on terms of military equality, and
- (5) That, under the circumstances, the conduct of the member was prejudicial to good order and discipline in the Armed Forces, or was of a nature to bring discredit upon the Armed Forces.

2.A.4.b. Personal Relationships between Officer and Enlisted

The custom of the Service accepts personal relationships between officer and enlisted personnel if they do not violate the provisions of Article 2.A.2.c. of this Manual. Relationships in conflict with those provisions violate the custom of the Service.

2.A.4.c. Romantic Relationships between Officer and Enlisted

The custom of the Service prohibits romantic relationships outside of marriage between officer and enlisted personnel. This includes such relationships with members of other military services. Officer and enlisted romantic relationships undermine the respect for authority which is essential for the Coast Guard to accomplish its military mission.

2.A.4.d. Marriage between Officer and Enlisted

The custom of the Service accepts officer and enlisted marriages which occur before the officer receives a commission. Lawful marriage between an officer and enlisted service member does not create a presumption of misconduct or fraternization. However, misconduct, including fraternization, is neither excused nor mitigated by subsequent marriage.

2.A.5. Responsibility

2.A.5.a. Primary Responsibility

All personnel are responsible for avoiding unacceptable or prohibited relationships. Primary responsibility rests with the senior member. Seniors throughout the chain of command shall attend to their associations and ensure they support the chain of command, good order and discipline.

2.A.5.b. Early Resolution

Personnel finding themselves involved in or contemplating unacceptable relationships should report the situation and seek early resolution from their supervisor, commanding officer, officer in charge, command enlisted advisor, or Coast Guard chaplain. Any potential conflict with Coast Guard policy should be addressed promptly. Commands are expected to assist members in understanding Coast Guard policy requirements and resolving conflicts. Bringing an unacceptable relationship to early Command attention will increase the opportunity for early, positive resolution.

2.A.5.c. Commanding Officer Responsibility

Reference (j), United States Coast Guard Regulations 1992, COMDTINST M5000.3 (series) specifically charge commanding officers and officers-in-charge with responsibility for their command's safety, efficiency, discipline, and well-being. They should take prompt, appropriate action to resolve conduct which does not comply with the provisions of this section.

2.A.5.d. Academy and Training Center Staff

Interpersonal relationships involving Academy and Training Center staff and students are particularly susceptible to abuse by the senior member. The Superintendent of the Academy and commanding officers of training commands may issue local directives further restricting or prohibiting such relationships as they deem appropriate. The Superintendent of the Academy may issue supplemental regulations addressing the unique concerns of cadet relationships, including when cadets are in training situations aboard other Coast Guard units, and when a personal relationship between Academy personnel and a cadet may be acceptable (e.g. the Academy sponsor program or social engagements that are commensurate with customary and acceptable wardroom interactions) notwithstanding Articles 2.A.2.g(1)(c), 2.A.2.g(3), and 2.A.3.c(4).

2.A.5.e. Violation by Commanding Officer

If a member's superior or immediate commanding officer is the subject of a report of misconduct under this Article, procedures outlined in Section 9-2-2 of reference (j), United States Coast Guard Regulations 1992, COMDTINST M5000.3 (series), (Oppression or Other Misconduct by a Superior) shall be followed.

2.A.6. Resolving Unacceptable Relationships**2.A.6.a. General**

Avoiding unacceptable personal relationships is in the best interest of all concerned. Training, counseling, and administrative actions help prevent unacceptable personal relationships or minimize detrimental effects when unacceptable relationships develop. Prompt resolution at the lowest level possible is desirable.

2.A.6.b. Training

Avoiding unacceptable and prohibited interpersonal relationships requires that personnel clearly understand Coast Guard policy and its application. The unit training program is an ideal forum to accomplish this. Training on "FRATERNIZATION AND INTERPERSONAL RELATIONSHIPS" shall be conducted at all officer and enlisted accession points and at resident training courses; e.g., leadership school, "A" and "C" Schools, etc. Training at other units is strongly encouraged.

2.A.6.c. Counseling

Early counseling often can resolve potential concerns about the characteristics of a relationship and appropriate actions to ensure the relationship develops in a manner consistent with Service custom. Counseling may be informal or more formal, including written documentation by Administrative Remarks, Form CG-3307, entry or an Administrative Letter of Censure. (See Article 2.E.4. of this Manual.) Counseling may include a direct order to terminate a relationship.

2.A.6.d. Personnel Reassignment

Members may request or a command may recommend reassignment of a member involved in a questionable relationship. However, reassignment is not a preferred option. The Coast Guard is not obligated to reassign personnel due to members' desires or based solely on a relationship. When reassignment is not an option, members may be directed to end a relationship.

2.A.6.e. Evaluations

When members do not respond favorably to counseling, comments and marks in officer and enlisted evaluations may be appropriate.

2.A.6.f. Other Administrative Actions

As warranted, commands may recommend separation, removal or withdrawal of advancement recommendations, appointment to another status, or promotions. See reference (k), Military Separations, COMDTINST M1000.4 (series), for additional administrative actions which may be considered.

2.A.6.g. Disciplinary Action

Non-judicial punishment or courts-martial may address fraternization or other unlawful or prohibited relationships or conduct.

2.A.7. Action

Commanding officers and officers in charge are responsible for ensuring that all members of their commands are familiar with these provisions.

Exhibit 2.A.1. Interpersonal Relationships

Organizational Relationship	Character of Relationship				
	Personal	Romantic			Married/Family
Separate Units	1-4 A	1-2 A	3 U	4 P	1-4 A
Same Large Shore Unit or Co- Located Units	1-4 A	1-2 A	3 U	4 P	1-4 A
Same Chain of Command, Same Afloat Unit, Small Shore Unit	1-4 A	1-2 U	3 U	4 P	1-4 U (for assignment purposes)

Legend:**Member Status:**

1. Peers: (Very similar in rank or position, e.g., officers; CPOs; POs; non-rated personnel; etc.)
2. Military and Civilian CG employee
3. CPO and Junior Enlisted (E-4 and below)
4. Officer (including cadets and officer candidates) and Enlisted

Character of Relationship:

- Personal:** Non-intimate, non-romantic associations between two or more people, e.g. occasional attendance at recreational or entertainment events (movies, ball games, concerts, etc.) or meals. (Does not include conduct which constitutes fraternization.)
- Romantic:** Sexual or amorous relationship. (Does not include conduct which violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended).)
- Married/Family:** Service members married to service member, or otherwise closely related; e.g., parent and child, or siblings, etc.

Service Policy:

- A = Acceptable:** Permissible provided conduct meets Service standards.
(See Article 2.A.2.c. of this Manual.)
- U = Unacceptable:** Inappropriate; not allowed under Service policy. Relationship must be terminated or otherwise resolved once recognized. Resolution is normally administrative.
- P = Prohibited:** The relationship violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended).

2.B. Discrimination

2.B.1. General

2.B.1.a. Definition

The Coast Guard is committed to maintaining a work environment free from unlawful discriminatory practices and inappropriate behavior. For the purpose of this section, illegal discrimination is any intentional action or omission that results in the adverse treatment of a person because of that person's race, color, religion, national origin, disability, handicap, age or gender, including sexual harassment or intentional actions or omissions in reprisal.

2.B.1.b. Policy

- (1) Accountability. The Coast Guard must hold persons accountable for illegal discriminatory conduct and track those persons through the personnel records system. Laws and regulations prohibiting illegal discrimination may be enforced through administrative or disciplinary action under both military and civilian personnel systems.
- (2) Disciplinary or Administrative Action. Disciplinary or administrative action shall be taken only where the discriminatory conduct is intentional. Although law and policy prohibit intentional and unintentional discrimination, only those persons who discriminate intentionally are included within the scope of this Section. If the discriminatory conduct is unintentional, disciplinary and administrative action is inappropriate and unjustified. However, counseling would be appropriate to draw attention to the discriminatory impact of the unintentional conduct or the application of a policy.

2.B.1.c. Prohibitions

Illegal discrimination in the Coast Guard is prohibited. No individual in the Coast Guard shall:

- (1) Engage in illegal discriminatory conduct as defined in Article 2.B.1.a. of this Manual;
- (2) Take reprisal action against a person who raises an allegation or discrimination, who assists another in raising an allegation or who provides information related to an alleged incident of discrimination; or
- (3) While in a supervisory or command position, condone or ignore discrimination of which he or she has knowledge or of which he or she should reasonably have knowledge.

2.B.1.d. Violation of Provisions

The prohibitions in Article 2.B.1.c. above are punitive general and regulatory orders and apply to all military personnel individually. A violation of these provisions by military personnel is punishable under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended).

2.B.1.e. Allegation Awareness

When area commanders, district commanders, commanding officers, officers-in-charge, chiefs of Headquarters offices and special staff divisions, become aware of allegations of illegal discriminatory conduct of personnel under their command, they shall investigate the basis for those allegations. Upon determining that illegal discrimination probably occurred; i.e., more probable than not, they shall initiate administrative or disciplinary action or formal disciplinary action as appropriate. In determining whether informal action or formal disciplinary action is appropriate, they must evaluate the severity of the alleged conduct with the reliability and veracity of the evidence presented.

2.B.2. Sexual Harassment**2.B.2.a. Policy**

All acts of sexual harassment are degrading to the offended individual and detrimental to the military profession.

2.B.2.b. Administrative and Criminal Sanctions

Commanding officers and officers in charge have a responsibility to look into all allegations of sexual harassment and to take prompt and effective action. They must be aware of all courses of action available to them to deal with sexual harassment allegations. They generally fall into three categories - discrimination complaint processes, administrative processes, and reference

(a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), provisions. These actions are not mutually exclusive and two or all three of them may be pursued simultaneously. The actions taken by a command in a particular case will depend upon the severity of the conduct, the state of the evidence, the limits of the commander's authority, and other such factors. Specific questions regarding prosecuting offenders should be addressed to the command's servicing legal office.

- (1) Sexual Harassment. Reference (l), Coast Guard Civil Rights Manual, COMDTINST M5350.4 (series), establishes the sexual harassment prevention system for the Coast Guard. It is intended to provide a single point of focus for the Coast Guard's efforts to prevent sexual harassment.
- (2) Sexual Discrimination. Reference (l), Coast Guard Civil Rights Manual, COMDTINST M5350.4 (series), provides detailed information on processing complaints of discrimination based upon gender. The primary purpose of the process is to ensure the complainant obtains an appropriate remedy or redress for any wrong he or she may have suffered.
- (3) Administrative Action. Prompt, appropriate administrative action should be taken simultaneously with discrimination complaint processes, with respect to sexual harassment offenders, when a command has sufficient information to reasonably believe an incident has occurred. It is not necessary to await the completion of the procedures set forth in the above paragraph. Commands have a wide variety of actions available which include but are not limited to informal or formal counseling, evaluation in performance reports, and formal performance reviews, which could lead to separation.
- (4) Criminal Offense. Specific acts of sexual harassment may amount to criminal offenses punishable under various provisions of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). A review of the UCMJ and reference (e), Manual for Courts-Martial (MCM), United States (current edition) reveals numerous provisions well suited for prosecution of sexual harassment amounting to criminal conduct. Sexual harassment is a specifically listed example of conduct amenable to prosecution under Article 93 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946 (as amended), (Cruelty and maltreatment). However, considering the wide range of conduct that could be characterized as sexual harassment, the following article of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), have provisions suitable for prosecuting sexual harassment cases depending on the facts of the case:

UCMJ	
Article 78	Accessory after the Fact
Article 80	Attempt to Commit an Offense
Article 81	Conspiracy
Article 89	Disrespect to a Superior Commissioned Officer
Article 90	Assaulting a Superior Commissioned Officer
Article 91	Insubordinate Conduct toward a Warrant Officer, Noncommissioned Officer, or Petty Officer

Article 92	Failure to Obey an Order or Regulation
Article 93	Cruelty and Maltreatment
Article 120	Rape and Carnal Knowledge
Article 125	Sodomy
Article 127	Extortion
Article 128	Assault
Article 133	Conduct Unbecoming an Officer
Article 134	Twelve Specifications, including: Indecent Acts, Assault, Exposure or Language; Communicating a Threat; Depositing or Causing to be Deposited Obscene Matters in the Mail; Disorderly Conduct; Fraternization; Misprision of a Serious Offense; and Soliciting Another to Commit an Offense

2.C. Reserved

The Hazing policy has moved to Chapter 3 of this manual.

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2.D. Indebtedness

2.D.1. General Policy

2.D.1.a. Military Duty

Members who fail to meet their financial obligations bring discredit upon the Service, burden the command administratively, and jeopardize their eligibility for a security clearance. Because of this, all members have a military duty to meet their financial obligations and cannot use military status as a pretext to avoid financial obligations. Despite the Coast Guard's interests in the matter, the Coast Guard has no authority to direct or control the pay of its personnel for the purpose of satisfying a private claim of indebtedness, except under the following circumstances:

- (1) When a court has ordered garnishment of a member's military pay for the payment of child support or alimony. Article 7.G. of reference (d), Coast Guard Pay Manual, COMDTINST M7220.29 (series).
- (2) When a court has ordered garnishment of a member's military pay for indebtedness. Claimant must comply with the Soldiers' and Sailor's Civil Relief Act to obtain a final judgment in a court of competent jurisdiction. (See 32 CFR, Parts 112 and 113.)
- (3) Under Article 139 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Coast Guard Claims and Litigation Manual, COMDTINST M5890.9 (series).

2.D.1.b. Command Action

Law and regulations require members to pay just financial obligations in a proper and timely fashion, and favors amicable, informal resolution. However, law and regulations also provide for involuntary allotments when this fails. The Service is not required to assist in processing debt complaints when the claimant has not made bona fide efforts to collect the debt directly from the member or when the claim is patently false, misleading, or exorbitant. In cases where there appears to be a genuine dispute as to the validity of the claim or where the amount of the claim is disputed, the claimant should be advised to seek redress through the courts. Except as provided for in Article 1.L.1.d. of this Manual, a court judgment or court order must be presumed by the commanding officer to be just, fair, and binding.

2.D.1.c. Disputing the Claim

While a commanding officer is not authorized to adjudicate disputed cases, careful consideration should be given to the merits of the member's position for the purpose of determining whether the member's delinquency or nonpayment of a claim reflects a good faith dispute. If there are sufficient grounds for disputing the claim, the commanding officer is authorized to temporarily postpone initiation of the adverse disciplinary or administrative actions provided for in Article 2.D. of this Manual in order to afford the member a reasonable opportunity to resolve the matter.

2.D.1.d. Waiver of Military Obligation

In the rare case when the commanding officer concludes that a court judgment or court order is

being disputed in court, a temporary waiver of the member's military obligation to comply with the court judgment or court order is appropriate. The member must be able to provide firm information of the efforts to resolve the dispute in court.

(1) Convincing Information. The member concerned must present convincing information which attests to a good faith course of action as described below. Full compliance with the court order will be required when:

(a) The commanding officer does not consider that the member has provided convincing information that the dispute is pending in court, or

(b) The member's efforts to obtain legal relief from the court order are unsuccessful or are terminated.

(2) Good Faith. "Good faith" in such cases includes the member's failure to comply with the judgment or court order is due to a conscious, positive plan of court action recommended by the member's attorney, the intent of which is to seek a court hearing immediately for relief or final resolution of the dispute. Mere conferral with an attorney by the member is not convincing information to suspend the member's military obligation to comply with the court judgment or court order, unless followed by positive action on the member's part.

(3) Member Responsibility. Temporary waiver from the military obligation to liquidate indebtedness does not authorize the member to ignore the claim. On the contrary, the member must demonstrate the court action taken to resolve the matter. A member involved in a disputed claim should be advised to consult with a Coast Guard legal assistance officer in accordance with the provisions of reference (m), Legal Assistance Program, COMDTINST 5801.4 (series).

2.D.1.e. Insufficient Funds

Tendering a check drawn on a bank when the individual knows or reasonably should know that there will be insufficient funds available may constitute a criminal offense under the laws of the civil jurisdictions or reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Commanding officers shall investigate incidents of this nature and take disciplinary action when appropriate. While every instance of a check returned because of insufficient funds is not necessarily criminal, repeated incidents of this nature are indicative of financial irresponsibility and should be handled as provided for in Article 2.D.4. of this Manual.

2.D.1.f. Information Provided to Creditors

Commanding officers shall not furnish creditors with any information concerning the personal credit rating or financial responsibility of a member even if authorized by the member. Such information may be construed as approving or endorsing the extension of credit.

2.D.2. Command Indoctrination and Counseling

Commanding officers shall ensure that members of their command are instructed in the basic provisions of this section. Inclusion of this section in a unit organization manual will fulfill this indoctrination requirement. For units below the sector level, training beyond initial indoctrination is the responsibility of the sector. The following points should be emphasized when discussing credit practices:

- (1) Evidence of Irresponsibility. Failure to pay just debts or repeatedly incurring debts beyond a member's ability to pay is evidence of irresponsibility and may jeopardize the member's security clearance, advancement, duty assignment, qualification for reenlistment or extension of enlistment, and may become grounds for disciplinary action or administrative discharge.
 - (2) New Credit. Prior to accepting new credit, members should evaluate their financial capabilities and establish a budget which demonstrates the ability to repay the new debt.
 - (3) Large Purchases/Difficulty Paying Debt. Members should consult with a legal assistance officer when contemplating large purchases on credit, or when they encounter difficulties in paying their debts. (See reference (m), Legal Assistance Program, COMDTINST 5801.4 (series).)
 - (4) Counseling Services. The savings, counseling, and lending services provided by credit unions may offer substantial advantages over those of standard commercial institutions.
 - (5) Seek Advice. Be wary of the "high-pressure" salesman. Think carefully and seek advice before signing an agreement or contract. Never sign a blank contract and always determine the total payment in installment sales. Note particularly the penalty clauses.
 - (6) Bankruptcy. Bankruptcy is not an easy way out of indebtedness. The circumstances prompting bankruptcy proceedings may reflect adversely on the military character of the bankruptcy petitioner. If it appears that the offense of dishonorable failure to pay just debts has occurred prior to discharge of indebtedness through bankruptcy proceedings, the subsequent discharge in bankruptcy will not preclude action under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended) even though the debts themselves may have been discharged by the bankruptcy action.
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2.D.3. Action upon Receipt of Complaint of Indebtedness

2.D.3.a. Initial Complaint

Commanding officers receiving an initial complaint of indebtedness shall inquire into the complaint and take prompt action to resolve the controversy. Such action should support reference (j), United States Coast Guard Regulations 1992, COMDTINST M5000.3 (series), regarding the maintenance of discipline. Command action must also support the law which provides for the garnishment of a member's pay as described in Article 2.D.1.a. of this Manual. All actions should be accomplished within 30 days of receipt of a complaint.

2.D.3.b. Retention of Receipts

The commanding officer should urge the individual to make payments on debts by U. S. postal money order, check, or by any other method providing an actual record of payment. The commanding officer should recommend that the member retain receipts in connection with all business transactions. The member concerned should then be directed to correspond in a courteous manner to inform the claimant of his or her intentions in the matter.

2.D.3.c. Response to Correspondence

The commanding officer shall acknowledge all correspondence from persons claiming indebtedness by responding promptly and courteously to the complaint. Each reply should be couched in temperate language and reflect concern for resolution of the dispute. The reply should include a statement that the matter has been brought to the member's attention and that the member has been advised to communicate with the claimant. A sample letter is provided below:

Name
Address
City, State, Zip

Dear:

This is in response to your letter of <Date> concerning the alleged failure of <Name of Member> to pay the debt owed to you.

The Coast Guard expects its members to honor all just debts and comply fully with the orders of any court of competent jurisdiction not under appeal. Upon receipt of your letter, we referred the matter to <Name of member> and advised <him/her> to communicate with you concerning this indebtedness.

If you and <Name of member> are unable to resolve this issue in a mutually agreeable manner, you must comply with the procedures of the Soldiers' and Sailors' Civil Relief Act and the provisions of Title 32, Code of Federal Regulations, Parts 112 and 113, to obtain a final judgment and court order in a court of competent jurisdiction.

2.D.3.d. Waiver of Military Obligation

When authorizing a temporary waiver of the military obligation to liquidate debts, the commanding officer may periodically require a statement from the member that the effort to obtain relief remains active and an approximate date when a court hearing may be held. When a waiver is granted, additional complaints regarding the matter should be responded to by briefly informing the claimant of the following:

- (1) The member has been granted a reasonable period in which to seek relief through the courts,
 - (2) The name of the member's attorney, and
 - (3) Questions on the merits of the case should be addressed to the member's attorney.
-

2.D.4. Repeated Indebtedness or Failure to Obey Court Orders

2.D.4.a. Administrative Responsibilities

When a unit receives a complaint of indebtedness, the commanding officer shall counsel the individual concerned. For units below the group level, all responses, Administrative Remarks, Form CG-3307, entries, and correspondence will be prepared by the group staff and copies provided to the unit CO or OIC. Unit COs or OICs will counsel the member and provide the details to the group point of contact, but the group is responsible for complying with the provisions of this Article. The unit CO or OIC may submit documentation in any informal method such as memorandum, rapidraft letter, or e-mail.

2.D.4.b. Financial Statements

When the commanding officer is convinced that a member is negligent or careless in regard to personal finances, the individual may be advised to submit a statement of monthly finances and outstanding obligations. Such a request should not be placed in the form of an order and failure to comply with the advice should not be the occasion for disciplinary action. In no event is this submission to be made mandatory.

2.D.4.c. Officers

When the commanding officer is convinced that an officer is negligent or careless in regard to their personal finances, an appropriate entry shall be made on the Officer Evaluation Report (OER) and other corrective action taken, if warranted.

2.D.4.d. Enlisted Personnel

Repeated complaints of indebtedness concerning an enlisted person, with no indication of satisfactory progress toward establishing an acceptable financial status, may be considered as evidence of unreliability. Commanding officers shall submit an Administrative Remarks, Form

CG-3307, entry that the member is "Unreliable due to failure to pay debts." The entry shall also include a description of the circumstances surrounding the entry such as the dates, debts, and actions taken. Such an entry may be made for each succeeding marking period until the situation improves. Each time this entry is made, it will be considered when completing the member's next performance evaluation, particularly in the commanding officer's advancement recommendation.

2.D.4.e. Transfers

If a member is transferred prior to satisfactory resolution of the problem, all current correspondence shall be forwarded to the member's new commanding officer.

2.D.4.f. Separation

Unsatisfactory progress toward resolution of financial difficulty should be considered as evidence of an unacceptable standard of conduct which warrants consideration for separation from the Coast Guard or for a recommendation against reenlistment. Articles 1.A.14, 1.B.15, or 1.B.17 (as appropriate) of reference (k), Military Separations, COMDTINST M1000.4 (series).

2.D.4.g. Security Clearances

Excessive indebtedness and unreliability are circumstances which may impinge on an individual's eligibility for a security clearance. Accordingly, when an individual who has or needs a security clearance in order to carry out assigned duties is considered under this Article, the member should also be evaluated in light of personnel security criteria. (See Personnel Security and Suitability Program, COMDTINST M5520.12 (series).)

2.D.5. Remission or Waiver of Indebtedness to the United States

2.D.5.a. Remissions

Only active duty enlisted personnel may request remissions of indebtedness. Collection of the outstanding debt may be suspended pending final decision on the remission. Debts collected prior to the commanding officer's endorsement on the remission request may not be refunded. Financial hardship may be considered in remitting a debt.

2.D.5.b. Waivers

All members and former members may apply for waivers of indebtedness. Collection of the debt continues while the application is being processed; however, money already collected may be refunded if the waiver is approved.

2.D.5.c. Applications

The policies for waiver or remission of indebtedness to the United States are contained in reference (d), Coast Guard Pay Manual, COMDTINST M7220.29 (series). Applications and procedures to be followed when submitting a waiver or remission are contained in reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series).

2.E. Support of Dependents

2.E.1. General

2.E.1.a. Policy

The Coast Guard will not be a haven or refuge for personnel who disregard or evade their obligations to their families. All members of the Coast Guard are expected to conduct their personal affairs honorably and lawfully. This obligation specifically includes the responsibility to provide adequate and continuous support for lawful dependents, and to comply with the terms of support clauses which may be contained in separation agreements and divorce decrees. When a member, despite counseling conducted in accordance with the requirements of Article 2.E.4. of this Manual, develops a pattern of conduct which demonstrates a dishonorable failure to contribute adequate support to dependents or failure to comply with the orders, decrees, or judgments of a civil court concerning support of dependents, such failure may lead to the member's separation for misconduct. When such failure is sufficiently notorious as to bring discredit upon the Coast Guard, none or inadequate support may as well become a proper subject for command consideration of court-martial proceedings or other disciplinary action. In addition, failure to provide adequate support to dependents may have implications with regard to a member's entitlement to basic allowance for housing, as discussed in Article 2.E.1.b. of this Manual. It should be noted that while the Coast Guard lacks the authority under federal law to compel members to support their dependents or to exercise discretion over a member's pay with the exception of garnishment orders, the obligation to support dependents is nonetheless considered binding on all members under penalty of administrative or disciplinary action, or both. (See Article 2.E.2.d. of this Manual.) Garnishment is action taken against a member's pay for money past due and does not substitute for nor relieve members of their obligation for support of their dependents.

2.E.1.b. Entitlement to Basic Allowance for Housing (BAH)

(1) Entitlement. Entitlement of members to BAH in behalf of dependents is provided by law, and in some instances is contingent upon the actual provision of more than 50 percent of the dependent's support. No member should be denied the right to submit a claim or application for BAH, nor should any command refuse or fail to forward any such claim or application. In cases involving a member's parents, the member should furnish an estimate of the dependency situation to the best of his or her knowledge. Commanding officers should not contact parents for dependency information to include in the member's application. This delays the application and serves no purpose as such cases are thoroughly investigated by the Pay and Personnel Center. Commander, Pay and Personnel Center, obtains dependency

affidavits from the parents. Any person, including a service member or dependent, who obtains an allowance or allotment by fraudulent means is subject to criminal prosecution.

- (2) Use of BAH. In the normal family situation, BAH will subsidize the member's ability to maintain a household. In cases of separation of husband and wife, the BAH should be employed to help provide support of the legal dependent(s) of the member until and unless legal or administrative relief from the obligation is granted. If the member's entitlement to BAH is contingent on actual dependency, as when based on the provision of support to parents or children, failure to provide adequate support will be grounds to reassess, and possibly to terminate, that entitlement. In such cases, the pertinent facts shall be forwarded to Commander, Pay and Personnel Center via the chain of command for determination.

2.E.1.c. Support of a Lawful Spouse

Members of the Coast Guard have a military obligation to support their spouse unless they demonstrate that there is no civil obligation to provide support to their lawful spouse.

2.E.1.d. Adopted Children

The natural parents of an adopted child are relieved of the obligation to support the child, as such duty is normally imposed on the adoptive parents. A Coast Guard member who contemplates the adoption of a child should be aware of the legal obligation to provide continuous support for a minor child.

2.E.1.e. Command Responsibility

It is the responsibility of every commanding officer to ensure that all personnel under his or her command are informed of Coast Guard policy and expectation regarding support of dependents and the possible consequences of separation for misconduct for failure to discharge their just obligations. All personnel at sea or stationed overseas shall be counseled and encouraged to make provisions for continuous allotments to their dependents in amounts sufficient to enable them to meet the family obligations at home.

2.E.2. Support Requirement Pursuant to Court Order

2.E.2.a. Support of Spouse or Former Spouse

- (1) Legal Separation. With respect to spousal support, a member who has been granted a legal separation by a court order remains obligated for support of his or her dependent spouse as provided for in Articles 2.E.1.c. and 2.E.3.c. of this Manual unless the court order either sets the spousal support obligation at some other level or specifically negates that obligation, or prevailing civil law makes termination of civil obligation for that spousal support an implicit element of a court order of legal separation. This question may be resolved by reference to the court which handed down the order.

- (2) Divorce. If a divorce decree specifies an amount to be provided for a former spouse, the alimony so specified constitutes the member's financial obligation to that former spouse. If a divorce decree is silent with respect to any financial obligation to the former spouse, the Coast Guard will consider that the member has no obligation to provide further spousal support.
- (3) Dependency Status of a Former Spouse. The entitlement of members to BAH on behalf of dependents is defined by law. Similarly, federal law defines the entitlement of dependents to military benefits and privileges. Information concerning eligibility requirements is contained in Chapter 2 of Military Civil and Dependent Affairs, COMDTINST M1700.1 (series). A member is not entitled to payment of BAH at the with-dependents rate on behalf of a former spouse notwithstanding the fact that the divorce decree orders payment of alimony. However, court ordered alimony is a binding legal obligation. Members are expected to comply with the terms of court orders or divorce decrees which adjudge payments of alimony even though BAH may not be payable. Failure to do so constitutes grounds for disciplinary or administrative action as provided for in Article 2.E.4. of this Manual. Garnishment of pay and allowances is discussed in Article 2.E.2.d. of this Manual.

2.E.2.b. Support of Children

- (1) Legal Separation. Cases of legal separation are those in which separation of a member from his or her spouse has been recognized in the order of a civil court (usually in contemplation of divorce proceedings). Court orders of legal separation normally define the continuing child support obligations of the separated parents quite precisely. Provision on a timely basis of the amount of support required by a separation order will satisfy a member's military obligation to support the dependents affected. However, unless a separation order specifies an amount of child support to be provided, or specifically negates such an obligation, a member remains obligated to provide support for minor children of the marriage at the level prescribed in Article 2.E.3. of this Manual.
- (2) Divorce. A final decree of divorce in most cases will establish the member's subsequent legal obligation concerning support of minor dependent children of the dissolved marriage. One of the following situations usually will be found to prevail:
 - (a) If the decree specifies a certain level of support to be provided for minor dependent children, the amount so specified represents the minimum support obligation of the member.
 - (b) If the language of the decree refers in any way to the existence of minor dependent children of the marriage, but remains silent as to any obligation of the member to provide support for such children, the member will be considered to have no military obligation to provide child support, provided, of course, that the member is not awarded custody of such children. A case in point would be one where the only language in the decree referring to children of the marriage awards the member's spouse custody. If the member is awarded custody of such minor dependent children, the obligation for their support and

welfare continues undiminished from that existing prior to the divorce decree, regardless of any support obligation which may be assessed against the spouse.

- (c) In the rare case where a final divorce decree makes no reference whatsoever to existent minor dependent children of the dissolved marriage, it is possible that the court may not have been cognizant of their existence, or may not have had jurisdiction over the child or children. In such cases, the member is obligated to continue provision of child support at a minimum level equivalent to that prescribed in Article 2.E.3.c. of this Manual.
- (3) Special Circumstances. A commanding officer has discretion to withhold action against a member for failure to support a child under the following conditions:
- (a) When the member cannot ascertain the whereabouts and welfare of the child; or
 - (b) When it is apparent that the person requesting support for a child does not have physical custody of the child.

2.E.2.c. Temporary Waiver of Requirement to Support Dependents

A court order or divorce decree requiring the payment of a stipulated amount of child or spousal support or alimony will normally be presumed to be binding upon the individual concerned. However, if a member, acting on good faith and on the express advice of qualified legal counsel, disputes such a claim, the commanding officer may withhold disciplinary or administrative action against the member for a reasonable length of time to provide an opportunity to resolve the matter. "Good faith" in such cases means that the member's failure or partial failure to comply with the judgment or court order is of itself an element of a conscious, positive plan of action, as recommended by the member's attorney, the intent of which action is to seek a court hearing for relief or final resolution of a long-standing dispute. Mere conferral with an attorney, not followed by positive action on the member's part, is not sufficient to invoke this provision. In requesting consideration under this subparagraph, it falls to the member concerned to present substantive, documentary evidence which attests to a good faith course of action as described above. Should the commanding officer not consider that the member has provided convincing evidence justifying a waiver of compliance, or should the member's efforts to obtain legal relief from the court order prove unsuccessful or be terminated prior to resolution, full compliance with the court order will be required. In determining the period to be allotted for such deferrals, the commanding officer may periodically require a statement from the member or his or her attorney stipulating that the effort for obtaining relief remains active, and indicating an approximate date upon which a court hearing may be forthcoming. In such cases, additional complaints regarding the matter should be responded to by briefly informing the complainant that the member has been granted a reasonable period in which to seek relief through the courts, that the complainant will be advised further upon conclusion of that effort, and that questions on the merits of the case may be addressed to the member's attorney.

2.E.2.d. Garnishment of Pay

- (1) Coast Guard Obligation to Comply with Civil Order. Under the provisions of the Social Services Amendments of 1974 (Public Law 93-647, 42 U.S.C. § 659) the Coast Guard is obliged to comply with the terms of a legally sufficient state or federal court order directing the garnishment of a member's federal pay for the purpose of child support or alimony, without regard for the merits of the case. A member who believes himself or herself entitled to relief from such an order must seek that relief through the civil court system. In this regard, members have available in most locations the advice and counsel of a legal assistance officer. In some cases, the circumstances may be found to justify the assistance of Coast Guard Mutual Assistance or other humanitarian consideration. Nothing contained in this Article, however, should be construed to imply that the Coast Guard has the authority to withhold action in complying with the terms of a legally sufficient garnishment order.

- (2) Action Upon Receipt of Court Order. If a local command or person in authority therein receives any legal document or court order referring to or purporting to be a garnishment order, such document or order should be forwarded immediately to such legal reviewing authority and by such means as are provided for in current directives. Coast Guard officers, commanding officers, and officers in charge in receiving such orders should not take any steps to implement such order prior to its referral to the designated legal reviewing officer. If upon legal review, the order is determined to be legally sufficient, the order will be transmitted via the chain of command to the member's commanding officer and to the authorized certifying officer having custody of the member's pay record for execution. The commanding officer upon such receipt shall immediately counsel the member. At a minimum, the member should be advised of the existence and terms of the order (including amounts ordered garnished, payees, duration of garnishment, etc.), of the availability in most locations of the advice and counsel of legal assistance officer, and that, until determined to the contrary by subsequent civil court order, the Coast Guard is obliged to consider the garnishment order valid and to effect immediately the required withholding of pay. The authorized certifying officer having custody of the member's pay record will upon receipt of the garnishment order commence withholding the stipulated amount of pay for transmittal to the designated payee.

- (3) Garnishment Action. Garnishment action taken by the Coast Guard is not considered a substitute for support ordered by a court to be paid by the member. A garnishment order may be the result of a member failing to meet his or her legal obligations to provide dependent support. It may also be the result of a decision by the court to raise the amount of support a member is required to provide. Even though a portion of a member's pay may be disbursed to dependents as a result of garnishment, the member is not relieved of the obligation to comply with existent orders, decrees, or judgments of a civil court concerning support of dependents. Valid court orders must be complied with in all cases.

2.E.2.e. Advice Regarding Support Provisions for Children When Divorce is Contemplated

Members who have minor children and contemplate divorce should be informed of the advisability of having support provisions incorporated in the court order or divorce decree to preclude later disputes. Courts and attorneys are occasionally misled into placing provisions in separation agreements and divorce decrees to the effect that the member will pay whatever

amount the Armed Forces pay or require to be paid for support of the child or children. Ambiguous phrases such as "whatever allowance is paid by the Coast Guard" or "whatever the Armed Services require to be provided" should be avoided. No attempt will be made to break down the housing allowance as to how much should be designated for a spouse, child, or other dependent. Such ambiguous orders of support or agreements will be considered the same as if they were silent with respect to the amount of support to be provided. The interests of all concerned will be better served if the amount of support to be provided is settled in fixed terms by agreement or court order at the time of separation.

2.E.3. Support Requirement in the Absence of a Court Order

2.E.3.a. Applicability

The provisions of this Article are applicable in disputed cases:

- (1) when a member is separated from his or her spouse, yet remains legally married and is not subject to a court order either negating a support obligation or directing a payment of a fixed level of support, or
- (2) in the rare case when a member is legally divorced, but the final decree of divorce makes no mention whatsoever of existent children of the marriage. In cases of legal separation, when a court having jurisdiction has ordered a specified level of support, the level so specified will constitute the member's obligation. (See Article 2.E.2. of this Manual.)

Note: Within the meaning of this Article, members are considered as still legally married when a valid marriage has not been dissolved by a final decree of divorce, notwithstanding the fact that the member may no longer reside with his or her spouse and/or children. Similarly, the instructions contained herein apply also to members who stand legally separated from their spouses pursuant to a valid court order providing such court order is silent with respect to any support obligation in behalf of the member's spouse and/or children.

2.E.3.b. Basic Considerations

Every person has an inherent natural and moral obligation to support his or her dependents. What constitutes adequate or reasonably sufficient support is a highly complex and individual matter dependent on numerous factors which ultimately can be resolved only in the civil courts. Salient factors which must be taken into account concerning both service members and their dependents, however, include such matters as the following: total income from all sources, the cost of necessities and everyday living expenses, and other binding financial obligations, including those of the dependents. The Coast Guard does not and cannot act as a court in these matters. Whenever possible, it is desirable that the amount of support to be provided for dependents be established either by mutual understanding between the parties concerned or by adjudication in the civil courts.

2.E.3.c. Support Scale

- (1) **General.** In disputed cases and in the absence of specific support provisions contained in a court order, commanding officers will resort to the support scale set forth below. The levels of support required by the scale are not intended to imply that the Coast Guard favors either side in a dispute, or that the Service takes any position on the merits of a dispute. Nor is any determination made pursuant to this support scale intended to serve as a substitute for proper adjudication of a particular case or as a permanent determination. Rather, the commanding officer's determination is intended only to provide for a reasonably equitable level of support for a member's dependents until such time as a final level of support time is established by mutual agreement of the parties or by court order. The mandatory and universal interim obligation contained in the following support scale is also intended to encourage members or their spouses in such cases to pursue final settlement in the civil courts. Unless otherwise specified by court order, married officer and enlisted personnel will, as a minimum, be considered obligated to provide support for their lawful dependents on a monthly basis as follows:

Situation	Level of Support
Spouse only	BAH difference plus 20 percent of basic pay
Spouse and one minor or handicapped child	BAH difference plus 25 percent of basic pay
Spouse and two or more minor or handicapped children	BAH difference plus 30 percent of basic pay
One minor or handicapped child	16.7 percent (1/6) of basic pay
Two minor or handicapped children	25 percent (1/4) of basic pay
Three or more minor or handicapped children	33 percent (1/3) of basic pay

Note: For this scale, BAH difference is defined as the difference between the BAH with dependents rate and the BAH without dependents rate as calculated for the member.

- (2) **Minimum Level of Support Expected.** This support scale constitutes the minimum level of support expected of all members without regard to other financial obligations or other factors favorable to the spouse's financial situation. This minimum level of support is intended to serve as an equitable guide in cases where the member no longer resides with his or her spouse and children, even if the separation represents unilateral action on the part of the member's spouse. The provisions of this paragraph do not apply to an ordinary compatible marriage where the member lives with and supports his or her dependents. In such cases, the rendering of a definitive monthly payment to a spouse or other dependent is optional, although such an arrangement may well be helpful in cases where the family is subject to involuntary separation because of duty assignment. For disputed cases, however, the

minimum obligation provided in this Article is binding on a member until such time as a court having jurisdiction may otherwise order. See Article 2.E.2. of this Manual for guidance concerning obligations under court order of legal separation and final decrees of divorce. A member may not escape the obligation to provide the minimum level of support prescribed here by terminating his or her BAH. The obligation for support at an equivalent level continues whether or not the member elects to claim the entitlement. It is emphasized that this support scale represents only a minimum obligation amount governed in general terms by pay grade (ability to pay) and number of dependents. In many instances a member may, out of moral responsibility or mutual agreement, provide support in excess of these limits.

2.E.3.d. Separation, Desertion, and/or Misconduct of Spouse

As noted above, the duty of a member to support his or her minor children is not diminished by informal separation of the parents, whether by mutual agreement to separate or by unilateral action on the part of one of the parents. Similarly, the member's obligation to provide such support is not diminished by virtue of the fact that his or her spouse may have retained custody of the children. Nor is the obligation of a member to support his or her minor children in any way diminished by virtue of desertion or misconduct on the part of the spouse. The member remains obligated in each of the above cases to provide, as a minimum, that level of child support specified in Article 2.E.3.c. of this Manual.

2.E.3.e. Special Circumstances

A commanding officer has discretion to withhold action against a member for failure to support a child under the following conditions:

- (1) When the member cannot ascertain the whereabouts and welfare of the child; or
- (2) When it is apparent that the person requesting support for a child does not have physical custody of the child.

2.E.4. Action upon Receipt of Complaints of Nonsupport and Insufficient Support of Dependents

2.E.4.a. Enlisted Personnel

Upon receipt of a complaint alleging that an enlisted person is not adequately supporting his or her lawful dependents (spouse and/or children), the member will be counseled and informed of the Coast Guard's policy concerning support of dependents. If there is a court order or divorce decree still existing in the case, the member will be expected to comply with its terms except as noted in Article 2.E.4.a.(3) of this Manual. In the absence of a determination by a civil court or a mutual agreement of the parties, the provisions of Article 2.E.3. of this Manual will apply. Members who are the subject of complaints about non or inadequate support of dependents will be advised of their legal rights in the matter, including the availability of legal assistance in most

locations under the provisions of reference (m), Legal Assistance Program, COMDTINST 5801.4 (series). Such members should be counseled further that while the Coast Guard cannot directly compel payment of support to their dependents nor exercise discretion over their federal pay for that purpose except in cases of garnishment, their Coast Guard career may be in jeopardy if the failure to provide adequate support continues. (See Article 2.E.2.d. of this Manual.) Specifically, continued noncompliance with the obligation to provide adequate support to dependents, or failure to comply with court orders or decrees concerning support of dependents, may constitute grounds to withhold recommendation for reenlistment or extension of enlistment, or render the member subject to administrative or disciplinary action possibly leading to involuntary separation from the Coast Guard. Further, the member should be reminded that the entitlement to claim a dependent as an exemption for federal income tax purposes is contingent upon actual provision of 50 percent or more of that dependent's support during any tax year. The member should be encouraged to communicate with the complainant either directly or through an attorney in an effort to resolve the matter expeditiously. The counseling required by this Article should be undertaken promptly (within five working days of receipt of the complaint as a general guideline), and should be oriented toward helping the member to effect a permanent, equitable resolution of this problem. The member will be required to acknowledge in writing the following Performance and Discipline Entry Type on Administrative Remarks, Form CG-3307, entry in his or her Personnel Data Record (PDR):

“Counseled concerning civil and moral obligations to provide continuous and adequate support of lawful dependents.”

- (1) Waiver of Support of Spouse. The Commandant may grant exemption from the military requirement to support a spouse, but not children, on the basis of evidence of desertion without cause, infidelity on the part of the spouse, or in some cases of spousal abuse inflicted on the member. Such an exemption does not affect any continuing civil obligation for spousal support which a member may have. Evidence of desertion or infidelity may consist of:
 - (a) An affidavit of the service member, relative, disinterested person, public official, or law enforcement officer. However, affidavits of the service member and relatives must be supported by other corroborative evidence. All affidavits must be based upon the personal knowledge of the facts. Statements of hearsay, opinion, and conclusion are not acceptable as evidence.
 - (b) Written admissions by the spouse contained in letters to the service member or other persons. The request for waiver of support of a spouse should be submitted to Commandant (CG-122) with a complete statement of the facts and substantiating evidence and comments or recommendation of the commanding officer.
 - (c) Waiver requests submitted on the grounds of abuse must be corroborated by evidence which may include the following types of documents: medical reports, police reports, affidavits of witnesses, chaplains, counselors or social workers, and Family Program Administrators.

- (2) Waiver of Support of Children. A temporary waiver of the military requirement to support a child or children may be appropriate in certain limited circumstances. (See Articles 2.E.2.b.3 and 2.E.3.e. of this Manual.)
- (3) Temporary Waiver of Compliance With Court Order. If a member, in failing to comply fully with the terms of a court order or divorce decree, is acting in good faith and upon the advice of qualified legal counsel in an effort to arrive at a permanent resolution of a disputed court decision, he or she may be entitled to a temporary waiver of the Coast Guard's requirement for the member to comply with such an order. (See Article 2.E.2.c. of this Manual.)
- (4) Repeated or Unresolved Complaints of Nonsupport or Inadequate Support.
 - (a) A justifiable and unresolved complaint that an enlisted member is failing to support his or her dependents adequately may, in an aggravated case, be considered as evidence of unreliability. If the complaint remains unresolved after 30 days have elapsed since the member was counseled concerning the legal and moral obligations to provide support as required by sub-paragraph a. of this Article, the member will be counseled again concerning these obligations and required to acknowledge in writing the following Performance and Discipline Entry Type on Administrative Remarks, Form CG-3307, entry in the member's PDR:

“Counseled, again, concerning civil and moral obligations to provide continuous and adequate support to lawful dependents.”
 - (b) If, after not fewer than six months since the member was notified that the command has received complaint(s) alleging nonsupport or inadequate support, it is the commanding officer's judgment that the member has failed to demonstrate an acceptable degree of effort towards resolving the complaint, the commanding officer may enter the following Performance and Discipline Entry Type on Administrative Remarks, Form CG-3307, entry in the member's PDR:

“Unreliable due to unsatisfactory conduct of personal affairs and support of dependents.”
 - (c) These entries will be considered when completing the member's next evaluation. The member shall be required to acknowledge these actions by signing the Administrative Remarks, Form CG-3307, entry. The entry in Article 2.E.4.a.(4)(b) above may be made after each succeeding 90-day period, during which, in the opinion of the commanding officer, the member continues to demonstrate inadequate effort towards resolving the complaint. Continued unsatisfactory effort on the part of the member to resolve the complaint may be considered to be unacceptable conduct warranting either consideration for separation or a recommendation against the member's reenlistment. Upon making the second consecutive Administrative Remarks, Form CG-3307, entry that the member is deemed unreliable, the commanding officer shall report the circumstances to Commander

(CG PSC-EPM) and make a recommendation. If the recommendation is for administrative separation or to deny reenlistment, the applicable provisions of reference (k), Military Separations, COMDTINST M1000.4 (series), apply.

2.E.4.b. Commissioned Officers and Chief Warrant Officers

(1) Action of Commanding Officer:

- (a) Upon receipt of a written complaint alleging that an officer of his or her command is not adequately supporting his or her legal dependents, the commanding officer will interview the officer for the purpose of emphasizing Coast Guard policy concerning support of dependents. The commanding officer will require submission of a written statement of the officer's position and intentions in the matter within the premises contained in Article 2.E.4.b.(2) of this below.
- (b) When the complaint is received directly from the dependent concerned or the legal representative thereof, the commanding officer will obtain the officer's written statement. The commanding officer shall then promptly advise Commander (CG PSC-OPM) and provide a brief summary of the officer's contentions and intentions as contained in the officer's written statement.
- (c) When a complaint is received via the Commandant, the commanding officer will obtain the officer's written statement and forward that statement, together with a summary of action taken or contemplated, to Commander (CG PSC-OPM). The commanding officer shall include in his or her endorsement such comments as deemed appropriate. This statement should normally be submitted to Commander (CG PSC-OPM) within 20 working days of receipt of the complaint.
- (d) The provisions for waiver of spousal or child support and waiver of compliance with court orders, as set forth in Article 2.E.4.a. of this Manual are equally applicable to officer personnel.
- (e) If, in the opinion of the commanding officer, it appears that the officer concerned has repeatedly and unjustifiably disregarded the provisions of a valid court order, the terms of a current mutual agreement, or the provisions of this section in a way that brings discredit upon the Coast Guard, the commanding officer should consider one or more of the following as the appropriate disposition according to the merits of the individual case:
 - [1] Appropriate notation in the officer's next regular Officer Evaluation Report.
 - [2] Commanding officer's nonjudicial punishment.
 - [3] Recommendation for trial by court-martial.

Note: The mere fact that an officer is involved in a matter concerning the nonsupport of

legal dependents should not, in itself, be the sole factor for considering the above action. However, when an officer's conduct in such a case does, in fact, become sufficiently negligent to bring discredit upon the Coast Guard, that officer's commanding officer is justified in invoking the provisions of this subparagraph, inasmuch as an officer must be morally, professionally, and physically qualified for retention in his or her present grade as well as for promotion to the next higher grade. As a general guideline, the above-listed action should be considered when six months have passed since receipt of the original complaint with no indication of satisfactory progress toward establishing an acceptable solution.

(2) Action of Officer Concerned.

- (a) Upon receipt of correspondence alleging his or her failure to contribute adequately to the support of legal dependents (spouse and/or children) and on the request of the commanding officer, the officer concerned will submit a statement setting forth the following:
 - [1] Amount and method of contributions to legal dependents during a 12-month period preceding receipt of complaint.
 - [2] Amount being contributed monthly as of date of receipt of complaint.
 - [3] Amount to be contributed monthly in the future and the method by which payments will be made.
 - [4] If amounts 1, 2, and 3 above are less than that required by Article 2.E.3.c. of this Manual or the pertinent court order, the reasons therefore.
 - [5] Any further information pertinent to the matter which the officer desires to call to the attention of the Commandant.
- (b) If practicable, a certified true copy of any pertinent court order or voluntary mutual agreement should be appended to the statement.
- (c) In the absence of a determination by a civil court or a mutual agreement of the parties, the support scale in Article 2.E.3.c. of this Manual will apply.

2.E.4.c. Security Considerations

Irresponsibility or unreliability, as evidenced by consistent failure to provide for one's legal dependents, may have implications with regard to an individual's eligibility for a security clearance. Accordingly, when an individual who has or needs a security clearance in order to carry out assigned duties is considered under this Article, he or she should also be evaluated in light of personnel security criteria.

2.E.5. Determination of Paternity and Support of Illegitimate Children

2.E.5.a. General

With respect to determinations of paternity and support of illegitimate children, no complaint requires greater exercise of judgment and tact than the charge that an officer or enlisted member serving under one's command is the father of a child born out of wedlock. While the officer or enlisted man should not be left with the impression that either civil law or reference (j), United States Coast Guard Regulations 1992, COMDTINST M5000.3 (series), require that he marry the mother of the child, if the serviceman desires marriage, leave for this purpose is recommended whenever consistent with the needs of the Service. When the blood parents of an illegitimate child marry, the child is considered to be legitimized by the marriage and therefore eligible for the same allowances and benefits as any other legitimate child of a member. If the member does not marry the child's mother but nonetheless elects to provide support for the child, he may in certain circumstances, be qualified for BAH-Diff on behalf of that child. Whenever such an entitlement is claimed or appears justified, the pertinent facts will be forwarded to the Human Resources Service and Information Center (LGL) for determination via the chain of command.

2.E.5.b. Foreign Complaints

Complaints from various sources in foreign countries regarding alleged paternity, marriage, or related matters involving Coast Guard personnel during their service at a foreign station can be detrimental to the prestige of the United States Coast Guard and adversely affect international relationships if not promptly resolved. It is expected that commanding officers will address such complaints as expeditiously as possible. Commanding officers should feel free to seek the advice of local United States consular officials. If, in the judgment of the commanding officer, the situation cannot be satisfactorily or permanently resolved before departure from the foreign area in question, a report setting forth all pertinent facts should be made to appropriate higher authority.

2.E.5.c. Judicial Order or Decree of Paternity or Support

Normally, any order or decree which specifies the obligation to provide support of illegitimate children will include within it a determination of paternity of such children; however, some jurisdictions provide for determinations of the legal obligation to support illegitimate children without a determination of paternity. Either type of order or decree falls within the scope of this paragraph. If a judicial order or decree of paternity or support is issued against a member of the Coast Guard on active duty by a United States or foreign court having jurisdiction over him, he will be informed of his moral and legal obligations as well as his legal rights in the matter. He will be advised that he is expected to provide financial assistance to the child regardless of any doubts of paternity that he may have. If the court order or decree specifies an amount of support to be provided, the officer or enlisted member will be expected to comply with the terms of such decree or court order. If no amount is specified, support should be provided in accordance with such reasonable agreement as may be made with the mother or legal guardian of the child. If no such agreement can be reached, the amount of support provided should bear a reasonable

relationship to the support scale contained in Article 2.E.3.c. of this Manual, with due regard for any other support obligations of the member. If a member refuses to comply with the terms of a valid court order, except as provided in Article 2.E.5.d. below, administrative action will be taken as indicated in Articles 2.E.4.a. above for enlisted members and 2.E.4.b. above for officers.

2.E.5.d. Temporary Waiver of Compliance with Court Order

A court order establishing paternity and/or the obligation to provide support for an illegitimate child will normally be presumed to be binding upon the individual concerned. However, if a member, acting in good faith and upon the advice of qualified legal counsel, disputes either the equity of the judgment against him, he may be entitled to a temporary waiver of the Coast Guard's requirement that members comply with such an order. Requests for such waivers will be submitted and considered in accordance with the procedures in Article 2.E.2.c. of this Manual for disputed support of dependents cases.

2.E.5.e. Garnishment of Pay in Paternity Cases

Coast Guard's obligation to comply with valid garnishment orders is set forth in Article 2.E.2.c. of this Manual.

2.E.5.f. No Judicial Determination

In the absence of an adjudication of paternity or of a legal obligation to furnish support by a court having jurisdiction, the officer or enlisted member shall be consulted privately, advised of the legal and moral obligation to support illegitimate children, as well as his rights in the matter, and asked whether he admits either paternity of, or the legal obligation to support, the child or expected child. If the answer is affirmative, he shall be informed that he is expected to furnish support as set forth in Article 2.E.5.c. of this Manual. When paternity or the obligation to support is admitted, members should be informed of their moral obligation to assist in the payment of prenatal expenses.

2.E.5.g. Replies to Paternity Complaints

Replies to individuals concerning paternity cases should be as kind and sympathetic as the circumstances permit. The following example may be appropriate in certain cases:

"Dear Miss Smith:

This is in response to your letter of February 25 in which you indicate that Seaman John J. Jones, U. S. Coast Guard, is the father of your minor child. Seaman Jones has been privately consulted about his attitude and intentions in this matter. He has denied paternity of your minor child. While sympathetic with you, I know of no further action that I can take. The Coast Guard has neither the authority nor the adjudicative facilities to render a judgment in a case of this kind. If Seaman Jones is adjudged by a civil court having jurisdiction over him to be the father of your child, he will be expected to

contribute toward support of the child and to comply with the terms of the judicial decree. If he then refused to take satisfactory action, he would be subject to administrative or disciplinary action which, while jeopardizing his Coast Guard career, would still not have the effect of providing support for your child."

2.E.5.h. Members Not on Active Duty

Allegations of paternity against members of the Coast Guard who are not on active duty will be forwarded to the individual concerned in a way that ensures the charges are delivered to the addressee only. The correspondence should be forwarded via the commander of the Coast Guard district in which the member resides.

CHAPTER 3 HAZING AND BULLYING

3.A. Policy

3.A.1. Application and Scope

This policy applies to all personnel at all times, on or off duty, at sea or ashore, on or off base. Any violation, attempted violation, or solicitation of another to violate this policy may subject involved members to appropriate administrative and/or disciplinary action.

3.A.1.a. General

Hazing and bullying erodes mission readiness and will not be tolerated. A healthy work environment is free from conduct that unreasonably interferes with an individual's work performance, or creates an intimidating, offensive, or hostile work environment. According to national leading research, bullying on the job occurs four times more often than sexual harassment or racial discrimination. Treating each other with dignity and respect is an essential element of a healthy work environment, workforce resiliency, morale, diversity & inclusion, retention, and mission effectiveness. There are many time-honored traditions in our service, but hazing and bullying are not among them and have no place in the Coast Guard. Hazing and bullying are unacceptable and are prohibited in all circumstances and environments, including off-duty or in "unofficial" unit functions and settings. Hazing and bullying can be conducted through the use of electronic devices or communications, and by other means, as well as in person. Early reporting of perceived abuse allows commands to quickly address and correct a problem before it has the opportunity to become more severe. This policy specifically addresses conduct of military members

3.A.1.b. Hazing

Subjecting an individual military member to harassment or ridicule for the purposes of "inclusion" is prohibited and will not be tolerated. No service member may engage in hazing or consent to being hazed. Its prevention is an all-hands responsibility. Under Article 4.1.15 of reference (j), United States Coast Guard Regulations 1992, COMDTINST M5000.3 (series), a commanding officer must "prohibit unit introductory initiations or hazing of personnel."

3.A.1.c. Bullying

Subjecting an individual military member to harassment or ridicule for the purposes of "exclusion" is prohibited and will not be tolerated. No service member may engage bullying. Its prevention is an all-hands responsibility.

3.A.1.d. Prevention

Hazing and bullying serve no useful purpose and are contrary to our core values of honor, respect, and devotion to duty and have no place in our organization. The demeaning, abusive activities associated with hazing and bullying inhibit performance, debase personal dignity, and

can result in serious injury. To prevent hazing and bullying, we must be aware of what constitutes hazing and bullying and understand these activities' negative impact. Our success as an organization depends on the positive and productive attitude and performance of our people. A healthy, positive, professional work environment is essential to enable all our personnel to contribute to mission success.

3.A.1.e. Initiations

Some units have condoned hazing incidents at initiations as innocent jests without intent to harm. Although some observers may consider such actions or verbal harassment humorous, they often create a real fear in the victims' minds. Further, they undermine the very morale and esprit de corps they purport to advance.

3.A.1.f. Investigations and Administrative/Disciplinary Action

The Coast Guard has no place for dehumanizing treatment. Commands must investigate any hazing or bullying incident and initiate appropriate administrative or disciplinary action against the perpetrators and those in the chain of command who are determined to have tacitly condoned such practices, either by inaction or neglecting to investigate reported incidents.

3.A.1.g. Sexual Assault

Incidents of hazing or bullying that may involve allegations of sexual assault must be addressed in accordance with the Sexual Assault Prevention and Response (SAPR) Program, COMDTINST M1754.10 (series). In all cases, appropriate reporting and investigative protocols must be followed and support and care must be provided to complainants and victims.

3.A.1.h. Discrimination

Hazing or bullying may involve allegations of unlawful discrimination and/or harassment. Reports that refer to allegations based on an individual's protected status, which includes race, color, religion, sex (including gender identity, sexual harassment, pregnancy, and sexual orientation), national origin, age, disability, genetic information, marital status, parental status, political affiliation, retaliation or any other basis protected by law, must be addressed in accordance with the Coast Guard Civil Rights Manual, COMDTINST M5350.4 (series).

3.B. Definitions

3.B.1. Definition of Hazing

Hazing is any conduct through which a military member or members, or any other persons physically or psychologically injure or create a risk of physical or psychological injury to one or more military members for the purpose of: initiation into, admission into, affiliation with, change in status or position within, or as a condition for continued membership in any military or DHS civilian organization. Specifically, hazing is any conduct in which a military member without

proper authority causes another military member(s) to suffer or be exposed to any cruel, abusive, humiliating, oppressive, demeaning, or harmful activity, regardless of the perpetrator's and recipient's Service or rank. Soliciting or coercing another to conduct such activity also constitutes hazing. Hazing need not involve physical contact among or between members; it can be verbal or psychological in nature. Activities meeting these criteria constitute impermissible hazing even if there is actual or implied consent to the acts. Hazing can include, among other things, the following activities:

- (1) Playing abusive or mean-spirited tricks intended to ridicule, humiliate, or ostracize,
- (2) Throwing personnel over the side from a ship or pier,
- (3) Tacking on crows or other devices by forcibly applying them to a member's clothes or body,
- (4) Forcing or encouraging the consumption of substances not normally prepared or suitable for consumption,
- (5) Group wrestling matches targeting a particular member,
- (6) Encouraging a member to consume excessive amounts of alcohol or requiring the consumption of alcohol in any amount,
- (7) Subjecting to excessive or abusive use of water,
- (8) Forcibly cutting or shaving hair,
- (9) Branding, tattooing, or painting another,
- (10) Coercing or encouraging another member to fully or partially disrobe,
- (11) Taping, tying, or otherwise restraining a member's arms, legs, or mouth,
- (12) Handcuffing or otherwise securing a member to a fixed object or another member(s),
- (13) Using law enforcement restraints or techniques on another member in other than an official capacity or a bona fide training session,
- (14) Placing or pouring foreign substances or liquids on another member,
- (15) Touching in an offensive manner,
- (16) Striking, or slapping another member,
- (17) Threatening or offering violence or bodily harm to another, or
- (18) Oral or written berating of another for the purpose of belittling or humiliating.

3.B.3. Definition of Bullying

Bullying is abusive conduct by a military member or members which harms a military member or any other persons, either physically or psychologically, without a proper military or other governmental purpose and with intent to exclude the member. Bullying is threatening, humiliating, or intimidating. Bullying can also be work interference, undermining performance, or verbal abuse. Individuals are often targeted because they may be perceived to be weak, different, or pose a threat to the bully. Bullying may also be described as psychological abuse, psychological harassment, 'status-blind' harassment, and mobbing. It often involves an imbalance of power between the aggressor and the victim. Bullying includes, but is not limited to:

- (1) Physically striking another in any manner or threatening to do the same,
- (2) Intimidating,
- (3) Teasing,
- (4) Taunting,
- (5) Oral or written berating of another for the purpose of belittling or humiliating,
- (6) Encouraging another to engage in illegal, harmful, demeaning or dangerous acts,
- (7) Playing abusive or malicious tricks; branding, handcuffing, duct taping, tattooing, shaving, greasing, or painting,
- (8) Subjecting to excessive or abusive use of water,
- (9) The forced consumption of food, alcohol, drugs, or any other substance, or
- (10) Degrading or damaging the person or his or her property or reputation.

3.B.3.a. Implied Consent

Personnel often attempt to disassociate their activities from “hazing” by stressing the voluntary nature of participation. Even genuinely voluntary participation can cause detrimental consequences. Often apparently willing participation is actually prompted by subtle compulsion, peer pressure, or a bid for acceptance and is not truly voluntary at all. As indicated in the definition of hazing, actual or implied consent does not eliminate the perpetrator’s culpability. Personnel knowingly and voluntarily submitting to hazing may be held accountable as well.

3.B.3.b. Initiation Ceremonies

(1) General. Hazing typically occurs in connection with unofficial, impromptu, unsupervised “initiations” or other informal rites of passage. The personnel involved often view these activities as an amusing way to “let off steam,” enhance unit morale, or bond with their peers and profess no intent to cause harm. However, these ceremonies are often demeaning or

abusive and can result in physical injury to the participants. (See Article 1.K. of this Manual.)

- (2) **Traditional Ceremonies.** Traditional service initiation ceremonies, including Chief's Initiations and equator, international dateline, and Arctic and Antarctic Circle crossings, are authorized, provided commands comply with governing directives when conducting such ceremonies. However, commanding officers must ensure these events do not include harassment of any kind that contains character degradation, sexual overtones, bodily harm or otherwise uncivilized behavior. Innocuous practical jokes, such as fetching "relative bearing grease" or "prop wash" do not constitute hazing as long as they are not intended to and actually do not humiliate, ridicule, or ostracize. Even otherwise innocuous jokes that are pervasive, repeated frequently, or disproportionately targeted toward selected individual(s) can cross the line and constitute impermissible hazing.
 - (3) **Miscellaneous.** Also excluded from the definition of hazing are command-authorized or operational evolutions, training in preparation for these evolutions, administrative corrective measures including extra military instruction administered in accordance with reference (b), Military Justice Manual, COMDTINST M5810.1 (series), command authorized physical training or athletic events, and command-authorized competitions or contests. Commands should conduct these activities appropriately with proper command sanction and oversight, preserving proper chain of command roles at all times.
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3.C. Responsibilities

3.C.1. Commanders

- (1) Unit commanding officers and all supervisors are responsible for ensuring they administer their units in an environment of professionalism and mutual respect that does not tolerate hazing or bullying of individuals or groups.
- (2) Commanding officers and supervisor may not by act, word, deed, or omission condone or ignore hazing or bullying if they know or reasonably should know hazing or bullying is occurring or has occurred.
- (3) Commanding officers who receive complaints or information about hazing or bullying must investigate and take prompt, effective action. Unit commanding officers and supervisors must ensure reports of hazing or bullying are promptly and fully investigated and appropriately resolve verified instances of hazing. Those within the chain of command who violate this policy by overtly condoning hazing or bullying, failing to investigate reports of hazing or bullying, or implicitly approving it through inaction when they know or reasonably should know such activity is occurring or has occurred must be held properly accountable.
- (4) If hazing and/or bullying is suspected or an allegation is hazing or bullying has been made, commands must report the following items (if known) via memo format through their operational chain of command to Commandant (CG-133) and inform their servicing legal office and/or Civil Rights or Coast Guard Investigative Service (CGIS) if applicable:

- (a) General nature of the alleged hazing or bullying incident (physical, psychological, verbal, technological, a combination thereof, individual or group, etc),
 - (b) Location of the hazing or bullying incident (on-duty, off-duty, etc),
 - (c) Duty status of both the complainant and alleged offender at the time of the alleged hazing or bullying (training, temporary duty, present for duty, leave, etc.),
 - (d) Description of the act(s) of hazing or bullying complained of or alleged,
 - (e) Demographics regarding both the complainant and alleged offender (as to each, their gender, grade, and race),
 - (f) Relationship between the complainant and alleged offender (superior, co-worker, subordinate, etc.),
 - (g) Description of the act(s) of hazing or bullying substantiated,
 - (h) Adjudication and disposition of any substantiated allegation (by whom and at what level of the organization the allegation was investigated, by whom and at what level of the organization the allegation was adjudicated, and the disposition of the allegation, including: no action, non-judicial punishment, discharge in lieu of court martial or other adverse action, adverse administrative action, court-martial, etc.)
- (5) **COs/OICs are responsible for notifying the next superior in the chain of command of the final action on hazing, and bullying inquiries. The CO/OIC will forward the administrative investigation and the final action memo to the next superior in the command. The command will document in writing the reasons for the finding to either substantiate or unsubstantiated the allegations, as well as the evidence relied upon to reach that conclusion.**
- (6) Commanding officers are responsible for ensuring traditional observances and legitimate “initiation ceremonies” enjoy the full involvement and sponsorship of the command to ensure impermissible hazing does not occur.
- (7) Commanders must incorporate hazing awareness training into the annual unit training schedule.

3.C.2. **Anti-Harassment and Hate Incident (AHHI) Procedure**

The following requirements apply to AHHI investigation. To the extent that the requirements of this chapter conflict with requirements of the Administrative Investigations Manual, COMDTINST M5830.1 (series), this chapter shall take precedent:

- (1) **Convening Orders. Written convening orders are required for all command-directed AHHI investigations. This includes investigation of a single utterance of harassing language or reports made by third parties. Convening orders must be drafted with sufficient detail to initiate a proper investigations. Sufficient detail includes the name of**

- complainants, alleged victims, and alleged perpetrators, as well as enough information to provide clear and detailed records of the allegations to which the Investigating Officer (I/O) is assigned. The convening order must also advise the I/O what to do if he/she uncovers additional allegations during the course of the investigation. Additionally, the convening orders must advise the I/O not to offer any recommendations. The convening order must be reviewed by the Servicing Legal Office prior to issuance. The convening order must be issued within 10 days of receipt of the allegation. Convening Authorities will not use a DEOMI Organizational Climate Survey or a command climate survey as a means by which to investigate or address specific allegations under this chapter.
- (2) **Selection of Investigating Officer.** The Convening Authority must carefully consider who is selected to investigate allegations of harassment or hate.
- (a) Factors to consider include: maturity, temperament, current assignments and workload, education, past experience as an I/O, writing skills, demonstrated ability to exercise discretion and maintain confidentiality, and demonstrated ability to apply analytical and critical thinking skills.
- (b) The Convening Authority must also ensure that whomever is selected as the I/O has no substantive professional or personal associations with the complainant(s), alleged victim(s), or alleged perpetrator(s), such that a reasonable person with knowledge of all the facts and circumstances would not question the I/O impartiality.
- (3) **Confidentiality.** The Convening Authority and the I/O must ensure that the confidentiality of the investigation, complainant(s), alleged victim(s), and alleged perpetrator(s) is maintained to the maximum extent possible.
- (a) Only those with a need-to-know may be advised of the allegations and the existence of an investigation. Convening authorities must discourage rumors and when necessary, must consider issuing a non-disclosure order to witnesses to prohibit them from discussing the matter.
- (b) The Convening Authority will not consult with any individual who has a personal interest in the outcome of the investigation prior to taking final action. This includes the alleged perpetrator(s) in particular. Consultation must be limited to those with an official role in the matter, including but not limited to, Servicing Legal Office, and Human Resources representatives.
- (4) **Logistical support.** Convening Authorities will provide or otherwise arrange for administrative and logistical support of the AHHI investigation. Convening Authorities must ensure the I/O has access to an interview space that is far removed from the work spaces of those involved to ensure that meetings are kept confidential and witnesses feel they can speak freely. The Convening Authority must also ensure that complainants, alleged victims, and alleged perpetrators are not expected or tasked to provide logistical support for the investigation.

- (5) **Legal Review of the Investigative Report.** Prior to routing the completed investigative report to the Convening Authority, the I/O must route it through the Servicing Legal Office for a legal sufficiency review. The Servicing Legal Office will be listed on the “Thru” line of the report. A signature endorsement on the report by the Servicing Legal Office signifies the report is legally sufficient. The I/O must account for the time needed for legal review in order to ensure that the deadline for completion is met.
- (6) **Final Action.** The CO/OIC must take final action (i.e., at a minimum make a formal finding as to whether the alleged conduct occurred) on every investigation. Final action must be documented in writing and must be a stand-alone document. Prior to taking final action, the CO/OIC must consult with his/her staff judge advocate. In order to substantiate an allegation, the CO/OIC must find that it is more likely than not that the perpetrator engaged in bullying or hazing as defined in this chapter. Conversely, if the CO/OIC determines that the behavior did not meet these standards, the allegation must be unsubstantiated. Further, the CO/OIC must articulate, in writing, the basis for the determination of whether harassment and/or bullying occurred and the evidence reviewed to reach the determination.
- (7) **Forwarding the Final Action Memorandum.** The CO/OIC must forward a copy of the Final Action Memo and investigative report to the next superior in the chain of command. That superior commander must acknowledge receipt and indicate that he/she has considered the report and final action.

The CO/OIC should strive to take final action no later than 30 calendar days from the date the incident was reported.

3.C.3. Office of Military Personnel, Commandant (CG-133)

Utilizing the information in Article 3.A.3.a. above, Commandant (CG-133) must report the following information to the Director of Reserve and Military Personnel, Commandant (CG-13) on an annual basis:

- (1) Number of substantiated and number of unsubstantiated reports or allegations of hazing,
- (2) Number of substantiated and number of unsubstantiated reports or allegations of bullying.

3.C.4. Coast Guard Personnel

- (1) Every member must ensure hazing and bullying does not occur in any form at any level.
- (2) Every military member must inform the appropriate authorities of each suspected violation of this policy.
- (3) Victims of actual or attempted hazing and/or bullying and witnesses to these activities must report it to the appropriate level of the chain of command.

3.C.5. Training Centers

- (1) Incorporate hazing and bullying awareness training into existing recruit, officer and leadership training curriculums for all new personnel. Incorporate hazing and bullying awareness training into the Prospective Commanding Officer/Executive Officer Course and the Officer-in-Charge/Executive Petty Officer Course.
 - (2) Incorporate hazing and bullying awareness training into the Officer-in-Charge/Executive Petty Officer Course, and the Officer and Senior Petty Officer Leadership and Management Courses, etc.
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3.D. Penalties

3.D.1. General

While the Uniform Code of Military Justice (UCMJ) does not specifically address hazing or bullying in the punitive articles, hazing and bullying can, in some cases, serve as the underlying cause in cases of alleged/reported misconduct, including sexual assault and sexual harassment. Similarly, not all cases that may involve hazing or bullying rise to the level of Coast Guard Investigative Service involvement or courts martial. Thus, commands must be familiar with the definitions and reporting requirements described in this policy even if an alleged/reported incident does not extend beyond the unit.

3.D.2. Command Response to Hazing and Bullying

In dealing with hazing and bullying, commands have a wide variety of procedures available, depending on an incident's specific circumstances. One function of command, and a challenge to its leadership capabilities, is to fit the appropriate command response to each particular situation. Available remedies range from counseling to administrative discharge proceedings.

3.D.3. Punitive Application

While this statement of policy does not qualify as a punitive general order, specific hazing and bullying acts and hazing or bullying incidents are punishable under various provisions of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), specifically:

Article 92	Prohibits disobeying orders and regulations and dereliction of duty.
Article 93	Prohibits cruelty and maltreatment of a person subject to another's orders. This offense includes sexual harassment.
Article 128	Prohibits assault.

Article 134	Prohibits any conduct prejudicial to good order and discipline, including indecent language and acts. Any other degrading, humiliating, oppressive, etc., conduct could fall under this Article.
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CHAPTER 4 POSSESSION OF FIREARMS

A. Overview.

1. Lautenberg Amendment. The Gun Control Act of 1968, specifically 18 U.S. Code Section 922, prohibits individuals with felony convictions from possessing firearms. Out of concern regarding the frequency with which firearms were used in domestic violence situations, the “Lautenberg Amendment” amended the Gun Control Act of 1968 to prohibit individuals with convictions for qualifying misdemeanor crimes of domestic violence as defined in 18 U.S.C. 921(33) to ship, transport, possess, or receive firearms or ammunition. This provision also makes it unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any person, whom he or she knows or has reasonable cause to believe has been convicted of such a misdemeanor. In addition, the Gun Control Act of 1968, amended federal firearms laws so that government employees, including law enforcement and military personnel, who have been convicted of a “qualifying” misdemeanor would not be lawfully able to receive or possess firearms and ammunition required to perform their official duties. Violations of the Gun Control Act of 1968 are felonies punishable by imprisonment for up to ten years and a maximum fine of \$250,000. An individual commander can be subject to prosecution for providing firearms or ammunition to someone with a qualifying conviction for a “misdemeanor crime of domestic violence”.
2. Domestic Violence. Domestic violence is incompatible with Coast Guard service and contrary to our core values. It detracts from readiness and will not be tolerated. Timely and effective intervention to prevent domestic violence remains a command responsibility executed with the assistance of the Coast Guard’s Family Advocacy Program. In addition to the actions directed below to comply with the Lautenberg Amendment, unit commanders, commanding officers and officers-in-charge must continue to take all appropriate measures, to include restricting access to weapons, whenever they deem it necessary to protect military spouses and children from domestic violence.

B. Roles and Responsibilities.

1. Recruiting Command. The Coast Guard Recruiting Command must screen all applicants for enlisted or officer accession programs and will not accept anyone who has a qualifying misdemeanor or felony domestic violence conviction, unless the applicant has been granted an expungement or pardon of the domestic violence conviction. All applicants must complete and sign Qualification to Possess Firearms or Ammunition, DD Form 2760. The Qualification to Possess Firearms or Ammunition, DD Form 2760 will be made a part of the member’s permanent Personnel Data Record (PDR).
2. Commanding Officer and Officer-in-Charge.

- a. Ensure all members under their command complete and sign Qualification to Possess Firearms or Ammunition, DD Form 2760 upon member reporting to the unit.
- b. Ensure all members under their command complete and sign Qualification to Possess Firearms or Ammunition, DD Form 2760 annually at a minimum. However commanding officers and officers-in-charge may require any member to complete and sign Qualification to Possess Firearms or Ammunition, DD Form 2760 upon demand.
- c. Forward Qualification to Possess Firearms or Ammunition, DD Form 2760 to Servicing Personnel Office (SPO) to be filed in member's SPO PDR and PSCBOPS to be included in the EIPDR. File a copy into the Unit PDR.
- d. Submit copy of Qualification to Possess Firearms or Ammunition, DD Form 2760 to Coast Guard Security Center (SECCEN) in which a member reports that they have a qualifying conviction or when the member indicates that they "do not know".
- e. Ensure all applicants are screened for positions or attendance at any training which requires or may require access to firearms or ammunition to ensure that no one is appointed to such a position if they have a qualifying conviction or are currently subject to a civilian restraining order.
- f. Ensure counseling is complete and documented on applicable Administrative Remark, CG-3307 any time a military protective order or civilian restraining order is issued.

(1) Restraining Order or Military Protective Order mandatory statement for Administrative Remark, CG-3307:

"You are advised that as the subject of a (Enter "Restraining Order" or "Military Protective Order") issued on (Enter: Date), you are prohibited from accessing or possessing firearms or ammunition as explained in Discipline and Conduct, COMDTINST M1600.2, for the duration of the order. You are advised that this prohibition is a federal law and applies to personally owned firearms and ammunition, as well as government owned firearms and ammunition. Possession of any firearm or ammunition, including those previously privately owned, for the duration of the order, is a violation of the law as contained in 18. U.S.C. Section 922 and if you are found to be in the possession of a firearm or ammunition, you may be prosecuted by the civilian authorities or punished under the Uniform Code of Military Justice."

(2) Conviction for domestic violence mandatory statement for Administrative Remark, CG-3307:

“You are advised that as the result of a conviction for domestic violence on (Enter: Date), you are permanently prohibited from accessing or possessing firearms or ammunition as explained in Discipline and Conduct, COMDTINST M1600.2. You are advised that this prohibition is federal law and applies to personally owned firearms and ammunition as well as government owned firearms and ammunition. Possession of any firearm or ammunition, including those previously privately owned, is a violation of the law as contained in 18. U.S.C. Section 922 and if you are found to be in the possession of a firearm or ammunition, you may be prosecuted by the civilian authorities or punished under the Uniform Code of Military Justice.”

3. Member.

- a. Members must notify their supervisor if they have or believe they may have a qualifying conviction. Members must immediately notify their supervisor if they receive a qualifying conviction at any time during their Coast Guard career. Members should be referred to a legal assistance attorney for the purpose of determining whether they have a qualifying conviction. Notification not only protects the Coast Guard, by enabling commands to know not to issue firearms or ammunition, it also protects individual members of the Coast Guard with qualifying convictions from violations of the law.
 - b. Notification of a qualifying conviction must be made using Qualification to Possess Firearms or Ammunition, DD Form 2760. When completing the Qualification to Possess Firearms or Ammunition, DD Form 2760 providing false or fraudulent information, or failing to self report may be grounds for criminal and/or administrative proceedings to include disciplinary action under the Uniform Code of Military Justice.
 - c. Military members must also immediately notify their supervisor if they become the subject of a restraining order.
- C. Contracted Protective Forces. Commanding officers of facilities with contracted protective forces (for example civilian police, guard or security services) must ensure that the Contracting Officer's Technical Representative (COTR) remind contractors of the Gun Control Act of 1968 and ascertain the actions taken or planned to maintain compliance with the Gun Control Act of 1968. Contracting Officers must include the requirements of this Manual and the Gun Control Act of 1968 in solicitations, and resulting contracts, for protective forces. The COTR, on behalf of the contracting officer, must ensure compliance with these requirements. The COTR is to coordinate in advance with the contracting officer concerning any new data deliverable or change in performance. At a minimum, the Coast Guard must be informed that the contractor is complying with the guidance contained in this Manual.

- D. Issuance of firearms and Ammunition. Commanding officers and officers-in-charge will ensure that persons under their command do not issue government-owned or privately owned firearms or ammunition to persons whom they know or have reasonable cause to believe have been convicted of a misdemeanor crime of domestic violence. This prohibition also applies to members who are the subject of a restraining order or military protective order for the duration of the order. Personnel known to have such convictions will be advised both on the application of the Gun Control Act of 1968 and the manner in which they may affect lawful disposition arrangements for personally owned firearms and ammunition presently in government custody. This restriction applies to active duty and reserve members, civilian employees and contractors.
- E. Mandatory Retrieval of Firearms and Ammunition. Commanding officers and officers-in-charge must take steps to immediately retrieve government-owned firearms and ammunition from the custody of individuals known to have been convicted of qualifying misdemeanor crimes of domestic violence, as well as a current civilian restraining order or any felony conviction, and will take steps necessary to deny these persons access to government-owned firearms and ammunition.
- F. Disposition of Affected Personnel. Commanding officers and officers-in-charge must ensure that military personnel known to have qualifying misdemeanor crime of domestic violence convictions are temporarily reassigned to duties that do not include either access to or possession of firearms or ammunition. The military member will have one year to obtain an expungement or pardon of the domestic violence conviction. If no expungement or pardon is obtained for the qualifying conviction, then the member may be allowed to complete his or her current enlistment, may be discharged, separated, or allowed to retire (if applicable) IAW Military Separations, COMDTINST M1000.4 (series). The one year period authorized for the military member to obtain an expungement or pardon from the qualifying conviction, does not bar, delay, or suspend a command's authority or responsibility to consider and/or initiate administrative separation actions at any time if the underlying act(s) of domestic violence from which the qualifying conviction justify administrative separation. Military Separations, COMDTINST M1000.4 (series). Steps may be taken to ensure the best use of military personnel discovered to have qualifying convictions, such as requesting a change of rating, reassignments, etc. Separation of military personnel must comply with existing statutory military retirement sanctuaries. A member in any of these sanctuaries who has a "qualifying conviction" and would otherwise be separated under Coast Guard regulations must be given meaningful duties that do not entail access to firearms or ammunition until they are retired upon first attaining eligibility.
- G. Affirmative and Continuing Obligation to Report. Commanding officers and officers-in-charge must advise all personnel of the provisions of this policy. All commands must also post notices about the domestic violence amendment and this policy in all facilities where firearms or ammunition are stored, issued, disposed of, and transported. The notice must include information that all personnel have an affirmative, continuing obligation to inform their supervisors if they have, or later obtain, a qualifying conviction or restraining order.

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CHAPTER 5 NO CONTACT ORDERS AND MILITARY PROTECTIVE ORDERS

- A. No Contact Orders and Military Protective Orders (MPO). These orders provide commanding officers with tools to use as an emergency remedy. Similar to the role of restraining orders in the civilian community, both orders are designed to either prohibit a person from taking an action likely to cause irreparable harm or to maintain the status quo between two or more people. A No Contact Order is designed to fill the role that a temporary restraining order fills in the civilian community. It is limited in scope to contact between the subject of the order and the protected person(s), and is of limited duration. Because of this, at least initially, similar to a temporary restraining order, generally no contact orders should be issued upon request. Military Protective Orders cover a wider range of conduct, can be for longer duration, and trigger notification to civilian authorities and entry into the National Criminal Information Center (NCIC) restraining order file. Military Protective Orders under this policy are, very generally, designed to fill the role that a restraining order in the civilian community.
- B. Orders as a Means of Prevention and Protection. Restraining and Protective orders, to include Military Protective Orders, have been used by civilian courts and military commanders for a number of years. Most often, these orders are provided to prevent further violence, to include, domestic violence, sexual assault, harassment, stalking, and workplace violence. The orders establish a boundary for the subject to maintain distance or prevent communication with the person(s) protected by the order. They also create a greater perception of safety, satisfaction, and psychological well-being for individuals protected by the order. Commands are charged with maintaining good order and discipline, ensuring the safety and well-being of their personnel, family members, their own unit, as well as considering the safety of surrounding units and communities. When presented with situations that may indicate an increased concern for violence risk, or when an increased concern for violence risk may not be ruled out, commands must consider the use of restricting a member's proximity or contact with another individual, either directly, or indirectly via a direct order or an MPO. It may be appropriate to issue a No Contact Order or MPO in situations where a civilian restraining order might not be issued or might be issued only temporarily. No Contact Orders and MPOs are orders designed to safeguard or promote the morale, discipline, and usefulness of members of a command and are directly connected with the maintenance of good order in the service.
- C. Types of Situations Where No Contact Orders and Military Protective Orders are Used.
1. Sexual Assault. Individuals who have made an unrestricted report of sexual assault can request a No Contact Order or an MPO.
 2. Intimate Relationship Settings. Situations where No Contact Orders or MPOs might be considered in a domestic relationship include accusations, reports, or evidence of: domestic violence, battery, assault, stalking, sexual assault, harassment, threats (written

or stated), inappropriate communication, or inappropriate contact. Intimate relationships involve people who are married, divorced, separated, registered domestic partnership, have a child together, dating, used to date, live together, or used to live together. Other relationships can also be considered intimate, such as parent, in-laws, child, step-child, siblings, stepparent, etc.

3. Workplace Setting. Situations where No Contact Orders or MPOs might be considered in a workplace setting include accusations, reports, or evidence of: aggressive behavior, causing or attempting to cause bodily harm, acting or attempting to sabotage, destroy, violently damage, deface real or personal property, possessing unauthorized weapons at work, threatening behavior while possessing a weapon, threats either overt or implied of physical aggression or psychological harm, bullying, stalking, harassment, abuse or aggressive behavior, aberrant, bizarre, or menacing behavior or statements. The workplace is any location that is a Coast Guard facility, vessel, vehicle, or other work-related function or location. Personnel related to the workplace are most often, military members, civilian employees, other agency employees, contractors, vendors, visitors, etc.
4. Other Settings. Other settings in which a No Contact Order or MPO might be considered are wide and varied; however, they might include a military member harassing someone over a personal issue in the community, a neighbor, or former colleague.

D. No Contact Orders. No Contact Orders are designed to stabilize a situation and allow time for more considered action regarding keeping two individuals apart. Upon application from a person requesting a No Contact Order, commanding officers should consult, as appropriate for the situation, the Sexual Assault Response Coordinator (SARC), Family Advocacy Specialist (FAS), or Health Safety-Work Life Supervisor, CGIS, and the servicing legal office. This consultation may be accomplished through the SAPR Crisis Intervention Team, the Family Advocacy Incident Determination Committee, or the Workplace Violence Crisis Intervention Team, but such consultation is not required prior to issuance of a No Contact Order. If contemplating a No Contact Order for a Reservist contact your servicing legal office.

1. Presumption. The presumption is that No Contact Orders will be issued when requested by a person seeking to be protected from an active duty member.
2. Duration. No Contact Orders may last from 7 to 30 days.
3. Denials. If the request for a No Contact Order is denied, the commanding officer must state in writing why the request is denied and, if the No Contact Order was requested by a person seeking to be protected from an active duty member, such as an individual making an unrestricted report of sexual assault, the person must be informed of the right to appeal the decision to deny a No Contact Order.
4. Appeals of Denials. Appeals of the denial of a No Contact Order must be made within 72 hours of the denial of a No Contact Order. Appeals are to the next flag officer in the chain of command of the commanding officer who denied the No Contact Order. The

appeal officer must make a decision on the appeal within 24 hours of receipt of the appeal.

5. Example Provisions. No Contact Orders can include provisions covering:
 - a. Separation - order to not come within a certain distance of the protected individual.
 - b. No contact – an order to have no verbal, physical, or electronic contact with the protected person to include communication via phone, text message, email, or social media, directly, indirectly, or via a third party.
 - c. Duty to retreat - an order that the subject of the order upon encountering the protected individual must retreat to maintain any required area of separation.
 - d. Shared domicile - order the subject of the No Contact Order on how they will deal with a shared domicile while the order is in place including any terms or conditions for how they may retrieve personal belongings and health and comfort items.
 - e. Temporary surrender of personal firearms or other weapons-an order can require the temporary surrender of firearms or other weapons.
6. Notification to Civilian Authorities Not Required. A No Contact Order does not trigger a requirement to notify civilian authorities of the imposition of a No Contact Order under Sections 561, 562, and 563 of Public Law 110-417.
7. Access to Firearms. A No Contact Order does not trigger a prohibition on the possession of firearms or ammunition under 18 U.S.C. § 922(g)(8), but as noted above may result in a requirement that the subject of the order temporarily surrender personal firearms or other weapons.
8. NCIC Entry. A No Contact Order does not trigger the need for an entry in the National Crime Information Center (NCIC) system.
9. Unrestricted Reports. No Contact Orders are available only to victims who have made an unrestricted report of sexual assault.
10. Verbal No Contact Orders. Verbal No Contact Orders must be documented as soon as possible, no later than 24 hours after the verbal order is issued.
11. Duration of No Contact Orders. No Contact Orders normally last for 30 days. After that time they either expire, or may be converted into an MPO. A command must consult with their servicing legal office before issuing a No Contact Order that will last more than 30 days. There are circumstances, however, where a No Contact Order of longer duration may be appropriate and the additional consequences of an MPO are unnecessary. An example of such a situation is where the subject of the order and the protected person are not located in close proximity to one another and there is no indication the subject has failed to abide by the provisions of an initial No Contact Order.

Before opting for a No Contact Order of longer duration commands must consult with the protected person(s), and should seek the views, as appropriate to the situation, of the FAS, SARC, SVC, CGIS, or other appropriate person.

12. Not Enforceable by Civilian Authorities. The command, SARC, FAS, SAPR VA, SVC, CGIS, or other appropriate person must inform the person seeking the No Contact Order that the No Contact Order is not enforceable by civilian authorities and that persons desiring protection off base should seek a civilian protective order (CPO). Off base violations of the No Contact Order should be reported to the issuing commanding officer and the Coast Guard Investigative Service for investigation.
13. Seeking a Civilian Protection Order. The command, SARC, FAS, SAPR VA, SVC, CGIS, or other appropriate person are encouraged to inform the person seeking the No Contact Order to contact local domestic abuse, sexual assault, or other victim resources to evaluate the need for, or assist the victim with obtaining a CPO.

E. Military Protective Orders.

1. Prior No Contact Order Not Required. A MPO may be issued without the prior issuance of a No Contact Order. Generally, MPOs are intended to be of longer duration, and issued after an opportunity to more thoroughly develop information and assess the need for protection.
2. Consultation. Prior to issuance of a MPO the command must consult, as appropriate, the SARC, FAS, or HSWL Supervisor. In addition, the command must consult with the Coast Guard Investigative Service and the command's servicing legal office. This consultation may take place in the context of a SAPR CIT, FAP IDC, Workplace Violence CIT, or other appropriate meeting.
3. Duration. MPOs may be issued for up to 90 days at a time. MPOs can be renewed.
4. Factors to Consider. Factors to consider in whether to grant a MPO include, but are not limited to:
 - a. Evidence of the need for protection.
 - b. Is a CPO in place and if so, for how long.
 - c. Changed circumstances since the issuance of the No Contact Order or since the issuance of the last MPO.
 - d. Recommendations of the SAPR CIT, FAP IDC, or Workplace Violence CIT (if applicable).
 - e. The recommendations of the SARC, FAS, HSWL Supervisor, SVC, CGIS case agent, and SAPR VA (as applicable).

- f. The desires of the protected person(s).
 - g. Has the protected person received an expedited transfer.
 - h. Has the subject of the MPO been moved, via temporary or permanent change of station orders, and if so, how far from the protected person is the subject of the order, or, is the subject of the order in pre-trial confinement or subject to some other form of pre-trial restraint.
 - i. Has the subject of the No Contact Order, or MPO, complied with the order, or is there any indication of non-compliance.
 - j. Is there any impact on the subject or protected person(s) unit(s) or the execution of any Coast Guard missions.
 - k. Does the MPO impact child custody, visitation, access to personal belongings, or other personal matters that impact the subject of the order or the protected person(s).
5. Requests for Initial Issuance or Continuation of MPO. If the protected person(s) request(s) continuation of the order, and if the recommendation of the required consultations (SARC/FAS/HSWL Supervisor, SVC, CGIS, servicing legal office) is to continue the order, the presumption is that the MPO should be issued or continued. The subject of a proposed order should be given notice of a request to issue or continue in place an MPO.
- a. If the command decides to not issue a MPO, or continue it in place, when requested that it be issued or remain in place by the protected person, and the required consultations all recommend issuance or continuation of the MPO, the command must state its reasons for not granting/continuing the MPO.
 - b. The written explanation for the denial, if the MPO was requested and it was recommended by the required consultations, must be forwarded to the next flag officer in the chain of command.
 - c. MPOs should not be kept in place, through periodic extensions, for more than one year. If the protected person(s) requests renewal of a MPO beyond a total of one year, specific reasons why the MPO is still required must be stated. In these circumstances the presumption is against renewal of the MPO, except in the case of pending civilian criminal trial, military justice proceedings, or separation of subject from the USCG.
6. Notification to Civilian Authorities Required. Commands that issue MPOs must notify the appropriate civilian authorities of the issuance of a MPO and of the individuals affected by the order. In the event a MPO has been issued against a Coast Guard member and any individual affected by the MPO does not reside on a military installation at any

time during the duration of the MPO, and the issuing command must notify the appropriate civilian authorities of any change made in a MPO, or its termination.

7. MPO Period of Effectiveness. A MPO issued by a command will remain in effect until such time as the commanding officer terminates the order or issues a replacement order, subject to the provisions of Paragraph 5.E.6.c above.
8. Which Civilian Authorities Must be Notified of a MPO. When a MPO has been issued against a Coast Guard member and any individual involved in the MPO does not reside on a military installation at any time during the duration of the MPO, notify the appropriate civilian authorities of the issuance of a MPO and of the individuals involved in the order. The appropriate civilian authorities notified will include, at a minimum, the local civilian law enforcement agency or agencies with jurisdiction to respond to an emergency call from the residence of any individual involved in the order.
9. NCIC Entries Required for a MPO. Commanding officers will inform the Coast Guard Investigative Service, of an MPO and the need to place an active MPO in the National Crime Information Center (NCIC) for the duration of the order. Installation law enforcement will initiate a police report for the MPO, creating the required Originating Agency Case Number, and place the MPO in the NCIC Protective Order File, using PROTECTION ORDER CONDITIONS (PCO) Field Code 08 with the following mandatory caveat in the miscellaneous field: "THIS IS A MILITARY PROTECTIVE ORDER AND MAY NOT BE ENFORCEABLE BY NON-MILITARY AUTHORITIES. IF SUBJECT IS IN POSSIBLE VIOLATION OF THE ORDER, ADVISE THE ENTERING AGENCY (MILITARY LAW ENFORCEMENT)."
10. Other Notification Issues.
 - a. Military Protective Orders Not Enforceable by Civilian Authorities. Advise the person seeking a MPO that the MPO is not enforceable by civilian authorities off base and that persons desiring protection off base should seek a civilian protective order (CPO). Off base violations of the MPO should be reported to the issuing commanding officer or Coast Guard Investigative Service.
 - b. Notifications of Civilian Protective Orders. If a person protected by a MPO has informed CGIS, the SARC, or, as appropriate, the FAS, or HSWL Supervisor, of an existing CPO, a commanding officer must require the SARC/FAS/HSWL Supervisor to inform the SAPR Crisis Intervention Team (SAPR CIT), Family Advocacy Incident Determination Committee (FAP IDC), or Work Life Workplace Violence Crisis Intervention Team (CIT) (as appropriate) of the existence of the CPO and its requirements. After the CPO information is received at the SAPR CIT, FAP IDC, or Work Place Violence CIT, CGIS must document CPOs for all Coast Guard members in an investigative case file, to include documentation for Reserve Component personnel. To the extent CGIS has an open investigative case file concerning a member of the Coast Guard Auxiliary, Coast Guard civilian employee, or Coast Guard contractor, a notation in that case file of the MPO is appropriate.

- c. Military Protective Order, CG Form 6070. The issuing commander will fill out the Military Protective Order, CG Form 6070. A copy of the MPO must be served personally upon the subject of the order and provided to all of the persons protected by the MPO. If the protected person(s) is/are a minor the copy must be served on the appropriate guardian of the minor(s), but in no circumstances the subject of the order be that person.
 - d. CGIS Case File Entries Regarding MPOs. Coast Guard Investigative Service agents must document MPOs for all Coast Guard members in their investigative case file to include documentation for Reserve Component personnel.
11. Civilian Protective Orders Have the Same Effect on Coast Guard Installations. Pursuant to 10 U.S.C. §1561a, a CPO must have the same force and effect on a Coast Guard installation as the order has within the jurisdiction of the court that issued the order. Commanding officers and the Coast Guard Investigative Service must take all reasonable measures necessary to ensure that a CPO is given full force and effect on all Coast Guard installations within the jurisdiction of the court that issued the order.

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CHAPTER 6 DEFINITIONS

- A. Abuse. Abuse means to intentionally or recklessly cause or attempt to cause bodily injury to another; or sexually assault another; or to place anyone in reasonable fear of imminent serious bodily injury; or to molest, attack, hit, stalk, threaten, batter, harass, telephone, or contact you; or to disturb your peace; or destroy your personal property. Abuse can be spoken, written, or physical.
- B. Civilian Protection Order (CPO). A CPO includes any injunction or other order issued by a court for the purpose of protecting another person from: violent or threatening acts, harassment, contact or communication, or physical proximity. This includes any temporary or final order issued by a civil or criminal court.
- C. Domestic Violence. An offense under the United States Code, the Uniform Code of Military Justice, or state law involving the use, attempted use, or threatened use of force or violence against a person, or the violation of a lawful order issued for the protection of a person, who is: (a) a current or former spouse; (b) a person with whom the abuser shares a child in common, or (c) a current or former intimate partner with whom the abuser shares or has shared a common domicile, or, (d) a domestic partner of a military member.
- D. Firearm. The term “firearm” means (a) any weapon (including a starter gun) which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive; (b) the frame or receiver of any such weapon; and (c) any firearm muffler or firearm silencer; or (d) any destructive device. The Gun Control Act of 1968 does not apply to the operation and maintenance of fixed or crew served weapons systems and ammunition.
- E. Intimate Partner. A person with whom the victim shares a child in common (for example a spouse) or a person with whom the victim shares or has shared a common domicile, or a domestic partner of a military member.
- F. Military Protective Order (MPO). An order issued by a Commanding Officer or the commander exercising control over an active duty member for the purpose of protecting a person from: violent or threatening acts, harassment, contact or communication, or physical proximity. A MPO may be specifically tailored by the issuing authority to meet the needs of the protected person. If contemplating a MPO for a Reservist contact your servicing legal office.
- G. Misdemeanor Crime of Domestic Violence. Defined as an offense that:
1. is a misdemeanor under federal or state law, and
 2. has, as an element, the use or attempted use of physical force or threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

- H. No Contact Order. An order issued by a Commanding Officer or the commander exercising control over an active duty member to have no contact, whether in person or electronically, with another person and can include a requirement to maintain a specified distance from the protected person. No Contact Orders are more narrow than Military Protective Orders and at least an initial No Contact Order should be issued when one is requested. If contemplating a No Contact Order for a Reservist contact your servicing legal office.
- I. Possession. For purposes of this Manual, the term “possession” includes both “active possession” and “constructive possession,” whether authorized or unauthorized. Active possession of a firearm or ammunition exists when a person has immediate dominion or control over a firearm or ammunition. Constructive possession exists when a person does not have actual possession but instead knowingly has the power and at a given time to exercise dominion and control over the firearm or ammunition, either directly or through others. Possession need not be exclusive but may be joint with others.
- J. Qualifying Conviction. For the purpose of this Manual, the term “qualifying conviction” is a state or federal conviction for a “misdemeanor crime of domestic violence” and any General or Special court-martial conviction for an offense that otherwise meets the elements of a “crime of domestic violence”, even though not classified as a misdemeanor or felony. A qualifying conviction does not include a summary court-martial conviction or the imposition of non-judicial punishment under Article 15, UCMJ or alternative civilian disposition arrangements, including deferred prosecutions. “Qualifying conviction” also does not include convictions that have been expunged or for which a military member has received a pardon. The Coast Guard will also apply this policy to any felony conviction as well.
- K. Restraining Order. For purposes of this Manual, the term “restraining order” applies to Military Protective Orders as defined in 5.E of this Manual or a civil court order which was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and includes a finding that such person represents a credible threat to the physical custody of such intimate partner or child.
- L. Sexual Assault. “Sexual assault” is defined as contact between the penis and the vulva or anus or mouth of another person, or the penetration, however slight, of the vulva, anus, or mouth of another by any part of the body or by any object with an intent to abuse, humiliate, harass, or degrade any person, or to arouse or gratify the sexual desire of any person. Sexual assault also includes touching or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person, or touching, or causing another person to touch, either directly or through clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Consent is defined as words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of refusal or lack of consent through words or conduct means there is no consent (that is “No Means No”). Lack of verbal or physical resistance or submission resulting from the alleged offender's use of force, threat of force, or placing another person in fear does not constitute consent. The victim's lack of verbal or physical resistance or submission resulting from intoxication, from unconsciousness due to sleep or alcohol/drug consumption, or from any other conditions which render the person incapable of consenting, declining participation in the act, or communicating unwillingness to engage in the sexual act does not constitute

consent. A current or previous dating relationship does not constitute consent. The manner of dress of the victim does not constitute consent.

M. Stalking:

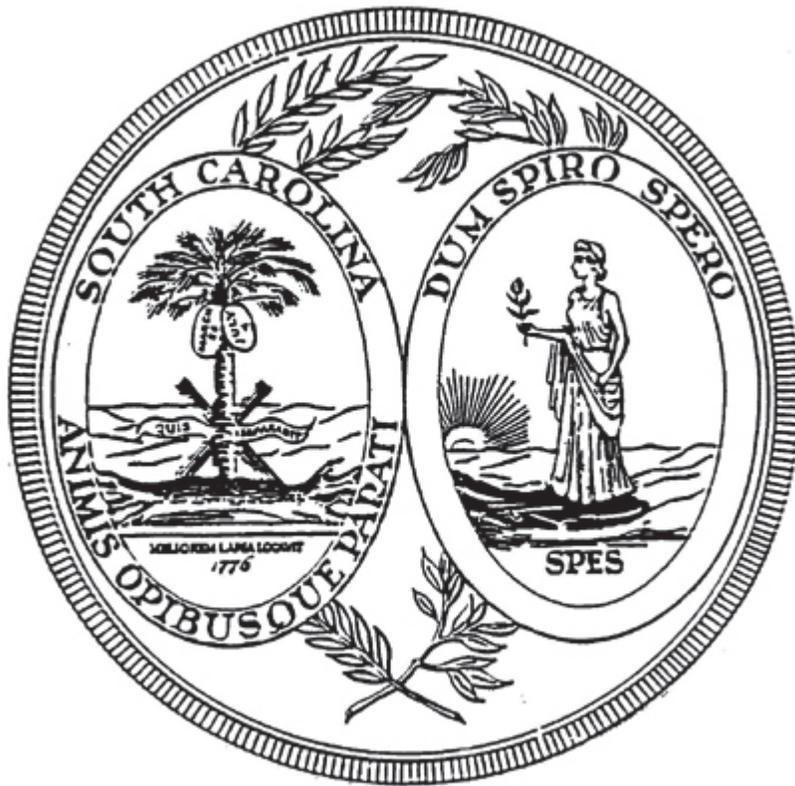
1. Wrongfully engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family;
2. who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and
3. whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family.

N. Threats. An expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property either now or in the future. Proof the person accused of making the threat actually intended to kill, injure, intimidate, damage, or destroy is not required.

O. Victim. An individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense.

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South Carolina CHILD SUPPORT GUIDELINES



2014 EDITION

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1. INTRODUCTION

The South Carolina General Assembly, through Act 195 of 1989, provides that the child support guidelines must be applied by the courts in determining the amount of child support that is expected to be paid toward the support of a dependent child (Section 43-5-580(b) and 20-7-852(a), South Carolina Code of Laws, 1976 as Amended).

These guidelines are based on the Income Shares Model, developed by the Child Support Guidelines Project of the National Center for State Courts. Developed with the best available economic evidence on child rearing expenditures, the Income Shares Model is based on the concept that the children should receive the same proportion of parental income that they would have received had the parents lived together. A more detailed explanation of the Income Shares Model and the underlying economic evidence used to support it is contained in Development of Guidelines for Child Support Orders, Report to the Federal office of Child Support Enforcement, September 1987 (National Center for State Courts, Denver, Colorado).

The Income Shares Model calculates child support as the share of each parent's income which would have been spent on the children if the parents and children were living in the same household. The shares are based on the amount of money ordinarily spent on children by their families living in the United States and adjusted to South Carolina cost of living levels. This evidence indicates that individuals tend to spend money on their children in proportion to their income, and not solely on need. The expenditures include the following nine categories: food at home; food away from home; shelter; utilities; household goods (furniture, appliances, linens, floor coverings, and house wares); clothing; transportation (other than visitation related); ordinary health care; and recreation. Excluded from these expenditure categories are estimated expenditures for child care and child support on an as-paid basis. Also excluded from these estimates are personal insurance (e.g. life, disability), gifts, contributions, and savings. Because mortgage principal (as opposed to interest) is considered to be savings, it is not included in the estimates of child-rearing expenditures.

These guidelines and the accompanying worksheets assume that the parent to whom support is owed is spending his or her calculated share directly on the child. For the parent with the obligation to pay support, the calculated amount establishes the level of child support to be given to the custodian for support of the child.

2. USE OF THE GUIDELINES

- A. The Child Support Guidelines are available to be used for temporary and permanent orders, actions for separate maintenance and support, divorce and child support awards. Additionally, the guidelines are to be used to assess the adequacy of agreements for support and encourage settlement of this issue between parties.
 1. In any proceeding in which child support is an issue, the amount of the award which would result from the application of these guidelines is the amount of the child

support to be awarded. However, a different amount may be awarded upon a showing that application of the guidelines is inappropriate. When the court orders a child support award that varies significantly from the amount resulting from the application of the guidelines, the court shall make specific, written findings of those facts upon which it bases its conclusion supporting that award.

2. In cases where the parents' combined monthly gross income is less than \$750.00, the guidelines provide for a case-by-case determination of child support, which should ordinarily be set at no less than \$100.00 per month. In those cases, the court should take care to award an amount of child support that would not jeopardize the ability of the parent with the legal obligation to pay support to live at a minimum level of subsistence. However, the guidelines encourage that a specific amount of child support always be ordered to establish in the payer's mind the principle of the parent's obligation to pay as well as lay the basis for increased/decreased orders if income changes in the future.
 3. These guidelines provide for calculated amounts of child support for a combined parental gross income of up to \$30,000 per month, or \$360,000 per year. Where the combined gross income is higher, courts should determine child support awards on a case-by-case basis.
- B. Deviation from the guidelines should be the exception rather than the rule. When the court deviates, it must make written findings that clearly state the nature and extent of the variation from the guidelines. These Child Support Guidelines do not take into account the economic impact of the following factors which can be possible reasons for deviation.
1. Educational expenses for the child(ren) or the spouse (i.e., those incurred for private, parochial, or trade schools, other secondary schools, or post-secondary education where there is tuition or related costs);
 2. Equitable distribution of property;
 3. Consumer debts;
 4. Families with more than six children;
 5. Unreimbursed extraordinary medical/dental expenses for either parent, or extraordinary travel expenses for court-ordered visitation;
 6. Mandatory deduction of retirement pensions and union fees;
 7. Child-related unreimbursed extraordinary medical expenses;
 8. Monthly fixed payments imposed by court or operation of law;
 9. Significant available income of the child(ren);

10. Substantial disparity of the parents' incomes;
11. Alimony. Because of their unique nature, lump sum, rehabilitative and reimbursement alimony may be considered by the court as a possible reason for deviation from these guidelines;
12. Agreements Reached Between Parties. The court may deviate from the guidelines based on an agreement between the parties if both parties are represented by counsel or if, upon a thorough examination of any party not represented by counsel, the court determines the party fully understands the agreement as to child support. The court still has the discretion and the independent duty to determine if the amount is reasonable and in the best interest of the child(ren).

3. DETERMINATION OF CHILD SUPPORT AWARDS

A. INCOME

1. DEFINITION

The guidelines define income as the actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed. Gross income is used in order to avoid contention over issues of deductibility which would otherwise arise if net income were used. The guidelines are based on the assumption that the parent with the legal obligation to pay support will have only one federal exemption and will have higher taxes than the parent to whom support is owed. Adjustments have been made in the Schedule of Basic Child Support Obligation for lower child support payments. Other factors included in the schedule are South Carolina taxes, FICA, and earned income.

2. GROSS INCOME

Gross income includes income from any source including salaries, wages, commissions, royalties, bonuses, rents (less allowable business expenses), dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits (but not Supplemental Social Security Income), workers' compensation benefits, unemployment insurance benefits, Veterans' benefits and alimony, including alimony received as a result of another marriage and alimony which a party receives as a result of the current litigation. Unreported case income should also be included if it can be identified.

A. The court may also take into account assets available to generate income for child support. For example, the court may determine the reasonable earning potential of any asset at its market value and assess against it the current treasury bill interest rate or some other similar appropriate method of computing income.

B. In addition to determining potential earnings, the court should impute income to any non-income producing assets of either parent, if significant, other than a

primary residence or personal property. Examples of such assets are vacation homes (if not maintained as rental property) and idle land. The current rate determined by the court is the rate at which income should be imputed to such nonperforming assets.

3. GROSS INCOME DOES NOT INCLUDE:

- A. Benefits received from means-tested public assistance programs, such as Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), Food Stamps and General Assistance;
- B. Income derived by other household members; and/or
- C. In-kind income; however, the court should count as income expense reimbursements or in-kind payments received by a parent from self-employment or operation of a business if they are significant and reduce personal living expenses, such as a company car, free housing, or reimbursed meals. With regard to military allotments, individuals not receiving Housing allotments should be imputed with the BAH-II amount for dependents. This differential is consistent and unrelated to the domicile location of the service member, as well as easily obtained.

4. INCOME FROM SELF-EMPLOYMENT OR OPERATION OF A BUSINESS

For income from self-employment, proprietorship of a business, or ownership or a partnership or closely held corporation, gross income is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation, including employer's share of FICA. However, the court should exclude from those expenses amounts allowed by the Internal Revenue Service for accelerated depreciation of investment tax credits for purposes of the guidelines and add those amounts back in to determine gross income. In general, the court should carefully review income and expenses from self-employment or operation of a business to determine actual levels of gross income available to the parent to satisfy a child support obligation. As may be apparent, this amount may differ from the determination of business income for tax purposes.

5. POTENTIAL INCOME

If the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income which would otherwise ordinarily be available to the parent. If income is imputed to a parent to whom support is owed, the court may also impute reasonable day care expenses. Although Temporary Assistance to Needy Families (TANF) and other means-tested public assistance benefits are not included in gross income, income may be imputed to these recipients. However, the court may take into account the presence of young children or handicapped children who must be cared for by the parent, necessitating the parent's inability to work.

- A. The court may also wish to factor in considerations of rehabilitative alimony in order to enable the parent to become employed.
- B. In order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community.

6. INCOME VERIFICATION

Ordinarily, the court will determine income from verified financial declarations required by the Family Court rules. However, in the absence of any financial declaration, or where the amounts reflected on the financial declaration may be an issue, the court may rely on suitable documentation of current earnings, preferably for at least one month, using such documents as pay stubs, employer statements, or receipts and expenses if the parent is self-employed. Verification of current earnings, whether reflected on a financial declaration or not, can be supported with copies of the most recent tax returns filed by the payer. Income can also be verified through the Employment Security Commission or through the State Department of Revenue.

7. MONTHLY ALIMONY (THIS ACTION)

Any award of alimony between the parties should be taken into consideration by the court when utilizing these guidelines as a deduction from the payer spouse's gross income, and as gross income received by the recipient spouse. Because of their unique nature, lump sum, rehabilitative reimbursement, or any other alimony the court may award, may be considered by the court as a possible reason for deviation from these guidelines. The purpose of this adjustment is not to give priority to alimony or child support payments, but to recognize that each parent's proportional share of total combined monthly income changes with the introduction of any alimony award between the parties, and to provide for a sharing of the Total Combined Monthly Child Support Obligation based upon each parent's actual percentage share of the total combined monthly income, taking into consideration the financial impact of any alimony award between them, rather than the parent's share of the total combined monthly income as it existed before any alimony award. Accordingly, the court, in its discretion, may consider any modification or termination of any alimony award between the parties of a child support award made under these guidelines. This adjustment does not affect the Total Combined Monthly Child Support Obligation of both parents as determined under these guidelines, which may be determined before any determination on the issue of alimony, as the total combined monthly income of both parties will remain the same irrespective of any income shifting between the parents as the result of an alimony award.

8. OTHER MONTHLY ALIMONY OR CHILD SUPPORT PAID

Any previous or existing court orders requiring the payment of child support, alimony, or both, should be protected by any subsequent child support order. Alimony actually paid as a result of another marriage or child support actually paid for the benefit of children other than those considered in this computation, to the extent such payment or payments are required by a previous or existing court order, should be deducted from gross income.

9. OTHER CHILDREN IN THE HOME

Either parent shall receive credit for additional natural or adopted children living in the home, but not for step-children, unless a court order establishes a legal responsibility. Such credit shall be given whether or not such children are supported by a third party. The basis of this is to recognize the responsibility of the parent to whom support is owed and share in supporting those other children in the home just like that parent's responsibility and share to the child or children in the present calculation.

Using the income of the parent with the additional child(ren) in the home only, the basic child support obligation for the number of additional dependents living with that parent (from the Schedule of Basic Child Support Obligations) is determined for that parent. This figure is multiplied by .75 and the resulting credit is subtracted from that parent's gross income.

10. BASIC CHILD SUPPORT OBLIGATION

The court can determine the basic child support obligation using the Schedule of Basic Child Support Obligations. "Combined gross income" refers to the combined monthly gross incomes of the parents. Where combined gross income amounts fall between the amounts reflected in the Schedule of Basic Child Support Obligations, the court is encouraged to extrapolate upwardly to set the basic award. The number of children refers to that number for whom the parents share support responsibility and for whom support is being sought.

11. SELF SUPPORT RESERVE

A self support reserve allows a low-income parent with the legal duty to pay support to retain a minimal amount of income before being assessed a full percentage of child support. This insures that the parent with the legal duty to pay support has sufficient income available to maintain a minimum standard of living which does not affect negatively his or her earning capacity, incentive to continue working, and ability to provide for him or herself. These Guidelines incorporate a self support reserve of \$748.00 per month. In order to safeguard the self support reserve in cases where the income of the parent with the obligation to pay support and corresponding number of children fall within the shaded area of the Schedule of Basic Child Support Obligations, the support obligation must be calculated using the

obligor's income only. To include the income of the parent to whom support is owed in the calculation of such cases, or include any adjustments like medical insurance or day care expense, would reduce the net income of the parent with the legal duty to pay support to an amount below the self support reserve.

12. HEALTH INSURANCE

The court shall consider provisions for the children's health care needs through health insurance coverage and/or cash medical support. The court should require coverage by one or both parents who can obtain the most comprehensive coverage through an employer or otherwise, at the most reasonable cost. If either or both parents carry health insurance for the child(ren) who is to receive support, the cost of the coverage should be added. If the employer provides some measure of coverage, only that amount actually paid by the employee or contributed by the employee should be added. This amount should be determined by the difference between self-only coverage and family coverage, or the cost of private medical insurance for the child. If the amounts for self-only and family coverage cannot be verified, the total cost of the premium should be divided by the total number of persons covered by the policy and then multiplied by the number of children in the support order. The party responsible for paying the health insurance premium will receive a credit. The guidelines are based on the assumption that the parent to whom support is owed will be responsible for up to \$250.00 per year per child in uninsured medical expenses. The Schedule of Basic Child Support Obligations includes \$250 per child per year for uninsured medical expenses such as co-pays, over-the-counter medicines and similar expenses. Reasonable and necessary unreimbursed medical expenses in excess of this \$250 per child per year shall be divided in pro rata percentages based on the proportional share of combined monthly adjusted gross income. The determination of "reasonable and necessary", e.g. orthodontia and professional counseling, would be at the discretion of the court.

13. CHILD CARE COSTS

The cost of day care the parent incurs due to employment or the search for employment, net of the federal and state income tax credit for such day care, is to be added to the basic obligation. This is to encourage parents to work and generate income for themselves as well as their children. However, day care costs must be reasonable, not to exceed the level required to provide high quality care for children from a licensed provider.

As I parents to whom support is owed may be eligible for qualified tax credits, the actual day care expense should be adjusted to recognize this credit. This adjustment may take place in two ways. In cases where the primary residential parent's gross income exceeds the thresholds listed below, the actual or allowed day care cost is multiplied by .27 to simulate the federal and state income tax credits. The lesser of the simulated amount and \$67.50 for one child and \$135 for two or more children is

subtracted from the actual or allowed day care cost. It is entered as the adjusted amount on the appropriate line 6.c.

	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
Primary Residential Parent's Monthly Income	\$1,950	\$2,600	\$2,900	\$3,200	\$3,500	\$3,800

These thresholds are based upon the standard deduction for head-of-household, dependent exemptions, and the intricate application of the child care tax credit. While these will hold true in most cases, judges can always review child care costs with the actual credit method, below. The maximum amounts for the tax credits that can be subtracted from actual or allowed day care are based on the maximum qualifying child care expense according to federal and state tax code.

The other method would be to take the actual costs and subtract the actual value of the federal and state tax credit such as determined by the last filed IRS Form 2441 and SC 1040, Line 11. This adjusted amount would then be entered on line 6.c.

14. COMPUTATION OF CHILD SUPPORT

The court can determine a total child support obligation by adding the basic child support obligation, health insurance premium (portion covering children), and work related child care costs.

- A. The total child support obligation is divided between the parents in proportion to their income. Each parent's proportional share of combined adjusted gross income must be calculated. Compute the obligation of each parent by multiplying each parent's share of income by the total child support obligation, and give the necessary credit for adjustments to the basic combined child support obligation.
- B. Although a monetary obligation is computed for each parent, the guidelines presume that the parent to whom support is owed will spend that parent's share directly on the child in that parent's custody. In cases of joint custody or split custody, where both parents have responsibility of the child for a substantial portion of the time, there are provisions for adjustments.

4. UNUSUAL CUSTODY ARRANGEMENTS

A. SHARED PARENTING ARRANGEMENTS

When both parents are deemed fit, and other relevant logistical circumstances apply, active participation in the life of the child(ren) by the parent without custody should be encouraged in order to ensure the maximum involvement by both parents in the life of the child(ren). . The amount of visitation, however, is left to the discretion of the judge in consideration of the various factors of the Children’s Code, and the use of the calculation on Worksheet C in shared physical custody cases is advisory and not compulsory. The court should consider each case individually before applying the adjustment to ensure that it does not produce a substantial negative effect on the child(ren)’s standard of living.

For the purpose of this section, shared physical custody means that each parent has court-ordered visitation with the children overnight for more than 109 overnights each year (30%) and that both parents contribute to the expenses of the child(ren) in addition to the payment of child support.

If a parent with shared physical custody does not exercise it as ordered by the court, the parent to whom support is owed may petition the court for a reversion to the level of support calculated under the guidelines without the shared parenting adjustment. The shared physical custody adjustment is an annual adjustment only and should not be used when the proportion of overnights exceeds 30% for a shorter period, e.g., a month. For example, child support is not abated during a month-long summer visitation. This adjustment should be applied without regard to legal custody of the child(ren). Legal custody refers to decision-making authority with respect to the child(ren). If the 109 overnights threshold is reached for shared physical custody, this adjustment may be applied even if one parent has sole legal custody.

1. Child support for cases with shared physical custody shall be calculated using Worksheet C. This worksheet should be used only for shared physical custody as defined above.
2. The basic child support obligation shall be multiplied by 1.5 to arrive at a shared custody basic child support obligation. The shared custody basic child support obligation is apportioned to each parent according to his or her income. In turn, a child support obligation is computed for each parent by multiplying that parent’s portion of the shared custody child support obligation by the percentage of time the child(ren) spend(s) with that parent. The respective basic child support obligations are then offset, with the parent owing more basic child support paying the difference between the two amounts, subject to the provisions below. The transfer for the basic obligation for the parent owing less basic child support shall be set at zero dollars.

3. If a parent has more than 109 overnights but less than 128 overnights, a graduated support obligation should be determined. The graduated support obligation reflects a transition between the full shared-physical custody obligation and the sole custody obligation, thus requiring the completion of both Worksheet A and Worksheet C. The sole custody amount is calculated from Worksheet A and the full shared-physical custody order is calculated from Worksheet C. The graduated support obligation is determined by subtracting an amount from the Worksheet A obligation. This amount is the difference between the worksheet A and worksheet C values, multiplied by the number of overnights more than 109 divided by the difference between 128 and 110 overnights. If positive, the graduated support obligation would then be treated as the basic child support obligation for that parent. Otherwise, it would be treated as the basic child support obligation for the other parent.
4. Adjustments for each parent's additional direct expenses on the child(ren) are made by adding child(ren)'s share of any reimbursed child health care expenses, work-related child care expenses and any other extraordinary expenses agreed to by the parents or ordered by the tribunal, less any extraordinary credits agreed to by the parent or ordered by the tribunal according to their income share. In turn, each parent's net share of additional direct expenses is determined by subtracting the parent's actual direct expenses on the child(ren)'s share of any unreimbursed child health care expenses, work-related child care expenses and any other extraordinary expenses agreed to by the parents or ordered by the tribunal from their share. The parent with a positive net share of additional direct expenses owes the other parent the amount of his or her net share of additional direct expenses. The parent with the zero or a negative net share of additional expenses owes zero dollars for additional direct expenses.
5. The final amount of the child support order is determined by summing what each parent owes for the basic support obligation and additional direct expenses as defined in subsections (2), (3) and (4) of this section. The respective sums are then offset, with the parent owing more paying the other parent the difference between the two amounts.

B. SPLIT CUSTODY

Split custody refers to custody arrangements where there are two or more children and each parent has physical custody of at least one child. Using these guidelines, the court should determine a theoretical support payment for the child or children in the custody of the other. In split custody arrangements the guidelines arrive at separate computations for the child or children residing with each parent. The obligations are then offset, with the parent owing the larger amount paying the difference to the other parent.

5. PERIODIC REVIEW

Every three years, if there is an assignment under part A of Title IV of the Social Security Act, or upon the request of either parent where an assignment exists under part D of Title IV of the Social Security Act, the Department of Social Services shall with respect to a support order being enforced under this part, taking into account the best interests of the child involved, review and, if appropriate, adjust the order in accordance with the guidelines if the amount of child support award under the order differs from the amount that would be awarded in accordance with the guidelines. Adjustments to support orders can only be done for those with assignments under part A of Title IV of the Social Security Act or part D of Title IV of the Social Security Act, and must be done pursuant to Article 5 of Chapter 17 of the South Carolina Children's Code.

6. CHILD SUPPORT GUIDELINES SCHEDULE AND WORKSHEETS

South Carolina Child Support Guidelines Schedule and worksheets are specifically incorporated into these regulations by reference. Copies of the Schedule and worksheets are on file with the Legislative Council and may also be obtained from the State Department of Social Services and local clerks of court offices.

7. FISCAL IMPACT STATEMENT

No additional state funding is requested. The South Carolina Department of Social Services estimates that no additional costs will be incurred by the State and its political subdivisions in complying with the proposed revisions to Regulation 114, Sections 4710 - 4750.

8. STATEMENT OF RATIONALE

In accordance with the Mission Statement of the Department of Social Services, it is incumbent upon the Integrated Child Support Services Division to, “. . . ensure the safety and health of children . . . and to assist those in need . . .” The purpose of the quadrennial review of the Guidelines is to ensure that the integrity of the Income Shares Model is maintained by ongoing assessment and reassessment of the numerous issues inherent in the formulae. This model, based on the concept that children should receive the same proportion of parental income that they would have received had the parents lived together, is the one best suited to the needs of the children and families of South Carolina.

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
750.00	100	100	100	100	100	100
800.00	117	117	117	117	117	117
850.00	133	133	133	133	133	133
900.00	150	150	150	150	150	150
950.00	182	184	186	188	190	192
1000.00	227	229	232	234	237	239
1050.00	241	275	278	281	284	287
1100.00	252	320	324	327	331	334
1150.00	263	366	370	374	378	382
1200.00	273	399	416	420	425	429
1250.00	282	412	462	467	472	477
1300.00	291	425	503	513	519	524
1350.00	300	437	518	560	566	572
1400.00	309	450	532	595	613	619
1450.00	318	463	547	611	660	667
1500.00	327	475	561	627	689	714
1550.00	335	487	575	642	706	762
1600.00	343	498	588	657	723	786
1650.00	352	510	602	672	740	804
1700.00	360	522	616	688	756	822
1750.00	369	534	630	704	774	841
1800.00	377	547	645	720	792	861
1850.00	386	560	660	737	811	881
1900.00	395	572	675	753	829	901
1950.00	403	585	689	770	847	921
2000.00	412	598	704	787	865	941
2050.00	421	610	719	803	884	960
2100.00	429	623	734	820	902	980
2150.00	438	635	749	837	920	1000
2200.00	447	648	764	853	938	1020
2250.00	455	661	778	869	956	1040
2300.00	464	673	793	886	974	1059
2350.00	473	685	807	902	992	1078
2400.00	481	697	822	918	1010	1098
2450.00	489	710	836	934	1027	1117

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
2500.00	498	722	850	950	1045	1136
2550.00	506	734	865	966	1062	1155
2600.00	515	746	879	982	1080	1174
2650.00	523	758	893	998	1097	1193
2700.00	532	770	907	1014	1115	1212
2750.00	540	783	922	1030	1133	1231
2800.00	549	795	936	1046	1150	1250
2850.00	557	807	950	1062	1168	1269
2900.00	565	819	965	1077	1185	1288
2950.00	573	830	977	1092	1201	1305
3000.00	580	841	990	1106	1216	1322
3050.00	588	851	1002	1119	1231	1338
3100.00	595	862	1015	1133	1247	1355
3150.00	603	873	1027	1147	1262	1372
3200.00	610	883	1040	1161	1277	1388
3250.00	618	894	1052	1175	1293	1405
3300.00	625	904	1064	1189	1308	1422
3350.00	632	915	1077	1203	1323	1438
3400.00	640	926	1089	1217	1338	1455
3450.00	647	936	1102	1231	1354	1472
3500.00	655	947	1114	1244	1369	1488
3550.00	660	954	1122	1254	1379	1499
3600.00	665	961	1131	1263	1389	1510
3650.00	669	968	1138	1272	1399	1520
3700.00	674	974	1145	1279	1407	1530
3750.00	678	980	1153	1287	1416	1539
3800.00	682	986	1160	1295	1425	1549
3850.00	687	992	1167	1303	1434	1558
3900.00	691	998	1174	1311	1442	1568
3950.00	695	1005	1181	1319	1451	1577
4000.00	699	1011	1188	1327	1460	1587
4050.00	704	1017	1195	1335	1469	1596
4100.00	708	1023	1202	1343	1477	1606
4150.00	712	1029	1209	1351	1486	1615
4200.00	717	1036	1218	1360	1496	1626
4250.00	722	1043	1226	1370	1507	1638
4300.00	728	1051	1235	1379	1517	1649

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
4350.00	733	1058	1243	1389	1528	1660
4400.00	738	1066	1252	1398	1538	1672
4450.00	743	1073	1260	1408	1549	1683
4500.00	748	1080	1269	1417	1559	1695
4550.00	754	1088	1277	1427	1570	1706
4600.00	759	1095	1286	1436	1580	1718
4650.00	764	1103	1295	1446	1591	1729
4700.00	769	1110	1303	1456	1601	1740
4750.00	774	1117	1312	1465	1612	1752
4800.00	780	1125	1320	1475	1622	1763
4850.00	785	1132	1329	1484	1633	1775
4900.00	789	1139	1336	1492	1642	1784
4950.00	794	1145	1343	1500	1650	1794
5000.00	798	1151	1350	1508	1659	1803
5050.00	803	1157	1357	1516	1667	1812
5100.00	807	1163	1364	1524	1676	1822
5150.00	812	1170	1371	1531	1685	1831
5200.00	816	1176	1378	1539	1693	1840
5250.00	821	1182	1385	1547	1702	1850
5300.00	825	1188	1392	1555	1710	1859
5350.00	830	1195	1399	1563	1719	1868
5400.00	834	1201	1406	1570	1728	1878
5450.00	839	1207	1413	1578	1736	1887
5500.00	843	1213	1420	1586	1745	1897
5550.00	848	1219	1427	1594	1753	1905
5600.00	848	1220	1427	1594	1754	1906
5650.00	849	1221	1428	1595	1754	1907
5700.00	850	1222	1428	1596	1755	1908
5750.00	851	1223	1429	1596	1756	1909
5800.00	852	1224	1430	1597	1756	1909
5850.00	853	1225	1430	1597	1757	1910
5900.00	854	1225	1431	1598	1758	1911
5950.00	855	1226	1431	1599	1759	1912
6000.00	856	1227	1432	1599	1759	1912
6050.00	857	1228	1432	1600	1760	1913
6100.00	857	1229	1433	1601	1761	1914
6150.00	858	1230	1434	1601	1761	1915

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
6200.00	859	1231	1434	1602	1762	1915
6250.00	860	1232	1435	1603	1763	1916
6300.00	861	1232	1435	1603	1764	1917
6350.00	862	1233	1436	1604	1764	1918
6400.00	863	1234	1436	1604	1765	1918
6450.00	863	1235	1437	1605	1766	1919
6500.00	864	1236	1437	1606	1766	1920
6550.00	865	1237	1438	1606	1767	1921
6600.00	866	1237	1439	1607	1768	1921
6650.00	869	1241	1443	1612	1773	1927
6700.00	872	1245	1448	1617	1779	1933
6750.00	875	1249	1452	1622	1784	1940
6800.00	877	1253	1457	1627	1790	1946
6850.00	880	1258	1462	1633	1796	1952
6900.00	883	1262	1466	1638	1802	1958
6950.00	886	1266	1471	1643	1807	1965
7000.00	889	1270	1476	1648	1813	1971
7050.00	892	1274	1480	1654	1819	1977
7100.00	895	1278	1485	1659	1825	1984
7150.00	898	1282	1490	1664	1831	1990
7200.00	901	1286	1495	1669	1836	1996
7250.00	904	1290	1499	1675	1842	2002
7300.00	907	1295	1504	1680	1848	2009
7350.00	910	1299	1509	1685	1854	2015
7400.00	912	1303	1513	1690	1860	2021
7450.00	915	1307	1518	1696	1865	2028
7500.00	918	1311	1523	1701	1871	2034
7550.00	921	1315	1528	1706	1877	2040
7600.00	924	1319	1532	1712	1883	2046
7650.00	927	1323	1537	1717	1888	2053
7700.00	930	1327	1542	1722	1894	2059
7750.00	933	1332	1546	1727	1900	2065
7800.00	936	1336	1551	1733	1906	2072
7850.00	939	1340	1556	1738	1912	2078
7900.00	942	1344	1560	1743	1917	2084
7950.00	945	1348	1565	1748	1923	2090
8000.00	947	1352	1570	1754	1929	2097

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
8050.00	950	1356	1575	1759	1935	2103
8100.00	953	1360	1579	1764	1941	2109
8150.00	956	1364	1584	1769	1946	2116
8200.00	959	1369	1589	1775	1952	2122
8250.00	962	1373	1593	1780	1958	2128
8300.00	965	1377	1598	1785	1964	2134
8350.00	968	1381	1603	1790	1969	2141
8400.00	971	1385	1608	1796	1975	2147
8450.00	974	1389	1612	1801	1981	2154
8500.00	977	1394	1617	1807	1987	2160
8550.00	980	1398	1623	1812	1994	2167
8600.00	983	1402	1628	1818	2000	2174
8650.00	986	1407	1633	1824	2006	2180
8700.00	989	1411	1638	1829	2012	2187
8750.00	992	1415	1643	1835	2018	2194
8800.00	995	1420	1648	1840	2025	2201
8850.00	999	1424	1653	1846	2031	2207
8900.00	1002	1429	1658	1852	2037	2214
8950.00	1005	1433	1663	1858	2044	2222
9000.00	1009	1438	1669	1864	2051	2229
9050.00	1012	1443	1674	1870	2057	2236
9100.00	1015	1448	1680	1877	2064	2244
9150.00	1019	1453	1686	1883	2071	2251
9200.00	1022	1458	1691	1889	2078	2259
9250.00	1026	1462	1697	1895	2085	2266
9300.00	1029	1467	1702	1902	2092	2274
9350.00	1033	1472	1708	1908	2099	2281
9400.00	1036	1477	1714	1914	2105	2289
9450.00	1039	1482	1719	1920	2112	2296
9500.00	1043	1487	1725	1926	2119	2304
9550.00	1046	1491	1730	1933	2126	2311
9600.00	1050	1496	1736	1939	2133	2318
9650.00	1053	1501	1741	1945	2140	2326
9700.00	1057	1506	1747	1951	2147	2333
9750.00	1060	1511	1753	1958	2153	2341
9800.00	1063	1516	1758	1964	2160	2348
9850.00	1067	1521	1764	1970	2167	2356

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
9900.00	1070	1525	1769	1976	2174	2363
9950.00	1074	1530	1775	1983	2181	2371
10000.00	1077	1535	1780	1989	2188	2378
10050.00	1081	1540	1786	1995	2195	2385
10100.00	1084	1545	1792	2001	2201	2393
10150.00	1087	1550	1797	2008	2208	2400
10200.00	1091	1554	1803	2014	2215	2408
10250.00	1094	1559	1808	2020	2222	2415
10300.00	1098	1564	1814	2026	2229	2423
10350.00	1101	1569	1820	2032	2236	2430
10400.00	1105	1574	1825	2039	2243	2438
10450.00	1108	1579	1831	2045	2249	2445
10500.00	1111	1583	1836	2051	2256	2453
10550.00	1115	1588	1842	2057	2263	2460
10600.00	1118	1593	1847	2064	2270	2467
10650.00	1122	1598	1853	2070	2277	2475
10700.00	1125	1603	1859	2076	2284	2482
10750.00	1129	1608	1864	2082	2291	2490
10800.00	1132	1613	1870	2089	2297	2497
10850.00	1135	1617	1875	2095	2304	2505
10900.00	1139	1622	1881	2101	2311	2512
10950.00	1142	1627	1886	2107	2318	2520
11000.00	1146	1632	1892	2113	2325	2527
11050.00	1149	1637	1898	2120	2332	2534
11100.00	1152	1641	1903	2125	2338	2541
11150.00	1155	1644	1906	2129	2342	2546
11200.00	1157	1647	1910	2133	2347	2551
11250.00	1159	1651	1913	2137	2351	2555
11300.00	1161	1654	1917	2141	2355	2560
11350.00	1164	1657	1920	2145	2360	2565
11400.00	1166	1660	1924	2149	2364	2569
11450.00	1168	1663	1927	2153	2368	2574
11500.00	1170	1666	1931	2157	2372	2579
11550.00	1172	1669	1934	2161	2377	2584
11600.00	1175	1672	1938	2165	2381	2588
11650.00	1177	1675	1941	2168	2385	2593
11700.00	1179	1678	1945	2172	2390	2598

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
11750.00	1181	1682	1948	2176	2394	2602
11800.00	1184	1685	1952	2180	2398	2607
11850.00	1186	1688	1955	2184	2403	2612
11900.00	1188	1691	1959	2188	2407	2616
11950.00	1190	1694	1962	2192	2411	2621
12000.00	1193	1697	1966	2196	2415	2626
12050.00	1195	1700	1969	2200	2420	2630
12100.00	1197	1703	1973	2204	2424	2635
12150.00	1199	1706	1976	2208	2428	2640
12200.00	1201	1709	1980	2211	2433	2644
12250.00	1204	1713	1983	2215	2437	2649
12300.00	1206	1716	1987	2219	2441	2654
12350.00	1208	1719	1990	2223	2446	2658
12400.00	1210	1722	1994	2227	2450	2663
12450.00	1213	1725	1997	2231	2454	2668
12500.00	1215	1728	2001	2235	2458	2672
12550.00	1217	1731	2004	2239	2463	2677
12600.00	1219	1734	2008	2243	2467	2682
12650.00	1222	1737	2011	2247	2471	2686
12700.00	1224	1740	2015	2251	2476	2691
12750.00	1226	1744	2018	2254	2480	2696
12800.00	1228	1747	2022	2258	2484	2700
12850.00	1231	1750	2025	2262	2489	2705
12900.00	1233	1753	2029	2266	2493	2710
12950.00	1235	1756	2032	2270	2497	2714
13000.00	1237	1759	2036	2274	2501	2719
13050.00	1239	1762	2039	2278	2506	2724
13100.00	1242	1765	2043	2282	2510	2728
13150.00	1244	1768	2046	2286	2514	2733
13200.00	1246	1771	2050	2290	2519	2738
13250.00	1248	1775	2053	2294	2523	2742
13300.00	1251	1778	2057	2297	2527	2747
13350.00	1253	1781	2060	2301	2532	2752
13400.00	1255	1784	2064	2305	2536	2756
13450.00	1257	1787	2067	2309	2540	2761
13500.00	1260	1790	2071	2313	2544	2766
13550.00	1262	1793	2074	2317	2549	2770

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
13600.00	1264	1796	2078	2321	2553	2775
13650.00	1266	1799	2081	2325	2557	2780
13700.00	1269	1802	2085	2329	2562	2784
13750.00	1271	1806	2088	2333	2566	2789
13800.00	1273	1809	2092	2337	2570	2794
13850.00	1275	1812	2095	2340	2575	2799
13900.00	1277	1815	2099	2344	2579	2803
13950.00	1280	1818	2102	2348	2583	2808
14000.00	1282	1821	2106	2352	2587	2813
14050.00	1284	1824	2109	2356	2592	2817
14100.00	1286	1827	2113	2360	2596	2822
14150.00	1289	1830	2116	2364	2600	2827
14200.00	1291	1833	2120	2368	2605	2831
14250.00	1293	1837	2123	2372	2609	2836
14300.00	1295	1840	2127	2376	2613	2841
14350.00	1298	1843	2130	2380	2618	2845
14400.00	1300	1845	2133	2383	2621	2849
14450.00	1301	1848	2136	2386	2624	2852
14500.00	1303	1850	2138	2388	2627	2856
14550.00	1305	1852	2141	2391	2630	2859
14600.00	1307	1855	2143	2394	2633	2862
14650.00	1308	1857	2146	2397	2636	2866
14700.00	1310	1859	2148	2399	2639	2869
14750.00	1312	1862	2151	2402	2643	2872
14800.00	1313	1864	2153	2405	2646	2876
14850.00	1315	1866	2156	2408	2649	2879
14900.00	1317	1869	2158	2411	2652	2882
14950.00	1319	1871	2161	2413	2655	2886
15000.00	1320	1873	2163	2416	2658	2889
15050.00	1322	1875	2166	2419	2661	2892
15100.00	1324	1878	2168	2422	2664	2896
15150.00	1326	1880	2170	2424	2667	2899
15200.00	1327	1882	2173	2427	2669	2902
15250.00	1329	1884	2175	2429	2672	2905
15300.00	1330	1886	2177	2432	2675	2908
15350.00	1332	1888	2179	2434	2678	2911
15400.00	1334	1890	2182	2437	2681	2914

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
15450.00	1335	1893	2184	2440	2684	2917
15500.00	1337	1895	2186	2442	2686	2920
15550.00	1338	1897	2189	2445	2689	2923
15600.00	1340	1899	2191	2447	2692	2926
15650.00	1342	1901	2193	2450	2695	2929
15700.00	1343	1903	2196	2452	2698	2932
15750.00	1345	1905	2198	2455	2701	2935
15800.00	1346	1907	2200	2458	2703	2939
15850.00	1348	1910	2202	2460	2706	2942
15900.00	1350	1912	2205	2463	2709	2945
15950.00	1351	1914	2207	2465	2712	2948
16000.00	1353	1916	2209	2468	2715	2951
16050.00	1354	1918	2212	2470	2717	2954
16100.00	1356	1920	2214	2473	2720	2957
16150.00	1358	1922	2216	2476	2723	2960
16200.00	1359	1925	2219	2478	2726	2963
16250.00	1361	1927	2221	2481	2729	2966
16300.00	1363	1929	2223	2483	2732	2969
16350.00	1364	1931	2225	2486	2734	2972
16400.00	1366	1933	2228	2488	2737	2975
16450.00	1367	1935	2230	2491	2740	2978
16500.00	1369	1937	2232	2493	2743	2981
16550.00	1371	1939	2235	2496	2746	2985
16600.00	1372	1942	2237	2499	2748	2988
16650.00	1374	1944	2239	2501	2751	2991
16700.00	1375	1946	2241	2504	2754	2994
16750.00	1377	1948	2244	2506	2757	2997
16800.00	1379	1950	2246	2509	2760	3000
16850.00	1380	1952	2248	2511	2763	3003
16900.00	1382	1954	2251	2514	2765	3006
16950.00	1383	1956	2253	2517	2768	3009
17000.00	1385	1959	2255	2519	2771	3012
17050.00	1387	1961	2258	2522	2774	3015
17100.00	1388	1963	2260	2524	2777	3018
17150.00	1390	1965	2262	2527	2779	3021
17200.00	1391	1967	2264	2529	2782	3024
17250.00	1393	1969	2267	2532	2785	3027

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
17300.00	1395	1971	2269	2535	2788	3031
17350.00	1396	1974	2271	2537	2791	3034
17400.00	1398	1976	2274	2540	2794	3037
17450.00	1399	1978	2276	2542	2796	3040
17500.00	1401	1980	2278	2545	2799	3043
17550.00	1403	1982	2281	2547	2802	3046
17600.00	1404	1984	2283	2550	2805	3049
17650.00	1406	1986	2285	2552	2808	3052
17700.00	1408	1988	2287	2555	2811	3055
17750.00	1409	1991	2290	2558	2813	3058
17800.00	1411	1993	2292	2560	2816	3061
17850.00	1412	1995	2294	2563	2819	3064
17900.00	1415	1998	2298	2567	2823	3069
17950.00	1417	2002	2302	2571	2829	3075
18000.00	1420	2005	2306	2576	2834	3080
18050.00	1422	2009	2310	2581	2839	3086
18100.00	1425	2013	2315	2586	2844	3092
18150.00	1428	2016	2319	2590	2849	3097
18200.00	1430	2020	2323	2595	2854	3103
18250.00	1433	2024	2327	2600	2860	3108
18300.00	1435	2027	2332	2604	2865	3114
18350.00	1438	2031	2336	2609	2870	3120
18400.00	1441	2035	2340	2614	2875	3125
18450.00	1443	2038	2344	2618	2880	3131
18500.00	1446	2042	2348	2623	2886	3137
18550.00	1448	2046	2353	2628	2891	3142
18600.00	1451	2049	2357	2633	2896	3148
18650.00	1454	2053	2361	2637	2901	3153
18700.00	1456	2057	2365	2642	2906	3159
18750.00	1459	2060	2370	2647	2911	3165
18800.00	1461	2064	2374	2651	2917	3170
18850.00	1464	2068	2378	2656	2922	3176
18900.00	1467	2071	2382	2661	2927	3182
18950.00	1469	2075	2386	2666	2932	3187
19000.00	1472	2079	2391	2670	2937	3193
19050.00	1474	2082	2395	2675	2942	3198
19100.00	1477	2086	2399	2680	2948	3204

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Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
19150.00	1480	2090	2403	2684	2953	3210
19200.00	1482	2093	2407	2689	2958	3215
19250.00	1485	2097	2412	2694	2963	3221
19300.00	1487	2101	2416	2699	2968	3227
19350.00	1490	2104	2420	2703	2974	3232
19400.00	1493	2108	2424	2708	2979	3238
19450.00	1495	2112	2429	2713	2984	3244
19500.00	1498	2115	2433	2717	2989	3249
19550.00	1500	2119	2437	2722	2994	3255
19600.00	1503	2123	2441	2727	2999	3260
19650.00	1506	2126	2445	2731	3005	3266
19700.00	1508	2130	2450	2736	3010	3272
19750.00	1511	2134	2454	2741	3015	3277
19800.00	1513	2137	2458	2746	3020	3283
19850.00	1516	2141	2462	2750	3025	3289
19900.00	1519	2145	2466	2755	3031	3294
19950.00	1521	2148	2471	2760	3036	3300
20000.00	1524	2152	2475	2764	3041	3305
20050.00	1526	2156	2479	2769	3046	3311
20100.00	1529	2159	2483	2774	3051	3317
20150.00	1532	2163	2488	2779	3056	3322
20200.00	1534	2167	2492	2783	3062	3328
20250.00	1537	2170	2496	2788	3067	3334
20300.00	1539	2174	2500	2793	3072	3339
20350.00	1542	2178	2504	2797	3077	3345
20400.00	1545	2181	2509	2802	3082	3350
20450.00	1547	2185	2513	2807	3087	3356
20500.00	1550	2189	2517	2812	3093	3362
20550.00	1552	2192	2521	2816	3098	3367
20600.00	1555	2196	2525	2821	3103	3373
20650.00	1558	2200	2530	2826	3108	3379
20700.00	1560	2203	2534	2830	3113	3384
20750.00	1563	2207	2538	2835	3119	3390
20800.00	1565	2211	2542	2840	3124	3396
20850.00	1568	2214	2547	2844	3129	3401
20900.00	1571	2218	2551	2849	3134	3407
20950.00	1573	2222	2555	2854	3139	3412

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
21000.00	1576	2225	2559	2859	3144	3418
21050.00	1578	2229	2563	2863	3150	3424
21100.00	1581	2233	2568	2868	3155	3429
21150.00	1583	2236	2572	2873	3160	3435
21200.00	1586	2240	2576	2877	3165	3441
21250.00	1589	2244	2580	2882	3170	3446
21300.00	1591	2247	2584	2887	3176	3452
21350.00	1594	2251	2589	2892	3181	3457
21400.00	1596	2255	2593	2896	3186	3463
21450.00	1599	2258	2597	2901	3191	3469
21500.00	1602	2262	2601	2906	3196	3474
21550.00	1604	2266	2606	2910	3201	3480
21600.00	1607	2269	2610	2915	3207	3486
21650.00	1609	2273	2614	2920	3212	3491
21700.00	1612	2277	2618	2925	3217	3497
21750.00	1615	2280	2622	2929	3222	3502
21800.00	1617	2284	2627	2934	3227	3508
21850.00	1620	2288	2631	2939	3233	3514
21900.00	1622	2291	2635	2943	3238	3519
21950.00	1625	2295	2639	2948	3243	3525
22000.00	1628	2299	2643	2953	3248	3531
22050.00	1630	2302	2648	2957	3253	3536
22100.00	1633	2306	2652	2962	3258	3542
22150.00	1635	2310	2656	2967	3264	3548
22200.00	1638	2313	2660	2972	3269	3553
22250.00	1641	2317	2665	2976	3274	3559
22300.00	1643	2321	2669	2981	3279	3564
22350.00	1646	2324	2673	2986	3284	3570
22400.00	1648	2328	2677	2990	3289	3576
22450.00	1651	2332	2681	2995	3295	3581
22500.00	1654	2335	2686	3000	3300	3587
22550.00	1656	2339	2690	3005	3305	3593
22600.00	1659	2343	2694	3009	3310	3598
22650.00	1661	2346	2698	3014	3315	3604
22700.00	1664	2350	2702	3019	3321	3609
22750.00	1667	2354	2707	3023	3326	3615
22800.00	1669	2357	2711	3028	3331	3621

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
22850.00	1672	2361	2715	3033	3336	3626
22900.00	1674	2365	2719	3038	3341	3632
22950.00	1677	2368	2724	3042	3346	3638
23000.00	1680	2372	2728	3047	3352	3643
23050.00	1682	2376	2732	3052	3357	3649
23100.00	1685	2379	2736	3056	3362	3654
23150.00	1687	2383	2740	3061	3367	3660
23200.00	1690	2387	2745	3066	3372	3666
23250.00	1693	2390	2749	3070	3378	3671
23300.00	1695	2394	2753	3075	3383	3677
23350.00	1698	2398	2757	3080	3388	3683
23400.00	1700	2401	2762	3085	3393	3688
23450.00	1703	2405	2766	3089	3398	3694
23500.00	1706	2409	2770	3094	3403	3700
23550.00	1708	2412	2774	3099	3409	3705
23600.00	1711	2416	2778	3103	3414	3711
23650.00	1713	2420	2783	3108	3419	3716
23700.00	1716	2423	2787	3113	3424	3722
23750.00	1719	2427	2791	3118	3429	3728
23800.00	1721	2431	2795	3122	3434	3733
23850.00	1724	2434	2799	3127	3440	3739
23900.00	1726	2438	2804	3132	3445	3745
23950.00	1729	2442	2808	3136	3450	3750
24000.00	1732	2445	2812	3141	3455	3756
24050.00	1734	2449	2816	3146	3460	3761
24100.00	1737	2453	2821	3151	3466	3767
24150.00	1739	2456	2825	3155	3471	3773
24200.00	1742	2460	2829	3160	3476	3778
24250.00	1745	2464	2833	3165	3481	3784
24300.00	1747	2467	2837	3169	3486	3790
24350.00	1750	2471	2842	3174	3491	3795
24400.00	1752	2475	2846	3179	3497	3801
24450.00	1755	2478	2850	3183	3502	3806
24500.00	1758	2482	2854	3188	3507	3812
24550.00	1760	2486	2858	3193	3512	3818
24600.00	1763	2489	2863	3198	3517	3823
24650.00	1765	2493	2867	3202	3523	3829

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
24700.00	1768	2497	2871	3207	3528	3835
24750.00	1771	2500	2875	3212	3533	3840
24800.00	1773	2504	2880	3216	3538	3846
24850.00	1776	2508	2884	3221	3543	3852
24900.00	1778	2511	2888	3226	3548	3857
24950.00	1781	2515	2892	3231	3554	3863
25000.00	1784	2519	2896	3235	3559	3868
25050.00	1786	2522	2901	3240	3564	3874
25100.00	1789	2526	2905	3245	3569	3880
25150.00	1791	2530	2909	3249	3574	3885
25200.00	1794	2533	2913	3254	3580	3891
25250.00	1797	2537	2917	3259	3585	3897
25300.00	1799	2541	2922	3264	3590	3902
25350.00	1802	2544	2926	3268	3595	3908
25400.00	1804	2548	2930	3273	3600	3913
25450.00	1807	2552	2934	3278	3605	3919
25500.00	1810	2555	2939	3282	3611	3925
25550.00	1812	2559	2943	3287	3616	3930
25600.00	1815	2563	2947	3292	3621	3936
25650.00	1817	2566	2951	3296	3626	3942
25700.00	1820	2570	2955	3301	3631	3947
25750.00	1823	2574	2960	3306	3636	3953
25800.00	1825	2577	2964	3311	3642	3958
25850.00	1828	2581	2968	3315	3647	3964
25900.00	1830	2585	2972	3320	3652	3970
25950.00	1833	2588	2976	3325	3657	3975
26000.00	1836	2592	2981	3329	3662	3981
26050.00	1838	2596	2985	3334	3668	3987
26100.00	1841	2599	2989	3339	3673	3992
26150.00	1843	2603	2993	3344	3678	3998
26200.00	1846	2607	2998	3348	3683	4004
26250.00	1849	2610	3002	3353	3688	4009
26300.00	1851	2614	3006	3358	3693	4015
26350.00	1854	2618	3010	3362	3699	4020
26400.00	1856	2621	3014	3367	3704	4026
26450.00	1859	2625	3019	3372	3709	4032
26500.00	1861	2629	3023	3377	3714	4037

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
26550.00	1864	2632	3027	3381	3719	4043
26600.00	1867	2636	3031	3386	3725	4049
26650.00	1869	2640	3035	3391	3730	4054
26700.00	1872	2643	3040	3395	3735	4060
26750.00	1874	2647	3044	3400	3740	4065
26800.00	1877	2651	3048	3405	3745	4071
26850.00	1880	2654	3052	3409	3750	4077
26900.00	1882	2658	3057	3414	3756	4082
26950.00	1885	2662	3061	3419	3761	4088
27000.00	1887	2665	3065	3424	3766	4094
27050.00	1890	2669	3069	3428	3771	4099
27100.00	1893	2673	3073	3433	3776	4105
27150.00	1895	2676	3078	3438	3781	4110
27200.00	1898	2680	3082	3442	3787	4116
27250.00	1900	2684	3086	3447	3792	4122
27300.00	1903	2687	3090	3452	3797	4127
27350.00	1906	2691	3094	3457	3802	4133
27400.00	1908	2695	3099	3461	3807	4139
27450.00	1911	2698	3103	3466	3813	4144
27500.00	1913	2702	3107	3471	3818	4150
27550.00	1916	2706	3111	3475	3823	4156
27600.00	1919	2709	3116	3480	3828	4161
27650.00	1921	2713	3120	3485	3833	4167
27700.00	1924	2717	3124	3490	3838	4172
27750.00	1926	2720	3128	3494	3844	4178
27800.00	1929	2724	3132	3499	3849	4184
27850.00	1932	2728	3137	3504	3854	4189
27900.00	1934	2731	3141	3508	3859	4195
27950.00	1937	2735	3145	3513	3864	4201
28000.00	1939	2739	3149	3518	3870	4206
28050.00	1942	2742	3154	3522	3875	4212
28100.00	1945	2746	3158	3527	3880	4217
28150.00	1947	2750	3162	3532	3885	4223
28200.00	1950	2753	3166	3537	3890	4229
28250.00	1952	2757	3170	3541	3895	4234
28300.00	1955	2761	3175	3546	3901	4240
28350.00	1958	2764	3179	3551	3906	4246

Exhibit 8

Proposed Updated Schedule of Basic Support Obligations

(shading indicates where self-support reserve applies)

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
28400.00	1960	2768	3183	3555	3911	4251
28450.00	1963	2772	3187	3560	3916	4257
28500.00	1965	2775	3191	3565	3921	4262
28550.00	1968	2779	3196	3570	3927	4268
28600.00	1971	2783	3200	3574	3932	4274
28650.00	1973	2786	3204	3579	3937	4279
28700.00	1976	2790	3208	3584	3942	4285
28750.00	1978	2794	3213	3588	3947	4291
28800.00	1981	2797	3217	3593	3952	4296
28850.00	1984	2801	3221	3598	3958	4302
28900.00	1986	2805	3225	3603	3963	4308
28950.00	1989	2808	3229	3607	3968	4313
29000.00	1991	2812	3234	3612	3973	4319
29050.00	1994	2816	3238	3617	3978	4324
29100.00	1997	2819	3242	3621	3983	4330
29150.00	1999	2823	3246	3626	3989	4336
29200.00	2002	2827	3250	3631	3994	4341
29250.00	2004	2830	3255	3635	3999	4347
29300.00	2007	2834	3259	3640	4004	4353
29350.00	2010	2838	3263	3645	4009	4358
29400.00	2012	2841	3267	3650	4015	4364
29450.00	2015	2845	3272	3654	4020	4369
29500.00	2017	2849	3276	3659	4025	4375
29550.00	2020	2852	3280	3664	4030	4381
29600.00	2023	2856	3284	3668	4035	4386
29650.00	2025	2860	3288	3673	4040	4392
29700.00	2028	2863	3293	3678	4046	4398
29750.00	2030	2867	3297	3683	4051	4403
29800.00	2033	2871	3301	3687	4056	4409
29850.00	2036	2874	3305	3692	4061	4414
29900.00	2038	2878	3309	3697	4066	4420
29950.00	2041	2881	3314	3701	4072	4426
30000.00	2043	2885	3318	3706	4077	4431

South Carolina Department of Social Services
CHILD SUPPORT OBLIGATION: WORKSHEET A

_____ vs. _____

Name of Plaintiff Name of Defendant File Number

	Father	Mother	
1. Monthly Gross Income:	<input type="checkbox"/> Imputed	<input type="checkbox"/> Imputed	
2. Monthly Alimony (This action)			
a. To Be Received:	+	+	
b. To Be Paid:	-	-	
3. a. Other Monthly Alimony of Child Support Paid: (If Having Priority Over This Action)	-	-	
b. Adjustment For _____ Other Child(ren) In the Home:	-	-	Combined Monthly Adjusted Gross Income
4. Adjusted Monthly Gross Income:	4(F)	+ 4(M)	= 4(C) <small>4(F) + 4(M) = 4(C)</small>

Number of Children To Be Supported By Order In this Action: <input style="width: 50px;" type="text"/>			
5. Basic Combined Child Support Obligation: (Gross) (From Schedule, Using Combined Monthly Adjusted Gross Income (Line 4C))			5(C)
6. Adjustment to Basic Child Support Obligation			
a. Health Insurance Premium: (Portion Covering Children Only)	+	+	
b. Child(ren)'s Extraordinary Medical Expenses:	+	+	
c. Work-Related Child Care Costs Adjusted For Federal Tax Credit (Choose one method): Actual _____ - Adjustment* _____	+	+	
<small>(Subject to income restraints) ADJUSTMENT is lesser of (1) Actual Credit from state and federal tax return OR (2) .27 of Actual Expenses OR (3) \$68 for 1 child or \$135 for 2 or more children receiving care)</small>			
Total Adjustment to Basic Combined Child Support Obligation:	6(F)	+ 6(M)	= 6(C)
7. Total Combined Monthly Child Support Obligation: (Net)			= 7(C) <small>5(C) + 6(C) = 7(C)</small>

8. Proportional Share of Combined Monthly Adjusted Gross Income:	$\frac{8(F)}{4(F)+4(C)=8(F)} \%$	+	$\frac{8(M)}{4(M)+4(C)=8(M)} \%$
9. Gross Child Support Obligation of Individual Parent: (Monthly)	$\frac{9(F)}{7(C) \times 8(F) = 9(F)}$	+	$\frac{9(M)}{7(C) \times 8(M) = 9(M)}$

Complete Items 10-11 for Obligated Parent Only:		
Obligated Parent is: (Check One)	<input type="checkbox"/> Father	<input type="checkbox"/> Mother
10. Credit for Adjustment to Basic Combined Child Support Obligation: (From Item 6(F) or Item 6(M))	$\frac{10(F)}{\text{(Same as Item 6(F))}}$	$\frac{10(M)}{\text{(Same as Item 6(M))}}$
11. Net Child Support To Be Paid To Custodian:	$11(F)$ <small>9(F) - 10(F) = 11(F)</small>	$11(M)$ <small>9(M) - 10(M) = 11(M)</small>

Date: _____ Worksheet Prepared By: _____ For: Father Mother

Note: If deviations from the Guidelines is necessary, please specify reasons (over).

South Carolina Department of Social Services
SPLIT CUSTODY WORKSHEET: WORKSHEET B

_____ vs. _____
 Plaintiff Defendant File Number

	Father	Mother
1 Gross Income	_____	_____
2 Alimony		
a To be paid	- _____	- _____
b To be received	+ _____	+ _____
3 Other support paid	- _____	- _____
4 Adjusted Gross	_____ 4(F)	_____ 4(M)
5 Medical Insurance	_____	_____
6 Extraordinary Med expense	_____	_____
7 Child Care	_____	_____
Total monthly _____ - Adjustment _____		
<small>Adjustment is lesser of (1) actual expenses, (2) .27 of total or (3) \$68 for 1 child or \$135 for 2 or more children</small>		
8 Total adjustments (5+6+7)	_____ 8(F)	_____ 8(M)
9a Number of children with Father 9a(F)		Number of children with mother 9a(M)
9b Number of other children in home _____ 9b(F)		Number of other children in home _____ 9b(M)
10 Credit for children with Father _____ <small>.75 x guideline support of 4(F) with children 9a(F)+9b(F)</small>		Credit for children with Mother _____ <small>.75 x guideline support of 4(M) with children in 9a(M)+9b(M)</small>
11 Father's adjusted gross [4(F)-10(F)] _____		Mother's adjusted gross [4(M)-10(M)] _____
12 Credit for other children in Mother's home _____ <small>.75 x guideline support of 4(M) with children 9b(M)</small>		Credit for other children in Father's home _____ <small>.75 x guideline support of 4(F) with children 9b(F)</small>
13 Mother's adjusted gross [4(M) - 12(F)] _____		Father's adjusted gross [4(F) - 12(M)] _____
14 Total Adjusted Gross [13(F) + 11(F)] _____		Total Adjusted Gross [13(M) + 11(M)] _____
15 Percentage retained [11(F)/14(F)] _____		Percentage retained [11(M)/14(M)] _____
16 Base Support for children in 9a(M) _____ <small>Guideline support based on 14(F)</small>		Base support for children in 9a(F) _____ <small>Guideline support based on 14(M)</small>
17 Total Adjustments 8(F)+8(M) _____		Total Adjustments 8(F)+8(M) _____
18 Total Support 16(F) + 17(F) _____		Total Support 16(M) + 17(M) _____
19 Support retained 18(F) * 15(F) _____		Support retained 18(M) * 15(M) _____
20 Less Adjustment 8(F) _____		Less Adjustment 8(M) _____
21 Subtotal 19(F)-20(F) _____		Subtotal 19(M)-20(M) _____
22 Net obligation _____ <small>If less than zero Enter '0'</small>	21(F)-21(M)	21(M)-21(F)

Date _____ Preparer _____

NOTE: If deviation from the guideline award amount is necessary, please specify reasons. (See reverse side)

South Carolina Department of Social Services
SHARED PARENTING WORKSHEET: WORKSHEET C

	vs.		
Name of Plaintiff	Name of Defendant	File Number	
	Father	Mother	
1. Monthly Gross Income:	_____	_____	
2. Monthly Alimony (This Action)			
a. To Be Received:	+ _____	+ _____	
b. To Be Paid:	- _____	- _____	
3. a. Other Monthly Alimony or Child Support Paid: (If Having Priority Over This Action)	- _____	- _____	
b. Adjustment For _____ Other Child(ren) In the Home: (0.75)	- _____	- _____	
4. Adjusted Monthly Gross Income:	4(F) _____	+ 4(M) _____	= 4(C) <small>4(F) + 4(M) = 4(C)</small>
5. Proportional Share of Combined Monthly Adjusted Gross Income:	5(F) _____ %	+ 5(M) _____ %	
	<small>4(F)/4(C) = 5(F)</small>	<small>4(M)/4(C) = 5(M)</small>	
Number of Children To Be Supported By Order In This Action: 			
6. Basic Combined Child Support Obligation: (Gross) (From Schedule, Using Combined Monthly Adjusted Gross Income (Line 4C))			6(C) _____
7. Shared Custody Basic Obligation:			7(C) _____ <small>6(C) x 1.50</small>
8. Each Parent's Share:	8(F) _____ <small>5(F) x 7(C) = 8(F)</small>	8(M) _____ <small>5(M) x 7(C) = 8(M)</small>	
9. Overnights with Each Parent: <small>*See note below if overnights between 109 and 129</small>	9(F) _____	+ 9(M) _____	= 9(C) 365
10. Percentage with Each Parent:	10(F) _____ %	+ 10(M) _____ %	= 10(C) 100%
	<small>9(F)/365 = 10(F)</small>	<small>9(M)/365 = 10(M)</small>	
11. Amount Retained:	11(F) _____ <small>8(F) x 10(F) = 11(F)</small>	11(M) _____ <small>8(M) x 10(M) = 11(M)</small>	
12. Each Parent's Obligation:	12(F) _____ <small>8(F) - 11(F) = 12(F)</small>	12(M) _____ <small>8(M) - 11(M) = 12(M)</small>	
13. Amount Transferred for Shared Basic Obligation: (If Negative Number, Enter \$0)	13(F) _____ <small>2(F) - 12(M)</small>	13(M) _____ <small>12(M) - 12(F)</small>	
14. Adjustment to Basic Obligation			
a. Health Insurance Premium: (Portion Covering Children Only)	+ _____	+ _____	
b. Child(ren)'s Extraordinary Medical Expenses:	+ _____	+ _____	
c. Work-Related Child Care Costs:	+ _____	+ _____	
Total Adjustment:	14(F) _____	+ 14(M) _____	= 14(C)
15. Each Parent's Share of Total Adjustments:	15(F) _____ <small>14(C) x 5(F) = 15(F)</small>	15(M) _____ <small>14(C) x 5(M) = 15(M)</small>	
16. Amount Transferred for Adjustments: (If Negative Number, Enter \$0)	16(F) _____ <small>15(F) - 14(F)</small>	16(M) _____ <small>15(M) - 14(M)</small>	
17. Total Amount Transferred:	17(F) _____ <small>13(F) + 16(F) = 17(F)</small>	17(M) _____ <small>13(M) + 16(M) = 17(M)</small>	<small>*If overnights between 109 and 129 use worksheet on reverse</small>
18. Final Child Support Amount: (If Negative Number, Enter \$0)	18(F) _____ <small>17(F) - 17(M)</small>	18(M) _____ <small>17(M) - 17(F)</small>	

Note: If deviation from the Guidelines is necessary, please specify reasons (over).

Date: _____ Worksheet Prepared By: _____

South Carolina Child Support Guidelines Evaluation Form

Federal law requires that each state's child support guidelines be reviewed every four years. Please participate in this review process by completing this form and returning it to the address below.

1. Do you think that the guidelines are clear and easy to use? If not, what would you like to see changed?

2. Are the guidelines fair to all parties: custodian, obligated parent, joint custody? If not, how could the guidelines be made fairer to both parties?

3. From your experience with the guidelines, have the award amounts been adequate, too high, or too low?

4. General comments or suggestions (please attach additional sheets if necessary):

Name and address (optional):

Return to:
Integrated Child Support Services Division
South Carolina Department of Social Services
Post Office Box 1469
Columbia, SC 29202-1469
Attention: Stephen Yarborough



South Carolina Bar

Continuing Legal Education Division

What is Evidence in the GAL Investigation?

Ashby Jones

**SPONTANEOUS KNOWING: A HERMENEUTIC PHENOMENOLOGY STUDY
EXPLORING THE MYSTICAL SIDE OF INTUITION**

**A dissertation
presented to the Faculty of Saybrook University
in partial fulfillment of the requirements for the degree of
Doctor of Philosophy (Ph.D.) in Psychology**

by

Dawn A. McDaniel

**Pasadena, California
April, 2022**

Approval of the Dissertation

SPONTANEOUS KNOWING: A HERMENEUTIC PHENOMENOLOGY STUDY
EXPLORING THE MYSTICAL SIDE OF INTUITION

This Dissertation by Dawn A. McDaniel has been approved by the committee members below, who recommend it be accepted by the faculty of Saybrook University in partial fulfillment of requirements for the degree of

Doctor of Philosophy in Psychology

Dissertation Committee:

Walker Ladd, Ph.D., Chair

Date

Marina Smirnova, Ph.D.

Date

Drake Spaeth, Psy.D.

Date

Abstract

SPONTANEOUS KNOWING: A HERMENEUTIC PHENOMENOLOGY STUDY EXPLORING THE MYSTICAL SIDE OF INTUITION

Dawn A. McDaniel

Saybrook University

Intuition is a universally known term that represents a sudden and unexpected knowing that happens without conscious effort. Despite the commonality of the word intuition, the literature reflects inconsistent interpretations of the phenomenon, leading to confusion (Wahbeh et al., 2018; Yaden et al., 2016). Historically, intuition research has focused on the cognitive realm leaving a void in understanding intuitive experiences, including ethereal and mystical qualities (Alvarado, 2002; Baruš & Mossbridge, 2016). The lack of research into humanistic and transpersonal perspectives of intuition has restricted understanding of this phenomenon. Societal norms and narrow research perspectives tend to trivialize and pathologize unusual experiences and penalize individuals who have experiences that transcend the confines of what is believed to be the human experience.

The purpose of this hermeneutic phenomenology study was to explore the experience of mystical intuition and unravel the specific language experiencers used to convey a mystical intuitive experience. The research question guiding this study was: What is it like to experience mystical intuition? This research question prompted an inquiry that reached beyond the cognitive aspects of intuition and explored the lived experience of intuition.

Hermeneutic phenomenology allows the researcher to explore the lived experience of a phenomenon while paying close attention to the language and how the perspectives interact and fuse together (Gadamer, 1982). The interpretive nature of hermeneutic phenomenology requires rich subjective experiences from participants with firsthand experience. The sample consisted of 22 experiences collected from personal interviews and 23 archived experiences that facilitated triangulated findings and observations of how the language surrounding these types of experiences changed over time.

Using the iterative analysis process of the hermeneutic circle, which included dialogue, writing, rewriting, I analyzed the experience through the lens of van Manen's (2016) existentials of the lifeworld (temporality, spatiality, relationality, and corporeality) as well as a transpersonal perspective that includes the transcendent spirit. Six themes of mystical intuition emerged that normalize spontaneous knowing experiences and increase understanding of mystical intuition in a way that may help reduce stigma and spiritual emergencies related to anomalous experiences and may even shed light into the puzzle of human existence.

Dedication

This work is dedicated to all those who have hidden or ignored their mystical and spiritual experiences simply because they are not easily explained or understood by society. I hope this work shows that you are not alone, and your experiences are valuable.

Acknowledgments

The journey to a doctoral degree is long, arduous, and isolating. Still, it is a journey that cannot be taken without support. The list of people who offered me support is longer than I am even aware. I am grateful for all the encouragement I received, from the steadfast supporters who offered consistent and persistent reassurance to the smallest encouragement from the grocer who overlooked my frazzled appearance yet took note of my “Sorry, I can’t. I am writing a dissertation” t-shirt. Each interaction was valuable and helped me cross the finish line. Nevertheless, there are several that deserve greater recognition.

To my rock, my greatest supporter, the love of my life, Jeff, your encouragement and support throughout this process has meant so much to me. Through all the ups and downs and navigating all the unknowns, you stood by me and encouraged me to keep going despite the challenges we faced. You mean the world to me; I love you. My daughters, Coralin and Megan, were the true heroes of this journey, offering unwavering support and encouragement even when it meant sacrifice for them. These young women were with me every step of the way, every day sharing their pride and confidence in my pursuit. This work would not have been possible without these two remarkable women.

My scholarly path would not have been possible without my soul sister, Emy Tafelski. We carried the torch of knowledge together allowing each other to take the heavier end now and again. The daily interaction with Emy kept me engaged in my studies and focused on the work I was meant to bring to the world. This is a friendship that started on my first day at Saybrook University and will be one that withstands the test of time.

I could not have asked for a better chair to my committee. Dr. Walker Ladd gave me so much more than mentorship. She pushed me in ways that were excruciating and momentous. She

singlehandedly transformed me from a fledgling scholar into a leader in my field. She empowered me to take on the most pressing issues while cultivating my ability to discern what was truly important in the moment. My gratitude for her mentorship and support is endless.

I am grateful to my dissertation committee members Dr. Marina Smirnova and Dr. Drake Spaeth. Their insight to the process and their expertise in humanistic and transpersonal psychology allowed me to push beyond the traditional inquiry and into the mystical spaces of the psyche in an effort to learn more about our humanity.

I would be remiss if I didn't mention a few more who left a big impact on my work. Thank you to the teenagers of East Hampton High who frequently asked about my work and engaged in thought-provoking discussions that helped me understand my work through fresh and exciting eyes. Thank you to Sandy Coomer and a number of women I found at the Rockvale Writer's Colony. They are an amazing, inspiring, supportive, nurturing, and encouraging crew that beckoned me beyond myself and into what they knew I could be. Ever so gentle and with an abundance of love, they nurtured me, while pushing me forward toward my goal. For this I am eternally grateful. Finally, to my participants. I am honored to have been trusted with your stories and your experiences of mystical intuition. Thank you for sharing your experiences with the world so that we may learn more about this phenomenon.

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CHAPTER 1: INTRODUCTION

Intuition is a commonly known term and frequently used by the public; however, interpretations of the phenomenon are incongruent (Dane & Pratt, 2007). The literature has consistently shown fundamental differences in ontology (Walach, 2020); the philosophical foundation of shared concepts about reality may contribute to incongruent interpretations and definitions of intuition. Materialism is a philosophy that prioritizes the tangible and measurable (i.e., matter); conversely, idealism is a philosophy that matter cannot separate from consciousness (e.g., mind, spirit).

As a research topic, intuition has been studied by a broad range of disciplines, including management, medical, neuroscience, psychology, and parapsychology (McDaniel, 2019a). The existing body of research on intuition indicates that most studies aligned with a materialist ontology and focused on decision-making (Mikušková, 2017; Talat et al., 2017), problem-solving (Gilhooly, 2016), and neuroscience (Eskinazi & Giannopulu, 2021; Marks-Tarlow, 2015).

Few studies have investigated intuition using an idealist ontology. Research that explores the more ethereal and transcendent qualities of intuition tend to be in the areas of extrasensory perception (Hinton, 2014; Hunt, 2019; Rhine, 1978; Stokes, 2017; Wahbeh et al., 2018), spiritual experiences (Attig et al., 2011; Kennedy & Kanthamani, 1995; Renner & Ramalingam, 2016), and mystical experiences (James, 1917; McCann & Davis, 2020; Yaden et al., 2017). I refer to this group collectively as mystical intuition for this study.

I aimed to explore mystical intuition, including the ethereal and transcendent qualities that accompany intuitive experience yet are infrequently researched and seldom published in peer-reviewed journals (Alvarado, 2002; Barušs & Mossbridge, 2016). Some researchers suggest

the dearth of mystical intuition research is due to societal taboos that trivialize unusual experiences that transcend the conventional boundaries of space and time (Anthony, 2011), a fear of stigmatization for using intuition (Woodard, 2012) that keeps the phenomenon concealed (Hinton, 2014), and inconsistent definitions and nomenclature (Wahbeh et al., 2018) that create a barrier to understanding the experience (Woodard, 2012). A lack of attention to anomalous experiences such as mystical intuition in science is problematic because “a specialty that conducts little research has no possibility of developing as a science and has little impact on society” (Alvarado, 2002, p. 115).

This chapter introduces the study and addresses the problem and purpose statements, research question, and the study’s significance to the body of knowledge. I introduce the hermeneutic phenomenological methodology research design and the underlying conceptual framework. I close the chapter by defining key terms used in the literature review and preview highlights of what is to come in the following chapters.

Background

Since ancient times, people have been interested in consciousness and intuitive experiences (Facco et al., 2021). Historical documents and sacred texts capture early civilizations’ thoughts and discussions and deliver them to the present time (Larson, 2019). The historical documentation supports the notion that the universe is an interconnected matrix of consciousness (Monzavi et al., 2017). Suddenly acquired knowledge that compels the recipient is a defining characteristic of mystical intuition (Gore & Sadler-Smith, 2011; Rhine, 1978). Rhine (1953/2018) found that intuitive information tends to be incomplete or devoid of clarity. Larson (2019) posited that messages attributed to mystical intuition are from the spirit realm, considered divine, and frequently require interpretation. Since these attributes do not conform to the

materialist perspective, mainstream science has historically rejected these phenomena as legitimate.

Despite the genuine interest in these anomalous experiences as part of the New Age revolution that started in the West around the 1930s (Hunt, 2019), research efforts of these more anomalous experiences have been suppressed for decades (Barušs & Mossbridge, 2016; Lange et al., 2019; Petitmengin-Peugeot, 1999; Sadler-Smith, 2016). The New Age movement, born from psychologists, philosophers, theologians, and mystics in the 1930s, emerged “to address a globalizing materialism and its disenchantments” (Hunt, 2019, p. 1).

In the 1970s, the transpersonal psychology movement sought to expand the psychology field beyond the brain and the natural sciences into the more expansive (Lattuada, 2018; Wade, 2019), unknown space of human science (Hartelius, 2019). Transpersonal psychology researchers explored aspects of the human condition that transcended ego into consciousness, spirituality, and anomalous experiences (Palmer & Hastings, 2013). This intentional divergence from the positivist paradigm met a measure of success at the onset (Kling, 2019), yet mainstream science continues to marginalize these efforts.

Problem Statement

The problems addressed in this study are the lack of peer-reviewed research on mystical intuition and the inconsistent language used to describe intuition as a phenomenon. The parochial exploration of intuitive experiences has been confined to decision-making and problem-solving, representing only a portion of intuitive experiences. The disadvantage of limiting intuition research to experiences that can be explainable within the materialist paradigm is that the experience’s full potential is unknown. The root of the problem is the lack of peer-reviewed

research on mystical intuition. This problem has transpired from three areas: dualism, taboos, and language.

It is a widely held belief that Rene Descartes (1596–1650) served as the impetus for the ontology of dualism, which suggests that the human mind or soul and body are separate. Researchers have said that this Cartesian split of the body from the mind or soul was evidence that the body or matter was superior to other ontological perspectives (Farrell, 2020; Robbins et al., 2018). Until recently, this paradigm has maintained a stronghold in Western society and the understanding of science without contest. In 2021, hundreds of years after science accepted dualism, researchers learned that Descartes separated the soul (consciousness) from the body (science) as a way to avert criticism and interference from the Church (Facco et al., 2021, p. 5). As modern researchers uncover more evidence that supports a connection between consciousness and the natural sciences, this paradigm is beginning to shift. Ontological paradigms are beginning to expand as these researchers and others continue to seek evidence for a connection between the natural sciences and consciousness. However, researchers must continue conducting and publishing studies to facilitate a broadened worldview.

The scarcity of studies on mystical intuition results from long-standing taboos that dissuade researchers from investigating topics that deviate from conventional science. In academia, taboos resulted in little to no research funding and exclusion from the academic discourse (Wahbeh et al., 2018). Societal taboos have instilled fear in individuals who experience mystical intuition, causing them to ignore the experience or keep it a secret (Hinton, 2014). Religious and cultural taboos where beliefs and these types of experiences are incongruous (Brymer & Schweitzer, 2017). Facco et al. (2019) explained that some taboos have come about because of insufficient information on extrasensory perceptions.

Language is the way we learn, understand, and communicate. It is both helpful and limiting. Few participants in Woodard's (2012) study could clearly articulate the full scope or breadth depth of their experience because they did not have words representing the experience. Many relied on slang to describe the experience and then struggled to find additional words or explanations. This language barrier is common throughout the literature. It is problematic for researchers as there is no established nomenclature (Wahbeh et al., 2018) or lexicon (Yaden et al., 2016) to guide and establish consistency within the research. When the definitions of terms are fluid from one study to the next, the terms end up with so many meanings that they become meaningless.

Purpose Statement

This hermeneutic phenomenology study aimed to explore the experience of mystical intuition. The subjective, intuitive experience that includes ethereal and transcendent qualities is infrequently researched and seldom published in peer-reviewed journals (Alvarado, 2002; Barušs & Mossbridge, 2016). This study's secondary purpose was to unravel the specific language used by participants to support efforts to clarify and define terms associated with intuitive experiences. Given hermeneutic phenomenology's interpretive nature, this study's findings may reveal something new about the experience to share with society. They may help humans make sense of their existence. Moreover, I hope that findings will be advantageous for future research design and topic exploration.

Research Question

Gadamer (1982) suggested that an individual's worldview represents the entire span of a person's experience, and they interpret everything through that lens. The person's experience is made up of various perspectives, which Gadamer identified as horizons. My personal experience

reflects that mystical, anomalous, and spiritual terms invoke profound emotions and interpretations. Wahbeh et al. (2020) learned that using neutral language to describe the phenomenon rather than typical terms associated with paranormal experiences such as clairvoyance, telepathy, mediumship, and precognition (pp. 3–4) helped to minimize bias. Following this finding, I used more neutral language that describes the phenomenon's basic tenets while recruiting and conducting the study. The following research question guided this study: What is it like to experience mystical intuition? The secondary question was: What words do experiencers use to convey a mystical intuitive experience?

Significance

In what could presumably be a call to action, parapsychologist Carlos S. Alvarado (2002) opined that it is time to move beyond “marvelous stories” (p. 117) to learning something new about mystical and paranormal experiences. In part, this study is a response to that appeal. Qualitative research in this field is minimal; this study adds another example of qualitative research to it. Qualitative research informs future research (Kruth, 2015), and as interest in these phenomena grows, exploration will continue. This study further informs future researchers as they work toward a deeper understanding of mystical experiences and increases awareness and understanding of mystical intuition, which is instrumental for knowing how the world works (Woodard, 2012) and exploring our existence as humans.

The literature suggests several areas where qualitative research of mystical intuition may be beneficial. Increased understanding of the subjective experience of mystical intuition may help determine any evolutionary impact (Broughton, 2010), establishing a relationship between ordinary and exceptional information acquisition to evaluate advantages (Wahbeh et al., 2018, p. 338), or deciphering how the world and human existence works (Woodard, 2012). Additionally,

this study may support efforts to transcend stereotypes and stigmas related to anomalous experiences and update criteria used in mental health pathologization (Woodard, 2012, p. 78). Findings from this study may expand our understanding of the lived experience and uncover some basic tenets that make the ineffable more tangible, thereby providing a more robust framework to explore the depths of the phenomenon.

Research Design

I took a transpersonal, approach leveraging idealism as the ontological foundation to keep my inquiry focused on mystical intuition's transcendent qualities. In line with the selected methodology, hermeneutic phenomenology, I followed the study's natural flow by employing an interpretive epistemology to support my phenomenological attitude (Suddick et al., 2020; van Manen, 2018).

This hermeneutic phenomenological study was designed to explore the ethereal and transcendent qualities accompanying mystical intuition. Hermeneutic phenomenology is a qualitative research methodology that uses an in-depth, dialogical technique to collect data and interpretive analysis to investigate the meaning of being (Gadamer, 1982; van Manen, 2016) beyond what is already evident or presumed (Crowther et al., 2017). This methodology combines Heidegger's interpretive phenomenology with hermeneutics, the theological tradition of interpreting sacred texts, to interpret a phenomenon (Gadamer, 1982). The secondary purpose of this study was to unravel the specifics of the language to reveal, clarify, and define words associated with intuitive experiences. The hermeneutic element of interpreting texts was crucial to making sense of the language that surrounds mystical intuition.

Terminology

In the absence of a phenomenon lexicon that would establish a solid foundation of definitions, the broad and inconsistent use of the terms surrounding intuition research requires clarity. This section identifies and defines terms used throughout the study to facilitate clarity.

- *Intuition* – a sudden and unexpected, knowing that happens without conscious effort.
- *Mystical Intuition* – spontaneous knowing that transcends consciousness accompanied by unusual circumstances, characteristics, or outcomes.
- *Spontaneous Knowing* – instant, unsolicited information acquisition with no antecedent and no connection to anything rational.
- *Extrasensory Perception (ESP)* – a sense of knowing that gathers information from beyond the five natural senses or by esoteric means.

Chapter Summary

To summarize, intuition is a commonly experienced phenomenon that has myriad interpretations. Due to long-standing taboos established under dualism, published research on mystical intuition as a human phenomenon is scarce. Consequently, experiences with ineffable qualities remain a mystery, and the potential benefits are unknown.

Chapter 1 reviewed the problem, purpose statement, research question, and the study's significance to the body of knowledge. I identified the alignment between the hermeneutic phenomenological research design and the underlying conceptual framework. Finally, key terms were defined to facilitate clarity for the reader.

What follows is an overview of the remaining chapters for this dissertation. Chapter 2 contains a review of the academic literature on intuition. The chapter begins with a definition and interpretation of intuition, followed by a brief historical review. Then the phenomenon is explained through the phases of the experience that include features of intuitive experience, modes of delivery, types of intuition, information transmission and processing theories, source of

information, and outcomes. The chapter includes various methods and approaches to qualitative research and identifies the best approach for this study.

Chapter 3 focuses on the methodology, methods, and the study's design. The chapter reviews potential types and methodologies of research and the rationale for the selected methodology. It then addresses the research design structure and details, including participants, recruitment, data collection methods, ethics, and analysis. Trustworthiness, limitations, and delimitations are also addressed.

Chapter 4 reports the findings of the study. I start the chapter with a brief overview of the study, the sample, the study's execution, and analysis. Next follows a detailed explanation of findings from the study and provides evidence from the participants to support the findings.

Chapter 5 encompasses the interpretations and implications of the findings, how findings relate to the literature, the limitations of the study, and recommendations for future research.

CHAPTER 2: LITERATURE REVIEW

This literature review examines empirical and theoretical literature related to intuition. A relatively small body of literature is concerned with mystical intuition, and most of it is within the space of theology, philosophy, and parapsychology. Conversely, there is a considerable amount of literature about intuitive experiences related to decision-making, problem-solving, and, to a lesser degree, creativity.

This chapter comprises a comprehensive overview of the empirical and theoretical literature related to intuition. The theoretical literature is rich and plentiful and can easily overshadow the empirical literature in the field. The literature imbalance is especially true for mystical intuition. It is clear from the literature that intuition is a phenomenon that manifests experiences along a spectrum. Throughout this chapter, I examine the spectrum of experiences and strive to report the literature and how it informs the study of mystical intuition. The myriad experiences and attributes connected to intuitive experiences of any type are complex and multifaceted. I have identified a conceptual framework that supports clear communication of the literature and serves as the foundation for this study.

The conceptual framework uncovered through the literature review consists of six phases of the experience. Not all phases are experienced, nor have they all been studied. This chapter is organized around these identified phases of intuitive experience. The chapter starts by grounding the reader in intuitive phenomenon through the definition, interpretations, and historical background. Then the chapter expounds on the literature through the process of the phases, including characteristics of intuitive experience, how intuition is experienced, the process of information transference from origin to consciousness, and the result of the experience. After working through the details of the experience identified in the literature, I address the source of

information, the meaning people make of the experience, and how the inconsistent language serves as a barrier to understanding. The last section of the chapter addresses the methodologies, methods, and instruments used in empirical studies on intuitive experience and how it has informed my research design decisions.

What is Intuition?

Intuition is a word with multiple definitions and considerably more meanings. The word intuition is quite popular, ranking in the top 1% of looked-up words on Merriam-Webster.com (Merriam-Webster, n.d.). Despite the popularity and frequent usage of the word intuition, there is much debate regarding its interpretation. Similar to other words in a dictionary, the entry for intuition lists multiple subsenses. The words used in the various subsenses seem to cover a broad scope of intuition. The definition contains words that convey meanings such as instant knowledge, thinking without thought, immediate understanding, conviction, and quick insight (Merriam-Webster, n.d.). The experience of intuition is frequently ineffable or challenging to explain (Brymer & Schweitzer, 2017; Larson, 2019; Yaden et al., 2016). Despite inconsistency with definitions across diverse fields of study, the general interpretation of the word intuition is a sudden and unexpected knowing that happens without conscious effort.

Interpretations of Intuition

The confusion surrounding intuition can be traced to the various perspectives and interpretations (Dane & Pratt, 2007). Additionally, researchers' tendency to use a single word, intuition, to describe intuitive processes and their associated results or outcomes exacerbates the problem. Dane and Pratt (2007) advocated for a shift in phrasing to differentiate between processes and outcomes to clarify the phenomenon. Currently, interpretations of intuition tend to align with the field of study.

Intuition researchers in the business and management field take a pragmatic approach to research, primarily focused on decision-making and judgment as an outcome of intuition. Meziani and Cabantous (2020) conducted a longitudinal study on how film crews make sense of intuition and the resulting action. They identify intuition as rapid, non-conscious processing with both cognitive and affective elements that results in “affectively charged judgement” (p. 2). In a modified phenomenology, Mikušková (2017) found that managers use a combination of rational and intuitive judgment to make decisions. Further, managers in the study associated intuition with feelings, skills, traits, and natural features that develop due to experience and practice.

Neurological scientists prefer to take a positivist approach to intuition research. Researchers in this field postulate that intuition is a subconscious, non-verbal process that accesses dormant and pre-existing knowledge and automatically transmits the information into conscious awareness (Eskinazi & Giannopulu, 2021; Marks-Tarlow, 2015). Neuroscience brain studies have revealed a connection between intuition and neural activity in “a specific part of the prefrontal cortex, the anterior medial orbitofrontal cortex, which is considered a rapid detector of nonverbal information” (Eskinazi & Giannopulu, 2021, p. 2). Campbell and Angeli (2019) conducted a study from two disparate archival data sets that suggested that various internal and external cues that arise from experience and situational awareness inform a type of intelligence labeled intuition. Marks-Tarlow (2015) came to a similar conclusion, stating that clinical intuition was a form of social and emotional intelligence.

Transpersonal psychologists generally interpret intuition as “a way of knowing that transcends both space and time” (Vaughan, 2002, p. 98). From this perspective, confining intuition studies to decisions, judgments, or neural activity in the brain may unnecessarily restrict the full scope of the phenomenon (Dörfler & Ackermann, 2012). Therefore, transpersonal

psychology studies on intuition follow a broad interpretation of intuition and reach untraditional and anomalous inquiry areas. Rogers and Wiseman (2005) asked self-identified, highly intuitive people to provide a layperson's definition of intuition. The study revealed that most participants referred to intuition as a gut feeling or "a non-conscious or super-fast method of processing information" (Rogers & Wiseman, 2005, p. 164). This study of highly intuitive people also showed that over 60% of participants felt justified in self-identifying as a highly intuitive person because of precognition or foretelling future experiences. Intuitive experiences that venture into the realm of clairvoyance, precognition, and the like are often classified as paranormal (Zahran, 2017) and have been explored by parapsychologists.

Background

Early Philosophy. Eastern philosophers believed that intuition is a transcendence of difficulties and achieved through spiritual growth (Vaughan, 1979) and passage to a broader consciousness (Dane & Pratt, 2007). Western philosophers considered intuition a pure and immediate knowledge (Dane & Pratt, 2007) that conveys absolute truth (Vaughan, 1979). As Cartesian science gained popularity, any knowledge that did not derive from matter was considered unscientific (Walach, 2020), which illuminated the dichotomy between intuition and reason (Vaughan, 1979).

William James (1842–1910), a prominent American philosopher and psychologist, recognized two forms of knowledge. James (1885) identified the first form of knowledge as a phenomenological acquaintance of what is known; this is a sensed or perceptual knowledge. James explained this way of knowing as immediate and intuitive. The second form of knowledge is a cerebral way of knowing that is conceptual and representative. James (1885) suggested that

both manners of knowledge are valid and that we can express the knowledge in whichever manner we choose, “provided only we do not confusedly express it” (para. 16).

Ontological Discourse or Positivism. The prevailing ontology in the West is materialist and born from natural science. While James (1885) deemed both intuitive and cerebral forms of knowledge valid, the Cartesian perspective, which separates mind from body or soul from science (Zahran, 2017), leaves little room for soulful experiences to provide information to science. This classical epistemology has appropriated intuition to reason, logic, and the cognitive processing of knowledge.

Under the materialist paradigm, intuition is studied as a mode of subconscious processing that supports decision-making (Talat et al., 2017), problem-solving (Gilhooly, 2016), and judgment (Mikušková, 2017). This paradigm is juxtaposed with the transpersonal epistemology of transpersonal psychology and parapsychology that supports the notion that intuition is an act that happens beyond reasoning (Valverde, 2016; Zahran, 2017). The fundamental differences in epistemological perspectives make researching intuition under a single ontological standard impossible.

Psychological Constructivism. The positivist stronghold on mainstream science led to a rejection of ideas and concepts that transcend the material world and are unexplainable by natural science (Friedman, 2002). Thus, positivists have encouraged a taboo that limits research and research funding (Stokes, 2017), a taboo that ironically arose from a lack of understanding and information about anomalous phenomena (Facco et al., 2019). Woodard (2012) asserted that anomalies in any field serve to push science beyond the known boundaries; therefore, limiting research on ineffable phenomena prevents a complete or comprehensive understanding of the full scope of human experience.

Pathologizing Mystical and Anomalous Experiences. The taboo that suppresses transpersonal experiences also has repercussions for individuals. A study on how people make meaning from numinous (intuition and tacit ways of knowing) experiences revealed a level of secrecy among participants (Hinton, 2014). Hinton (2014) sought to learn more about why people kept their experiences secret in a follow-up study. Hinton used a phenomenological approach and employed triangulation by collecting three types of data: a personal narrative, a piece of expressive art, and a semi-structured interview. The study uncovered that all participants felt uncomfortable about sharing their experiences with others. Hinton emphasized that all seven operational themes were ideations of other people's perceptions when conveying the results. Similarly, in a study on spontaneous spiritual and paranormal experiences, Woodard (2012) reported that 100% of the participants had a concern about their experience being pathologized, noting that participants "asked the researcher if he was thinking that they were 'crazy' or 'nuts'" (p. 123).

Paranormal, spiritual, or numinous experiences are not the only type of experience that induces secrecy. While working on a paper about enhancing intuition, Dörfler and Stierand (2016) ascertained that professionals feel the need to conceal that intuitive knowledge was influential in their achievements and opt for a more rational explanation. Evidence supporting Dörfler and Stierand's claim came from Mikušková's (2017) study on managers' decision-making that found that intuition could not be used to justify professional and managerial decisions, even if they used intuitive information in the decision process.

The fear of stigmatization for using intuition is ubiquitous. More research is needed to understand the full scope of human experience. Plus, a better understanding of spontaneous experiences in aggregate can inform practitioners and establish boundaries for pathologizing

experiences that otherwise could be deemed within the normal range of human mental functioning (Woodard, 2012).

Intuition and Psi. In 1930, spiritualism was on the rise in the United States (Kloosterman, 2012), and there was a growing interest in empirical research in psychical and paranormal phenomena (Duke University Libraries, n.d.-b). That same year, Drs. J. B. and Louisa Rhine arrived at Duke University and started conducting experiments at the parapsychology lab (Duke University Libraries, n.d.-a). The parapsychology lab focused on extrasensory perception (ESP) and empirically established four types: telepathy, clairvoyance, precognition, and psychokinesis (Rhine, 1978). Each type of extrasensory perception was based on the target or agent; for instance, telepathy worked with another person's thoughts, clairvoyance worked with objects, and precognition worked with future events (Rhine, 1978, p. 21).

In 1948, Louisa Rhine (1978) commenced a case study research project to supplement the laboratory experiments. Rhine sought to understand the mechanisms and expression in consciousness in an unrestricted environment. Rhine reviewed 1,001 spontaneous cases for the pathway used to enter consciousness. The type of spontaneous experience, such as telepathy, clairvoyance, or precognition, was irrelevant in this review as the type was not relevant to the mechanism. Rhine identified four distinct psi impressions on consciousness, intuitive, hallucinatory, unrealistic dreaming, and realistic dreaming (Rhine, 1953/2018).

The intuitive category is the most pertinent to this study. The intuitive group was comprised of spontaneous cases where the experiencer "suddenly 'just knew' something that was later judged to pertain to an event or situation unknown to him by any sensory means" (Rhine, 1953/2018, p. 58). The intuitive experiences were further characterized by limited content clarity

and an unyielding conviction that the information was true, even when that information was incomplete. Finally, intuitive experiences compelled subjects toward action or overcame them with emotion. These experiences are ones of intuition and the subject of this study.

Identifying Features

Despite the varied interpretations and meanings for intuition, researchers have found common ground on the phenomenon's characteristics. Dörfler and Stierand (2016) reviewed the intuition literature to ascertain the characteristics of an intuitive experience. To effectively delineate the characteristics, Dörfler and Stierand recognized a need to differentiate the process of intuition from the outcome of intuition. Each aspect of the intuitive experience comprises three characteristics.

Dörfler and Stierand (2016) identified the *process* of acquiring information as intuiting. The characteristics of intuiting are rapid, alogical, and spontaneous. Intuitive experiences are *rapid*: presented instantly without warning. The speed of intuiting suggests that the information bypasses the cognitive process. Intuiting is neither linear nor logical, nor can it be summoned. Intuiting produces an outcome that has identifiable characteristics as well.

Dörfler and Stierand (2016) identified the *outcomes*, or what they call intuition, to be tacit, holistic, and compelling. The outcome of intuiting or processing information is the way it appears to the individual. The experiencer cannot explain where the information came from or how they know; they just do. Intuition is perceived holistically rather than in parts. Finally, intuitions have a strong sense of truthfulness beyond any doubt (pp. 1–2).

A qualitative review of first-hand accounts submitted in written form revealed some unique characteristics associated with intuitive spontaneous cases that are different from dreams or hallucinations. Rhine (1953/2018, 1978) explained that intuitive cases manifested with limited

content, lacking specific details. Instead, the information was presented as a broad idea, appeared without warning, accompanied by a powerful conviction that the information was absolutely true.

Rhine (1978) discovered that information that compels the recipient to action is a crucial characteristic of intuitive cases. In 2018, Wahbeh et al. conducted a study about intuition via a questionnaire that surveyed the general population identified as scientists, engineers, and enthusiasts (believers of psi phenomenon). Results showed that nearly 70% of both general and scientists' groups and 87% of believers/enthusiasts reported knowing something to be true when there was no other way of knowing (Wahbeh et al., 2018). Woodard (2012) confirmed, saying, "They felt that their experiencing was self-validating and self-evident, and there was no need to prove it to others" (p. 121).

Intuitive Experience Types

The intuition literature is replete with aspects, attributes, and components of an intuitive experience. Many of these terms are used interchangeably or in contradicting ways. A multitude of names identifies the experience itself. Clark (1973) captured these terms and descriptions of the phenomenon as:

Experiences that are commonly called intuitive include mystical apprehension of absolute truth, insight into the nature of reality, unitive consciousness, artistic inspiration, scientific discovery and invention, creative problem solving, perception of patterns and possibilities, extrasensory perception, clairvoyance, telepathy, precognition, retrocognition, feelings of attraction and aversion, picking up "vibes," knowing or perceiving through the body rather than the rational mind, hunches and premonitions (p. 156)

The act of categorizing intuition into subgroups simplifies the phenomenon while simultaneously acknowledging the intricacies within boundaries of an elusive definition and copious terms. The literature presents intuition as an experience comprised of several components that are difficult to conceptualize as separate since they happen seemingly

instantaneously. Still, I have grouped the components of the phenomenon as described in the literature into segments that correspond with the delivery mode, the process of intuiting, the outcome, the source of knowledge, and the meaning of the experience.

The delivery mode is how the individual becomes aware of the experience. I have grouped these into creative and cosmic categories based on the literature for creative intuition and paranormal intuition, respectively. Creative delivery modes include unconventional ways of acquiring information, whereas cosmic delivery modes contain metaphysical properties.

Creative Intuition

An experience of intuition that manifests through a creative delivery mode may include dreams, insight, and hunches. Strict categorization of intuitive experiences is not possible since delivery modes like the information itself are bound to subjective perspectives. As I discuss later, there are times when hunches, inspiration, and dreams may contain expert judgment, psi properties, or both.

The theoretical literature distinguishes creative intuition as a problem-solving technique more so than a decision-making technique (Robinson et al., 2017). Creative intuition is an intuitive process that generates multiple ideas appropriate for the problem (Shirley & Langan-Fox, 1996) that works by assimilating a deluge of information to satisfy a specific goal (Pétervári et al., 2016). This process happens below the level of conscious awareness and includes many of the features associated with intuition as a means of acquiring knowledge without knowing how it appeared (Eskinazi & Giannopulu, 2021).

Insight has been described as sudden information that results in clear comprehension (van Manen, 2018), resolution (Eskinazi & Giannopulu, 2021), insight (Walach, 2020), or epiphany (Dane, 2020). Gilhooly (2016) conducted a theoretical review on the incubation effects on

creativity. Gilhooly hypothesized that creative intuition resulted from the *unconscious work theory*, where the same processes used in conscious cognitive processing are employed beneath the surface of conscious thought, the proverbial back burner. Conversely, Dörfler and Ackermann (2012) argued that creative intuition results in new knowledge that transpires to solve ambiguous problems rather than well-structured problems that utilize intuitive judgment. This dichotomy reinforces Pétervári et al.'s (2016) claim that researchers have an incomplete understanding of creative intuition since intuitive judgment studies dominate the management literature.

Dreams are another delivery mode to obtain intuitive information. In a survey study, Wahbeh et al. (2018) sampled the general population, scientists and engineers, and enthusiasts to ask about their exceptional experiences. The researchers found that dreams as an exceptional experience were among the top five ways of receiving information for scientists and enthusiasts, with each population's responses topping 60% or more (Wahbeh et al., 2018). Dreams may manifest as either fantasy or realistic imagery (Rhine, 1953/2018). According to Rhine (1978), dreams with psi impressions may be experienced while asleep or awake (daydreams) and are considered more of a forecast of possibilities rather than prophecy (Targ, 2010; Vaughan, 1979).

Hunches

A hunch is the most prevalent experience associated with intuition in both the theoretical and empirical literature. A hunch is described as a gut feeling (Wahbeh et al., 2018), instinct (Rogers & Wiseman, 2005), a twinge (McGahhey & Van Leeuwen, 2018), or impression (Rhine, 1953/2018), to name a few. Hunches are categorized as creative due to the somatic (Mikušková, 2017) and anomalous (Goldberg, 2006) characteristics.

The word hunch seems to be synonymous with all types of intuition throughout the literature (Dörfler & Ackermann, 2012; Gallate & Keen, 2011; Goldberg, 2006; Leach & Weick, 2018; McGahhey & Van Leeuwen, 2018; Mikušková, 2017; Myers, 2002; Pétervári et al., 2016; Rhine, 1978; Rogers & Wiseman, 2005; Sadler-Smith, 2016; Vaughan, 1979; Wahbeh et al., 2018; White, 1992; Wilcox et al., 2018). Using direct, first-person reports, Vaughan (1979) asked workshop participants to describe their intuitive experience and found that hunch was the word that surfaced the most. Hunch is interpreted in various ways throughout the literature and ranges from gut feelings or hunches to ESP that transcends space and time (Wahbeh et al., 2018). In an exploratory study via a questionnaire to self-identified highly intuitive people, the majority, 62% of respondents, described intuition as a gut feeling or instinct (Rogers & Wiseman, 2005).

Frequently, the experience of a hunch is further described in somatic terms or as bodily sensations (Mikušková, 2017), such as a gut feeling (Sadler-Smith, 2016) or a twinge (McGahhey & Van Leeuwen, 2018). Notably, several articles in the literature explain a hunch as an impression (Rhine, 1953/2018), perception (Gallate & Keen, 2011; Myers, 2002), or “vague suspicion” (McGahhey & Van Leeuwen, 2018, p. 2). Still others describe a hunch as an internal prompting (McGahhey & Van Leeuwen, 2018) or unsolicited urge “to move in what seems to be a strange direction” (Goldberg, 2006, p. 55).

Regardless of what the word hunch represents, the literature delineates between two types of hunches: cognitive and mystical (Pétervári et al., 2016). The first type is a cognitive hunch and geared toward decisions (Gallate & Keen, 2011; Myers, 2002; Sadler-Smith, 2016) and presumably a byproduct of the primary information processes associated with cognition (Leach & Weick, 2018). The cognitive type of intuition, typically tacit knowledge attributed to implicit learning, responds to a stimulus thought, whether there is conscious awareness of this thought or

not (Shirley & Langan-Fox, 1996). Intuition of this type often corresponds with creative intuition in that the individual relies on information gathered over a lifetime (Gilhooly, 2016) and assimilates that information (Dörfler & Ackermann, 2012) in a unique way as to generate a sudden but predictable solution (Pétervári et al., 2016).

Conversely, the second type is considered mystical (Goldberg, 2006). It is unique in that it has “no antecedent, sensory or rational” (Rhine, 1953/2018, p. 58). The mystical hunch is not in response to a problem or decision that the experiencer needs to answer. Instead, the experiencer becomes aware of the information, completely unsolicited and unexpected; it may be in the form of new or novel ideas (Pétervári et al., 2016) or insight to move into a new direction (Goldberg, 2006). The mystical hunch also has the trademark feature of having a powerful, compelling component or urge that moves the experiencer to action with complete confidence that the new information is absolutely accurate (Rhine, 1978; Vaughan, 1979).

Rhine (1953/2018) explained that spontaneous experiences of an intuitive nature frequently lack details and represent a holistic or essential meaning of the experience rather than precise details of the knowledge. White (1992) suggested that hunches may be deemed mystical if the individual has a simultaneous awareness that the experience is parapsychological.

The mystical hunch involves more of the distinguishing features for an intuitive experience. The cognitive hunch seems to be missing a few characteristics found in the mystical hunch. For instance, mystical hunches present new and surprising knowledge and have a strong conviction that they are accurate without any question or doubt and have no antecedent.

Due to the lack of explicit details, the mystical hunch needs to be interpreted (McGahhey & Van Leeuwen, 2018). However, experiencers commonly have difficulty interpreting sudden, obscure, and bewildering information (Goldberg, 2006; Vaughan, 1979). Sadler-Smith (2016)

cautioned managers of “the pitfalls and potential of intuitive judgment” (p. 1087) and stressed the importance of discerning between cognitive intuitive hunches and those with more mystical qualities. Sadler-Smith expressly pointed out that not all knowledge and insight received requires action, and discernment is vital. The warning seems apt given recent findings on intuition effectiveness in performance. Leach and Weick (2018) studied 101 participants to determine the veracity of intuition. Findings from this study suggest that “intuitions were a poor guide to actual performance” (Leach & Weick, 2018, p. 46).

Mystical Intuition

The cosmic classification encompasses intuitive experiences comprising esoteric, mystical, or anomalous attributes. These delivery modes are synonymous with mystical intuition. In addition to the mystical attributes of hunches discussed above, cosmic delivery modes further include extrasensory perception and spiritual experiences.

Dane and Pratt (2007) maintained that intuition is sometimes seen as “a mystical avenue to knowledge” (p. 34). An intuition that is considered mystical tends to include a trait of oneness (Vaughan, 1979; Zahran, 2017), contain various components of the psyche (Mukhopadhyay, 2018), manifest through multiple channels deemed extrasensory or psi (Grof, 2013; Hardy, 2015), and subvert the space-time continuum expanding beyond the conventional norms of physicality and matter (Facco et al., 2019). The literature reflects that intuition with esoteric qualities has many names, including mystical experiences (James, 1917; McCann & Davis, 2020; Yaden et al., 2017), exceptional human experiences (Hartelius et al., 2013; Palmer & Hastings, 2013; Simmonds-Moore et al., 2019), spiritual experiences (Attig et al., 2011; Kennedy & Kanthamani, 1995; Renner & Ramalingam, 2016), awakening experiences (de

Castro, 2017), noetic experiences (Wahbeh et al., 2018), numinous experiences (Hinton, 2014; Hunt, 2019), and spontaneous cases (Rhine, 1978; Stokes, 2017).

Extrasensory Perception (ESP). Extrasensory perception (ESP) is “an unconscious process that functions primarily outside the voluntary control of the organism” (Krippner et al., 1978, p. 188). Lindhard (2018) explained that spontaneous knowledge generated from beyond the five physical senses represents an awareness at the soul level and a connection to the nonphysical world. Hardy (2015) referred to many extrasensory perceptions as “receptive psi” (remote viewing, telepathy, precognition, retrocognition) and opined that it functions differently and separately from the cognitive constructs that have been established in mainstream science.

A study by Rogers and Wiseman (2005) surveyed 90 self-identified highly intuitive people about their intuition. Participants reported on mechanisms that explained their intuitive experiences. The first two align with the materialist view of intuition consistent with hunches and rapid processing of disparate information (Rogers & Wiseman, 2005), as covered in the creative intuition section. The third and fourth mechanisms participants identified were extrasensory perception and spiritual guidance (Rogers & Wiseman, 2005, pp. 165–166).

When studying psi phenomenon in a laboratory, there have been two types of studies. In the first type, participants were unaware that researchers were studying ESP, an intentional choice to test the “unintentional operation of psi” (Krippner et al., 1978, p. 188). In the second type—purposeful studies—participants were instructed to use ESP to gather information about a specific target intentionally. Studies on unintentional psi produced some evidence that subjects can use ESP toward personal needs. However, goal-oriented psi experiments where the subject intentionally used psi to access information about a target were more consistent and reliable in empirical studies (Krippner et al., 1978). Studies of unintentional psi were not associated with

any specific type, whereas intentional psi experiments were associated with remote viewing or telepathy.

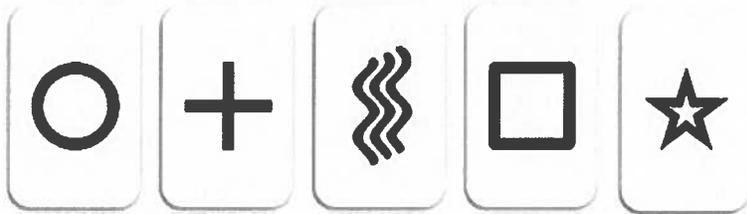
Intentional ESP. Remote viewing is when a person describes a shape, form, or location by information gathered from a nonlocal source. Remote viewing experiments designed to study and operationalize this phenomenon were the prime component in the secret military operation of The Stargate Project (Stargate; Targ, 2019). Participants in these experiments were given coordinates or a person's name and asked to describe and draw the mental images that came to mind without interpretation (Targ, 2010). Stargate was created in 1972 to collect intelligence through remote viewing ESP sessions for nineteen tasking agencies in the U.S. government. During Stargate's 23-year tenure, participants in remote viewing sessions successfully collected actionable intelligence for 504 missions (Marwaha, 2018). Targ and Kutra (2001) asserted that any individual can learn to gather "this direct knowing of the world" (p. 144) via remote viewing.

Telepathy is described as a mind-to-mind transfer of information through non-ordinary channels (Schouten, 1983) across space and time (Hardy, 2015). Telepathy was the first psi phenomenon that J. B. Rhine and colleagues studied (Rieber, 2012). One of the Duke faculty on the team, Karl Zener, invented Zener cards as an instrument used to test the hypothesis that mind-to-mind communications are possible (Rieber, 2012). The Zener cards consisted of five cards, each with a single shape: circle, plus sign, three wavy lines, square, and star (Krippner et al., 1978), see Figure 1. The Zener cards were a logical way of testing psi at inception; however, as parapsychologists learned more about the phenomenon of telepathy and mental imagery, the cards and other forced-choice experimental tools were found to be obstructive. Targ (2019)

explained that mental noise such as “naming, guessing, grasping, memory, analysis, and imagination” (p. 576) can suffocate the delicate psi images.

Figure 1

Zener Cards



Unintentional ESP. The most popular extrasensory perception delivery mode is clairvoyance, clear seeing. The propensity of clairvoyance in the intuition literature leads someone to believe that clairvoyance is the only sense that obtains information from beyond the natural senses. However, there are a number of extrasensory perceptions, one for each of the natural senses and a few extras for a total of eight versus the five natural senses. Zahran (2019) identified these extrasensory perceptions as clairsentience, clairpathy, claircognizance, clairvoyance, clairaudience, clairalience, clairgustance, and clairtangency (p. 23). These terms are not yet adopted in the broad ESP literature; however, as the inquiry into mystical intuition increases, as it has for the past decade, it will be increasingly essential to delineate the various modes of delivery and separate the experiences to glean more specific data. The literature surrounding intuition in all fields highlights the vernacular as a consistent problem for an already ineffable phenomenon.

Clairsentience—clear feeling—can be somatic or emotional sensing of information. Zahran differentiates somatic or physical feeling from emotional feeling as clairsentience and clairpathy, respectively. Clairsentience is often indicated by a powerful physical reaction

(Hotelling, 2017) or a gut feeling that something is amiss (Zahran, 2019). Drinkwater et al. (2017) reported a somatic clairsentience from a qualitative study where one participant “sensed someone stroking her back” (p. 32). Zahran (2019) explained clairpathy as sensing emotional energy (p. 23). Wahbeh et al. (2018) found that 78% of all respondents experienced a clear sense of another person’s emotions (p. 333), indicating that clairpathy may be the most common ESP experience among the general population.

Claircognizance—clear knowing—is represented by an instant influx of information (Hotelling, 2017; Zahran, 2019). Wahbeh et al. (2018) noted that 77.8% of respondents confirmed “Just known something to be true or had a clear sensation or feeling of knowing something that you would otherwise have no way of knowing?” (p. 334). This response combines claircognizance (clear knowing) with clairsentience (clear feeling), creating ambiguity about the experience, especially since the literature acknowledges gut feelings regularly.

Clairvoyance—clear vision—is when information comes through the mind’s eye (Hotelling, 2017), manifesting in mental images, impressions, and symbols (Zahran, 2019). Many of Wahbeh et al.’s (2018) study responses can be classified as a clairvoyant experience. Respondents reported seeing in the mind’s eye (59.3%), being in touch with someone in a far off location (67.2%), seeing something that is not in their vicinity (44.1%), and seeing events as they happened (17.2%; Wahbeh et al., 2020).

Clairience—clear smelling—is when the experiencer clearly smells an odor that does not come from anything in their environment or surroundings (Zahran, 2019). Clairience was experienced by 53% of respondents in Wahbeh et al.’s study. Qualitative studies on spontaneous and paranormal experiences identify participants who smelled a grandmother’s perfume and

thought they were in the house (Drinkwater et al., 2017) or “a flower or a pipe” that was associated with the subject or target of the information (Rhine, 1953/2018).

Clairaudience—clear hearing—is when the experience consists of audible sounds (Zahran, 2019) or sound impressions from the inner ear (Hotelling, 2017; Wahbeh et al., 2020). Participants in qualitative studies recount clairaudience experiences such as hearing music, noises and voices, and children’s footsteps, as if “they were running down the stairs” (Drinkwater et al., 2017, p. 32) or hearing someone call out at the same time that person was in an accident (Rhine, 1953/2018). In Wahbeh et al.’s (2018) study, less than half the sampled population (44.1%) confirmed hearing something in the inner ear, a finding that explains the sparse reference to clairaudience in the literature.

Clairgustance—clear tasting—is when information comes through taste in the absence of a physical source in the mouth (Zahran, 2019). The literature rarely mentions this phenomenon, suggesting it is negligibly experienced. However, more than one-third of respondents in Wahbeh et al.’s (2020) study experienced tasting something that was not present in their mouth.

Clairtangency—clear touching—more commonly known as psychometry, is when a person receives information through direct contact with a person or object (Branković, 2019; Zahran, 2019). Branković (2019) and Stokes (2017) suggested that psychometry presents information from the past. Wahbeh et al. (2020) revealed that 31.3% of respondents received information from touching an object.

Intuitive experiences are as unique as the individual having the experience. The modes addressed in this section illustrate the various ways individuals access intuitive information. The following section is about the processes theorized to facilitate the transfer of information from the origin to the recipient.

Intuition Processing Mechanisms

Intuition is a subjective experience that manifests in numerous ways. While theoretical and empirical literature explains the mode of delivery—dreams, imagery, or hunches—of the mysterious information, less has been explored about how the information ends up in conscious awareness (Mukhopadhyay, 2018). This section addresses the mechanism or process for how information gets from the source to the experiencer’s conscious awareness.

Dual-Process System

Rogers and Wiseman (2005) studied highly intuitive people and asked participants to explain intuition. One-third of respondents described intuition as a “non-conscious or super-fast method of processing of information” (Rogers & Wiseman, 2005, p. 165), a finding slightly higher than respondents that classified intuition as extrasensory perception. Researchers agree with this assessment and attribute intuition to the dual-process theory (Sadler-Smith, 2016). The dual-process theory posits that the human brain processes information through two processing centers (Talat et al., 2017), intuitive and analytical (Akinci & Sadler-Smith, 2020).

It is theorized that the dual-process system acquires knowledge through system 1 (intuitive) and processes the information into consciousness through system 2 (analytical). System 1 is considered the older of the two processes and is based in evolution as the instinctual processing center (Dane & Pratt, 2009) and automatically and effortlessly processes and learns information (Julmi, 2019). Conversely, system 2 analyzes information slowly and methodically (Kahneman, 2013). System 2 is the processing center that interacts with the physical world and evolves through culture and behavior (Talat et al., 2017).

Pattern Matching

Rosenblatt and Thickstun (1994) speculated that what is perceived as intuition is merely the result of our brains processing a unique pattern matching that exceeds the level of repression and crosses over into consciousness, a preconscious cognition. Pattern matching is when the brain constructs, recognizes, and matches patterns (Rosenblatt & Thickstun, 1994) with imperceptible speed toward a specific solution (Julmi, 2019). This form of intuition is linked to rapid information processing (Dane & Pratt, 2009; Kahneman, 2013; Meziani & Cabantous, 2020) that bypasses the analytic processing center (Talat et al., 2017) and attributes to intuitive decision making among professionals and experts (Akinci & Sadler-Smith, 2020). Similarly, an intuitive hunch connects to pattern matching, experience, decisions, or physical sensation.

Creative Assimilation

Creative intuition is portrayed as a mechanism for assimilating disparate information into a whole new knowledge (Eskinazi & Giannopulu, 2021; Julmi, 2019; Pétervári et al., 2016). Dane and Pratt (2009) hypothesized an intensely felt or physical affective sense that is intense that accompanies creative intuition. Dane and Pratt (2009) also connected creative intuition with entrepreneurial intuition, which may be the basis for innovation.

Gilhooly (2016) asserted that an incubation period precedes instant insight or a creative solution. The incubation period begins after conscious problem-solving efforts fail and the individual sets the problem aside (Duch, 2007). One study showed high EEG activity in the brain's right hemisphere 300 milliseconds before sudden comprehension during a problem-solving task (Duch, 2007). Duch (2007) expounded on the connection between the increased brain activity and the task of assimilating "distantly related information during comprehension"

(p. 6). This characteristic of systematically gathering heterogeneous information is unique to creative intuition as an information processing mechanism (Robinson et al., 2017).

Outcomes and Results

Intuition can be viewed as a process or an outcome (Dane & Pratt, 2007; Gore & Sadler-Smith, 2011; Julmi, 2019). The intuiting process would include how the information was acquired and translated; conversely, the outcome is the byproduct of receiving the information (Gore & Sadler-Smith, 2011). Intuition as a way of information acquisition relies on an outcome (Julmi, 2019) to be acknowledged as intuition. Without an outcome, information that materializes from unknown origins can be interpreted as meaningless. It is reasonable to infer that intuition must result in some outcome or conclusion from the intuitive experience to qualify as a phenomenon. In this section, I explore some of the top outcomes associated with intuition in the literature.

Decision-Making

Researchers agree that intuition influences and supports decision-making (Akinci & Sadler-Smith, 2020; Mikušková, 2017; Robinson et al., 2017). Myers (2002) described intuition as a large part of decision-making. To illustrate this point, Myers (2002) used examples comprised of optical illusions. A familiar example offered a line with arrows pointing toward each other and away from each other. He then posed the question: Which line segment is longer? (Myers, 2002, p. 6). While most intuitively select the segment with the arrows pointing together, the line segments are, in reality, equal (Myers, 2002). Researchers conducting such studies are studying perception. Through these types of studies, researchers have determined that feelings and perceptions (Gallate & Keen, 2011), along with personal and circumstantial factors (Mikušková, 2017), are the driving factor in decision-making.

Problem-Solving

The literature reflects a strong connection between an intuitive experience and problem resolution. Intuition used for problem-solving is analogous to decision-making except for that creative intuition, instead of expert intuition, leads to problem-solving (Dörfler & Ackermann, 2012; Gore & Sadler-Smith, 2011; Raidl & Lubart, 2000; Robinson et al., 2017), especially when a problem requires improvisation (Robinson et al., 2017). Creative intuition has information-processing mechanisms that assimilate heterogeneous information instantly toward a goal (Pétervári et al., 2016). However, Gilhooly (2016) concluded that intuition is a precursor to problem-solving, but only after a period of incubation.

Precognition

Precognition is recognized as the ability to circumvent time and space used to gain unusual insight into future events (Hardy, 2015, p. 1017). This definition is remarkably close to the definition of clairvoyance. Marwaha and May (2015) conducted a meta-analysis of ESP studies from 1935–1997, expressly focused on precognition and clairvoyance, and “found no significant differences between them” (p. 3). The language surrounding this phenomenon is tangled and complicated, with single words often being represented as different phenomena. The similarities between many of the clair senses and precognition, as described in the bulk of the literature, suggest that all mystical intuition can be subsumed under precognition.

Primarily, precognition is explained as a process of knowing; however, first-hand accounts offer an alternative perspective, where precognition is helpful as a forewarning of favorable or unfavorable events. During a study of spontaneous cases, Rhine (1953/2018) found a theme that precognition served to foretell tragic events. In a few cases, the experiencer wanted to take action, but the impression was too vague to act. During a workshop, Vaughan (1979)

inquired about precognitive experiences and the effects; a woman shared her experience of envisioning a plane she was to take for her honeymoon crashing. The woman acted immediately and changed the flight reservations. On the day of the flight, the plane crashed and killed everyone on board (Vaughan, 1979, p. 58). Not all precognitions are tragic. One spontaneous case was of a man who dreamed that he saw a baby girl surrounded by something white; his wife was pregnant and convinced they were having a boy. Two months later, on the day of delivery, a nurse brought him their baby, and it was an image exactly like the one in his dream (Rhine, 2010, p. 123). These experiences illustrate how mystical intuition may be used and valuable; however, the information's source remains unknown.

Source of Information

Intuition can be interpreted as a psychological phenomenon regarding its form in consciousness (Dane, 2020; Mossbridge & Radin, 2018; Shirley & Langan-Fox, 1996). However, there is a debate that the source that prompts that conscious formation is an aspect that reflects a psi phenomenon when it originates from an extrasensory source (Rhine, 1978, p. 23). Rhine suggested that the difference in experience alone is not enough to include a psi aspect; instead, the source of the intuition that originates from an extrasensory source is where the psi phenomenon enters the scene.

Rhine (1978) relied on G. N. M. Tyrrell's findings that information with direct access to the psyche is a parapsychological phenomenon. In contrast, the information processed into consciousness is the domain of "familiar psychological constructs" (Rhine, 1978, p. 24). During what Tyrrell referred to as stage one, information is received by the psyche without conscious awareness of the acquisition. Conversely, stage two is where the information is processed and "transformed into useful information" (Broughton, 2010, p. 2). Mukhopadhyay (2018)

corroborated the idea that information reaches the psyche before it reaches consciousness “without or with the support of organ brain” (p. 356) and postulated that all creatures possessing an organ called psyche have intuition.

The source of this knowledge is still unknown and the cause for much debate. Research studies and leading theories indicate that knowledge emanates from expertise, dormant knowledge, and the unified or Akashic field. Some researchers, primarily transpersonal psychologists and physicists, identify the oneness of the universe (Vaughan, 1979; Zahran, 2017) as the source of all unexplained information associated with intuition phenomenon. Terms that are starting to emerge for this information source are zero-point field (as part of quantum field theory; Mukhopadhyay, 2018), the Akashic field (integral theory of everything based on the quantum field theory; Laszlo, 2007), and the cosmic hologram (as part of string theory; Currivan, 2017).

Expertise

Two studies on first responders found that behavioral and contextual cues work alongside intuition to inform “practical wisdom” (Campbell & Angeli, 2019, p. 358) and trigger expertise intuition (Akinici & Sadler-Smith, 2020; Campbell & Angeli, 2019). Dörfler and Ackermann (2012) conducted a meta-analysis on intuition in management research and found a strong consensus among researchers that expertise, especially at high levels, informs intuitive knowledge. Expertise as an intuitive function processes a deluge of information (Robinson et al., 2017) collected through implicit and explicit learning (Meziani & Cabantous, 2020) swiftly and accurately into a decision without deliberation (Akinici & Sadler-Smith, 2020; Robinson et al., 2017).

Dormant Knowledge

The theoretical literature presents a similar function to expertise where intuitive knowledge is garnered through latent knowledge the individual has forgotten and can then retrieve in a subconscious way (Gallate & Keen, 2011). Kahneman (2013) claimed that human intuition is common and involves no magic (p. 11) and described the phenomenon as the knowledge that emanates from clues that allow the individual to access learned and stored information.

Using a highly technical neurophysiological quantitative research design, a team of neurologists explored working memory and found substantial evidence to support non-conscious working memory. In contrast to a widespread belief that memory and perception are conscious brain functions, this study revealed that,

without the participant knowing, the brain appears to have stored the target location in working memory using parts of the brain near the back of the head that process visual information. Importantly, this non-conscious storage did not come with constant brain activity but seemed to rely on other, “activity-silent” mechanisms that are hidden to standard recording techniques. (Trübutschek et al., 2017, p. 2)

Trübutschek et al. (2017) postulated that the human brain can capture and store information without conscious awareness. The study investigated only non-conscious memory and called for future studies to determine the brain’s capability to “non-consciously manipulate or use information in its working memory” (p. 2). Despite the technical complexity, these findings are informative to the intuitive experience phenomenon.

Akashic Field

The theoretical literature on the source of information abounds. Some of these theories are directly linked to the phenomenon of intuition, as explained previously. In contrast, others explain the source of information to mimic the characteristics and functions of mystical intuition. Jung famously referred to this information source as the collective unconscious (Adamski, 2011;

Vaughan, 1979) and suggested it contained the knowledge of all archetypal themes in human existence (Adamski, 2011). Einstein referred to this point in his unified field theory (Laszlo, 2007). As theories evolve in physics, this source of information is called the zero-point field (Mukhopadhyay, 2018), quantum hologram (Schwartz, 2012), or cosmic hologram (Currivan, 2017; Hardy, 2016). Mukhopadhyay (2018) stated that the zero-point field is the point from which all life and knowledge emanate. In Hindu, the Yogic term, Akasha, also known as the unified field (Levin, 2021), represents a continuous space that transcends time and “has the potential to inform” (Oliver, 2010, p. 271).

Ervin Laszlo (1932–) is a Hungarian philosopher, a two-time Nobel peace prize nominee, and recipient of the 2017 Luxembourg Peace Prize (Simon & Schuster, n.d.). Laszlo’s most recent work is geared toward a new paradigm for life and consciousness, the “Akashic Paradigm” (Millar, n.d.). At the center of this paradigm is the Akashic field, named to honor the traditional Hindu Akasha and the field of contemporary science (Laszlo, 2007). I have opted to use the term Akashic field to represent this source because it encompasses the old in the new and aligns with my presuppositional understanding of a mystical source of information that transcends the space-time continuum.

Meaning

Research shows that mystical intuition positively affects experiencers (Kennedy & Kanthamani, 1995; Wahbeh et al., 2018; Yaden et al., 2016). Drinkwater et al. (2017) used thematic analysis to investigate language in interview transcripts and reports that while the initial impact of such experiences can be unsettling, most report a sense of fulfillment, empowerment, self-efficacy, and personal growth. During an exploratory study on spiritual experiences, Kennedy and Kanthamani (1995) found fear to be an initial reaction in 45% of all respondents’

problem-solving; 9% maintained that the experience offered no positive effect. Participants can express the meaning of their experience using language (Woodard, 2012; Yaden et al., 2016), that language can create a barrier to understanding the true essence of the experience (Woodard, 2012).

Methods in Intuition Research

Inductive Approach

A researcher uses a qualitative methodology to gain insight and understanding to a human experience that may be imperceptible by a different approach (Tuffour, 2017; van Manen, 2016). Drinkwater et al. (2017) utilized a “qualitative/person-centered approach” (p. 28) to study subjective paranormal experiences and gathered data to distinguish and legitimize these personal experiences. An inductive approach, such as the one used by Drinkwater et al., was used to understand phenomenon through identifying patterns, characteristics, and meaning of a phenomenon (Kafle, 2013; Lauterbach, 2018) rather than identifying causes, providing explanations (Woodard, 2012), or generalizing to a population (Patton, 1999).

Uncontrolled Environment

During a study of corporate managers and executives, Mikušková (2017) opted to leave the controlled laboratory environment in favor of a more realistic setting. Mikušková argued that decisions made on well-structured problems could not account for the many variables inherent in the experience beyond the laboratory. This example indicates that not all experiences are conducive to study within a controlled laboratory environment. The experience of intuition is one experience that is not appropriate to study in a controlled environment. The spontaneous nature of the experience (Dörfler & Stierand, 2016) cannot realistically be captured within strict boundaries and rarely in real-time (Lukoff & Lu, 1988). Moreover, a qualitative approach that

elucidates the phenomena in a rich and detailed way (Kafle, 2013) in the experiencer's own words (Ajjawi & Higgs, 2015) is best to capture phenomena associated with a subjective human experience.

Subjective Experience

It is widely stated that the first-person perspective is under-represented in the literature (Barušs & Mossbridge, 2016; Sadler-Smith, 2016; Wahbeh et al., 2018; Woodard, 2012). Rigato et al. (2019) challenged this widespread assumption and reviewed 53 studies from the cognitive science literature to evaluate the prevalence of first-person experiences within these studies. The findings from Rigato et al.'s (2019) study revealed that first-person experiences are “nearly ubiquitous within [the studies], yet largely unacknowledged” (p. 21). The first-person accounts primarily came from semi-structured interviews and self-report questionnaires that allowed for flexibility for subjects (Rigato et al., 2019). While these studies included first-person data, Rigato et al. (2019) submitted that researchers communicated the information through second-person reports.

Rigato et al. (2019) acknowledged the use of first-person data as a means for accessing the nuances between subjective reports. In qualitative studies that focus on the experience from the perspective of the experiencer, it is unlikely that a second-person account of a first-person experience would yield the same richness or depth that is found in an exploration of a participant's subjective experience (Sadler-Smith, 2016; Woodard, 2012). The common theme throughout the literature on intuition has been that (a) there is more to discover (Brymer & Schweitzer, 2017; Larson, 2019; Yaden et al., 2016), and (b) studies that lack the first-person perspective for personal experiences are inadequate to inform transcendental understanding of various cognitive and intuitive phenomena (Rhine, 1953/2018).

Qualitative studies that include a subjective viewpoint are needed to expand our understanding of mystical intuition and its impact on people's lives. Hermeneutic phenomenology focuses on the lived personal experience from the experiencer's subjective perspective (Kafle, 2013) and has a successful history in studies on intuition (Hunter, 2008; Sadler-Smith, 2016; Savage, 2006). Sloan and Bowe (2014) warned of pitfalls associated with defining and extracting the essence of a lived experience. As such, I fully engaged in the hermeneutic circle and frequently transitioned from the parts to the whole while writing, reading, and rewriting as a way to fully understand the lived experience (Neubauer et al., 2019).

The Importance of Reflexivity

Bengtsson (2016) emphasized the importance of building credibility from the moment the study begins through the end of the study. Experienced qualitative researchers recommend reflexivity as a best practice (Bengtsson, 2016; Drinkwater et al., 2017; Lattuada, 2018; Meziani & Cabantous, 2020; van Manen, 2016) for establishing credibility for a study. Drinkwater et al. (2017) stressed the importance of reflexivity and distinguishing between the participant's original account and the researcher's analysis and interpretations. Furthermore, qualitative researchers maintain credibility and increase validity for a study when the researcher clearly articulates how the researcher's perspectives and preconceptions influence its design and execution (Lattuada, 2018; Rose & Johnson, 2020). Clear delineation of the process and influences throughout the study allows the researcher to discriminately select good ideas over bad, which "is precisely the role of rigor and logic" (Wilcox et al., 2018, p. 755). The following section addresses data collection tools used during intuitive research studies.

Instruments

Surveys

The literature on intuition reflects an assortment of methods beneficial to studying subjective experiences. Using surveys, Wahbeh et al. (2018) evaluated the general population, scientists, and enthusiasts' unique experiences to obtain a general idea of the perspectives and opinions about exceptional human experiences across a broad population. Wahbeh et al. intentionally designed their study to use neutral language in phrasing survey questions to facilitate understanding and reduce bias. Sadler-Smith (2016) wanted to learn more about how Human Resource (HR) managers intuit. Sadler-Smith's study gathered initial data about the language HR managers use through a short questionnaire. Powell and Moseley (2020) assessed anomalous sensory experiences among spiritualist mediums through a questionnaire. The questionnaire captured data numerically through questions such as frequency of occurrence and linguistically through questions about the experience. These examples illustrate the value and reach of a questionnaire or survey; however, this format lacks the benefit of real-time interaction and the opportunity to clarify the experiencer's statements.

Interviews

Akinci and Sadler-Smith (2020) used an inductive method of inquiry combined with purposive sampling and open-ended questions in a semi-structured interview format to evaluate police first responders' decision-making. McCann and Davis (2020) used a similar interview structure to inquire about mystical experiences. Interviews conducted in person or via videoconference were recorded and lasted between 35–60 minutes (McCann & Davis, 2020). Mikušková (2017) also used recorded, semi-structured interviews, which lasted between 40–60

minutes to study intuition in decision-making. The methodological literature illustrates the successful execution of qualitative studies on intuition using interviews.

Interviews allow the participant to provide rich data as they internally focus on the experience (Morse, 2015). Roberts (2020) reminded researchers conducting interviews of the importance of attending to the participant's experience, any nonverbal cues, and the interview protocol and structure. Ajjawi and Higgs (2015) used participant transcripts to craft a holistic picture of the participant's experience to gain deep rich content from the text.

Written Text

Campbell and Angeli (2019) used diverse datasets during a rhetorical investigation in order (interviews, video recordings, patient charts) to study the various cues that work alongside intuition to inform "practical wisdom" (p. 358). Robinson et al. (2017) reviewed micro-diaries from social media posts "in an attempt to capture real-time, context-specific insights" (p. 43). While mystical experiences are rarely expressed in explicit verbal terms, a review of written reports of mystical experiences and transcripts of successful individuals often reflect themes within the experiences (Yaden et al., 2016). These findings support the benefits of using written accounts and interview transcripts to evaluate the impact the medium has on delivering the experience.

Language

The absence of standard nomenclature for intuition has led to overlapping definitions and added unnecessary complexity to the field (Wahbeh et al., 2018). Yaden et al. (2016) attempted to identify a common lexicon for mystical experiences. The study explored the specific words of 777 participant writings. Yaden et al. (2016) found participants who had a mystical experience to use more "socially and spatially inclusive language and used fewer overtly religious words" (p.

244). Yaden et al. illustrated the subtle yet notable distinctions in the language of those who have had a mystical experience and those who have not.

Woodard (2012) found that participants used myriad linguistic statements to explain their experiences. Language presents a challenge to interpretation. On the one hand, it allows the experiencer to share and communicate in terms that render the experience relatable and comprehensible; on the other, language limits the full scope and understanding of any subjective experience because the words used “shapes our expressions and experiencing through a desire for conformity and consensus” (Woodard, 2012, p. 117). Woodard provided an example of language restricting the experience when noting that participants struggled to define slang words in their explanation of the experience (p. 122). Together, these examples help illuminate the role language plays in the persistent challenge to clarify intuitive phenomena within the field.

Intuition Study

This study of the intuition experience builds on the seminal works of Louisa Rhine and her qualitative analysis of spontaneous cases. In her breakout study of 1953, she reviewed over 1,000 submissions of spontaneous cases considered anomalous experiences and identified four themes surrounding information acquisition. These themes were intuitive, hallucinatory, unrealistic dreams, and realistic dreams (Rhine, 1953/2018). Rhine’s follow-up study in 1978 explored these four themes, intent on learning more about the information acquisition and transmission from the psyche, or soul, to consciousness (Rhine, 1978). The connection Rhine drew between this mode of information acquisition and parapsychology was clear. She considered these spontaneous cases to express evidence of extrasensory perception or psi phenomenon.

Chapter Summary

The myriad experiences and attributes connected to intuitive experiences of any type are complex and multifaceted. I used a conceptual framework that supports the reader's understanding of the experience through six phases to inform the reader about identifying features, types of experiences, intuition processing, outcomes and results, source of information, and the meaning of such experiences. The theoretical and empirical literature provided several research studies that informed the research design. In the last section of this chapter, I identified approaches, techniques, and instruments effective in my study. I address the research design in the next chapter.

Chapter 3 focuses on the methodology, methods, and the study's design. The chapter addresses the potential research types and methodologies, the rationale for the selected methodology, and its background. The following section explains the research design structure and details: participants, recruitment, data collection methods, ethics, and analysis. Trustworthiness, limitations, and delimitations are also addressed.

CHAPTER 3: METHODOLOGY

The purpose of this hermeneutic phenomenology study was to explore the experience of mystical intuition to address the shortage of published, peer-reviewed research on this topic. The research questions and purpose statement drive the study's method, methodology, and strategy. This chapter begins with the process and rationale for selecting the methodology and a brief background of this study's methodology. Next, I describe my strategy in designing this study and outline the research design, including sample, recruitment, data collection methods, ethics, and analysis. Lastly, I address trustworthiness, limitations, and delimitations for this study.

Research Design Rationale

Quantitative research is an approach that consists of large-scale samples, generalizability, and transferability (Robson & McCartan, 2016, p. 166) in a controlled environment (Kruth, 2015). Quantitative researchers operate under a postpositivist or objectivist epistemology where matter is supreme, and results are static and explainable (Yilmaz, 2013). In contrast, qualitative researchers employ a constructivist or interpretivist epistemology and inductive reasoning (Yilmaz, 2013). The epistemological differences between quantitative and qualitative research methods inherently address different topics and phenomena. Research questions that address phenomena easily controlled or reproduced in a laboratory are better suited for quantitative research.

Qualitative research is an approach that provides an in-depth exploration of subjective experiences (Willig & Rogers, 2017), improves understanding (Lincoln & Denzin, 2003), communication, and explains omnipresent phenomena that extend beyond current comprehension (Lincoln & Denzin, 2003; van Manen, 2016). The phenomenon of mystical intuition is presumably random, unpredictable, and instant. To fully grasp this phenomenon, I

require data with a depth and richness associated with the subjective or qualitative (SAGE Research Methods Video, n.d.) perspective. I do not intend to generalize this study's findings to any specific population or demographic; therefore, a qualitative methodology is the best fit for this study.

Methodology Selection

When deciding on a methodology, I considered my purpose, research question, and intention to capture the phenomenon as interpreted by the experiencer to understand the essence of mystical intuition. I considered the population, resources available, ease of conducting the study, and data analysis options. With my research question in mind, I considered what kind of data I wanted to collect (details of a rich personal experience) and the most effective approach to collecting this information from an individual.

Scholars have identified as many as 28 approaches to qualitative research (Creswell, 2017). Multiple methodologies seemed to be viable options for this study. Ajjawi and Higgs (2015) suggested that the question drives the method and the philosophical perspective that drive the investigation. My research questions reflect my goals for this study: to understand what it is like to experience mystical intuition and unravel the specifics of the language associated with the experience. My questions stemmed from my curiosity about the characteristics that separate this experience from other facets of intuition and what it is like to experience mystical intuition. I focused on extracting the essence of mystical intuition in the experience's voice through their words to increase understanding of the phenomenon.

In designing this study, I contemplated multiple research methodologies. Ethnographic studies emerged from anthropology and are frequently used to interpret a social group's structure over a long duration (Robson & McCartan, 2016; Ryan et al., 2007). My research question is

about an individual phenomenon rather than a group phenomenon; therefore, my question did not align with an ethnographic study. I considered the heuristic methodology because it offers a straightforward design with specific action at each phase. Moustakas (2015) asserted that the researcher using this method has personal experience and a passion for the studied phenomena. After some reflection and sitting with my research question and intention, I realized that my question was not about making sense of my own experience; therefore, it was not a heuristic inquiry. The case study methodology addresses research questions that explore, describe, or explain (Yin, 2017). However, case studies often include observation and report descriptions and issues (Creswell, 2017). Mystical intuition is a phenomenon that is instant and unsolicited; as such, observation of the phenomenon within the boundaries of this study was highly unlikely. Therefore, the case study was not a good fit for this study. In a phenomenological study, the researcher studies the lived experience and the phenomenon (Creswell, 2017). My question asks what it is like to experience mystical intuition; therefore, a phenomenological study was the best fit.

There are two distinct types of phenomenological research: descriptive and interpretive. Descriptive phenomenology results in a detailed description of the phenomenon and requires that the researcher transcend their beliefs, understandings, and preconceptions about the phenomenon, also known as bracketing (Giorgi, 2010; Giorgi et al., 2017; van Manen, 2014). In pondering how I would bracket my presuppositions, I remembered Gadamer's (1982) concept of horizons. Horizons represent the entire span of a person's experience that makes up their worldview. This vantage point represents my historical consciousness or how I see and interpret the world around me. I recognized that it was not feasible to separate myself from my consciousness. Plus, I am not aiming to describe the phenomenon, as I believe previous studies

have described the extrasensory perception of the underlying phenomenon to mystical intuition (Mansfield et al., 1998; Rhine, 1978). In contrast, interpretive phenomenology, also known as hermeneutic phenomenology, “pushes beyond a descriptive understanding” (Neubauer et al., 2019, p. 95) into the meaning and interpretation of the experience. This methodology requires the researcher to acknowledge presuppositions and maintain awareness of how the researcher’s subjectivity influences analysis and interpretation (Neubauer et al., 2019; van Manen, 2016).

As I exemplified in Chapter 2, the language surrounding intuitive experiences is diverse and complex. To understand what it is like to experience mystical intuition, it is imperative that the experiencer share specifics about the experience in their voice. This study’s secondary purpose was to unravel the specific language used to support efforts to clarify and define terms associated with intuitive experiences. This goal aligns with the interpretive hermeneutic approach that examines words as the foundation for interpretation and language as the vehicle to convey meaning (Gadamer, 1982). Therefore, a methodology that allows an in-depth, dialogical technique (Gadamer, 1982; van Manen, 2016) to uncover a detailed description and interpret the parts in conjunction with the whole of the phenomenon makes hermeneutic phenomenology the most appropriate methodology for this study.

Background of Methodology

Researchers using hermeneutic phenomenology must understand the philosophical and ontological underpinnings of the qualitative research method. Phenomenological inquiry, in general, cannot be evaluated against objective measures because human experiences are inherently subjective phenomena (Heidegger, 1962). Hermeneutic phenomenology is an iterative approach that resists the empirical paradigm (Gadamer, 1982).

Martin Heidegger (1889–1976) introduced an ontology of existentialism to phenomenological philosophy by inquiring about the meaning of being (Heidegger, 1962). By asking this question, Heidegger distinguished the difference between human existence, or Dasein, and the meaning of being. Dasein is what it means to exist or be a human being existing in the world. Conversely, the inquiry of the meaning of being reaches beyond being in the world or Dasein into that which is hidden (Gorner, 2002). This meaning of being is the tenet that Heidegger brought to interpretive phenomenology.

Gadamer (1982) expanded on the ideas and work of Heidegger, combining it with the philosophy of hermeneutics. The theological tradition of interpreting sacred texts, combined with Heidegger's interpretive phenomenology and the inquiry into the meaning of being, resulted in a dialogical approach to interpreting a phenomenon. Our Dasein, human existence, and experiences comprise our "historical consciousness" (p. 301). Our experiences as a being of the world translate into horizons that we, as humans, use to view and interpret the world. In this sense, humans cannot separate themselves from their consciousness, as Husserl had suggested. Instead, the interpreter would acknowledge the various horizons and incorporate them into the interpretation as they move from the individual parts to the whole, melding them all together into a new understanding.

Instead of following a prescribed list of steps, researchers who select hermeneutic phenomenology as their methodology are encouraged to adopt a phenomenological attitude (Suddick et al., 2020; van Manen, 2018) to adhere to the natural development of the study under this methodology. Researchers using the hermeneutic phenomenology methodology seek to understand the phenomenon differently, beyond what is already evident or presumed (Crowther et al., 2017). I envisioned the phenomenological attitude as one where the researcher remains

open and curious throughout the study, keeping a keen eye open to see what has remained hidden. As such, I employed an open, curious, and dialogical approach to interacting with the gathered data to find the experience's essence.

Research Design

Qualitative research has been criticized as having no method (Freeman, 2008; van Manen, 2016). Qualitative research designs appear to lack structure and standardized procedural steps compared to quantitative research methodology; however, that does not mean the mode of inquiry is devoid of parameters. Instead of strict procedural guidelines, the qualitative research methodology's underlying philosophical principles guide the process (McLeod, 2001). The philosophical principles that underlie my study are the essence of the lived experience (Heidegger, 1962), the hermeneutic circle (Gadamer, 1982; Heidegger, 1962), fusions of horizons (Gadamer, 1982), interpretation (Ricoeur, 1975), and a phenomenological attitude (van Manen, 2016). I use these principles to guide my research design and inform my methods, actions, and approach.

My design for this study adopted a phenomenological attitude of wonder. My understanding of the phenomenological attitude is how a researcher approaches the study, the data, and the results. Unlike Husserl's approach to bracket previous knowledge and prejudices, something he referred to as our "natural attitude" (Tuffour, 2017, p. 3), van Manen (2016) described the phenomenological attitude as one where the researcher acknowledges their natural attitude and incorporates the knowledge and judgments into the interpretation. I used reflection and reflexivity (van Manen, 2014) to identify and acknowledge my historical consciousness and use the hermeneutic circle to fuse my horizons with those of my participants. I used writing and rewriting techniques throughout the study to document and efficiently respond to what I learned

and interpreted. This strategy aligns with the methodology and the multi-dimensional approach inherent in hermeneutic phenomenology.

Qualitative research is rarely a linear process (Maxwell, 2009). Many researchers represent an iterative study as returning to a previous step and then repeating those steps sequentially. A research design that requires researchers to return to a previous step in a process and work the data again through subsequent steps still represents a one-directional process that establishes a hierarchy and signifies a specific order to analysis. Maxwell (2009) suggested that qualitative research requires a dynamic and reflexive approach throughout the entire process, which means many research steps happen continuously and simultaneously. A hermeneutic phenomenological study uses the hermeneutic circle to address this shortcoming.

The hermeneutic circle is one of the cornerstones of hermeneutic phenomenology research. The hermeneutic circle represents the ebb and flow of analysis and interpretation that vacillates between the parts and the whole to gain a holistic understanding of the phenomenon (Kidd, 2019; Ryan et al., 2007; van Manen, 2018). Instead of a research design that is linear or one-directional, the hermeneutic circle is more dynamic by adding perspectives from both the part and the whole. Still, a circle implies that the process may be flat or two-dimensional. The process of analyzing the data from parts to the whole is multi-dimensional, prompting researchers to also describe it as a spiral (Paterson & Higgs, 2005). Even so, a spiral representing analysis that moves through the parts to the whole, then back again repeatedly, depicts a three-dimensional shape. This three-dimensional shape cannot convey the multi-dimensional aspects inherent in the iterative review of the data (Suddick et al., 2020); dialogue between the text, horizons, and the researcher (Gadamer, 1982); writing and rewriting as a way of thinking (van

Manen, 2016); and interpretation that makes up the hermeneutic phenomenological analysis process (Smythe & Spence, 2008).

Participants

In this study, I aimed to understand everyday people's lived experiences of mystical intuition. I sought to capture rich examples from participants with first-hand experience (van Manen, 2014) with mystical intuition. I used an interpretivist epistemology; therefore, objectivity and generalizability were not the goals. Because I was not trying to generalize the findings to a specific population, I omitted conventional demographic data from this study as the focus was on the participant's experience of the phenomenon and not the demographic of the experiencer. Instead, I focused on the purposeful sampling rationale to demonstrate reliability (Morse, 2015).

Unlike other qualitative research methodologies, the hermeneutic phenomenology methodology does not require the researcher to reach data saturation or the point when the data reveals nothing new (Gentles et al., 2015, p. 1782). I set out to interview 6–8 participants, which was estimated to provide enough data without inhibiting in-depth analysis (van Manen, 2014). I used a purposive sampling strategy combined with a snowballing approach to reach a broad range of individuals to recruit participants.

Because of the confusing language rampant in the literature, it was essential to recruit individuals who use plain language without the jargon commonly used among individuals who experience mystical intuition regularly, such as mediums (Krippner & Friedman, 2009; Pirog, 2004). I delineated inclusion and exclusion criteria to identify eligible participants. I used a screening process to confirm that the participants had experienced the phenomenon and met the inclusion criteria.

Inclusion Criteria

- Adult (25–65)
- English speaking
- Reside in the United States
- Self-identify as having an experience of mystical intuition
- Willingness to participate in one 45–60-minute audio-recorded interview

Exclusion Criteria

- Disclosure of a previous history of a psychiatric or medical condition that may have influenced the experience
- Disclosure of the use of drugs or alcohol before or during the phenomenon
- Disclosure of status within a protected population
- Self-identify as a psychic, medium, intuitive, or other mystical specialties
- Does not self-identify with having had an experience of mystical intuition
- A direct, personal relationship with the researcher

Recruitment

With my purposive sampling strategy in mind, I reached out to the executive director of the Rhine Research Center (RRC). The RRC is an organization with nearly 100 years of experience exploring the frontiers of consciousness and exceptional human experience in the context of unusual and unexplained phenomena. I described my study to the Executive Director of the RRC and asked to share my study information on the organization's website and social media (Facebook and Instagram) pages. I received written confirmation on RRC letterhead, confirming permission to share my study information with their members. I included this documentation with my Institutional Review Board (IRB) application. This research study was approved by the Saybrook Institutional Review Board on September 17, 2021.

Before designing the recruiting flyer, I considered the language disparity within the literature and my presuppositions of the phenomenon. I wanted a sample that was representative of the scope of the experience and realized that any definition I used on recruiting information might result in a sample that understood the experience as I did. Therefore, adding a definition to the recruiting flyer seemed unnecessarily limiting and short-sighted. When designing the recruiting flyer, I intentionally used vague language and loosely defined the phenomenon. I used spontaneous knowing without any other identifying language to reach participants with experiences they deemed to be spontaneous knowing. Given the nature of the hermeneutic phenomenology methodology and the importance of words and language, I felt this approach opened the opportunity for robust and diverse experiences and, in turn, high-quality data.

After receiving IRB approval, I shared the recruiting flyer on the RRC's social media pages (Facebook and Instagram). Additionally, I posted the flyer on my personal Facebook page and asked readers to share the flyer and information with their networks to find prospective participants. Recruiting tactics can have varied results (Foss et al., 2013); however, my decision to share my recruiting information on social media and through the RRC yielded a high response of interested participants. During the 2-week recruiting period, recruiting efforts drew 35 potential participants to the screening form.

Screening

I screened prospective participants for inclusion and exclusion criteria using an automated Microsoft Form available to interested participants via the flyer's web address and QR code. The screening form consisted of 10 questions and ensured the study participants met all the eligibility criteria. Using an electronic form for screening was beneficial in protecting

prospective participants' identities. Additionally, this format captured precise data regarding the specific criteria that made a potential participant ineligible.

The recruiting efforts were successful in driving 35 people to the screening form. Prospective participants were deemed ineligible for age ($n = 1$), residing outside the U.S. ($n = 3$), and not completing the form ($n = 2$), see Table 1. Another 19 prospective participants had more than three spontaneous knowing experiences. The screening form successfully identified 25 potential participants who did not meet the inclusion criteria while maintaining anonymity. All 25 ineligible participants were immediately thanked for their interest and informed they were ineligible to participate. The remaining 10 fully qualified participants were directed to a page to contact me directly with any questions or provide their contact information to confirm their interest in participating. All 10 eligible participants agreed to move on to the next study phase and provided contact information.

Table 1

Prospective Participants

Action	Prospective Participants	Eligible Participants
Started the screening form	0	35
Ineligible		
Did not meet the age criteria	1	34
Lived outside the United States	3	31
Had more than three experiences	19	12
Did not complete the screening form	2	10
Had questions before participating	2	n/a
Screened via email and invited to participate	1	1
Agreed to participate		
Interview could not be scheduled	2	11
Interviewed and included in the study		9

Eligible Participants

Table 1 shows what disqualified people for the study. Most participants were excluded because they had too many identified spontaneous knowing experiences. The number of prospective participants who identified as having more than three experiences suggests that this phenomenon may be more commonplace than anomalous.

After completing the screening form, two eligible participants contacted me directly via email to inquire if their experience qualified as a “spontaneous knowing” experience. These inquiries offered a unique opportunity to validate my purposeful use of open-ended language on the recruiting flyer. Both participants inquired about my definition of spontaneous knowing. In both cases, I invited the participant to share their interpretation of the term and whether they believed their experience fit that definition. In both cases, the participants identified experiences that were quite different than what I had expected and did not necessarily align with my presuppositions, and still were spontaneous knowing experiences, an observation I noted in my reflexive and reflective journals.

This interaction revealed two crucial points that informed my study. First, this phenomenon is subjective and individual horizons play a significant role in understanding and interpreting these experiences. Secondly, these interactions confirmed that language could be a barrier to gathering qualified data, and the purposeful use of spontaneous knowing in recruiting materials instead of mystical intuition experiences had been effective.

Participant Selection

I sent all 10 qualified participants a welcome email and the informed consent document. I received one inquiry via email from a potential participant who did not complete the form. I confirmed eligibility and sent a welcome email with the informed consent to this participant. All

11 participants returned a signed informed consent document. I scheduled 10 interviews. The participant who reached out via email was unavailable for an interview despite completing the informed consent. I experienced scheduling conflicts with one other participant attempts to reschedule were unsuccessful. I included all nine interviews in my study.

Sample

I interviewed nine qualified participants, with a total of 22 experiences. I also used 23 archived experiences identified as intuitive extrasensory perception by the RRC. All the archived experiences were between the years 1940 and 1980. The archived experiences did not include specific dates; however, this was the timeline assigned to the experiences transcribed by the RRC's secretary from handwritten accounts. I used the archived data to triangulate the experiences and observe how the language surrounding these experiences has changed over time.

Setting and Instruments

Setting

The setting for this study was a recorded phone interview. This setting allowed the participant to be in a location of their choice and where they felt comfortable. In at least one instance, the phone interview allowed the individual to participate who may not have been able to otherwise.

Transcription and Member Checking

All interviews were transcribed by me using voice-to-text recognition as a starting point. Then, I meticulously reviewed and revised each transcript to reflect the interview verbatim. During the initial transcription and all subsequent reviews, I captured my reflexive thoughts as they appeared in my researcher journal.

I intended to capture all the interview details from the audio into the written transcript prior to having the participant review and verify the veracity of the transcript. As I worked through the first transcript capturing all the background noises and non-verbal cues, I wondered if it were the best approach for the version the participant would verify. I wrote in my journal to help me make sense of this question. I wrote,

As I was transcribing the first interview and working hard to get my transcription convention just right, I realized that the additions of (..) many of the ITEMS used in the convention would *NOT* be {helpful <coughing> <laughing>} for the interviewee. How could they read (.) easily read (:04) a passage, let alone 10-12 ^pages of annotated text. (McDaniel, 2019b Transcription process)

I wanted to capture the details of the audio recording into the text as these elements add depth when analyzing subjective experiences (McLellan et al., 2003). I reconsidered the goal of member checking and thought about what information may facilitate a participant in verifying that the transcript captured their experience. I concluded that verifying annotations of non-verbal cues and background noises without reviewing the recording might be problematic for participants.

Davidson (2009) suggested that selectivity in transcription should “be understood as a practical and theoretical necessity” (p. 38). Transcription selectivity is especially valuable when “extraneous information makes a transcript difficult to read and might obscure the research purpose” (p. 38). Still, selectivity in transcription needs to be explicitly addressed by the researcher and tied to the study’s goals. I shifted to a selective transcription approach for the transcript going to the participant for verification. After sending the selective transcript to the participant, I returned to the transcript and added the supplementary details on the following review to ensure high-quality data for analysis.

For each transcript, I noted areas that I perceived as potentially identifying information for participants and asked them to review my suggestions for ensuring their privacy. I invited

participants to identify their own pseudonyms and informed them that I would assign them if they did not provide one. Each transcript was sent to the participant to confirm that their experiences were captured correctly. Eight of nine participants validated the transcript, and four participants offered minor edits or changes. These changes were related to the spelling of unusual words or to clarify the setting. One participant returned the verified transcript, and additional information was revealed to her upon reflection after the interview. This information was added to the transcript to provide an accurate account of the experience.

As participants returned the reviewed transcripts, I annotated the dates on my tracking sheet, made noted changes, and de-identified the transcripts, replacing personal or identifying information with pseudonyms. Following the corrections and de-identification, I read through the transcript and coded sentences, phrases, or words that caught my attention.

Data Collection Methods

This study required data that was personal and subjective. For inquiries into a lived phenomenon, the participants' own words are of utmost importance in identifying and extracting the essence of the experience. Language is how we communicate and interpret our experiences; the first-hand accounts were the window into what it is like to spontaneously know information that has "no right to reach us" (Carpenter, 2012, p. 2). I gathered individual experiences through interviews and archival data for this study.

Tracking Sheet

A qualitative research study with multiple steps and phases requires organization. As prospective participants started to complete the screening form, I quickly became aware of the volume of data and correspondence I would need to manage. I developed the tracking sheet to manage participants' information and serve as an audit trail for the study. I updated the

spreadsheet daily, which allowed me to easily track participants' progress through the study, including details about informed consents, interviews, follow-up information and correspondence, and activity notes (i.e., the number of times I contacted each participant, what information I gathered). I also used this spreadsheet to track details about the interview data, including recordings, transcription, member checking, any errors or additional information offered by the participants, and anonymizing through adding pseudonyms. The spreadsheet was a helpful tool during the execution of the study. However, I found it most valuable in gathering and securing all the information, emails, and other data that each participant provided. Having documentation made it much easier to gather all identifying information and keep those records secure, protecting participants' identity and personal information.

Interview

The phenomenological interview is unique in its aim to gather information on “pre-reflective experiential accounts” (van Manen, 2014, p. 314). During my pilot study, the phone interview allowed me to establish trust (Heinonen, 2015) and set a conversational tone that facilitated open dialogue (McDaniel, 2019b). Moreover, conducting a telephonic interview allowed me to immediately clarify any participant statement and frequently led to additional participant insight into their experience. My pilot study showed me that some questions might unintentionally direct the conversation (McDaniel, 2019b). To minimize unintentional bias or lead the participant, I opted for an unstructured interview to collect high-quality data about the experience.

There were three benefits to using an unstructured interview format. First, I asked an open-ended question and allowed the participant to explain their experience in their own words without answering specific questions (Willig & Billin, 2012). The interview was a dialogue, and

I was able to ask follow-up questions based on the participant's experience to gather rich, detailed information (Dibley et al., 2018). Second, the time frame for these interviews was flexible to accommodate spaces of silence so participants could formulate their thoughts and explain their experience to completion (Willig & Billin, 2012). Third, this format was adaptable to the changing landscape in a hermeneutic phenomenological study. As I engaged the hermeneutic circle, horizons began to fuse, making each interview unique (Morse, 2015). These benefits made the unstructured interview a prudent choice to collect data.

During the unstructured interview, I used one question (i.e., "What is it like to experience spontaneous intuition?") to encourage the participant to share their experience in their own words (Crowther & Thomson, 2020). I frequently repeated what I heard the participant say to confirm I understood the experience. The act of reflecting the words of the experience back to the participant often prompted participants to clarify or elaborate on their experience by adding details or emphasizing one point or another. To keep the interviews focused on the lived experience, I used prompts (e.g., "What was that like?" and, "Do you have anything else to share?") as invitations to the participant to explore and communicate what it is like to live this experience as close to real-time (van Manen, 2016) as possible.

The unstructured phone interviews were recorded and varied in length between 30 minutes and 1 hour, with an average of 47.5 minutes per interview. The interview length was adequate for capturing rich, detailed data about the experience or experiences with ample time for discussion. For the initial transcription, I uploaded audio recording files to a third-party speech-to-text application (Temi.com). Using a speech-to-text application reduced the data preparation and cleaning time, plus I was able to focus on the recording details, including reflexive notetaking from the first review. I verified the initial transcript against the audio

recording and made necessary corrections, paying particular attention to capturing non-verbal cues, such as pauses, energy level, and inflections. Verbatim transcription was essential to capture the interview in detail as these characteristics may offer intimations to the experience's essence (Love, 1995).

Archival Data

Hermeneutics as a unique verbal activity separate from other verbal activities depends on writing (van Manen, 2016). During my pilot study, I invited participants to partake in a one-page reflection following the interview. The reflection asked how the participant made meaning from their experience. Unlike my pilot study, I explored what it was like to live the phenomenon and how individuals communicate that experience rather than capture how participants made meaning from that experience. For this study, I was interested in how the language used in a live interview compares with that used in written accounts of similar experiences. I used archival data from spontaneous cases submitted to the Rhine Research Center.

Data Statistics

For this study, I conducted nine interviews with participants. Interviews were between 30 minutes and 1 hour, with an average of 47.5 minutes. These interviews resulted in 7.5 hours of audio. Transcription was captured verbatim and reviewed for accuracy. Transcript length was commensurate with the length of the interview and background noises and reflexive notes. Transcript length ranged from 15 to 28 pages, each with an average of 21 pages. The total text data attributed to interview transcripts was 188 pages. The data from my reflexive and reflective journals totaled 26 and 73 pages, respectively. I created 9 data tables during data analysis, and writing and rewriting dialogue between participants to fuse horizons yielded an additional 26 pages. Finally, the archival data obtained from the Rhine Research Center amounted to 17 pages.

In all, I gathered over 300 pages of textual data that I used to inform my inquiry into what it is like to experience mystical intuition. See Figure 2 for a visual representation of data collected for analysis.

Figure 2

Data Collected for Analysis



As part of emerging myself in the data, I worked on three art projects that supported my dialogue with the data. I used the experiences and words to create a canvas painting, one dozen word art designs based on the words used by participants, and a mind map to visualize interconnections and facilitate dialogue between all the parts.

Ethical Considerations

High ethical standards are a priority for me. In designing this study, I made every effort to protect participants and safeguard their privacy. This section explains what measures I took to ensure ethical conduct during my study and beyond.

Securing Informed Consent

After screening potential participants, I set a welcome email with an informed consent form inviting eligible participants to participate. I asked them to review the informed consent document and contact me if they had any questions. Participants interested in moving forward could print, sign, and return the informed consent form via email or use the electronic informed consent document I sent via email using Adobe sign software. This software allowed for a secured e-signature that automatically sent a copy to the participant and me. The participant was required to sign the informed consent form before being accepted into the study. I included my personal contact information in the recruitment materials, welcome packet, and informed consent document. Participants with questions contacted me directly with any questions.

Protecting Participants

Before any data collection began, I confirmed that the participant signed the informed consent document and that I had answered all questions to the participant's satisfaction. At the beginning of each interview, I reminded participants that all responses to questions are voluntary, and they can skip any question they are not comfortable answering without penalty. I also reassured the participant that they could stop the interview at any time. Finally, I ensured the participant knew that they could contact the Saybrook University Institutional Review Board if they felt mistreated.

Anonymity and Confidentiality

Anonymity

This study uses one-on-one interviewing as a data collection tool; subsequently, participants are not anonymous. Because I collected identifying information as part of the intake, screening, and interviewing process, anonymity was impossible (Saybrook University Institutional Review Board, 2015).

Confidentiality

Without anonymity to protect participants, confidentiality is of the utmost importance. I took several steps to ensure the information remained confidential to protect the participants' personal information. I took the following measures to safeguard sensitive information from unintentional exposure to viewers outside the study.

Intake and Screening Data. I safeguarded personal information and notes collected through intake forms and screening interviews in a password-protected electronic file or a locked cabinet. All passwords for the research study materials were known only to me as the principal investigator.

Interview Data. The individual interviews were conducted over the phone, allowing the participant to select a comfortable location. The audio file from the recorded call included the date and time of the interview only. I used a code and changed any details that might reveal a participant's identity (Ajjawi & Higgs, 2015). All data collected, including personal information, was safeguarded through passwords or locked cabinets to ensure participant confidentiality.

Transcript Verification. Participants had an opportunity to review the transcript and confirm it reflected a true and accurate account of their experience (Rose & Johnson, 2020). Additionally, I asked participants to identify any information that might violate their

confidentiality and take measures to protect participants, such as pseudonyms (Anastasia et al., 2020). I invited participants to create pseudonyms and confirm the veracity of the transcript.

Risk Assessment

Potential Risks to Participants

Hermeneutic phenomenological studies explore a phenomenon as a lived experience (van Manen, 2016). van Manen (2016) advised researchers engaging in human experiences to be cognizant of possible effects the research may have on participants, institutions, and researchers. In a study on numinous experiences, Hinton (2014) found that some participants were hesitant to share their experiences for “fear of having the experience devalued by others” (p. 6).

Minimizing the Risk of Unanticipated Harm

To mitigate any potential risk to participants related to their personal experience with mystical intuition, I invited them only to share what they are comfortable sharing. Further, I reminded the participants of their rights and protections, including that their answers were entirely voluntary and not required and that data collected was secure.

As a researcher, I am aware that participants may be classified as part of a protected class as defined in Human Protections Act. An inherent risk in any study could be unintended harm to one of these special classes without the researcher’s knowledge. This study screened willing participants to confirm they met the inclusion criteria for the study. The screening materials only asked the participants about their mystical intuition experience and inclusion criteria. There was no evidence of unintended harm during the study.

Benefits

There was no compensation or incentives available for this study. Some participants expressed that they received new insight into their experience through sharing it within the

context of this study. They saw their experience from a new perspective, which expanded the meaning of the experience for themselves. Anomalous experiences remain understudied in the transpersonal psychology field (Cardeña et al., 2017); this study may provide insight that facilitates future research efforts (Kruth, 2015) and expands current understanding of the meaning of being.

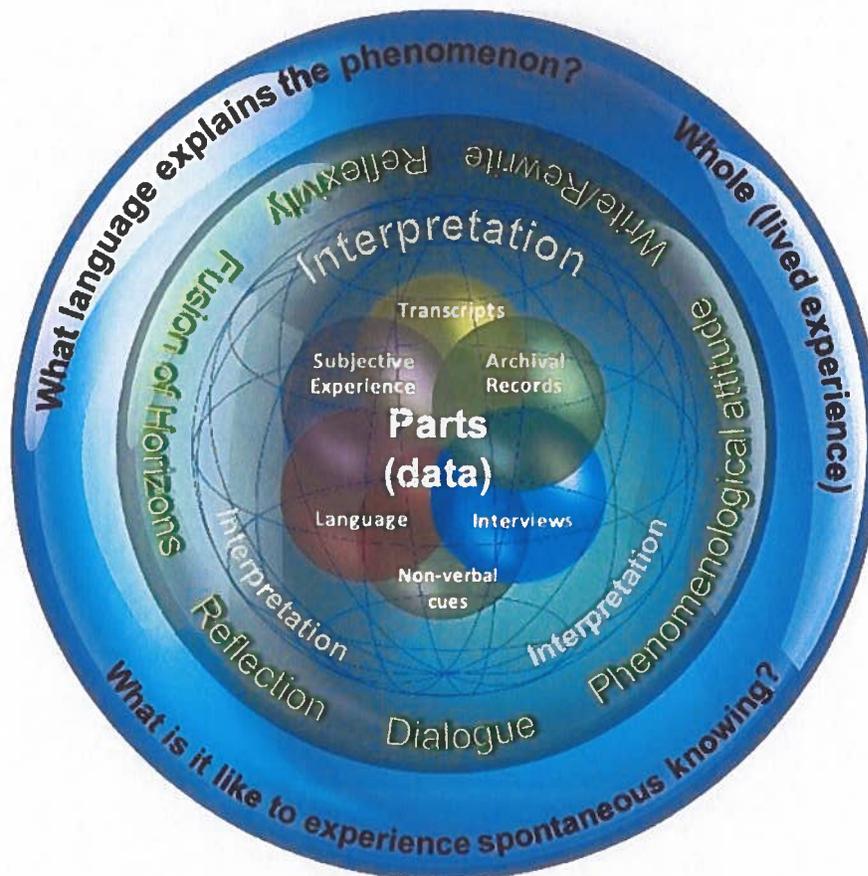
Data Analysis Model

Data analysis in the hermeneutic phenomenology methodology was an iterative process. I reviewed the data as individual parts and fluctuated to reviewing that same data in the context of the whole, as indicated by the hermeneutic circle. Throughout the analysis, I used van Manen's (2016) writing and rewriting technique to think. I journaled in reflective and reflexive writing (Crowther & Thomson, 2020; van Manen, 2016; Walsh, 2003). During analysis, I entered a dialogue with the participants, their horizons, and a researcher's perspective to interpret the data and extract the essence. Each participant's horizons or perspectives varied based on their own life experiences, beliefs, and understandings to include cultural, spiritual, and societal influences, as well as family and friends.

The diagram (Figure 3) depicts the data analysis process as a series of spheres layered within each other. Each sphere represents the dimensional aspect of each element. The layering represents the multi-dimensional nature of hermeneutic phenomenology studies. The layers are transparent to illustrate the fluidity of the analysis from the parts to the whole. The transparency also signifies the importance of maintaining clarity, authenticity, and transparency in conducting the study and reporting the findings.

Figure 3

Data Analysis Diagram



The Inner Sphere – The Parts

The data analysis diagram visually represents the process and procedures I took during this study. The center of the diagram contains six individual spheres comprising the data collected and used in the study. The data represents the parts to be explored and includes transcripts, archival data, interviews, non-verbal cues, language, and subjective experience. Each part contributes information to what it is like to experience mystical intuition. Surrounding the sextet of spheres at the center are interwoven lines representing the study's interpretation phase and illustrating that the interpretation is continuously ongoing and interactive.

The Middle Sphere – The Research Analysis

The middle sphere symbolizes my review, analysis, and interpretation of the data through reflection, dialogue, phenomenological attitude, writing and rewriting, reflexivity, and fusions of horizons. The review, analysis, and interpretation of the data, or the parts, are not linear. This phase was not predictable—the time spent in each sphere varied by the day. Attempts to anticipate where the research may lead were inevitably thwarted by the data, horizons, or my phenomenological attitude.

The Outer Sphere – The Purpose (Whole)

The outer sphere represents the depth and breadth of the whole experience. This sphere encases the inner spheres and maintains the structure of the process. The fortifying elements of the research questions and purpose of understanding the lived experience enable the interpretative analysis process to move fluidly from the parts to the whole.

Data Analysis

The process to review, analyze, and interpret the data is not linear. During my first round of analysis, I worked through each step in a streamlined fashion. With this approach, I quickly and easily identified several themes. The themes that became noteworthy in this round of analysis were remarkably like those found in the literature. This attempt at working through the analysis process sequentially resulted in a dull reporting of the experiences' details rather than the essence of the experience. In subsequent rounds of analysis, I frequently returned to the data analysis diagram and research design to keep the investigation permeating through the hermeneutic spheres of parts to the whole.

The Symbiotic Dance With the Data

The literature explains this concept of moving between the parts and the whole as a back and forth, a dance, playing with the data (van Manen, 2018). I found that focusing on the concept of spheres allowed me to float in the data, swirl around with the data, catch glimpses of the essence in one place and then look for it in another. The experience of data analysis in the hermeneutic spheres was all-encompassing. Often, I found myself immersed and at play with the data where I would find a word or a similarity that begged for a deeper inspection and introspection. In these cases, I took the data off the pages of transcripts and onto a canvas as a painting, into pictures made of words, and a diagram of the details and interconnections between the experiences and those who experienced them.

Existential Analysis

With growing awareness of my understanding of the phenomenon of mystical intuition, I was cautious about reviewing the data with predetermined codes or categories. Instead, I wanted to let the themes emerge organically. While the themes emerged from the data through the analysis process, it was helpful to have a starting point to guide the research. I found van Manen's (2016) four existentials to be practical guides for my analysis.

The four existentials are corporeality (lived body), temporality (lived time), spatiality (lived space), and relationality (lived relations, human interaction; van Manen, 2016). Reviewing the data through a human's way of being aligned with the philosophy of the methodology and added structure to the analysis process allowed me to enter the hermeneutic circle and navigate the unfamiliar terrain.

Based on the notion from van Manen (2016) that "phenomenological research always begins in the lifeworld" (p. 7), I started my analysis process at the lifeworld. I reviewed

participants' stories and experiences through the lens of the four existentials. During analysis, I looked at each story in the context of the whole experience, prioritizing the individual experience through the lens of one existential at a time. As I reviewed the transcript for evidence of the selected existential, I tagged phrases and words that represented the lived experience from that perspective. For example, elements in a transcript that had a temporal nature, such as age, season, or time of day, were tagged as a temporal aspect of the lived experience. When I had tagged for temporal connections, I could more easily see a pattern or theme emerge. Glimpsing a pattern in the data led to more pointed questions about the age when the participant had the experience or the elapsed time between when they had the experience and when they realized that the experience was something they identified as a spontaneous knowing phenomenon. I continued the analysis in this fashion with the remaining existentials.

Transcendental Analysis

It was quickly apparent that the esoteric aspects of the human experience, such as consciousness, spirituality, and the space-time continuum, were not easily contained within the lifeworld concepts presented in this "purely prescriptive or technocratic sense" (van Manen, 2016, p. 3). The lived experience at the root of this study was a mystical phenomenon. The phenomenon happens through the lens of the ego. To this end, the four existentials provided a framework to identify and explore themes. However, to understand the essence of this anomalous and unexplainable phenomenon, I had to look at the experiences through both the humanistic and transpersonal lens to see where the subjective experience and the objective or worldly aspects of human experience met. Grof (2013) said, "The existence and nature of transpersonal experiences violate some of the most basic assumptions of materialistic science" (p. 13). The experience of mystical intuition violates the laws of the natural world and material

reality. In addition to the four existentials representing our lifeworld as humans, I applied a cosmic perspective that includes the spirit and speaks to our human experience as a whole being in the world, body, mind, and spirit.

Trustworthiness

Qualitative researchers generally disagree with the underlying epistemology of positivist standards of validity (Schwandt et al., 2007); instead, they argue for a revised lexicon that aligns with qualitative research ontology (Lincoln & Denzin, 2003). It is not always practical to base trustworthiness on a positivist criterion in qualitative research. I approached this study from an interpretivist paradigm, meaning I valued subjectivity. I immersed myself into the participant's experiences (Williams & Morrow, 2009), and I believed there was more than one truth (Makombe, 2017). The interpretivist ontology underlain this study and was incongruent with empirical epistemology; therefore, objectivity and generalizability were inappropriate criteria to assess the validity of studies within this paradigm. There are several ways qualitative researchers can increase legitimacy and establish the trustworthiness of a qualitative study. The revised vocabulary for trustworthiness in qualitative research includes concepts that parallel the quantitative research measures as credibility, dependability, confirmability, and transferability (Schwandt et al., 2007). In hermeneutic phenomenology, researchers establish trustworthiness through immersion (Neubauer et al., 2019) and contextual engagement (Bynum et al., 2019) with the examples (van Manen, 2014) or phenomenological data through reading and writing and engaging in reflexive and reflective writing to fuse the horizons and interpret the phenomenon (Neubauer et al., 2019, p. 95).

The hermeneutic phenomenological tradition encourages simultaneous review of the data, shifting perspectives as presented by the parts of the study to inform the interpretation of the

whole (Neubauer et al., 2019). Furthermore, the inclusion of reflective and reflexive writing ensured that I, as the researcher, remained aware of my presuppositions and judgments so I could acknowledge and note them during the study. I kept track of my thoughts, biases, and other experiences as a researcher in a reflective and reflexive contemplation journal. Actively engaging one's preconceptions throughout a study "brings discipline to interpretation" (Walsh, 2003, p. 53). In the interpretive analysis process, I acknowledged my subjective perspective as data (Neubauer et al., 2019) and consistently recorded my presuppositions and reflective thoughts in my journal.

Credibility

Credibility is akin to internal validity in quantitative research. Lincoln and Denzin (2003) explained that techniques that build a reader's confidence that the data is believable establish credibility. I employed two techniques to ensure accuracy in my data: triangulation and modified member checking.

Triangulation, sometimes called cross-checking (Schwandt et al., 2007), is when a researcher uses different sources, methods, and at times, different investigators (p. 18). I triangulated the findings by using two data sources (interviews and archival data). Interviews conducted in 2021 represented a different timeframe from the archival data. Moreover, the data comes from different modes (verbal and written). The process of writing is a more solitary and reflective act (van Manen, 2016). In contrast, the interview has a moderator who keeps the conversation on track and as close to the lived experience as possible.

In addition to cross-checking data by triangulation, I used a modified member checking technique. Member checking is a common data validating technique where the researcher shares preliminary findings with participants and solicits and incorporates participants' feedback on

interpretations and understandings (Candela, 2019; Gentles et al., 2015; Slettebø, 2020; van Manen, 2014). Rose and Johnson (2020) explained that member checking has limitations: “participants may not necessarily recognize their perspectives reflected in themes analyzed by the researcher(s)” (p. 441). Given that I was looking for hidden elements in the experience that was beyond Dasein, member checking as described was not a good fit for this study. The premise behind member checking is to get the participants to validate the data to minimize researcher bias in the study (Lincoln & Denzin, 2003). Keeping with the spirit of member checking and knowing the importance of using participants’ own words (Williams & Morrow, 2009), I used transcript verification as a modified member checking technique. While technically separate from member checking, transcription verification adds clarity and ensures accuracy in the data collected (Rose & Johnson, 2020). Transcript verification allowed the participant to review the content from their interview to ensure it was an accurate portrayal of their experience. During the transcript review, participants can clarify any points that do not convey the experience accurately.

Dependability

Dependability refers to the consistency and reliability of the study (Lincoln & Denzin, 2003). In the absence of prescribed and easily duplicated research procedures, qualitative researchers must explicate the systematic processes used to inform and conduct the study (Rose & Johnson, 2020). This study illustrated dependability through copious notetaking and journaling that provided transparency to the study’s processes and execution.

Confirmability/Reflexivity

Confirmability is how the researcher demonstrates objectivity in the study (Lincoln & Denzin, 2003). For some qualitative studies, like this one, objectivity was not an appropriate

assessment criterion. Instead of posing a risk to data contamination, Neubauer et al. (2019) explained that a researcher's subjectivity is fundamental to the hermeneutic phenomenological analysis process. When the criteria for trustworthiness are antithetical to the study's basis, the researcher needs to demonstrate efforts taken to minimize bias in the study (Gobo, 2018). To minimize the risk of researcher bias, I captured my presuppositions (Simmonds-Moore et al., 2019), reflections (Ajjawi & Higgs, 2015), and evolving thinking (paradigms, ontologies, and epistemologies) through ongoing reflexive and reflective journaling and frequently returned to them to inform my research throughout the study (Wharne, 2018).

Transferability

Transferability is when the reader can seamlessly transfer the information to another context (Onwuegbuzie & Leech, 2007). Detailed descriptions that convey a "more contextualized understanding of the phenomenon" (Rose & Johnson, 2020, p. 442) facilitate transferability (Onwuegbuzie & Leech, 2007; Schwandt et al., 2007). I used verbatim transcripts to create a narrative that conveyed the phenomenon's essence in the participants' own words (Ajjawi & Higgs, 2015).

Chapter Summary

This chapter summarized the selected research methodology, hermeneutic phenomenology, and rationale for my methodological choice. Chapter 3 outlined the study's details, including participant inclusion criteria, how data was collected and analyzed, and how participants were protected. I also explained the hermeneutic circle and its importance to interpreting the phenomenon in whole from the various parts. In the final section of the chapter, I addressed the trustworthiness, limitations, and delimitations to ensure rigor in the study.

Chapter 4 reports the findings of the study. The chapter starts with a brief overview of the study, the sample, the study's execution, and analysis. Next follows a detailed explanation of findings from the study and provides evidence from the participants to support the findings.

Chapter 5 encompasses the interpretations and implications of the findings, how findings relate to the literature, the limitations of the study, and recommendations for future research.

CHAPTER 4: FINDINGS

This chapter presents the findings of my hermeneutical phenomenological study on mystical intuition. The chapter starts with a summary of the participants included in the study. Next, I explain how I used the archived records as a triangulation tool to verify the themes that emerged during the analysis. Then I present the findings of the study. I identified six themes that inform our understanding of the lived experience of mystical intuition: information, interruption, persistence, confidence, validation, and lasting impression.

The question, “What is it like to experience mystical intuition?” guided this study. I recruited prospective participants through a flyer circulated on social media. The recruitment materials directed interested individuals to an online screening form that confirmed the participants met all the criteria for inclusion in the study. This form allowed me to screen prospective participants and determine their eligibility prior to collecting personal information. I had 35 people complete the screening form, and 11 of those people were deemed eligible for the study. After inviting eligible participants to the study, obtaining consent forms, and scheduling interviews, I had nine participants. During the interviews, many of the participants shared more than one experience. I also used archived data from the Rhine Research Center as triangulation and to validate the findings from the participants. In all, I analyzed 45 individual experiences in identifying themes. As the findings are from individual subjective experiences, I wanted to use names with the evidence that supported the findings. I have changed all the names and personal information to pseudonyms to protect participants.

Triangulation and Comparison to Seminal Findings

After identifying themes from the interview data, I used the archived data to corroborate my findings and include other horizons in the analysis. I decided to use archived data from the

RRC because it offered three distinct differences from the data I collected through interviews. First, the selected archived experiences were used and evaluated by another researcher, Dr. Louisa Rhine, in her seminal research on spontaneous experiences. Second, the data was collected more than 50 years ago. Finally, the archived cases came through personal handwritten correspondence. The decision to use archived experiences was quite beneficial as the archived data in conjunction with the interview data presented more questions and led to deeper inquiry and understanding of the findings. Returning to van Manen and the philosophy of the method, I found that van Manen (2016) said, what is the “distinction between appearance and essence, between the things of our experience and that which grounds the things of our experience” (p. 32). Reviewing the archival experiences against the criteria presented in Rhine’s (1953/2018, 1978) studies reminded me of a vital component of the mystical intuition experience that I had not noticed during my initial analysis, which was the role of antecedent in the phenomenon. Rhine (1978) classified intuitive experiences as experiences without an antecedent and having no sensory processes, no memory, no shrewd reasoning, and not influenced by anxiety or expectation. I took another look at my interview data with these criteria in mind. This review clarified which experiences had an antecedent, suggesting that those cases may be a different type of intuitive phenomenon. With these experiences, I scrutinized the details and the surrounding situation of the experience to determine if any of these antecedent criteria were met; at the same time, I reviewed the experiences against the essential themes I had identified to see if the antecedent criteria established by Rhine held up.

After completing the interviews and transcribing the recordings, I read and reread the transcripts, made reflexive notes, and wrote reflections about the experiences and what they were expressing. Through the hermeneutic circle, I continued to read and write, think about and

question the data to understand the lived experience of mystical intuition. I immersed myself in the data, looking at it from different angles and horizons and using different mediums such as painting and diagrams. Through this process, the data came to life, some connections were easy to decipher, and eventually I saw that which was more hidden and taken for granted. This process led me to identify six themes that make up the lived experience of mystical intuition: information, interruption, persistence, confidence, validation, and lasting impression.

Theme 1: Acquisition of Information

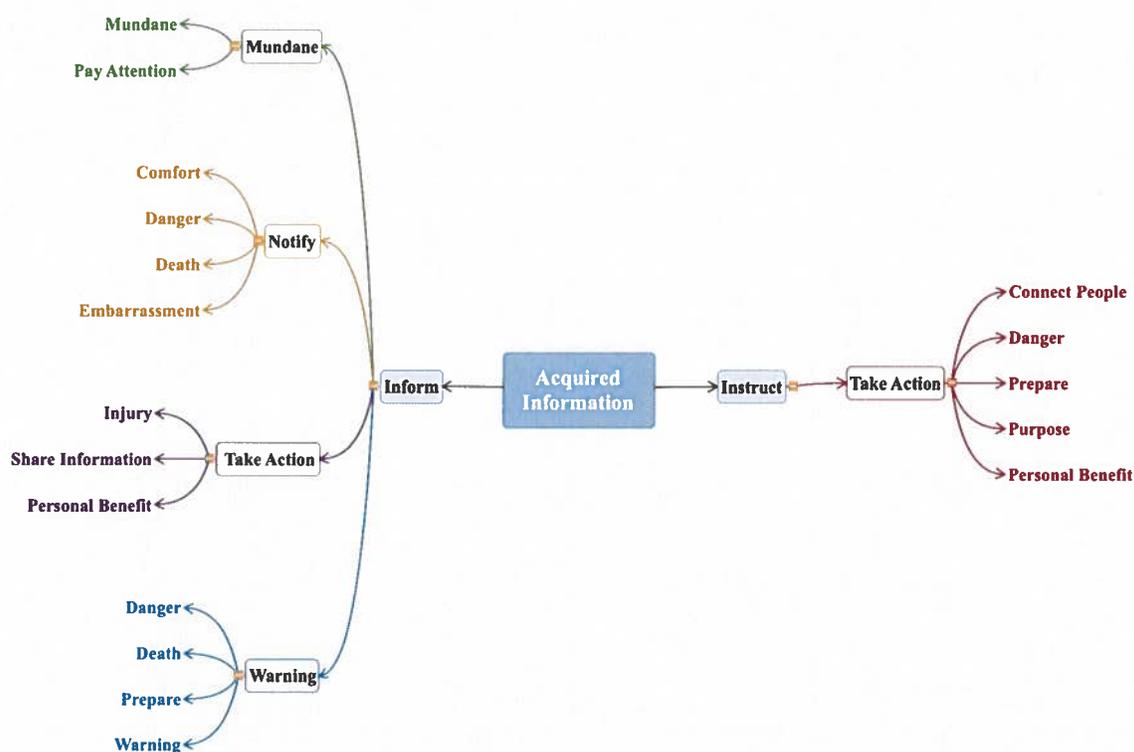
van Manen (2016) explained that essential themes cannot be objects. However, in this case, the information was the basis of the phenomenon. Without the acquisition of information, there would not be a spontaneous knowing experience. As Analise described her experience, she said, “it was just plain information, a ‘fact’ of an event.” Other participants shared their experiences in a similar way, supporting the notion that the phenomenon includes receiving information. When describing the information she received, Kendra said, “it does always feel like it’s information that I need,” and Kimberly explained that “it just was an obvious message.”

All participants’ experiences of spontaneous knowing started by receiving some information. This information had many interpretations depending on the personal experience; however, regardless of contrasting examples and details, the nature of the message was easily identified from the perspective of the whole. Figure 4 shows the emerging themes that were the original starting point for coding. Once I had a sense of what the messages meant to the participants, I could refine these categories. I noted several accounts related to danger, injury, or death during this initial pass. The information was often incomplete, unclear, or left the person perplexed until they had deciphered the message, like when Herman started having “nervous and broody spells” overshadowed by the knowledge that they “were going to have a close call while

driving.” Despite being clear that he was receiving a message, he was unsure of the details and said, “I didn’t know if I would do the right thing.” Herman’s experience represents one example of an experience that warned the recipient of danger.

Figure 4

Emerging Themes



Conversely, Margery had a spontaneous knowing experience where she knew “that there was something terribly wrong.” The information included insight into who was in danger but did not include any information about a location or what might be wrong. In this instance, Margery had no action to take. I classified this experience as a notification of danger. In both cases, the information was received spontaneously and was informative, even if not complete. While most spontaneous knowing experiences that communicated danger were informative, about one-third of all instructive experiences included an element of danger. Thelma had one such experience

and shared, “I jumped out of the car, ran to him, and pulled him off the track just as the train went by. I saved his life.” This experience required her to take action. The message was more an impetus to action than an instance of newfound awareness of something that may need attention.

Two subcategories were associated with spontaneous knowing within this theme of receiving information. Two types of messages are acquired, those that are informative and those that are instructive. The following section presents the findings for both types of information and explains how the emerging themes, such as danger, were refined and clarified through analysis and the continued dialogue with the participants’ texts.

Informative

Informative messages gravitated to information that was interesting, convenient, beneficial, raised awareness, or less frequently required action. Informative spontaneous knowing messages ranged from mundane to impactful.

During analysis, several sub-themes emerged about the type of information participants received. In following sections, I explain how the experiences were grouped and eventually reduced to the two primary types of information included in spontaneous knowing experiences. Initially, I identified 15 emerging themes related to the information participants received. As the emerging themes for informative experiences converged, I reduced the themes to five main sub-themes. The informative experiences were grouped into the sub-themes of mundane, notify, personal benefit, take action, and warning.

Mundane

Mundane experiences included everyday experiences that the participant identified as standing out as a little different from other day-to-day experiences. Participants often dismissed or overlooked the mundane experiences because of their ordinary nature. When Kora shared an

experience like this, she said, “it just came to me like, oh, it’s going to be—and then it was, and I went, oh, it was ... that’s cool. But there really isn’t anything special around it.” The archived records indicate one such mundane experience. Cameron reported frequently mistaking the identity of a person walking toward him, only to “meet the person I thought I saw at first, a short distance further on.”

All mundane experiences came from informative messages and, although infrequently reported, accounted for nearly 10% of the total data. Many of these experiences appeared as a cursory inclusion or afterthought during interviews. Kendra illustrates the resistance to include these experiences in the realm of spontaneous knowing when she said,

I don’t know if that really counts, but I know that sort of stuff, little things that make my life a little more convenient ... it’s usually situational things like this is something you’re going to need tomorrow or a week from now.

Notify

Nearly 20% of all informative spontaneous knowing alerted the participant about something that they would not have otherwise known at that time. The information in this category ranged from the mundane to the significant. While attending a fundraiser and listening to a live band she had never heard before, Analise just “knew what the next song was going to be.” Presumably, there was no reason for her to know, and the information did not seem very important, yet it was a moment where she had an experience of instantly knowing the next song the band would play. Stacy had a different experience and said, “I got this creepy feeling that somebody had—close to me had died.”

Take Action

Occasionally, informative spontaneous knowing required the percipient to take action. These instances are rare because usually, with informative spontaneous knowing, there was little proactive action to take. When it did occur, the direct action was to share that knowledge with

another person. The data suggests that the reason for telling another person was to make them aware of something (notify) or to ease anxiety and bring comfort to that person. One day, Hilda “felt the shadow of Death over me [her],” and she “just had to tell her [my oldest daughter], that either her father or I was going to die soon.” In the archived data, there was a story of a boy convinced that he would be going to his grandpa’s house that day. Despite the grandfather living more than 350 miles away, the boy was adamant. Newton explained that “the mother chided her son, but he persisted” less than an hour later, the family received word that the grandfather was in an accident, and “they immediately made the trip.”

Personal Benefit

One interesting finding was the spontaneous knowledge about something that benefits the experiencer. During the analysis, I identified three of these experiences and coded them as an outcome. As the conversation with the data continued, I revealed more about this category.

Ramon shared, “I woke up from a sound sleep with an unusual sounding name constantly going through my brain ... like a broken record.” While Ramon was not familiar with the name repeated in his head, he was aware that the name was on his list of sales leads. When he did call that lead, he made a sale. Another example of personal benefit because of spontaneous information was Melanie. When she was 10, she visited a museum, “and I just, like, all of a sudden just knew I was gonna win, so put my name in the bowl.”

The personal benefit was markedly different from the other experiences and relatively infrequent. I became curious and began to investigate where the differences may have occurred. The differences only became apparent during the final steps of analysis. I explain why this category was unique later in this chapter.

Warning

The majority (47%) of informative spontaneous knowing was interpreted or understood as a warning. The warnings varied in intensity, emotion, or impact. Rarely was a person directed to take action. When the interpretation was to take action, it centered around communicating the information to another person. The action taken under instructional information was different. These experiences illustrate the varied subjective responses to a similar type of information.

Many people reported having a corporeal or embodied experience in conjunction with the spontaneous knowing. Louise had a physical experience and said, "I began to feel the familiar hunch of something being wrong, tingling fingertips, chills, hair raising, and butterflies in my stomach." Hilda's experience was much more emotional; she explained, "I had a strange feeling of coming disaster to the point where I was terribly depressed and wept continually for no apparent reason." Donna "had a unique temporal experience." She said, "I 'knew' my father was in danger of death on Tuesday." While there was no specific action to take, Donna paid attention to the information and asked her parents if they had planned any trips. In Kendra's experience, the space immediately closed in on her as she described the moment of spontaneous knowing as "instantly walking into a dark cloud."

Instructive

The other type of information received during spontaneous knowing experiences was instructive. Instructive messages appeared in the data 20% of the time. While less frequent, these messages are more urgent and compel the percipient to act on the message. During analysis, several initial themes of instructive information emerged. The messages were related to connecting people, dangerous situations, preparing, and purpose. There was evidence that when the percipient received spontaneous messages in both informative and instructive categories, they

had involuntary reactions. However, these instructional-type experiences seem to be accompanied by more intense responses than those found in the informative category. Blake explained his experience as being a thought “so forceful that I had to go.”

Sometimes the intensity and impelling nature of the experience took over, and there was no indication of why they took such immediate action. Diotima suddenly knew she needed to be at her friend’s house. She “felt the urgency to go there without an understanding WHY.” For Craig, he explained his spontaneous knowing experience as simply, “This is what you need to do.”

Personal Benefit

Similar to the findings with informative messages, one instance of personal benefit appeared as instructional information. While at a casino, Melanie was drawn to a particular game. When asked about her experience in that instance, she said, “it’s a feeling a p— in my chest. It’s a pull in my chest. The limited number of experiences in this category was curious, and it prompted a deeper investigation into this particular category of instructional information. This deeper investigation led me to find negative cases.

Theme 2: Interruptive/Intrusive

The second essential theme was intrusiveness. The experience of spontaneous knowing was sudden and abrupt. The information seems to materialize without an antecedent or a logical reason. The participants described this experience as intrusive, interruptive, and sudden. Kora said, “it’s almost like an intrusive thought, but a factual, intrusive thought.” This knowledge invades their thoughts and conscious awareness with a surprising and unusual intensity. As Craig tried to capture the experience in words, he said, “It felt like an interruption.” As he processed

the information and what it meant for him, he said, “it’s almost like I barely even paid attention to what the sermon was. The content of it was irrelevant, um, for that feeling.”

Participants’ stories revealed that there might be a temporal reaction in the moment of the spontaneous knowing experience. Stacy offers a compelling illustration of the temporal reaction; she says, “I just stopped what I was doing. I was surfing the internet. I couldn’t sleep. I was burning the midnight oil, if you will. And just stopped—everything stopped.” Kimberly explained how her spontaneous knowing came as she went about her day. She recalled, “I was putting a jug of milk into the refrigerator, and as I was doing that, I kind of had this, all I can say is like visual hallucination.”

Theme 3: Persistent

The knowledge that came to participants suddenly, interrupting their day, persists in a way that demands the percipient pay attention to it. Participants repeatedly used similar terms to describe this essential theme. They used terms like “a thought that would not go away” (Colleen), “it was a nagging kind of thing in the back of my head” (Kendra), “all day I was haunted by the fact” (Estella), and “a feeling came to me that I could not shake” (Wanda).

The message often persisted until the percipient understood or explained the feeling. Graham explained, “Those words kept repeating themselves in my mind throughout the day until by night I was a nervous wreck.” Later that night, Graham had learned of an accident that coincided with the knowledge received. Each theme has an element of intensity that sets these experiences apart from others. Jenny’s experience might be the best example of how a message can persist and the intensity that accompanies it. As she drove home, the onset of the information was quick; she said, “all of a sudden, I had the awful feeling that I had run over and killed a child.” The corporeal feeling associated with this knowledge was so strong that she checked her

car for any indication that she had hit something. When the feeling did not go away, she said, “I began to feel like a fugitive from justice, expecting at any moment to be arrested.” The feeling finally subsided as she read in the evening paper that a child had been struck by a car and killed in that very spot where the information suddenly invaded her consciousness.

Theme 4: Confidence

As participants shared their spontaneous knowing experiences, it was clear that they had a high level of confidence in the information imparted to them. The experience was much more than just a feeling or a hunch that something was true. Judd said, “I awakened with a feeling, or rather a definite knowledge that someone connected with me was dead.”

Participants use explicit language to explain their confidence in the information they get. They use words like distinct (Stacy), absolutely positive (Analise), and 100% confident (Kora). There was no question that the information from a spontaneous knowing experience was authentic and accurate. Two participants elaborated on their experience of confidence. Analise said, “I remember when I got it, I was a hundred percent absolutely positive, but it wasn’t even like—it was as though you could tell me your name and I would believe you when you told me your name.” Similarly, Kimberly said, “It was just a, knew it, like, I know right now my car is in the parking lot, you know, in the, um, in the driveway. Uh, I know right now I’ve got bread dough in the kitchen.”

In all experiences, the participants trusted and believed the information to be true and accurate to the point that they took notice or action depending on the type of information they received. Rarely do participants have a moment of hesitation or second-guessing. Kora had such an experience, she said, “I was very confident with—the intrusive thought was confident, and then I second-guessed it, and then it really happened.” Kora’s experience of having confidence in

the information and then second-guessing it may have occurred as part of a cognitive or conscious awareness of the message, as it seems to be linked to becoming aware that she knew the information. Analise referred to this type of phenomenon as a result of the spontaneous knowing in her interview, saying, “there’s something to be said of knowing something, but then to realize that, you know, it, that, that knowing I know, because that was significant.

This unwavering confidence in the information was the essential theme that convinces the participant that they have this unusual knowledge and must heed the warning or take appropriate action. The high confidence in the information may result from the intensity of a spontaneous knowing experience. Without the confidence that the information each participant received was trustworthy, the phenomenon of spontaneous knowing may not be enough to convince the participant that it was anything other than a fleeting thought.

Theme 5: Validation

As expressed by my participants, spontaneous knowing suggests that confirmation or validation of the knowledge was consequential in identifying the experience as spontaneous knowing. When the participant can place their spontaneous knowing in the context of their reality, they recognize that their knowing experience was worthwhile. Estella offers a good example,

at midnight, as I was leaving I heard cries for help, and there next door, just as I had pictured it in my mind, were a woman and a man trapped upstairs, screaming for help, and no one to hear them.

Without validation, the knowledge may be ignored, dismissed, or otherwise go unacknowledged, which evaporates a connection to a spontaneous knowing phenomenon.

Colleen alluded to this when she said,

Just an observation of how it’s interesting that in this, in this instance, it would not have really been as poignant if it was just me having this feeling. Um, like I told you earlier, I

never would have known that anything actually was going on in the area. Um, if it hadn't involved somebody else.

The validation seems to contribute to how the participant interprets the experience significantly. Kora highlighted the impact of confirmation when she said, "it was kind of at that point relieving because it was like, oh, like maybe that anxiety and that fear wasn't just in my head."

Theme 6: Lasting Impression

The last theme revealed by the data was that of a lasting impression. The first indication of this theme was the frequency by which the participants referenced past events. Many of the participants interviewed discussed experiences from their youth. While timelines were not always specified and age was not collected, the inclusion criteria required participants to be between 25–65 years old; therefore, I identified any reference to childhood as 10 years ago. The data showed that 45% of the experiences from interviews and up to 74% of experiences from the archived data happened 10 or more years ago.

The bulk of experiences from the archives were undated and made determining the time between the event and the reporting difficult, which was a secondary indicator of the lasting impact. Some percipients identified a timeline such as "several years ago" (Ann) and "an experience I had 10 years ago" (Thelma). Others provided clues of time passing through the language they used, such as "I had taken a war job" (Betty) and "I was still a novice" (Ramon). To help evaluate the lasting effect, I reached out to the assistant director at the Rhine Research Center, to confirm when these archived submissions were collected. She confirmed that they started collecting these personal accounts around 1950. When combining the collection time with the dates the experiencers provided, many of which date back to the 1930s, I deduced that the event happened at least 10 years prior to them submitting the written account of the experience.

The Rhine Research Center assistant director corroborated this assessment in an email, saying, “In my experience, most reports occurred in the past, sometimes many years past” (D. McDaniel, personal communication, February 2, 2022).

A secondary indication of the lasting impression of these experiences was the uniqueness of the experience to the participant. These experiences were different from other experiences in their life. Helen “just could not imagine how such a thing could possibly happen, but it did”; the shock of such information coming true seemed to have a long-term impact. Other participants used language that supports lasting impression as an essential theme; for example, Digby said, “I remember very distinctly,” and Margery said, “it’s always remained with me.”

Finding the Negative Cases

The negative cases emerged through the continuous dialogue between the parts and the whole. Once I identified the essential themes, I returned to the experiences individually to validate the findings. At the same time, I looked for what was taken for granted in the experiences.

During this review, I perceived a few cases to have an antecedent (Table 2). The presence of an antecedent was a factor that Rhine (1978) considered when classifying experiences as intuitive. Rhine determined that spontaneous experiences with an antecedent were not intuitive experiences of the anomalous variety. Experiences with antecedents contained within the intuition literature are more cognitive than mystical. A closer inquiry into the cases with an antecedent revealed that the essential themes were present yet lacked the depth of the other cases.

Table 2*Experiences With Antecedents*

Data Source	Information Type	Information Category	Antecedent		Total
			No	Yes	
Interview	inform	warning	3	1	4
		take action	1	1	2
		notify	3	0	3
		personal benefit	0	3	3
		mundane	1	2	3
	instruct	take action	5	1	6
		personal benefit	0	1	1
Interview Total			13	9	22
Rhine Archives	inform	warning	13	0	13
		take action	1	0	1
		notify	5	0	5
		personal benefit	0	1	1
		mundane	0	1	1
	instruct	take action	2	0	2
Rhine Archives Total			21	2	23
Grand Total			34	11	45

As I investigated these experiences, I was able to decipher some areas more easily that I had questioned or coded as having the qualities of the theme that did not have overwhelming evidence. In my original review, I surmised that the cursory mention of the theme, such as confidence, was, upon further reflection and analysis, determined to be underwhelming and could be attributed to something in the environment or culture or another form of intuitive knowing as described in the literature. One example was when Melanie discussed her experience of winning roulette four times in a row. I wanted to confirm that this experience was better than chance, so I reviewed Melanie's experience against the probability statistics on a single number in roulette winning. The standard odds for hitting a single number in roulette is roughly 2.6%. However, she mentioned playing eight numbers at a time, which significantly increased her odds of winning to just over 21%. With each subsequent spin, the odds of selecting the winning

number reduce exponentially. Still, selecting the winning number four times in a row has a probability of 0.19%, which was determined to be better than chance. Through this rudimentary analysis of the probability of winning roulette four times in a row, I concluded that this experience was one of spontaneous knowing with moderate confidence. Melanie stated, "I just knew it was going to be one of those numbers, but I didn't know exactly which one," indicating that the information was incomplete. Rhine (1978) surmised that incomplete intuitive experiences lacked strong emotion or conviction in the information. Furthermore, Rhine (1953/2018) established that intuitive psi experiences "had no antecedent, sensory or rational, the subject accepting them without any conscious reason" (p. 58). When reviewing Melanie's experience alongside the criteria established by Rhine surrounding antecedents, I noticed several areas that could be perceived as antecedents as defined by Rhine.

The first potential antecedent was her reference to placing the bet on the number that "felt warm." Melanie said, "I would just scan across it. And when my hand got warm, that's when I would put down a chip." This corporeal experience was evidence that a sensory process was a contributing factor in this experience. Secondly, there was some expectation of winning, as I believe most people who place a roulette bet expect to win to some degree. As I contemplated and wrote about these influences, I remembered Melanie explaining that this roulette table was on a cruise ship, and "people started gathering around. People were putting their chips on my chips." I began to wonder if the environment could be a third potential antecedent.

After considering the high probability that this experience had an antecedent and may not meet the criteria for mystical intuition as defined by this study, I re-reviewed the transcript, paying attention to the words and evaluating them against the essential themes identified in the study. By entering the hermeneutic circle with this experience and new knowledge, and the

identified themes for this phenomenon, I could see the details contained within the transcript more clearly. The first thing I noticed was the mediocre confidence. Unlike other participants, the language surrounding her confidence seemed more directed to the environment and less about the information, such as when she said, “almost like, um, uh, confident energy that I was feeling.” Furthermore, her word choice indicated that the confidence in winning various drawings, sweepstakes, and casino games was always predicated on being aware of the opportunity ahead of time, for instance, “when I had heard about it, I had said, um, if you enter me in this, I’m pretty sure I’m going to win.”

Awareness of a situation alone was not enough to disqualify the experience from the theme, nor does it constitute an antecedent. What stood out to me during this evaluation was how each experience Melanie shared had an element of knowing about an opportunity ahead of time and having confidence that it would fall in her favor.

As I continued to review the data, taking each experience through the criteria for antecedent and then applying the essential themes to each instance, I found a few more experiences lacking at least one of the essential themes. In many cases, the remaining themes were present but lacked the intensity of some of the other experiences. This finding suggests that the reported experiences were examples of spontaneous knowing, but not mystical intuition.

I found 11 experiences like this out of 45, accounting for 24% of all reviewed experiences. While these experiences did not meet the essential themes identified in the analysis, they provided a negative case—the negative cases in this study helped reinforce the findings.

Chapter Summary

Throughout the themes, there was a sense of intensity, a powerful force that sets the experience of spontaneous knowing apart from the typical thoughts and ideas that come and

frequently go throughout the day. Some of these thoughts may be intrusive, but they lack persistence. Perhaps they are persistent but lack the characteristics of the type of information that these experiences report. The experience of spontaneous knowing is an experience that informs or instructs, the information is intrusive and persistent, and there is a confidence in the information that is beyond doubt. These experiences are often confirmed or validated in a short period, and they are not easily forgotten or dismissed. Chapter 5 encompasses the interpretations and implications of the findings, how findings relate to the literature, the limitations of the study, and recommendations for future research.

CHAPTER 5: INTERPRETATIONS AND DISCUSSION

This study revealed mystical intuition as an everlasting experience of spontaneous information acquisition that is intrusive, persistent, and true beyond doubt. This hermeneutic phenomenology study aimed to explore the experience of mystical intuition and unravel the language used to convey the experience to others. Chapter 4 revealed the research findings and introduced the six themes that inform our understanding of the lived experience of mystical intuition: information, interruption, persistence, confidence, validation, and lasting impression.

This chapter starts with interpretations of the six themes, a discussion of the findings, and the transpersonal aspects of the experience. Next follows a discussion surrounding the language used in describing mystical intuition experiences. The chapter concludes with notable findings, significance, limitations, and recommendations for future research.

Interpretation of Findings

Theme 1: Acquisition of Information

With all mystical intuition experiences in this study, information acquisition was ubiquitous. The information suddenly appeared in the participant's consciousness without a clue as to how it got there. The sudden knowledge, whether informative or instructional, was vital to the experience and indicated the starting point of the phenomenon. Without a sudden acquisition of information, there was no mystical intuition phenomenon.

The acquired knowledge was either informative or instructive. Informative knowledge was primarily a catalyst for increased awareness of danger, injury, or death. Informative messages were regularly presented with hazy, incomplete, or easily misinterpreted details, leading to a state of increased vigilance and bewilderment. Participants repeatedly expressed not knowing what to do with or about the information.

Conversely, instructional information was much clearer regarding what to do, even when they had no idea why. What these instances lacked in detail and clarity about specifics was replaced with a compelling sense to act. The instructional knowledge rarely left enough time for the participant to contemplate the details of the information.

There are multiple interpretations of the word intuition and the corresponding phenomenon throughout the intuition literature. Furthermore, the aspects of the acquired information are habitually overlooked or taken for granted. Rhine (1953/2018) analyzed spontaneous case data by the “forms the experiences more commonly took” (p. 54) and “characterized [the intuitive group] by limitation of content” (p. 58). There was no discussion about the acquired information beyond the specificity of the content contained in the information. Rhine’s study did provide detailed experiences, so a thorough reader may be able to decipher whether the information was informative or instructive and whether those experiences included similar subthemes found in this study. Comparably, Dörfler and Stierand (2016) reviewed the information content of the acquired knowledge, finding the information to be a holistic understanding of the scenario devoid of specific details. These examples represent the bulk of the intuition literature and illustrate how studies have neglected additional aspects of suddenly acquired knowledge.

Grasping the acquired information wholly rather than evaluating a single piece elucidates nuances that reveal a more comprehensive picture of the experience in its entirety. Assessing the identified subthemes, specific language used by participants, and the validated outcome, there is some evidence to suggest that poor interpretation rather than an incomplete delivery of the information may account for the lack of specific details.

Participants were unprepared for the spontaneous influx of information and may have missed some details or prematurely jumped to conclusions or interpreted the information in the context of their environment at the moment of transmission. Consider Louise's experience from this perspective. Louise was engaged in a conversation with an acquaintance about Christmas presents when the acquaintance mentioned a bike she had bought for her son. Louise immediately knew that the boy would die and linked the death to the bike. Louise thought about the information during her drive home and wondered why she thought the son would die on the bike. In this moment of questioning, she had more clarity about the details and realized the cause of death would be related to his heart. The boy drowned in a swimming pool during practice. An autopsy following the boy's death revealed that he had a heart murmur and became unconscious in the water due to a brain hemorrhage. Researchers rarely consider or discuss the percipient's interpretation of the experience throughout the literature.

Participants and archived accounts revealed that the lived experience always starts with sudden knowledge acquisition. That information can be informative and calls the individual's attention toward something as if to say, "Pay attention." Alternatively, that information could be instructional and push a person to act. The information is the fundamental element that defines the phenomenon of spontaneous knowing. The following themes address the specific attributes of the lived experience.

Theme 2: Intrusive

The experience of mystical intuition is sudden, abrupt, and interrupts the percipient's current activity. The information seems to materialize without an antecedent, such as a decision to make or a problem to solve. Furthermore, there is no identifiable reason for the percipient to know the specific information they receive. The intrusiveness of the information catches the

participant off guard and surprises them. This theme aligns with James' observation that mystical experiences are transient and short-term since the interruption is sudden and abrupt.

In reviewing the subjective experiences as a whole, there was a subtle temporal and spatial suspension at the moment of transmission. Participants consistently described the information as so intrusive that they disengaged from their current activity. The information demanded attention and combined with persistence to transport the individual into a space and time where only the acquired information was pertinent; all else around them seemed to dissipate, if only for that instant. The essence buried within the intensity of the interruption was elusive yet pervasive enough to consider in future studies.

All intuition experiences contain a sudden awareness of knowledge. The intrusive transmission is the unique characteristic that sets mystical intuition experiences apart from other intuitive experiences. In the realm of mystical intuition, there are no judgments to make (Dörfler & Stierand, 2016), no expertise to obtain (Meziani & Cabantous, 2020), no ah-ha moment to recognize (Pétervári et al., 2016, p. 4); there is no antecedent at all. The next theme, persistence, is another attribute rarely found in other forms of intuition experience.

Theme 3: Persistence

The abrupt input of information in a mystical intuition experience lingers and persists in the percipient's consciousness. The persistent and insistent qualities that accompany the newly acquired information invades the personal space of the percipient and increases the intensity of the experience. The theme of persistence predominantly manifests in a corporeal and spatial way.

Immediately following the acquisition of knowledge, more than half of all percipients reported overwhelming feelings, emotions, or physical sensations that pestered their consciousness, preventing the information from slipping in priority. The intensity surrounding

the knowledge started and remained high or increased over time. On several occasions, percipients became consumed by the message as it closed in around them. Once the message was confirmed, signaling that the threat, warning, or knowing had run its course, the percipient felt liberated from the message and reclaimed their personal perception of space and self.

The research available lacks studies on mystical intuition experiences. In reviewing the literature on spiritual experiences and intuition experiences, the characteristics associated with intuition were an inadequate comparison to this persistence theme. The closest representative finding in the literature discussed the importance of following intuitions (Akinci & Sadler-Smith, 2020; Dörfler & Stierand, 2016). There was no evidence that previous studies on intuition experiences had identified the persistent or nagging sense evident in participants' experiences in this study. I suspect the lack of inquiries into the lived experience has left a void in understanding the depths of the subjective experience of any intuition experience. One aspect of the mystical intuition experience repeatedly found in the literature was confidence.

Theme 4: Confidence

Confidence is an undeniable theme and is so universal throughout the literature that it may be the only feature with widespread agreement. Researchers found that confidence in the information is a primary contributor in identifying the experience of any intuition phenomenon (Dörfler & Ackermann, 2012; Dörfler & Stierand, 2016; Rhine, 1953/2018; Shirley & Langan-Fox, 1996; Vaughan, 1979). Across the literature, researchers wonder why percipients express such confidence in this sudden information “whilst having no apparent reasons for this feeling in terms of evidence” (Dörfler & Stierand, 2016, p. 3).

In every experience, participants had a firm conviction that the information was factual. The conviction participants expressed was palpable. Even if the information was hazy or lacked

detail, the participant was absolutely convinced that the information they received was accurate and trustworthy. The language participants used was powerful and clear/precise. A couple of participants compared the absolute of their knowledge to other material facts, thereby illustrating the strength of the conviction.

Although confidence was prevalent, the data revealed a couple of instances where the participant second-guessed or questioned the information they received. Despite participants' conviction and trust in the information, the awareness of knowing they knew something that defied explanation (Analise) allowed the ego to analyze the experience. It seems that at the moment the information was identified by the ego, the percipient second-guessed or challenged the information. Each instance revealed second-guessing to be a short-lived moment of doubt, and the absolute confidence in the information prevailed.

Theme 5: Validation

In all instances, the spontaneous knowing resulted in some validation of the experience and message. The validation component was a crucial element that grounded the anomalous experience within the context of the participant's reality. Once the acquired information was confirmed, the participant could understand the ineffable experience. Participants used validation as the primary way to differentiate this knowing experience from fantasy or imagination. There was some evidence that participants maintained a fervent conviction in the truth and validity of their experiences even without external confirmation or approval. I address this further in the discussion section.

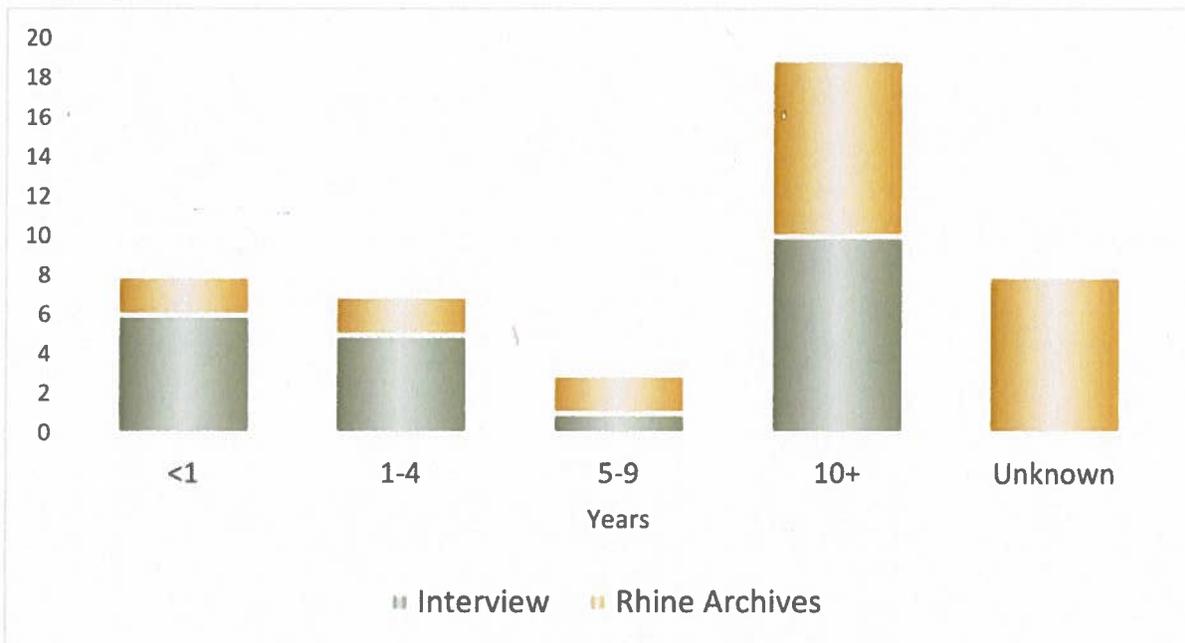
Theme 6: Lasting Impression

The final theme is a lasting impression. One distinctive feature of mystical intuition was the lasting impression left on those who experience it. Participants shared experiences from 5,

10, 20, or more years ago, indicating that something about the experience was significant enough to take root in their long-term memory in a way that daily activities and cognitive intuitions usually do not (see Figure 5).

Figure 5

Lasting Impression



The participants remember minute details about where they were and what they were doing at that moment of sudden knowing. Repeatedly, participants communicated their experiences with unmistakable specificity that was easy to understand. Intensity, disruption, and confidence all seem to play a role in making the experience impressionable. There was insufficient evidence to pinpoint which specific component made the experience have such a lasting impact. What is clear from the data is that the experience stood out and had such convincing features that it made a lasting impression.

The lasting impression theme is consistent with findings throughout the research about spiritual or mystical experiences (Wahbeh et al., 2018). Conversely, the bulk of studies on

intuition that tend to focus on intuition born from expertise (Gilhooly, 2016; Leach & Weick, 2018; Shirley & Langan-Fox, 1996) or adept problem-solving skills (Pétervári et al., 2016; Robinson et al., 2017; Shirley & Langan-Fox, 1996) rather than mystical foundations do not demonstrate evidence for a long-term effect from those types of intuition experiences.

The data denotes this experience as one of importance, one that secures its space in a percipient's long-term memory. The experience is not just another moment in the percipients' lives; it ends up being an experience that resides alongside some of the most important events of their lives. This finding reflects a notion from William James (1917), who said, "Mystical states, strictly so-called, are never merely interruptive. Some memory of their content always remains, and a profound sense of their importance" (p. 3).

Discussion

Language

The findings of this study, specifically the negative cases, support the notion that there are different types of spontaneous knowing comprised of different attributes, details, and purposes. There are enough disparate definitions throughout the literature to warrant a realignment of the word intuition and separate the types to improve our understanding and facilitate communication of this variety of knowledge.

The findings from this study show that mystical intuition has strong characteristics and factors not identified in other forms of intuition, such as judgment (Dörfler & Stierand, 2016; Eskinazi & Giannopulu, 2021), decision-making (Dane, 2020; Dane & Pratt, 2009; Julmi, 2019), creative problem solving (Dane, 2020; Dollinger et al., 2004; Gilhooly, 2016), and expertise (Moxley et al., 2012; Sinclair, 2010). The key markers that set mystical intuition apart from other intuition phenomena are the intrusive, persistent, and long-lasting nature of the experience.

While intuition in various factions will have similar qualities, any genuinely ineffable intuition or part of the cosmological realm will lack an antecedent and include at least five identified essential themes (barring only validation).

Compelling

Over the years, researchers have found spontaneous intuition cases to include a compelling sense that is fundamental to the experience (Akinci & Sadler-Smith, 2020; Dörfler & Stierand, 2016; Rhine, 1953/2018; Vaughan, 1979). Likewise, I found a similar compelling aspect to the experience; however, it was not an essential theme. The urge to act was almost exclusively constrained to the instructional information percipients received. Most experiences were informative and required no action. Instead, participants reported a sense of intrusion and persistence that made them pay attention to the information more so than compelling them into action.

Geographical Proximity

Personal accounts of a mystical intuition experience repeatedly include details about where they were and what they were doing. In reviewing the data, it became evident that each experience had a spatial theme related to geography. The location associated with participants' experiences was not an essential theme of the lived experience; however, the consistent reference to location related to the experience was undeniable.

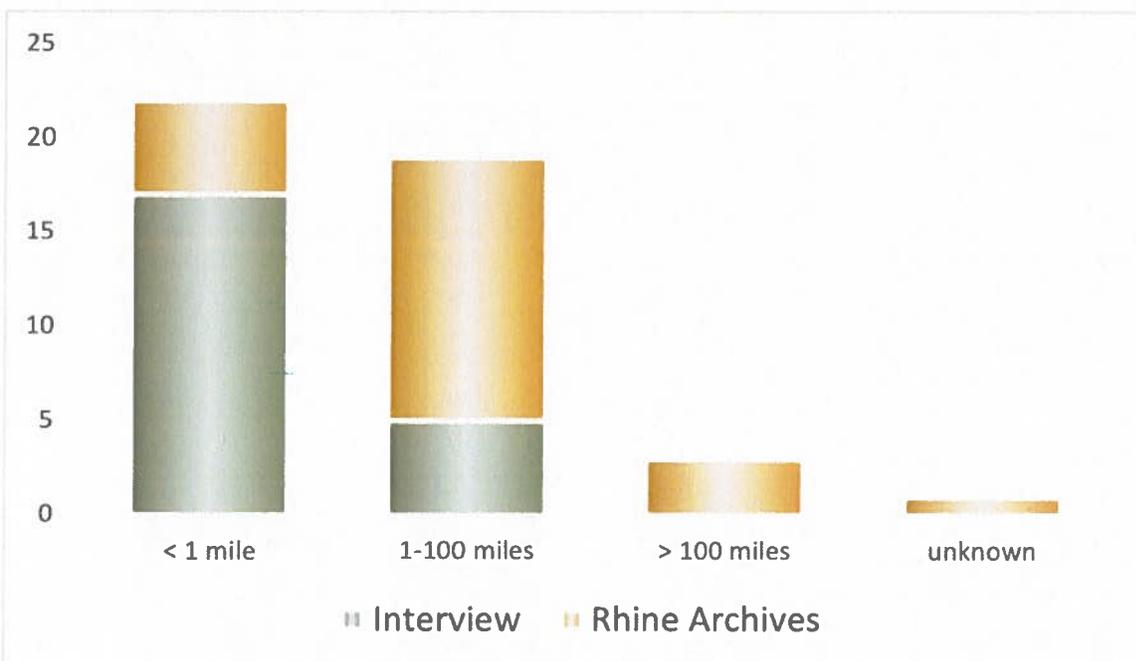
The language participants used in describing their experiences determined how geographical locations were categorized. The language used in these personal accounts is too general to identify proximity precisely. The participants often spoke of being in the house or down the street. I classified these types of experiences as having proximity of less than one mile. When participants used language that specified or implied a distance beyond their immediate

vicinity, I grouped them into a broad span of 1–100 miles. Only cases that indicated that the knowledge was related to something beyond 100 miles were annotated and captured in this category.

Looking at geographical correlations between the participant's location and the confirmed location of their information (Figure 6), I found that more than 90% of experiences were related to information that occurred within 100 miles of the experiencer's location. The proximity details found in the interview data leaned toward the immediate vicinity less than 1 mile away (< 1 mile = 17; 1–100 miles = 5; >100 = 0). The archives, however, told an opposite story with the majority of these cases linking to 1–100 miles (< 1 mile = 5; 1–100 miles = 14; >100 = 3). Experiences beyond 100 miles were found only in the archived data.

Figure 6

Geographical Distance



The archived literature comes from the post-World War II era. In the early 1960s, Rhine (1961) rarely found distances reported in spontaneous cases she reviewed; however, when

included, distances were more likely to be farther away than nearby. Findings related to geographical distances for archived data corresponded with Rhine's findings. I expected to find similarities between the studies, considering these findings emerged from the same data. However, there was an unexpected finding among the geographic distances within the interview data. Interviewed participants reported distances that reflected the complete opposite finding from the archived data.

Rhine (1961) speculated that greater distances included in spontaneous case reports were due to an engendered sense of separation that develops in people separated from others. She offered an alternative consideration that "long-distant experiences are more spectacular and hence more likely to be reported" (Rhine, 1961, p. 89). Rhine's data was from the mid-20th century, whereas the data I collected was more than 70 years later. The glaring difference in findings was unexpected and necessitated required further inquiry. Rhine's observation that the distance from others may have contributed to reports of long-distance experiences is juxtaposed to the sense of separation in current culture when considering technological advancements such as social media and smartphones. I suspect Rhine's assessment regarding separation was correct, and as the feelings of separation dissipated, the reports inevitably were less affected by the sense of separation.

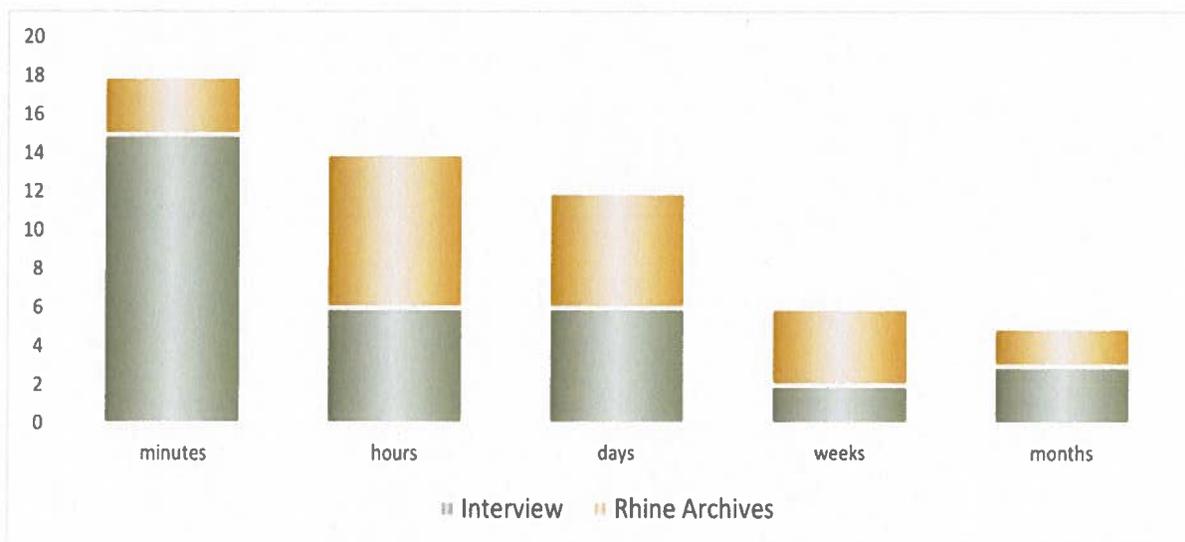
Validation—Essential or Critical?

The data showed that the validation theme might not be an essential element of the phenomenon. Many participants divulged unvalidated experiences that mimicked the characteristics of the validated experiences. The participants maintained that the unverified experiences were precisely the same, except they were aware of any outcome that matched their knowing. When participants shared these experiences with friends or family, they were not taken

seriously (Donna, Kendra). Still, participants' confidence in the unverified information was consistent with their confidence in the validated experiences.

In determining validation to be an essential theme, I reviewed the data from both the parts and the whole. When viewing the individual experiences, it was clear that having either the knowledge or the experience validated was essential for participants' future experiences or to reinforce their sanity. However, from the perspective of the whole, participants believed that the experience held some significance, even without a clear understanding of the information. Furthermore, participants expressed confidence in a manner that supported Woodard's (2012) findings that these types of experiences are "self-validating and self-evident, and there was no need to prove it to others" (p. 121).

To explore the necessity of validation as an essential theme, I reviewed the details surrounding geographic spatial elements and temporal elements (space and time) in conjunction with the prospect of validating the acquired information. Nearly a quarter of all experiences studied were verified more than a week after the information acquisition, while approximately half of the experiences occurred more than one mile away (Figure 7). This data suggests the plausibility that the information may be accurate, but the details of the information unfolded beyond the space and time perspectives of the percipient.

Figure 7*Time to Validation*

To evaluate the tenability of this supposition, these experiences should be considered from a different perspective. Jenny experienced a sudden and overwhelming sense that she had struck and killed a child with her car. Kora had a vivid dream of a helicopter crash. Suppose neither Jenny nor Kora had seen the news reports that confirmed their sense of knowing. Similarly, Colleen followed instructions to stay put and shared her knowledge with a friend. For Colleen, the act of sharing the information with a friend was the only reason she learned of the high-speed chase in her area.

Under the materialist paradigm, it is easy to perceive that the incidents reported in the news were actual events that happened regardless of whether the percipient knew they had transpired/occurred. This perspective suggests a possible causal relationship between the actual event and the spontaneously acquired information. While on the surface, these experiences

appear ineffable and unfounded, upon closer inspection, there is evidence that these experiences may be more valuable than we think.

The validation piece is a valuable component for grounding the experience in the lifeworld of the percipient. However, I submit that the validation piece is not required to determine the efficacy of a mystical intuition experience. Instead, this phenomenon of information acquisition remains unexplored to the depths that can answer the questions of how and why.

Secrecy and Isolation

Historically, research has shown that individuals are hesitant to share these experiences (Hinton, 2014; Woodard, 2012) because of the stigma and the risk of steep consequences such as being institutionalized. Many participants used language that reinforced the prevalence of this stigma, such as crazy, insane, straitjacket, dismissive, and ashamed. Kendra said, “I feel like people, if I were to tell them, they wouldn’t believe me. So, I just don’t usually talk about it much. Kind of nice to talk about it for once.”

Consistent with the literature, participants shared that disclosure of these experiences to parents or other adults during their youth was met with disdain. In varying ways, participants reported that their experiences were dismissed as coincidence or a figment of their imagination, thereby minimizing their experiences. This type of response from trusted adults in a young person’s life reinforces the barrier (White, 1992) that keeps these experiences suppressed. As a result, participants were concerned about sharing their experiences, opting to either keep it to themselves or share only with those they trust to honor their experience. Keeping this experience a secret resulted in at least one participant expressing a feeling of isolation while suffering in silence.

Pathologization

Western civilization's understanding of the human condition remains restricted. Despite evidence that anomalous experiences are "not necessarily, and often infrequently, markers of psychopathology" (Cardena et al., 2017, p. 10), continued pathologization of individuals with anomalous experiences perpetuates fears that people or society may consider percipients mentally unstable. Furthermore, keeping these experiences taboo thwarts the opportunity to demystify these experiences. I hope this study's findings will help dissolve stereotypes and stigmas related to anomalous experiences and inform professionals when updating criteria used in mental health pathologization (Woodard, 2012, p. 78).

The dichotomy between the percipient's conviction to the validity of the information juxtaposed by the societal and familial response increased isolation and secrecy among participants. Kimberly offered a clear example when she said,

I think that we all, um, I believe that almost everybody has experiences of some kind that they can't explain, and that the unfortunate thing is that in our culture, um, we sit alone with them because we don't want to look crazy ...

This view speaks to the continued need to explore and understand anomalous experiences from the subjective perspective of the percipient. Rather than trying to make these fit into the currently accepted paradigm, it is time to understand these experiences in the context of our daily lives.

Dörfler and Stierand (2016) identified a need and advocated for increasing the awareness of intuition. They postulated that tapping into personal intuition (in a cognitive sense) can be fostered through journaling, sharing the experience with others, and building a supportive environment that accepts intuitive information. While Dörfler and Stierand studied intuition from the perspective of increasing business acumen, their findings apply to all forms of intuition. Building a supportive environment has been ostensibly challenging, given the deeply rooted taboos and societal response to such anomalous experiences. Still, there are signs that this

perception is starting to change. Despite resistance to speak openly about her experiences, Kora explained, “any time that I have really shared that story, other people have opened up to me about their similar stories. Um, and I think it has really kind of opened some communication pathways.” It is unclear what actions may improve the public perception of this phenomenon; however, more research in this area will inform our understanding and illuminate ways to dissuade the public perception from classifying these experiences as anomalous.

Transpersonal

The hermeneutic phenomenological method set the foundation for exploring mystical intuition from numerous perspectives. I started my exploration through the lens of the four existentials: corporeality, temporality, spatiality, and relationality. Throughout the analysis, it was clear that aspects of the mystical intuition experience transcended the physical lifeworld into the transpersonal realm.

The transpersonal realm lies beyond our understanding of space and time, which defines the parameters of our experience every day: the three dimensions of objects that define our space within a one-directional timeline that is perpetually in the present, with a conscious awareness of our past (Neppe & Close, 2015). The future, considered as part of the four dimensions (time), is a mystery but not entirely unknown for us. Natural scientific principles and our daily lived experiences have shown us that a future does exist, even when we cannot be sure of the source.

Transpersonal experiences reach beyond the boundaries established by modern science and allow consciousness “into realms and dimensions that the Western industrial culture does not even consider to be “real” (Grof, 2016, p. 25). The ineffable contents of these experiences do not easily fall within scientific explanation. Adding the transpersonal lens to my analytical review of the data, several participants noted some interesting transpersonal observations.

The unstructured interview design allowed for an open dialogue about the experience led primarily by the participant. During many of the discussions, participants used language that revealed ethereal qualities of their experience and implied that their experience transcended the established scientific beliefs about what is possible. Participants spoke of universal connections and transcending space and time.

Universal Connections

Through this mystical intuition experience, several participants had an increased sense of connection beyond their current lifeworld. Stephanie shared that everything stopped at the moment she received the information, adding,

Like I feel as big as the ether right now, I feel as big as the rain and the stars and the ether itself, I feel as small as like a little ant too, I had a really feel—, I had a really weird feeling that I was hugging the whole earth. It was such a strange, um, feeling of intensity.

Analise grappled with finding the words to express her connection to the essence “of source of being or whatever.” Kimberly described her transcending experience by saying, “it felt like there was something significant moving in some kind of spiritual realm right outside of my grasp.” Similarly, Kendra said, “It felt like there was something else controlling it.” All of these examples illustrate a type of transcendence from everyday experiences.

Transcend Space and Time

Before discussing this section, it may be helpful to understand space and time as I use them in this section. The human lifeworld’s well-known and broadly accepted concept is based on the materialist ontology and has four dimensions: three spatial dimensions and one temporal dimension. Our understanding of spatial dimensions is specifically related to matter with the three dimensions of height, width, and depth. The dimension of time appears linear and chronological.

Neppe and Close (2015) reported they had “mathematically proved the existence of nine spinning dimensions” (p. 104). An in-depth explanation of this concept is beyond the scope of this study; suffice it to say that this is evidence that there are more dimensions than the four we currently consider. The spatial dimension beyond the three associated with matter is known as “higher dimensions” (Frecka, 2012; Neppe & Close, 2015). The temporal dimensions include Chronos, measured within linear and quantitative structures, and Kairos, which is qualitative and related to the sequence of events. In our current lifeworld, humans acknowledge Kairos time through statements like “right place, right time” and “all in due time,” representing a flow of existence beyond the confines of chronological time. The combined dimensions beyond the four in our immediate understanding are referred to in the literature as non-local reality (non-locality; Frecka, 2012; Neppe & Close, 2015; Walach, 2020). I invite the reader to consider these additional dimensions throughout this section, even if the concept seems difficult to accept or understand.

According to Neppe and Close (2015), the immediacy of events, such as spontaneous knowing, are “fundamental properties of non-local time” (p. 102). Furthermore, these immediate events “might appear discontinuous in lower dimensions and yet be connected in higher dimensions” (Neppe & Close, 2015, p. 107). Conceivably, this quantum concept may elucidate mystical intuition experiences as glimpses into the higher dimensions that briefly offer some specific information necessary for the moment. Perhaps this is what Diotima meant when she said, “So, you know, some stuff, some stuff is just on a different landing, on a different impulse.”

Significance

The shortage of published, peer-reviewed research on this topic has suppressed research of mystical intuition and related experiences; however, that is starting to change. A quick search

on ProQuest for “qualitative research AND parapsychology” revealed 619 articles since 1975. In reviewing the 45-year timespan from 1975 to 2020, most of these articles (59%) were published between 2010 and 2019. These results indicate the growing interest in this field, and this study can support the expansion of this research.

Findings in qualitative studies can inform future research by establishing protocols, themes, and techniques to inform the field and allow for greater exploration (Kruth, 2015). It is plausible that this study will contribute to the body of knowledge and support future research. In addition to these valuable contributions, this study has the potential to increase awareness and understanding of an enigmatic phenomenon. Discoveries about mystical intuition may assist studies on evolutionary impact (Broughton, 2010), human existence (Woodard, 2012), and human abilities (Wahbeh et al., 2018). Moreover, findings from this study may support current efforts to understand the meaning of spiritual experiences (Attig et al., 2011; Kennedy & Kanthamani, 1995; Renner & Ramalingam, 2016) and transcend stereotypes and stigmas related to anomalous experiences (Woodard, 2012).

Limitations

Some of the limitations of this study include the subjective data, unstructured data, and sample recruited. As a qualitative study, the data comprised self-reported accounts of personal experiences. Subjective experience includes inherent limitations such as inaccurate interpretations (Vaughan, 1979), recall bias (Vieten et al., 2018), or cultural influence (Gadamer, 1982). Any of the presented limitations to subjective data might contaminate the true essence of the lived experience as it is experienced rather than how it is remembered.

The unstructured interview may present another limitation during data collection. Without specific questions, as in a semi-structured design, each interview may result in

independent ideas that other participants may not corroborate. Uncorroborated ideas may limit the researcher's understanding of the entire scope or depth of the phenomenon.

The sample was recruited primarily through social media. This singular recruitment mode could have imposed unintentional limitations to the sample size and quality. Furthermore, this recruiting approach may have limited the sample to individuals predisposed to mystical experiences.

Future Research

With each study, our understanding of the human condition grows. New questions arise, and old ones persist. cursory findings from this study raised more questions than answers. As part of my temporal exploration of the data, I found evidence that a percipient's age at the time of the experience may be a factor in mystical intuition experiences. During the interviews, participants noted their age at the time of the experience. Nearly 40% of these experiences occurred before the participant was 25 years old. Future research around the age of these spontaneous knowing experiences may be incredibly insightful to how these experiences are perceived, interpreted, and understood.

As mentioned during the discussion, participants frequently mentioned their resistance to sharing their experiences with others. The tendency toward secrecy originated from others' responses when sharing mystical intuition experiences in their youth. Future research into the lived experience and aftermath of the mystical intuition experiences of children and young adults may help inform how best to overcome barriers to personal experiences shift public perception toward possibility rather than the myopic perspective that prevails, thereby ensuring children and young adults have more support in situations that may be confusing or unexplainable.

Additional areas of inquiry may be related to the spatial aspects of the phenomenon, especially as it relates to the geographical proximity of the information from the receiver. Similarly, studies about the temporal aspects of the experience relate to the length of time it takes for the intrusiveness and persistence to release the percipient and return to their daily lives. An investigation into the relational aspects of the experience may indicate trends about connections at various relational distances from family to strangers. Revelations found from each study may be combined to give a representative picture of the phenomenon and elucidate what these experiences mean, how to interpret them, and perhaps even how to apply these experiences practically.

More than half (60%) of collected experiences were related to someone the experiencer knows as part of their immediate circle or themselves, after which, there is a considerable reduction in connection with the second (22.22%) and third degree (17.78%) relationships. Informative experiences reveal a relatively equal number of occurrences for second and third degree relationships. In contrast, instructional experiences revealed no relational connection beyond the second degree.

Conclusion

The lived experience of mystical intuition is as universal as it is unique. I interpreted individual experiences through the lens of the participant. The individual experiences were placed within the context of another's horizon and iteratively reviewed. Distilling the cumulative data derived from the analysis revealed the phenomenon's essence.

The lived experience of mystical intuition begins with a distinctive acquisition of information that lacks an antecedent. Whether informative or instructive, the information is accompanied by an intensity that disrupts the percipient's regular activity and is interpreted as

true beyond any doubt. The information persists in a manner that requires the percipient to pay attention or act while keeping the experience at the forefront of consciousness for an extended period. The intrusive information frequently continues until the experience is validated. The experience is so notable that it leaves a lasting impression for decades.

This narrative interpretation summarizes the rich experiences gathered through unstructured interviews collected in 2021 and archived records collected between 1940 and 1980. Hermeneutic phenomenological analysis moved iteratively through the various spheres of data, interpretation, dialogue, reflection, the research question, and the essence of the whole experience. This detailed analysis process unearthed six themes (information, intrusiveness, persistence, confidence, validation, and lasting impression) that, when combined, represent the essence of a lived experience with mystical intuition.

The literature classifies various intuition experiences as ineffable. Some participants agreed with the literature and claimed to have trouble putting the experience into words. However, every participant I interviewed and every archived story I read revealed clear and descriptive language to explain each experience. The participants did not always grasp the meaning or the intent of the knowledge they acquired initially; however, during the original explication of the lived experience, participants did not struggle to find words to describe their experiences. The findings in this study conflicted with the widespread assertion that these experiences are difficult to explain. Based on researchers' preoccupation with understanding the content of the information, I propose that the information received is frequently ineffable rather than the experience itself.

Researchers have sought to understand the human condition for millennia, yet many aspects of our humanity remain a mystery. A growing body of knowledge reflects that continued

suppression and misunderstanding of mystical intuition and other experiences deemed anomalous harms human beings, especially children. Continued research into all varieties of anomalous experiences poses an excellent opportunity to advance our understanding of human existence. Inquiry into the lived experience of human phenomena serves to increase our understanding in a way that may have significant psychological benefits for humankind. Anomalous experiences need not remain mysterious, yet practical exploration requires opportunity and resources commensurate with efforts to decipher such a mystery.

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Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences

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ARTICLE

DISCOUNTING WOMEN: DOUBTING DOMESTIC VIOLENCE SURVIVORS' CREDIBILITY AND DISMISSING THEIR EXPERIENCES

DEBORAH EPSTEIN† & LISA A. GOODMAN††

In recent months, we've seen an unprecedented wave of testimonials about the serious harms women all too frequently endure. The #MeToo moment, the #WhyIStayed campaign, and the Larry Nassar sentencing hearings have raised public awareness not only about workplace harassment, domestic violence, and sexual abuse, but also about how routinely women survivors face a Gaslight-style gauntlet of doubt, disbelief, and outright dismissal of their stories. This pattern is particularly disturbing in the justice system, where women face a legal twilight zone: laws meant to protect them and deter further abuse often fail to achieve their purpose, because women telling stories of abuse by their male partners are simply not believed. To fully grasp the nature of this new moment in gendered power relations—and to cement the significant gains won by these public campaigns—we need to take a full, considered look at when, how, and why the justice system and other key social institutions discount women's credibility.

We use the lens of intimate partner violence to examine the ways in which women's credibility is discounted in a range of legal and social service system settings. First, judges and others improperly discount as implausible women's stories of abuse,

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based on a failure to understand both the symptoms arising from neurological and psychological trauma, and the practical constraints on survivors' lives. Second, gatekeepers unjustly discount women's personal trustworthiness, based on both inaccurate interpretations of survivors' courtroom demeanor and negative cultural stereotypes about women and their motivations for seeking assistance. Moreover, even when a woman manages to overcome all the initial modes of institutional skepticism that minimize her account of abuse, she often finds that the systems designed to furnish her with help and protection dismiss the importance of her experiences. Instead, all too often, the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse.

Two distinct harms arise from this pervasive pattern of credibility discounting and experiential dismissal. First, the discrediting of survivors constitutes its own psychic injury—an institutional betrayal that echoes the psychological abuse women suffer at the hands of individual perpetrators. Second, the pronounced, nearly instinctive penchant for devaluing women's testimony is so deeply embedded within survivors' experience that it becomes a potent, independent obstacle to their efforts to obtain safety and justice.

The reflexive discounting of women's stories of domestic violence finds analogs among the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus. For these women, too, credibility discounts both deepen the harm they experience and create yet another impediment to healing and justice. Concrete, systematic reforms are needed to eradicate these unjust, gender-based credibility discounts and experiential dismissals, and to enable women subjected to male abuses of power at long last to trust the responsiveness of the justice system.

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INTRODUCTION

We are at something of a feminist watershed moment in our society. For months, women have been coming forward in large numbers to share their stories about sexual harassment and assault in the workplace; stories of events that occurred over the course of decades, stories that survivors kept private until now.¹ It is both painful and exhilarating.

But as we hear this slow drip of horror stories, many of us struggle with the acute awareness that we've been here before. Back in 1991, during the Anita Hill–Clarence Thomas hearings,² the whole country confronted the ugly dynamic of sexual harassment—most particularly, how men use their power in the workplace hierarchy to subordinate women. (Some of us still have our “I believe Anita” buttons.) And yet here we are today, more than twenty-five years later, experiencing a similar sense of abrupt revelation and shock.

How can we still be surprised by these stories? It's not that workplace assault took a hiatus in the intervening quarter century. There were women all around us, women reading this essay right now, who continued to be sexually harassed. Women seeking legal protection from this kind of discriminatory abuse filed hundreds of thousands of complaints of sexual harassment and assault with the Equal Employment Opportunity

¹ See, e.g., Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME, Dec. 18, 2017; Anna Codrea-Rado, *#MeToo Floods Social Media With Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html?_r=0.

² When she was in her mid-twenties, Anita Hill worked for Clarence Thomas at the Equal Employment Opportunity Commission. When President George H.W. Bush nominated Thomas to replace Justice Thurgood Marshall on the U.S. Supreme Court, Hill testified that Thomas had subjected her to sexual harassment on the job. Millions watched the televised broadcast of the confirmation hearings, as members of the Senate Judiciary Committee, all male and all white, questioned Hill. Ultimately, Thomas was confirmed, with a vote of 52–48. See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994).

Commission during that time.³ But the broader culture stopped listening, relapsing into a long-standing tendency to trivialize women's experiences of abuse at the hands of powerful, predatory men.

Today's stories pouring out of Hollywood, Congress, and the media are just one facet of this long-simmering public scandal. After experiencing an initial victimization, many women also face a societal gauntlet of doubt, dismissal, or outright disbelief.

As more and more women stepped forward in all spheres of life to offer new testimonials to the #MeToo movement, we began to wonder about how this credibility discounting phenomenon plays out in the context of intimate partner violence⁴—another category of abuse that women primarily suffer at the hands of men.

The parallels are dramatic. Story after story demonstrates how, despite a substantial increase in public awareness of the problem, accompanied by improvements stemming from four decades of activism, scholarship, and training, women survivors of domestic violence face a persistent skepticism regarding both their accounts of abuse and their recitations of harm. Women find their credibility discounted⁵ by the partners who abuse them, by the larger society in which they live, and by the gatekeepers of the justice and social service systems to which they turn for help.⁶ This skepticism and suspicion compound the pre-existing, myriad harms inflicted via domestic abuse itself. And, perhaps even more important, the pronounced, nearly instinctive penchant for devaluing women's testimony is so deeply embedded within women's experience that it constitutes its own distinct obstacle to their ability to obtain safety and justice. Philosopher Alison Bailey captures, in part, the harm to which we refer: "Imagine living in an epistemic twilight zone, a world

³ See, e.g., Danielle Paquette, *Not Just Harvey Weinstein: The Depressing Truth About Sexual Harassment in America*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/10/12/not-just-harvey-weinstein-the-depressing-truth-about-sexual-harassment-in-america/?utm_term=.5ecb78df70a9.

⁴ We use the terms *intimate partner violence* and *domestic violence* interchangeably throughout this Article to describe a wide range of abuse—psychological, physical, sexual, or economic—inflicted by a partner or former partner.

⁵ The term "credibility discount," used frequently in this essay, was originally coined by Deborah Tuerkheimer, in a thoughtful analysis of women's experiences of sexual assault. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017). We use the same term here in part to advance a dialogue about the universality of credibility discounting across contexts where women attempt to resist male abuses of power.

⁶ This essay focuses on the credibility of straight women survivors in particular. We recognize, of course, that other survivor groups experience serious challenges in terms of achieving credibility. Male survivors, both in heterosexual and same-sex intimate relationships, are often dismissed or even ridiculed. Genderqueer survivors also face major credibility challenges. Our main objective here is to bring to light the persistent and particularized story of our cultural refusal to credit *women as women*, and especially those who have experienced relationship abuse at the hands of men. We also address the ways in which women's intersecting identities, on dimensions such as race, class, and sexual orientation, profoundly affect the likelihood that they will be discredited, as well as their experience of discrediting.

where many of your lived experiences are regularly misunderstood, distorted, dismissed, erased, or simply rejected as unbelievable.”⁷ But even this capacious understanding fails to capture the full dimensions of the problem. Women also face a legal twilight zone; laws meant to protect them, compensate them, and deter further abuse often fail in application, because women telling stories of abuse by their male partners are simply not believed.

This experience—the reflexive discounting of women’s stories of domestic violence—offers a useful vantage point into the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus.⁸ For all of these women, credibility discounts both deepen the harm they experience and create yet another obstacle to healing and justice.

This Article critically examines how the justice system and other key institutions of our society systematically discount the credibility of women survivors of domestic violence. Our analysis is based on a wide range of legal, psychological, philosophical, and cultural sources, including the more than twenty-five years of experience each of us has had, individually and in collaboration, representing survivors in civil protection order cases, conducting empirical research with survivors of intimate abuse, and consulting with local and national domestic violence organizations.⁹

A central focus here is on the civil justice system, with particular attention paid to women’s efforts to secure safety and a measure of redress in the form of civil protection orders—the legal remedy most commonly utilized by

⁷ Alison Bailey, *The Uneven Knowing Field: An Engagement with Dotson’s Third-Order Epistemic Oppression*, 3 SOC. EPISTEMOLOGY REV. & REPLY COLLECTIVE 62, 62 (2014).

⁸ See *infra* text accompanying notes 244–219.

⁹ Author Deborah Epstein has represented or closely supervised the representation of over 750 petitioners in civil protection order cases in D.C. Superior Court. She served as Co-Chair of the effort to create and implement the D.C. Superior Court’s integrated Domestic Violence Unit, Co-Director of the D.C. Superior Court’s Domestic Violence Intake Center, and Chair of the D.C. Domestic Violence Fatality Review Commission. She is the author of the D.C. Superior Court’s *Domestic Violence Benchbook*, has trained hundreds of police officers, worked in close collaboration with prosecutors on intimate partner violence cases, and written numerous articles addressing domestic violence issues. She has been a member of the D.C. Mayor’s Commission on Violence Against Women, and the National Football League Players’ Association Domestic Violence Commission, and has served on the Board of Directors of the D.C. Coalition Against Domestic Violence and the House of Ruth. Author Lisa Goodman has published over one hundred peer-reviewed articles based on her extensive research on the experience of intimate partner survivors as they move through systems designed to help them, including social service and justice systems. She has also supervised scores of domestic violence advocates working in a residential setting; conducted numerous evaluations of domestic violence programs; led workshops on trauma-informed approaches to domestic violence services, survivor-defined approaches to advocacy, and evaluating domestic violence programs; and consulted to the National Domestic Violence Resource Center, The National Domestic Violence Hotline, Futures Without Violence, The Full Frame Initiative, and The Second Step.

domestic violence survivors.¹⁰ Because the civil justice system offers no right to counsel, only those who can afford an attorney, or find a pro bono lawyer, are represented. These cases are quite different than those in the criminal courts, where the prosecution commands the investigative resources of the police and wields the full power of the state to subpoena corroborative evidence and compel witnesses to testify. In contrast, in approximately eighty percent of civil protection order and related family law cases,¹¹ neither the survivor nor the accused perpetrator has a lawyer, discovery is limited,¹² and virtually no one has the resources to retain a private investigator.¹³ As a result, few survivors have access to potentially powerful corroborative evidence. Moreover, they lack the benefit of legal advice about what types of more easily available evidence would be useful to bring to court.¹⁴

These forces all but guarantee that most civil protection order cases end up in the “he said/she said,” or “word on word” realm. It’s the survivor’s testimony against that of her intimate partner. This testimonial structure places enormous pressure on individual credibility. In the end, most protection order cases boil

¹⁰ Caroline Vaile Wright & Dawn M. Johnson, *Encouraging Legal Help Seeking for Victims of Intimate Partner Violence: The Therapeutic Effects of the Civil Protection Order*, 25 J. TRAUMATIC STRESS 675, 675 (2012).

¹¹ See, e.g., Amy Barasch, *Justice for Victims of Domestic Violence: One Thing They Really Need Is Lawyers*, SLATE (Feb. 19, 2015, 9:30 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/domestic_violence_protection_victims_need_civil_courts_and_lawyers.html (“[Eighty] percent of people in our civil courts do not have a lawyer . . .”); see also LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 52 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/KZL3-RGUD>] (“Low-income survivors of recent domestic violence or sexual assault received inadequate or no professional legal help for 86% of their civil legal problems in 2017.”); STATE OF MD. ADMIN. OFFICE OF THE COURTS, *DOMESTIC VIOLENCE MONTHLY SUMMARY REPORTING* (2017), http://jportal.mdcourts.gov/dv/DVCR_Statewide_2017_1.pdf [<https://perma.cc/4HCC-APE6>] (demonstrating that, in Maryland, 82.5% of petitioners were pro se in protective order cases during 2017) Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RIGHTS L. REV. 557, 567 (2006) (noting that in Illinois, neither party was represented in 83.4% of protective order cases).

¹² In a recent survey of chief judges in courts across the United States, thirty-three percent reported that pro se litigants faced challenges related to discovery issues that were sufficiently problematic that they could affect the case in most or all cases. DONNA STIENSTRA ET AL., *FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES* 21-23 (2011), <https://www.fjc.gov/content/assistance-pro-se-litigants-us-district-courts-report-surveys-clerks-court-and-chief-judge-1> [<https://perma.cc/3WWE-N6RG>].

¹³ Many survivors of domestic violence, and thus many petitioners in protection order cases, are low income. See *infra* text accompanying note 141.

¹⁴ A survivor may have access to some corroborative evidence, typically in the form of voice mails, photographs, texts, and social media posts. In many cases, however, a survivor no longer has access to such evidence; particularly in the absence of legal advice, she may have deleted the relevant files, either inadvertently or because they were too upsetting to retain. And because these cases are scheduled as emergency litigation, they typically move from filing to trial in two to three weeks—insufficient time to subpoena useful evidence in the absence of focused legal advice, even in jurisdictions providing nonlawyers with subpoena power.

down to this: if a survivor is believed, the judge will award her protection. If she is not believed, the judge will deny it. This fact—the central importance of a survivor's credibility in the protection order and broader civil justice system—led us to focus on that system as a core area of inquiry.

We examine credibility discounting from a variety of perspectives. In Part I, we analyze the two essential ways in which justice and social service system gatekeepers discount the credibility of women survivors seeking safety. First, judges and others *improperly discount as implausible women's stories of abuse*, due to a failure to understand the symptoms arising from neurological and psychological trauma as well as the practical realities of survivors' lives. Second, gatekeepers *unjustly discount women's personal trustworthiness*, based on inaccurate interpretations of survivors' courtroom demeanor, as well as negative cultural stereotypes about women and their motivations for seeking assistance.

In Part II, we explore how these credibility discounts are reinforced by the broader context of legal and social service systems that are willing to tolerate the harmful impact of laws, policies, and practices on survivors. Even when a woman makes it through the credibility discount gauntlet, she often finds that the systems to which she turns for help *dismiss her experiences and trivialize the importance of her harms*, adopting and enforcing policies with little or no regard for the ways in which they operate to her detriment.

In Part III, we examine the harms inflicted by this combination of discounting women's credibility and dismissing women's experiences. First, these harms can be measured as an additional psychic injury to survivors, an institutional betrayal that echoes the psychological abuse imposed by individual perpetrators. Second, the pervasive nature of these harms creates a distinct obstacle to survivors' ability to access justice and safety, in addition to the many, more concrete stumbling blocks with which domestic violence victims are all too familiar.

Finally, in Part IV, we offer suggestions for initial efforts to eradicate these unjust, gender-based credibility discounts and experiential dismissals. Adopting these reforms would allow women subjected to male abuses of power to trust the responsiveness of the justice system and our larger society.

I. TYPES OF GATEKEEPER-IMPOSED CREDIBILITY DISCOUNTS

Women survivors of abuse inflicted by their intimate partners encounter doubt, skepticism, or disbelief in their efforts to obtain justice and safety from judges and other system gatekeepers.¹⁵ First, their stories of abuse appear less plausible than other stories told in the justice system. We tend to believe stories

¹⁵ The most complete exploration of credibility-based obstacles to date can be found in the brief but insightful essay by Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES' J., Winter 1995, at 42.

that are internally consistent—they have a linear thread and are emotionally and logically coherent. But domestic violence often results in neurological and psychological trauma, both of which can affect a survivor's comprehension and memory. The result is a story that, to the untrained ear, sounds internally inconsistent and therefore implausible. In addition, we tend to believe stories that are externally consistent—that fit in with how we believe the world works. But many aspects of the domestic violence experience are foreign, and therefore incomprehensible, to most nonsurvivors. The result is a story that appears on its surface to lack external consistency, and therefore—again—to be less plausible. Second, our assessments of women's personal trustworthiness suffer from skepticism rooted in perceptions of survivors' apparent "inappropriate" demeanor, prejudicial stereotypes regarding women's false motives, and the long-standing cultural tendency to disbelieve women simply because they are women.

A. Story Plausibility

Narrative theorists and cognitive scientists agree that human beings are hard-wired to organize facts into "meaningful patterns."¹⁶ This "need for narrative form is so strong that we don't really believe something is true unless we can see it as a story."¹⁷ And storytelling is central to the justice system as well;¹⁸ it is the primary method judges and juries use to assess the reliability of facts presented at trial. Accordingly, any time a survivor needs to go through a gatekeeper to access resources or justice or safety, she has to tell some sort of story about her domestic violence experience. And if she is to succeed, her story must be a plausible one. So what makes a story plausible?

1. Internal Consistency

First, we believe stories that are *internally consistent*. That is, we grant credibility to stories that make logical and emotional sense, have a continuous,

¹⁶ CAROLYN GROSE & MARGARET E. JOHNSON, *LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS* 15-16 (2017); *see also* DAVID CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* 93-94 (2002); LISA CRON, *WIRED FOR STORY: THE WRITER'S GUIDE TO USING BRAIN SCIENCE TO HOOK READERS FROM THE VERY FIRST SENTENCE* 185-199 (2012); Kay Young & Jeffrey Saver, *The Neurology of Narrative*, *SUBSTANCE*, Mar. 2001, at 74.

¹⁷ H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 44 (2d ed. 2008). "For anyone who has read to a child or taken a child to the movies and watched her rapt attention, it is hard to believe that the appetite for narrative is something we learn rather than something that is built into us through our genes." *Id.* at 3.

¹⁸ "[T]he law is awash in storytelling." ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110 (2000).

linear thread, form a coherent whole, and contain no significant, unexplained gaps in time or action.¹⁹

But for many domestic violence survivors, telling the truthful story of their abusive experience involves a narrative that is more impressionistic than linear, and that appears somewhat illogical or emotionally off-kilter. The tension between our desire for internal consistency and the realities of survivor stories can be explained in part by some of the neurological and psychological consequences of domestic violence itself, such as traumatic brain injury and posttraumatic stress disorder.

a. *Neurological Trauma: Traumatic Brain Injury*

Traumatic Brain Injury (TBI) can result from either blunt-force trauma to the head (for example, being hit by an object, having your head smashed against something, or being violently shaken), or from reduced oxygen to the brain (for example, through strangulation).²⁰ Blows to the head can cause cranial bleeding or damage cranial blood vessels and nerves. A lack of oxygen can result in the decreased function or death of brain cells.²¹

In domestic violence cases, both blunt force trauma and strangulation are relatively common. One study of women in three New York domestic violence

¹⁹ GROSE & JOHNSON, *supra* note 16, at 16. These correlations apply in the courtroom as well; research demonstrates strong correlations between courtroom credibility determinations and the internal consistency of stories. Numerous studies reveal a strong belief that inconsistencies indicate inaccuracies, and this perception guides juror decisionmaking. See, e.g., Garrett L. Berman, Douglas J. Narby & Brian L. Cutler, *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability, and Verdicts*, 19 LAW & HUM. BEHAV. 79 (1995); Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. APPLIED PSYCHOL. 170 (1996); Neil Brewer et al., *Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony*, 13 APPLIED COGNITIVE PSYCHOL. 297 (1999); Neil Brewer & R.M. Hupfeld, *Effects of Testimonial Inconsistencies and Witness Group Identity on Mock-Juror Judgments*, 34 J. APPLIED SOC. PSYCHOL. 493 (2004); Sarah L. Desmarais, *Examining Report Content and Social Categorization to Understand Consistency Effects on Credibility*, 33 LAW & HUM. BEHAV. 470 (2009); Rob Potter & Neil Brewer, *Perceptions of Witness Behaviour–Accuracy Relationships Held by Police, Lawyers and Mock Jurors*, 6 PSYCHIATRY, PSYCHOL. & L. 97, 101 (1999). The centrality of internal consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. See, e.g., PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 58 (5th ed. 2013).

²⁰ OR. DEP'T OF JUSTICE, TRAUMATIC BRAIN INJURY AND DOMESTIC VIOLENCE, http://www.doj.state.or.us/wp-content/uploads/2017/08/traumatic_brain_injury_and_domestic_violence.pdf [<https://perma.cc/7ZVD-XBWJ>] (last visited Jan. 23, 2018); PARTNERS FOR PEACE, *Understanding Traumatic Brain Injury, Concussion and Strangulation in Domestic Violence* (Oct. 11, 2016), <http://www.partnersforpeace.org/understanding-traumatic-brain-injury-concussion-strangulation-domestic-violence/> [<https://perma.cc/D7CX-V9F9>].

²¹ NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, *Traumatic Brain Injury: Hope Through Research: How Does TBI Affect the Brain*, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Hope-Through-Research/Traumatic-Brain-Injury-Hope-Through#3218_2 [<https://perma.cc/C8HD-SBEL>] (last modified June 28, 2017).

shelters found that ninety-two percent of the women questioned had been hit in the head by their partners more than once; eighty-three percent had been hit in the head and shaken severely; and eight percent had been hit in the head over twenty times in the preceding year.²² Forty percent of these women lost consciousness as a result of at least one of the assaults they endured.²³ In another study, emergency room data indicated that sixty-seven percent of women treated for intimate partner violence-related injuries reported problems consistent with a diagnosis of head injury.²⁴

Even mild TBI—which can occur after only a short period without oxygen to the brain—can result in a significant and profound impact on memory and behavior, inducing symptoms such as confusion, poor recall, inability to link parts of the story together or to articulate a logical sequence of events, uncertainty about detail, and even recanting of stories (i.e., renouncing them as untrue after accurately reporting them to friends, family, police, or even judges).²⁵ In many ways, this is hardly surprising; people with an impaired sense of the consistency of their own experience are unlikely to produce consistent narratives of that experience on demand.

Because research demonstrating the frequency of TBI in the domestic violence context is relatively new, however, few justice system gatekeepers are aware of its potential neurological effects.²⁶ Even in hospital emergency rooms, where medical professionals now routinely perform TBI screens when

²² Helene Jackson, Elizabeth Philp, Ronald L. Nuttall & Leonard Diller, *Traumatic Brain Injury: A Hidden Consequence for Battered Women*, 33 *PROF. PSYCHOL.: RES. & PRAC.* 39, 41, 42 (2002) (showing that correlations between frequency of being hit in the head and severity of cognitive symptoms were statistically significant).

²³ *Id.* at 41.

²⁴ John D. Corrigan et al., *Early Identification of Mild Traumatic Brain Injury in Female Victims of Domestic Violence*, *AM. J. OBSTETRICS & GYNECOLOGY*, May 2003, at S71, S74. Yet another sampled women from both shelter and non-shelter populations who all had sustained at least one physically abusive encounter and found nearly seventy-five percent of the entire sample reported a domestic violence-related TBI. Eve M. Valera & Howard Berenbaum, *Brain Injury in Battered Women*, 71 *J. CONSULTING & CLINICAL PSYCHOL.* 797, 799 (2003).

²⁵ Valera & Berenbaum, *supra* note 24, at 801; Eve Valera, *Increasing Our Understanding of an Overlooked Public Health Epidemic: Traumatic Brain Injuries in Women Subjected to Intimate Partner Violence*, 27 *J. WOMEN'S HEALTH* 735, 735 (2018) (“[T]he greater the number and more recent . . . the TBIs, the more poorly women tended to perform on measures of memory, learning, and cognitive flexibility, and the higher . . . the levels [of PTSD symptoms].”); see also Gwen Hunnicut, Kristine Lundgren, Christine Murray & Loreen Olson, *The Intersection of Intimate Partner Violence and Traumatic Brain Injury: A Call for Interdisciplinary Research*, 32 *J. FAM. VIOLENCE* 471, 474 (2017); Maria E. Garay-Serratos, *A Secret Epidemic: Traumatic Brain Injury Among Domestic Violence Victims*, *L.A. TIMES* (Oct. 12, 2015), <http://beta.latimes.com/opinion/op-ed/la-oe-1012-garay-serratos-tbi-domestic-abuse-20151012-story.html>; Rachel Louise Snyder, *No Visible Bruises: Domestic Violence and Traumatic Brain Injury*, *NEW YORKER* (Dec. 30, 2015), <https://www.newyorker.com/news/news-desk/the-unseen-victims-of-traumatic-brain-injury-from-domestic-violence>.

²⁶ See Kevin Davis, *Brain Trials: Neuroscience Is Taking a Stand in the Courtroom*, 98 *A.B.A. J.* 37, 37-38 (2012).

a patient presents with certain kinds of athletic injuries, partner abuse victims are rarely screened.²⁷ And because most injuries caused by strangulation are internal, patients admitted in the absence of such screens are unlikely to be considered for a TBI diagnosis.²⁸ As a result, survivors themselves are unlikely to know that they are at risk for TBI, unlikely to get treatment, and unlikely to know about the possible symptoms they may later experience.²⁹ This creates a perfect storm of ignorance: a survivor is more likely to tell justice system gatekeepers a story that lacks internal consistency; the survivor herself is unlikely to be able to understand or explain this apparent failing; and those gatekeepers, in turn, are more likely to hear her story as less plausible and, accordingly, impose an unjust credibility discount on her narrative.

The following true story illustrates the problem.³⁰ Grace Costa³¹ was diagnosed with mild TBI, caused when her ex-boyfriend strangled her with a telephone cord. She's inconsistent when she tries to tell the story: the date changes; sometimes she remembers the assault taking place in one year; other times, another. Her memory varies as to which of her adult children were present. Sometimes she thinks they were about to eat dinner, sometimes that they were talking about a half-eaten apple on the kitchen floor.

Grace can't tell her story with a linear narrative. She says memories of the incident come to her in flashes, one image at a time—apple, blood, cord—but the disparate pieces never fit together as a whole.

Grace's explanation of events is confused. Pieces of her story hang untethered in her mind. She remembers being inside, then outside; being down, then up, and maybe down again. The police weren't there, then they were. Half the time, she says, she doesn't "remember much of anything."

27 See Eve Valera & Aaron Kucyi, *Brain Injury in Women Experiencing Intimate Partner-Violence: Neural Mechanistic Evidence of an "Invisible" Trauma*, 11 *BRAIN IMAGING BEHAV.* 1664, 1664 (2017) ("TBI treatments are typically absent and IPV interventions are inadequate."); see also Garay-Serratos, *supra* note 25; Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 *J. EMERGENCY MED.* 303, 308 (2001).

28 This challenge is illustrated by a study of 300 nonfatal domestic violence strangulation cases, where researchers found that only fifteen percent of victims had injuries that were sufficiently visible for police officers to photograph; they further found that even where the injuries were visible, they were often minimized in police descriptions with terms such as "redness, cuts, scratches, or abrasions to the neck." Strack et al., *supra* note 27, at 303, 305-06.

29 See Jacquelyn C. Campbell et al., *The Effects of Intimate Partner Violence and Probable Traumatic Brain Injury on Central Nervous System Symptoms*, 27 *J. WOMEN'S HEALTH* 761, 762 (2018) (noting that "for many abused women, head injuries occur multiple times, in an escalating pattern, and cognitive or psychological effects are often viewed within the context of abuse rather than as a specific medical injury" (i.e., cognitive effects are attributed to mental health conditions resulting from the abuse, rather than a TBI)); Valera & Kucyi, *supra* note 27; Valera, *supra* note 25, at 735 (majority of abuse-related TBIs in study sample "were considered to be mild TBIs for which medical attention [was] almost never sought").

30 This story relies heavily on the account written by Rachel Louise Snyder, *supra* note 25.

31 This is not her real name. *Id.*

To a trauma expert, the way Grace tells her story strongly indicates that she was, indeed, strangled and deprived of brain oxygen that night. The disjointed, incoherent way she tells her story makes it all the more plausible.³²

But the opposite is true when Grace is telling her story to justice system gatekeepers. To the untrained ear, her story's disjointed, inconsistent nature makes it sound *implausible*, and therefore she is likely to incur a credibility discount if she tells it to the police, deciding whether to make an arrest; to prosecutors, deciding whether to bring a criminal case; or to a judge, deciding whether to issue a protection order. The more Grace tries to remain faithful to what she actually remembers, the more likely she is to be denied assistance and protection.

b. *Psychological Trauma: Post-Traumatic Stress Disorder*

Psychological trauma can operate similarly to neurological trauma in undermining the internal consistency of a survivor's story; like TBI, it commonly produces memory lapses or dissociative states.³³ Research shows that a majority of survivors meet diagnostic criteria for Post-Traumatic Stress Disorder (PTSD),³⁴ and many more women exhibit serious symptoms of psychological trauma, though not enough to reach the threshold of a formal diagnosis. These symptoms are another common source of internal inconsistency in survivor accounts provided to police, judges, and other system gatekeepers.

The symptoms that comprise PTSD include avoidance, hyperarousal, and intrusive destabilizing experiences such as dissociative flashbacks and intense or prolonged emotional responses to reminders of the original traumatic event.³⁵ These reminders are commonly known as "triggers."³⁶ For many survivors, being in a courtroom, in close proximity to an abusive partner—particularly while being instructed to review his abusive behavior in detail—constitutes a potent trigger.³⁷ Instead of providing the judge with a clear, logical narrative, a

³² See *supra* text accompanying notes 20–25.

³³ See, e.g., Jonathan E. Sherin & Charles B. Nemeroff, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13 *DIALOGUES CLINICAL NEUROSCIENCE* 263, 263 (2011) ("Several pathological features found in PTSD patients overlap with features found in patients with traumatic brain injury . . .").

³⁴ A meta-analysis of eleven studies investigating the prevalence of PTSD among IPV survivors demonstrated a weighted mean prevalence of 63.8%. See Jacqueline M. Golding, *Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 *J. FAM. VIOLENCE* 99, 116 (1999); see also Loring Jones, Margaret Hughes & Ulrike Unterstaller, *Post Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 *TRAUMA, VIOLENCE, & ABUSE* 99, 100 (2001).

³⁵ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 271-72 (5th ed. 2013) [hereinafter *DSMD*].

³⁶ See, e.g., BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 182 (2014).

³⁷ NAT'L CTR. ON DOMESTIC VIOLENCE, *TRAUMA AND MENTAL HEALTH, PREPARING FOR COURT PROCEEDINGS WITH SURVIVORS OF DOMESTIC VIOLENCE: TIPS FOR CIVIL LAWYERS*

survivor may have flashbacks or feel overwhelmed by emotion. The predictable result is that she will skip, or forget, certain parts of her story—or, indeed, be unable to speak key elements of it out loud.³⁸ Again, this disconnected, inconsistent testimony is in fact evidence of the truth of her narrative; to the untrained ear, however, it makes her story suspect.

Psychological trauma, or even extreme stress, can affect the memory as well. As Judith Herman puts it: “Traumatic memories have a number of unusual qualities. They are not encoded like the ordinary memories of adults in a verbal, linear narrative that is assimilated into an ongoing life story.”³⁹ Instead, these memories often lack verbal narrative detail and context; they are encoded in the form of sensations, flashes, and images, often with little or no story.⁴⁰ And as with neurological trauma, psychologically traumatic memories encode the physical and psychic harms that generate them in a way that is prone to create a steep credibility discount based on the seeming implausibility of a survivor’s story.

The tendency to discount survivors’ stories based on internal inconsistencies is not restricted to police and judges alone. Courthouse clerks, for example—whose essential function is to create and maintain case files—often take on the role of credibility-assessors and system gatekeepers.⁴¹ This happens even though clerks have no formal authority to determine whether a complaint has merit; such power is reserved to members of the judiciary, through Article III of the Constitution. Here is one example, from attorney and law professor Jane Stoeber:

I recall waiting in a Domestic Violence Unit clerk’s office . . . and seeing a clerk confront an unrepresented abuse survivor about the lack of specific dates in her

AND LEGAL ADVOCATES 1 (2013), <http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH-2013-Preparing-for-Court-Proceedings.pdf> [<https://perma.cc/2UDK-JPRL>].

³⁸ Jerrell Dayton King & Donna J. King, *A Call for Limiting Absolute Privilege: How Victims of Domestic Violence, Suffering with Post-Traumatic Stress Disorder, Are Discriminated Against by the U.S. Judicial System*, 6 DEPAUL J. WOMEN, GENDER & L. 1, 29 (2017) (testifying in court can cause a survivor to reexperience trauma and dissociate); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1313 (1993) (noting that dissociation can make testimony appear “plastic” or “fake” while hyperarousal can make survivors appear overly excitable”).

³⁹ JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 37 (1997).

⁴⁰ *Id.* at 38. An inability to recall key features of the trauma is one criterion of the posttraumatic stress disorder diagnosis. See DSM-5, *supra* note 35, at 271. As Dr. Jim Hopper explains: “Remembering always involves reconstruction and is never totally complete or perfectly accurate . . . [G]aps and inconsistencies are simply how memory works – especially for highly stressful and traumatic experiences . . . where the differential encoding and storage of central versus peripheral details is the greatest. Such gaps and inconsistencies are never, on their own, proof of anyone’s credibility, innocence, or guilt.” Jim Hopper, *Sexual Assault and Neuroscience: Alarmist Claims Vs. Facts*, PSYCHOL. TODAY (Jan. 22, 2018), <https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/201801/sexual-assault-and-neuroscience-alarmist-claims-vs-facts> [<https://perma.cc/RG6P-EX38>].

⁴¹ This observation is based on the first author’s twenty-seven years of experience representing survivors in hundreds of civil protection order cases. See *supra* note 9.

petition. The clerk insisted that the litigant had to plead with specificity, which included identifying specific calendar dates. When the *pro se* survivor was unable to remember exact dates for the years of abuse she had endured, the clerk tore up her petition [and refused to let her file a protection order case].⁴²

2. External Consistency

In addition to crediting stories based on their degree of *internal* consistency, we are far more likely to credit stories that are *externally* consistent—i.e., chronicles of abuse that resonate with our pre-existing and publicly sanctioned narratives about how the world works.⁴³ An example taken from Professors Carolyn Grose and Margaret Johnson underlines this dynamic:

A narrative that tells of a person entering a home and closing a wet, dripping umbrella while exclaiming, “I just walked through a fire!” would not fit with our sense of normal. To be externally consistent, she should have burnt clothes, not a dripping wet umbrella, or be coughing from the smoke.⁴⁴

The demand for external credibility, however, is complicated by the unconscious process of “false consensus bias”—the tendency to see one’s “own behavioral choices and judgments as relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, or inappropriate.”⁴⁵ In other words, we tend to assume that our own personal experiences are universal: what *we* would likely do, say, and feel is what *all others* would do, say, and feel.⁴⁶

In reality, of course, these assumptions are misleading. Passengers who have survived a serious car crash tend to react quite differently to a driver’s sudden slamming of the brakes than those who have experienced only unremarkable

⁴² Interview with Jane Stoeber, Clinical Professor of Law, Univ. Cal., Irvine Sch. of Law (Jan. 6, 2018).

⁴³ GROSE & JOHNSON, *supra* note 16, at 15-16. As with internal consistency, the importance of external consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. *See, e.g.*, BERGMAN, *supra* note 19, at 62-63.

⁴⁴ GROSE & JOHNSON, *supra* note 16, at 16.

⁴⁵ Lee Ross, David Greene & Pamela House, *The “False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1976); *see also* Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCHOL. BULL. 72, 72 (1987) (noting that over a ten-year period, “over 45 published papers have reported data on perceptions of false consensus and assumed similarity between self and others”); Leah Savion, *Clinging to Discredited Beliefs: The Larger Cognitive Story*, 9 J. SCHOLARSHIP TEACHING & LEARNING 81, 87 (2009) (“People tend to over-rely on instances that confirm their beliefs, and accept with ease suspicious information”); Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1268 (2008).

⁴⁶ *See* Marks & Miller, *supra* note 45; Ross, Greene & House, *supra* note 45; Solan, Rosenblatt & Osherson, *supra* note 45.

car rides.⁴⁷ Veterans who have spent time in military conflict tend to react quite differently to loud, unexpected noises than do civilians leading peaceful lives.⁴⁸ In each of these examples, a profound difference in experience results in fundamentally different expectations about how the world works. And such expectations tend, in turn, to provoke diverse behaviors.

The most consequential experiential gap that separates domestic violence survivors from gatekeepers of the justice system involves, of course, the behaviors that stem from suffering abuse at the hands of an intimate partner. Despite decades of activism and research, the experiences of women survivors fall into what philosopher Miranda Fricker calls a persistent “gap in collective interpretive resources” that prevents the dominant culture from making sense of a particular kind of social experience.⁴⁹ In the intimate abuse context, this gap prevents most nonsurvivors from being able to make sense of how survivors might actually behave.

a. *Women Who Stay*

To see the real-world impact of this interpretive gap, consider a quandary that has assailed survivors since the early days of the anti-domestic violence movement.⁵⁰ We know that many women stay with their abusive partners in the aftermath of violent episodes. This tends to occur in the context of relationships characterized by coercive control, a pattern of domination that

⁴⁷ See J. Gayle Beck & Scott F. Coffey, *Assessment and Treatment of PTSD After a Motor Vehicle Collision: Empirical Findings and Clinical Observations*, 38 *PROF. PSYCHOL. RES. & PRAC.* 629, 629 (2007) (explaining that survivors of motor vehicle accidents are at heightened risk of post-traumatic stress disorder and may experience intrusive symptoms or avoid driving altogether).

⁴⁸ See, e.g., Anke Ehlers, Ann Hackmann & Tanja Michael, *Intrusive Re-Experiencing in Post-Traumatic Stress Disorder: Phenomenology, Theory, and Therapy*, 12 *MEMORY* 403, 407 (2004).

[M]any of the trigger stimuli are cues that do not have a strong meaningful relationship to the traumatic event, but instead are simply cues that were temporally associated with the event, for example physical cues similar to those present shortly before or during the trauma (e.g., a pattern of light, a tone of voice); or matching internal cues (e.g., touch on a certain part of the body, proprioceptive feedback from one’s own movements). People with PTSD are usually unaware of these triggers, so intrusions appear to come out of the blue.

Id. (emphasis omitted) (citation omitted). For a vivid visual/aural exposition of the triggers veterans face in daily life, see David Lynch Found., *Sounds of Trauma*, YOUTUBE (Apr. 11, 2017), <https://www.youtube.com/watch?v=bgpRw92d1MA>.

⁴⁹ MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 1 (2007).

⁵⁰ See, e.g., Nancy R. Rhodes & Eva Baranoff McKenzie, *Why Do Battered Women Stay?: Three Decades of Research*, 3 *AGGRESSION AND VIOLENT BEHAV.* 391 (1998).

includes tactics to isolate, degrade, exploit and control the survivor.⁵¹ The perpetrator creates and enforces a set of “rules” governing numerous aspects of his partner’s life—“her finances, clothes, contact with friends and family, even what position she sleeps in.”⁵² Once a perpetrator of abuse has appropriated the power to verbally restrict his partner’s day-to-day life choices, physical violence then serves as both the abuser’s means of enforcing that control and the punishment for attempts to resist it.⁵³ Many of us, but perhaps especially those privileged enough to live lives untouched by violence and with easy access to supportive resources, respond to stories of women who stay by focusing obsessively on the question “Why didn’t she leave?”⁵⁴ The question is really more of an accusation: “In her shoes, I would most definitely have left.” Or, in the words of a judge presiding over a civil protection order case: “[S]ince I would not let that happen to me, I can’t believe that it happened to you.”⁵⁵

In recent years, judges are less likely to make such explicit statements on the record, but many continue to perceive a woman’s decision to stay as externally inconsistent.⁵⁶ Judges tend to express their belief in the connection between women staying and story plausibility in less formal contexts, such as judicial training sessions and casual conversations outside of the courtroom.⁵⁷ And this failure of understanding affects case outcomes. In 2015, for example, one of the first author’s clinic clients lost her civil protection order suit based on a judge’s discrediting the woman’s story. The judge explained that her credibility determination derived from photographs, introduced by the perpetrator boyfriend, showing that, not long after a particularly serious violent episode and just a few days after she obtained a temporary protection order, the woman had

51 Evan Stark, Re-Presenting Battered Women: Coercive Control and the Defense of Liberty (2012) (unpublished manuscript), http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf [<https://perma.cc/DJK3-LVW7>].

52 Deborah Epstein & Kit Gruelle, *Should an Abused Wife Be Charged in Her Husband’s Crime?* N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/opinion/noor-salman-vegas-shooting-trial.html>.

53 Scholar Michael Johnson has developed a widely used typology of intimate partner violence, based on the extent to which coercive control is involved. Relationships that take the form of “intimate terrorism” are characterized by one partner’s use of coercive control to exert power over the other. In contrast, “situational couple violence” is not embedded within a broader pattern of controlling behaviors. Survivors who tend to seek help from social services and the justice systems are more likely to be involved in relationships of coercive control than are survivors in the general population. See Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322, 323-24, 347 (2005).

54 See *infra* text accompanying notes 60–66.

55 Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1275 (1993).

56 This observation is based on the first author’s twenty-seven years of experience representing survivors in hundreds of civil protection order cases. See *supra* note 9.

57 The first author has observed or participated in several such conversations at judicial training sessions, conferences, and in informal social settings over the last ten years.

gone to a Red Lobster restaurant with him.⁵⁸ The judge was not interested in hearing about why the woman had decided to have dinner with her abusive partner—whether it was because she believed that the best way to ensure her immediate safety was to comply with her boyfriend’s requests, because she was struggling with the challenges of ending a long-term relationship, or because she wanted her children to be able to see their father. Instead, the judge simply concluded that the photographs proved her incredibility.⁵⁹

This persistent interpretive gap separating survivor and nonsurvivor understandings of the world was a powerful theme of the recent #WhyIStayed movement. In the fall of 2014, Baltimore Ravens running back Ray Rice assaulted his then-fiancée Janay Palmer in an elevator, knocking her unconscious. The video of the incident, which also showed Rice dragging Palmer’s limp body out of the elevator, was made public.⁶⁰ Both the media and the general public focused their attention disproportionately on variations of the victim-blaming question, “Why didn’t she leave?” Far more ink was spilled discussing whether Janay provoked the assault (she slapped Rice in the face) and on Janay’s longer-term response to the incident (electing to stay with Rice and eventually marrying him) than was devoted to Rice’s knock-out punch to her head.⁶¹

Frustrated with the media response to the Rice–Palmer story, survivor Beverly Gooden decided to share with her family and friends, for the first time, the abusive conduct that had besieged her own marriage.⁶² She did so by sending out the following three tweets under the hashtag #WhyIStayed:

I tried to leave the house once after an abusive episode, and he blocked me.
He slept in front of the door that entire night - #WhyIStayed.

I stayed because my pastor told me that God hates divorce. It didn’t cross my
mind that God might hate abuse, too - #WhyIStayed.

He said he would change. He promised it was the last time. I believed him.
He lied - #WhyIStayed.⁶³

⁵⁸ Interview with Gillian Chadwick, Assoc. Professor, Washburn Univ. Sch. of Law (Jan. 1, 2018).

⁵⁹ *Id.*

⁶⁰ See, e.g., Charles M. Blow, *Ray Rice and His Rage*, N.Y. TIMES (Sept. 14, 2014), <https://www.nytimes.com/2014/09/15/opinion/charles-blow-ray-rice-and-his-rage.html>.

⁶¹ See, e.g., Greg Howard, *Does the NFL Think Ray Rice’s Wife Deserved It?*, DEADSPIN (July 31, 2014), <https://deadspin.com/does-the-nfl-think-ray-rices-wife-deserved-it-1612138248> [<https://perma.cc/7D MH-22R4>]; Mel Robbins, *Lesson of Ray Rice Case: Stop Blaming the Victim*, CNN (Sept. 16, 2014), <http://www.cnn.com/2014/09/08/opinion/robbins-ray-rice-abuse/index.html> [<https://perma.cc/EV9Y-MF24>].

⁶² *Hashtag Activism in 2014: Tweeting ‘Why I Stayed’*, NAT’L PUB. RADIO (Dec. 23, 2014), <https://www.npr.org/2014/12/23/372729058/hashtag-activism-in-2014-tweeting-why-i-stayed> [<https://perma.cc/XT7G-99MX>] [hereinafter *Hashtag Activism*].

⁶³ *Id.*

Much to Gooden's surprise—she had previously used Twitter only to make relatively mundane comments about the details of her day⁶⁴—the hashtag was soon trending; it remained steadily active for weeks and continued to receive daily contributions for over a year.⁶⁵

The numbers are telling here. Within hours, #WhyIStayed had unleashed thousands of tweets, with an avalanche of more than 100,000 in the first four months.⁶⁶ The sheer scale of the response is a strong indication of a pent-up sense among survivors that their stories are simply not understood by the larger culture.

b. *Physical Versus Psychological Harm*

The pronounced disconnect between survivor and nonsurvivor understandings of the world also strongly shapes common judicial expectations about experiences of harm. Most judges in our courts are men⁶⁷ and presumably—based on statistical probabilities alone—most are also nonsurvivors.⁶⁸ Anyone working in the justice system (including the first author) knows that many nonsurvivor judges in civil protection order cases tend to assume that, if they were to find themselves in an abusive relationship,

⁶⁴ *Id.*

⁶⁵ Melissa Jeltsen, *The Ray Rice Video Changed the Way We Talk About Domestic Violence*, HUFFINGTON POST (Sept. 8, 2015), https://www.huffingtonpost.com/entry/ray-rice-janay-video-domestic-violence_us_55ec7228e4b002d5c07646cb [<https://perma.cc/R92T-F4FH>]. The top three reasons cited by survivors in the first year of #WhyIStayed posts were: a desire to keep the family intact, love of the abusive partner, and fear of the dangers inherent in leaving. *Id.* Early responses to the hashtag included:

@HToneTastic #WhyIStayed - Because his abuse was so gradual and manipulative, I didn't even realize what was happening to me.

@BBZaftig #WhyIStayed - Because he told me that no one would love me after him, and I was insecure enough to believe him.

@MonPetitTX - Because I had watched my mother stay and she had watched hers before that.

Hashtag Activism, *supra* note 62.

⁶⁶ *Hashtag Activism*, *supra* note 62; Lizzie Crocker, *Harsh Truths about Domestic Violence: Why Voicing Terrible Experiences Can Help Others*, THE DAILY BEAST (Sept. 20, 2014), <https://www.the-dailybeast.com/harsh-truths-about-domestic-violence-why-voicing-terrible-experiences-can-help-others> [<https://perma.cc/5Q5B-AUES>].

⁶⁷ Thirty percent of judges in U.S. state courts (where domestic violence cases typically are heard) are women. NAT'L ASS'N OF WOMEN JUDGES, 2016 U.S. STATE COURT WOMEN JUDGES (2016), <https://www.nawj.org/statistics/2016-us-state-court-women-judges> [<https://perma.cc/LV2M-W9EF>].

⁶⁸ National survey data show that nearly one in three women and one in four men will experience domestic violence at some point in their lives. MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL & CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 2 (2010).

the most troubling aspect would be the physical, not the psychological, violence.⁶⁹ This prioritization of physical over psychological harm is reflected in the written law: criminal law, most of tort law, and civil protection order statutes all focus heavily on physical assaults and threats of violence, rather than emotional abuse or threats of psychological harm.⁷⁰ For judges and other justice system actors, the law tends to dictate psychic reality: what the law prohibits *must* be what is harmful. The end result is that most judges assume that the way the world works, and therefore what is externally consistent, is that physical violence is far worse than psychological abuse.⁷¹

How does this assumption translate into courtroom expectations? A common judicial expectation is that a “real” victim will lead with physical violence in telling her story on the witness stand.⁷² But in fact, many survivors tell their stories quite differently. For many women, abusive relationships are characterized by episodic, sometimes relatively infrequent, outbursts of physical violence and threats.⁷³ The day-to-day, routine abuse often occurs solely in the psychological realm.⁷⁴ Psychologists explain that in many abusive relationships victims are subjected to their partners’ coercive control through a wide variety of psychological tactics, including, for example, “fear and intimidation[,] . . . emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles.”⁷⁵ An abusive partner might effectively isolate a woman and increase his control over her life by sabotaging her efforts to find or keep a job or to attend a job-training session by refusing to allow her to

⁶⁹ This prioritization of physical over psychological harm is reflected in the written law: both criminal statutes and civil protection order laws focus on heavily on physical assaults and threats of violence rather than emotional abuse or threats of psychological harm. See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1143-44 (2009).

⁷⁰ *Id.* at 1134-38

⁷¹ *Id.* at 1143. This assumption may well vary depending on the particularities of a survivor’s identity. The stereotype of women as especially frail and vulnerable, for example, derives primarily from cultural images of white, heterosexual women.

⁷² This observation is based on the first author’s twenty-seven years of litigating hundreds of civil protection order cases. See *supra* note 9.

⁷³ See NAT’L CTR. FOR VICTIMS OF CRIME, *INTIMATE PARTNER VIOLENCE* (2017) (on file with authors) (demonstrating that emotional and psychological abuse more prevalent than physical violence); WORLD HEALTH ORG., *UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN: INTIMATE PARTNER VIOLENCE* (2012), http://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=72E1B41F23450EB8BFA1B9A66985F90E?sequence=1 [<https://perma.cc/4M79-8R8M>] (showing lifetime reported prevalence rate of emotional abuse higher than rate of physical abuse).

⁷⁴ In one study of 1443 women, 86.2% of those who had experienced physical violence also reported emotional abuse without physical/sexual violence. Ann L. Coker et al., *Frequency and Correlates of Intimate Partner Violence by Type: Physical, Sexual, and Psychological Battering*, 90 AM. J. PUB. HEALTH 553, 557 (2000).

⁷⁵ Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 245 (2000).

sleep the night before a job interview, hiding or destroying her work clothing, inflicting noticeable injuries to create a disincentive to appear in public, hiding car keys or disabling her family car, threatening to kidnap the children if she leaves them with a babysitter or at day care, and harassing her at work.⁷⁶

These pervasive, abusive experiences lead an overwhelming number of survivors to feel that the emotional harm inflicted by their partners is far more damaging than the physical injuries.⁷⁷ And this response is consistent with what we know from research; women report that psychological abuse is by far the greatest source of their distress,⁷⁸ regardless of the frequency or severity of the physical harm they've experienced.

So when a judge in a civil protection order court says to a woman: "tell me what happened," she may well focus on the harm that is most salient to her—the constant derogatory name calling, the way he made her feel that everything was her fault, the way he always checked her phone to see who she was talking to. The physical violence and threats may take a back seat; she might not even mention them unless specifically asked.⁷⁹ Thus, survivors often frame their courtroom stories in a way that fails to fit the expectations of most judges, and even of the law itself: what may feel to victims like the most insidious and intimate brand of abuse can come across to legal gatekeepers as something that really doesn't count as abuse at all.

The result is what philosophers call a serious "epistemic asymmetry" between marginally situated survivors and the judges who serve as their audience.⁸⁰ I (the first author) have frequently been in courtrooms and

⁷⁶ Jody Raphael, *Battering Through the Lens of Class*, 11 J. GENDER, SOC. POL'Y. & L. 367, 369 (2003); see also Postmus, *supra* note 75, at 246. For an excellent discussion of the failure of the legal system to incorporate the full range of survivor harms, see generally Johnson, *supra* note 69.

⁷⁷ The authors have observed this prioritization throughout their over fifty years of combined experience talking to women survivors.

⁷⁸ See, e.g., Mary Ann Dutton, Lisa A. Goodman & Lauren Bennett, *Court-Involved Battered Women's Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse*, 14 VIOLENCE & VICTIMS 89, 101-02 (1999) (finding that symptomatic responses to abuse, including PTSD and depression, were largely predicted by psychological abuse, rather than by physical violence); Mindy B. Mechanic, Terri L. Weaver & Patricia A. Resick, *Mental Health Consequences of Intimate Partner Abuse*, 14 VIOLENCE AGAINST WOMEN 634, 649-50 (2008). In addition, the psychological component of intimate partner violence appears to be the strongest predictor of posttraumatic stress disorder. See Maria Angeles Pico-Alfonso, *Psychological Intimate Partner Violence: The Major Predictor of Posttraumatic Stress Disorder in Abused Women*, 29 NEUROSCIENCE & BIOBEHAV. REVS. 181, 189 (2005) ("When the role of psychological, physical, and sexual aspects of intimate partner violence were considered separately, the psychological component turned out to be the strongest predictor [of PTSD].").

⁷⁹ This has been a consistent experience of the first author in representing many hundreds of women survivors, and watching thousands more, not represented by counsel, tell their stories in civil protection order court.

⁸⁰ See, e.g., Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, in ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 167, 170 (Ian James Kidd et al. eds., 2017) [hereinafter ROUTLEDGE HANDBOOK].

witnessed judges, presiding over protection order cases, get frustrated with women who testify at length about their mental anguish at their partner's hands. These survivors—more than eighty percent of whom proceed without the benefit of legal representation⁸¹—have no idea that this part of their stories will not trigger legal relief. It is often only after aggressive judicial questioning that survivors volunteer information about physical abuse or threats, and when they do, they may sound—to the judges, at any rate—less concerned about those aspects of their stories than about the day-to-day psychic harms they have endured. In this context, the admission of physical abuse can sound to judges like something of an afterthought. Because so many judges do not understand survivors' frames for their experiences, they may suspect that women's too-little, too-late testimony about physical violence is either exaggerated or fabricated out of whole cloth; that they are adding it only after belatedly realizing that the law demands such facts.

This profound gap in understanding—assuming a woman survivor's story is less plausible when it fails to meet her judicial audience's expectations about how the world works—creates real obstacles for survivors. The survivor has tried her best to faithfully recount her story as she experienced it, and thus with actual fidelity to the truth. But the judge has a fundamentally different understanding of how the world works, and he may well assume his is a universal one. As a result, the woman may well suffer a credibility discount based not on a fair assessment of her case, but rather on a fundamental failure of understanding.

As the above discussion illustrates, even after nearly five decades of anti-domestic violence advocacy, many justice system gatekeepers still lack a sophisticated understanding of what constitutes a truly plausible story about women's experiences of intimate partner abuse. Extensive and often high-profile media coverage, radical changes in the civil and criminal laws, the creation of specialized domestic violence courts, support for a massive proliferation of shelters and advocacy programs, and millions of dollars' worth of research⁸² have not realigned the way many officials go about making sense of plausible survivor behavior.

The dominant culture's persistent failure to absorb the different experiences shared among a marginalized group may well derive from what philosopher Gaile Pohlhaus calls a "willful hermeneutical ignorance."⁸³ Pohlhaus describes how our culture's asymmetrical authority systems essentially downgrade women into a status of less competent "knowers" than men.⁸⁴ Men, in contrast, are:

⁸¹ See Barasch, *supra* note 11.

⁸² See, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 3-4 (1999).

⁸³ Gaile Pohlhaus, Jr., *Varieties of Epistemic Injustice*, in ROUTLEDGE HANDBOOK, *supra* note 80, at 17.

⁸⁴ *Id.*

[E]ncouraged to develop a kind of epistemic arrogance in order to maintain that their experience of the world is generalizable to the entirety of reality, a close-mindedness to the possibility that others may experience the world in ways they cannot, and an epistemic laziness with regard to knowing the world well in light of those [who are] oppressed⁸⁵

The result here is that members of the predominantly male, nonsurvivor culture place too much weight on their own—uninformed, inexperienced—perceptions about key features of domestic violence, and too little on the perceptions of survivors with firsthand experience. When male authority figures are made aware of how their perceptions conflict with the stories of women survivors, they resolve the conflict by doubting women's articulated experience.⁸⁶ Cognitive scientists refer to this phenomenon as "belief perseverance"—the process by which people tend to hold onto a set of beliefs as true, even when ample discrediting evidence exists.⁸⁷

Women victimized by domestic violence often fail to offer narratives that are recognized as internally consistent, due, paradoxically enough, to symptoms of neurological and psychological trauma that *are themselves the effects of abuse*. Such women also fail to tell stories that fit the way nonsurvivors believe the world operates, resulting in the appearance of external inconsistency and, as an all-too predictable outcome, the reflexive dismissal of their experience within the justice system and the broader culture. Together, these apparent—but not real—inconsistencies in survivors' stories cast doubt on the stories' plausibility. And the real-world costs are steep indeed: judges, police officers, and other justice system gatekeepers are likely to impose credibility discounts that interfere with a woman's ability to obtain justice, safety, and healing.

B. *Storyteller Trustworthiness*

In addition to obstacles rooted in story plausibility, survivors face serious challenges in convincing justice system gatekeepers to accept them as personally trustworthy storytellers. In other words, regardless of the *content* of her story, a woman may be considered an unreliable reporter of her own experiences. In the philosophy literature, this is referred to as "testimonial injustice": a discriminatory disbelief of the storyteller herself, independent of the story she tells.⁸⁸

Three of the most critical factors that contribute to our assessments of storyteller trustworthiness are (1) the storyteller's demeanor;⁸⁹ (2) the

⁸⁵ *Id.* at 17.

⁸⁶ McKinnon, *supra* note 80, at 170-71.

⁸⁷ *See, e.g.*, Savion, *supra* note 45, at 81.

⁸⁸ FRICKER, *supra* note 49, at 4.

⁸⁹ *See infra* text accompanying notes 912-111.

storyteller's motive;⁹⁰ and (3) the storyteller's social location.⁹¹ All three of these factors are particularly salient in the experiences of women domestic violence survivors trying to establish credibility in the eyes of justice system gatekeepers.

1. Demeanor

As discussed above,⁹² when a survivor tells the story of the abuse she has experienced, her demeanor may be symptomatic of psychological trauma induced by extended abuse. Three core aspects of PTSD—numbing, hyperarousal, and intrusion⁹³—can influence demeanor in obvious ways. And despite the proliferation of police and judicial training, many gatekeepers continue to misinterpret—and, as a result, discount—the credibility of women who display each set of symptoms when telling their stories of abuse.

A survivor can respond to overwhelming trauma by becoming emotionally numb, a compensating psychic response that often manifests as a highly constrained affect.⁹⁴ This symptom can profoundly shape the way a woman appears in court and, in turn, how a judge or other justice system gatekeeper perceives her. Numbing may cause many survivors to testify about emotionally charged incidents with an entirely flat affect or render them unable to remember dates or details of violent incidents.⁹⁵ A woman may tell a story about how her partner sexually assaulted her as if she is talking about the weather outside. The disconnect between expectations about affect and story can be jarring and can result in the imposition of a credibility discount.

PTSD also alters demeanor via hyperarousal—that is, an anxious posture of alertness and reactivity to an imminent danger.⁹⁶ This “[h]yperarousal can cause a victim to seem highly paranoid or subject to unexpected outbursts of rage in response to relatively minor incidents.”⁹⁷ In the courtroom, for example, an accused abusive partner may give the survivor a particular look or adopt a particular tone of voice. The judge may not notice anything out of the ordinary, but the partner does: She knows that the abuser is communicating a message of intimidation or threat. As a result, she may suddenly break down on the witness stand, gripped by fear, frustration, fury, or all three. But to the judge, who has no window into the triggering event, the survivor is likely to sound

⁹⁰ See *infra* text accompanying notes 112–141.

⁹¹ See *infra* text accompanying notes 143–165.

⁹² See *supra* text accompanying notes 33–40.

⁹³ DSM-5, *supra* note 35, at 271–72.

⁹⁴ *Id.* at 272.

⁹⁵ See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221 (1993); see also HERMAN, *supra* note 39, at 45.

⁹⁶ DSM-5, *supra* note 35, at 272.

⁹⁷ Epstein, *supra* note 82, at 41.

out of control, even a bit crazy.⁹⁸ The survivor now fits the stereotypical classic hysterical female—an image commonly associated with exaggerated unreliability.⁹⁹ The judge is therefore more likely to apply a credibility discount in such settings and assume that, regardless of the content of her story, the survivor is not a fully trustworthy witness.

Finally, as discussed in the context of story plausibility, PTSD symptoms affect demeanor through *intrusion*—reliving the violent experience as if it were occurring in the present, often through flashbacks.¹⁰⁰ Such unbidden re-experiencing of traumatic events may badly impair a witness' ability to testify in a narratively seamless—or indeed, even a roughly sequential—fashion.¹⁰¹

Once more, domestic violence complainants can find themselves in a double bind. The symptoms of their trauma—the reliable indicators that abuse has in fact occurred—are perversely wielded against their own credibility in court. Because PTSD symptoms can make abused women appear hysterical, angry, paranoid, or flat and numb, they contribute to credibility discounts that may be imposed by police, prosecutors, and judges.¹⁰²

Even demeanor “evidence” that is not symptomatic of trauma but that is a “normal” response to stressful courtroom circumstances can lead judges to discount a survivor's credibility. In a 2017 Boston trial court proceeding, for example, a woman seeking a one-year extension of her existing protection order testified about her abiding fear of her former partner. Following a contested trial, the judge awarded her the extension. Sitting next to her attorney as she listened to the court's ruling, she smiled and slumped in her seat, her torso sagging with relief. A few days later, the trial judge, *sua sponte*, set a reconsideration hearing. He told the woman that, in his view, she had appeared “too celebratory” when he had ruled in her favor at the previous hearing. As a result, he realized that she was not, in fact, a credible witness. The judge then vacated his previous decision to extend her protection order.¹⁰³

⁹⁸ See Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1078 (2011).

⁹⁹ See *id.* at 1079 (“Female jurors, according to one study, already believe that women are generally ‘less rational, less trustworthy, and more likely to exaggerate than men.’”).

¹⁰⁰ DSM-5, *supra* note 35, at 275.

¹⁰¹ Epstein, *supra* note 82, at 41.

¹⁰² See, e.g., *id.*; Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1878 (1996); Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 742 (2003).

¹⁰³ Interview with Community Advocate, Transition House, in Cambridge, Mass. (Dec. 18, 2017). The classic example of the justice system's misuse of affective evidence is Albert Camus's novel, *The Stranger*. The protagonist, Meursault, is sentenced to death for a murder based in part on a condemnation of his unrelated, “inappropriate” actions in the days following his own mother's death. Witnesses testified that Meursault did not cry but smoked a cigarette and drank coffee as he sat near his mother's coffin, and that the day after her funeral he swam in the ocean, saw a comedy film, and then made love with a woman he'd long been romantically interested in. This behavior, inconsistent

Credibility discounts based on presumed inappropriate demeanor are imposed by other justice system gatekeepers as well. One attorney recalls a recent California case as follows:

In my county, domestic violence cases involving children may be referred to court evaluators to meet with the parties and provide the judge with an assessment as to the veracity of the allegations. One client went to her appointment with the evaluator and reported that her ex-boyfriend had been texting her in violation of an initial, temporary protection order. She showed her phone to the evaluator, who saw that she had saved her ex-boyfriend's phone number under an expletive, instead of using his actual name. Based on this evidence of the woman's anger, the evaluator determined that she was not afraid of the respondent (a fact irrelevant to the applicable legal standard), and for this reason deemed her domestic violence claim inconclusive.¹⁰⁴

At the same time, abusive men often provide a sharp credibility contrast; they tend to excel at presenting themselves as self-confident and in control, are adept at manipulation, and "are commonly able to lie persuasively, sounding sincere," all of which tends to trigger assumptions that they are in fact credible.¹⁰⁵ A 2015 study of survivors conducted by the National Domestic

with society's image of a grieving son, led the community to despise him and a jury to condemn him for a murder to which he had no connection. See ALBERT CAMUS, *THE STRANGER* 8, 20-21, 64 (Matthew Ward trans., Vintage Books 1988) (1942). The tendency, in both the public and the justice system, to discount credibility and assume guilt persists today, as demonstrated by the case of Amanda Knox, a young woman from Seattle who went to Perugia, Italy, and was twice convicted in Italian courts—and, years later, fully exonerated—of murdering her housemate. See Martha Grace Duncan, *What Not to Do When Your Roommate Is Murdered in Italy: Amanda Knox, Her "Strange" Behavior, and the Italian Legal System*, HARV. J.L. & GENDER-CREATIVE CONTENT, Sept. 19, 2017, <http://harvardjlg.com/2017/09/what-not-to-do-when-your-roommate-is-murdered-in-italy-amanda-knox-her-strange-behavior-and-the-italian-legal-system-by-martha-grace-duncan/> [<https://perma.cc/VBS7-P23B>]. Amanda's initial conviction was heavily dependent on her "inappropriate" actions in the days following the murder, including kissing her boyfriend not far from the scene, cuddling with him at the police station, turning a cartwheel—at a police officer's request—while waiting to be interviewed, and shopping for underwear not long after the murder (because she had no access to her apartment, which was locked down as a crime scene). *Id.* at 10-23. Similarly, Lindy Chamberlain was convicted of murdering her infant daughter while camping in the Australian outback. Clyde Haberman, *Vindication at Last for a Woman Scorned by Australia's News Outlets*, N.Y. TIMES (Nov. 16, 2014), <https://www.nytimes.com/2014/11/17/us/vindication-at-last-for-a-woman-scorned-by-australias-news-media.html>. Public sentiment condemned Chamberlain early on, based largely on her attire and affect in the courtroom. Lindy described feeling "trapped in a no-win situation. 'If I smiled, I was belittling my daughter's death . . . If I cried, I was acting.'" *Id.* Forensic evidence subsequently exonerated Chamberlain, confirming the accuracy of her report that a wild dog pulled her daughter out of a tent and killed her. *Id.*

¹⁰⁴ Interviews with Jane Stoeber, Clinical Professor of Law, Univ. of Cal., Irvine Sch. of Law (Jan. 6 & 9, 2018).

¹⁰⁵ LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT* 15-16 (1st ed. 2002); see also Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 174

Violence Hotline is full of examples of this profoundly damaging credibility gap, including this one from a female survivor: The police made “things worse and act[ed] like I was the bad guy because I came in crying, but my abuser was calm after 2 years of hell—duh[,] I was scared and he was fine.”¹⁰⁶

The skeptical reactions of justice system gatekeepers to survivor demeanor can trigger a vicious cycle of credibility discounts. The more a police officer or judge appears to doubt a survivor’s credibility, the more likely she is to feel upset, destabilized, or even (re)traumatized.¹⁰⁷ This reaction may trigger an increase in the intensity of her emotionally “inappropriate” demeanor, making her appear even less credible.¹⁰⁸ In other words, the testimonial injustice that women experience as they seek to be recognized as credible witnesses to their own abuse can become a self-fulfilling phenomenon: they internalize the court’s image of themselves as unreliable narrators of their own experience.¹⁰⁹

Social psychologists have coined the term “stereotype threat” to explain such harm. Stereotype threat arises when a person feels that she is at risk of conforming to a cultural stereotype about her particular social group. The existence of negative stereotypes—regardless of whether an individual herself accepts them—can make that individual anxious, and harm her ability to perform.¹¹⁰ Thus, the existence of

(2009)(“[B]atterers tend to be self-confident and ultra-controlled in their outward appearance and thus testify in a way that is traditionally perceived as truthful.”).

¹⁰⁶ TK LOGAN & ROB VALENTE, NAT’L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 9-10 (2015), <http://www.thehotline.org/resources/law-enforcement-responses> [<https://perma.cc/CC5Z-Z56H>] [hereinafter National Hotline Survey]. Two national studies, both conducted in 2015, help us understand what is happening on the ground in terms of police refusal to credit survivor stories. One study, conducted by the ACLU, surveyed more than 900 domestic violence service providers about their clients’ experiences with police. ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE AND POLICING (2015), www.aclu.org/responsesfromthefield [<https://perma.cc/3CKD-6J9E>] [hereinafter Responses from the Field]. The other, conducted by the National Domestic Violence Hotline, surveyed survivors themselves. National Hotline Survey, *supra* note 106, at 2. In the National Domestic Violence Hotline survey, just over half of the 637 women surveyed reported that they had never called the police for help when they experienced domestic violence. *Id.* at 2. When asked for the reason, fifty-nine percent of these participants said that their decision was based on either their fear that the police would not believe them or—and this is where we get to consequential credibility—that they would do nothing in response to their reports of abuse. *Id.* at 4. Much the same perceived deficit in consequential credibility hampered the reporting efforts of the remaining 309 women interviewed in the National Hotline Survey who *had* in fact interacted with the police: two-thirds of these women reported that they were “somewhat or extremely afraid” to call again in the future, based on the same sets of concerns. *Id.* at 8.

¹⁰⁷ See Jennifer Saul, *Implicit Bias, Stereotype Threat, and Epistemic Injustice*, in ROUTLEDGE HANDBOOK, *supra* note 80, at 236-38.

¹⁰⁸ See *supra* text accompanying notes 91-107; *infra* notes 109-110.

¹⁰⁹ Saul, *supra* note 107.

¹¹⁰ See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 617 (1997); Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379, 389 (2002).

such stereotypes, and women's concern about conforming to them, can diminish survivors' ability to effectively communicate their experiences.¹¹¹

2. Motive

To assess the trustworthiness of a woman's account of domestic violence, judges and other gatekeepers are inevitably (though perhaps unconsciously) influenced by stereotypical beliefs about women, particularly in the context of intimate relationships.¹¹² Although such beliefs vary by the individual, certain fundamental cultural tropes about women's motives to lie and manipulate tend to resonate here. Two of the most persistent and crude stereotypes about women's false allegations about male behavior are the grasping, system-gaming woman on the make and the woman seeking advantage in a child custody dispute.

A recent review of the first twenty websites to appear in a Google search of the term "domestic violence false allegations" underlines the power of these stereotypes in the legal context. The vast majority of the "hits" in response to this search were websites maintained by small firm and sole practitioner defense attorneys; in other words, lawyers available to represent those accused of domestic violence, typically in the face of criminal prosecution. These lawyers post advice for potential clients, and most explain that "false allegations" of domestic violence tend to derive from women scheming for some sort of material payday or other advantage, such as a leg up in a child custody case.¹¹³ Each of these stereotypes, and their implications for women's credibility, is explored below.

¹¹¹ See Saul, *supra* note 107, at 238.

¹¹² Philosopher Kristie Dotson calls this "testimonial quieting." Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 *HYPATIA* 236, 242-43 (2011).

¹¹³ See Memorandum Analyzing First Twenty Hits for "Domestic Violence False Allegations" (Nov. 15, 2017) (on file with authors). The twenty websites are: <https://www.breedenfirm.com/domestic-violence/defending-false-accusations-domestic-violence>; <https://billingsandbarrett.com/new-haven-criminal/domestic-violence-lawyer/false-accusations>; <https://www.adamyounglawfirm.com/Criminal-Defense/Violent-Crimes/False-Allegations-Of-Domestic-Violence.shtml>; <https://criminallawdc.com/dc-domestic-violence-lawyer/false-accusations>; <https://www.bajajdefense.com/san-diego-domestic-violence-attorney>; <https://www.jonathanmharveyattorney.com/Domestic-Violence/False-Allegations.shtml>; <https://www.lafaurielaw.com/Criminal-Defense/Domestic-Violence-Order-of-Protection-in-Family-IDV-Courts/False-Domestic-Violence-Accusations.shtml>; <https://chicago.criminaldefenselawyer.com/false-accusations-domestic-violence>; <http://www.amcoffey.com/Criminal-Defense-Overview/False-Domestic-Violence-Allegations.shtml>; <https://criminallawyermaryland.net/maryland-domestic-violence-lawyer/false-accusations>; <http://www.lnlegal.com/blog/2017/february/have-you-been-falsely-accused-of-domestic-violence>; <http://www.scottriethlaw.com/blog/2017/06/how-false-allegations-of-domestic-violence-can-ruin-your-life.shtml>; <https://www.weinbergerlawgroup.com/domestic-violence/false-allegations/defending-faqs>; <https://www.dworinlaw.com/false-domestic-violence-austin-texas>; <https://stearns-law.com/family-law-services/domestic-violence/false-accusations>; <http://www.inlandempiredomesticviolence.com/Domestic-Violence/Falsely-Accused-of-Domestic-Violence.aspx>; <https://www.carlahartleylaw.com/Domestic-Violence-And-Criminal-Law/False-Accusations-Of-Domestic-Violence.shtml>; <http://www.bosdun.com/Blog/2017/March/What-To-Do-if-You-Have->

a. *The Grasping Woman on the Make*

The grasping woman stereotype flourished in the Reagan era, when legislators portrayed poor women as “welfare queens,” whose family planning decisions were solely dependent on a desire to expand their monthly benefit check by a few dollars. Though factually discredited,¹¹⁴ the welfare queen image continues to have an impact on the law: to this day, fifteen states prohibit families from receiving higher benefit levels if a baby is born while the household is on assistance, in an effort to ensure that cash aid will not serve as a putative incentive for poor women to have more children.¹¹⁵

This same stereotype is reflected in our contemporary obsession with women as “gold diggers,” based on the 1933 movie of that name.¹¹⁶ This stereotype imbues the lyrics of the eponymous hip hop song about women who target wealthy men, falsely claim that these men are the fathers of their children, and then soak them for child support.¹¹⁷ It is readily apparent in Silicon Valley,

Been-Wrongly-Accused-of-D.aspx; <http://www.flowermoundcriminaldefense.com/domestic-violence>; <https://www.kefalinoslaw.com/miami-domestic-violence-defense-lawyer>.

¹¹⁴ See Stephen Pimpare, *Laziness Isn't Why People Are Poor. And iPhones Aren't Why They Lack Health Care*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/posteverything/wp/2017/03/08/laziness-isnt-why-people-are-poor-and-iphones-arent-why-they-lack-health-care/?utm_term=.59f65871be13; Eduardo Porter, *The Myth of Welfare's Corrupting Influence on the Poor*, N.Y. TIMES (Oct. 20, 2015), <https://www.nytimes.com/2015/10/21/business/the-myth-of-welfares-corrupting-influence-on-the-poor.html>.

¹¹⁵ Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 249 (2014).

¹¹⁶ GOLD DIGGERS OF 1933 (Warner Bros. 1933) (portraying aspiring actresses experiencing financial hardship who conspire to find wealthy husbands).

¹¹⁷ Kanye West's song, *Gold Digger*, contains the following lyrics:

Eighteen years, eighteen years
 She got one of your kids got you for eighteen years
 I know somebody payin' child support for one of his kids
 His baby mama car and crib is bigger than his
 You will see him on TV, any given Sunday
 Win the Super Bowl and drive off in a Hyundai
 She was supposed to buy your shorty Tyco with your money
 She went to the doctor, got lipo with your money
 She walkin' around lookin' like Michael with your money . . .
 If you ain't no punk
 Holla “We want prenup! We want prenup!” (Yeah!)
 It's somethin' that you need to have
 'Cause when she leave yo' ass she, gon' leave with half
 Eighteen years, eighteen years
 And on the eighteenth birthday he found out it wasn't his?!
 . . . Now I ain't saying she a gold digger . . .
 But she ain't messin' with no broke n* . . .

KANYE WEST, *Gold Digger*, on LATE REGISTRATION (Roc-A-Fella Records & Def Jam Recordings 2005).

where tech magnates swap warnings about women they refer to as “founder hounders.”¹¹⁸ These gender stereotypes are, of course, shaped by race, class, and other identity-based assumptions. The image of the welfare queen, as one example, was purposefully designed to draw its power from racialized narratives;¹¹⁹ at the same time, it operates more broadly to negatively affect societal perceptions of all women, perhaps especially those who are also poor or low income. As with all stereotypes, those that affect women as women are not monolithic in their impact: gender stereotypes are racialized (the unrapeable black woman, for example), and racial discounts are gendered (blackness in women is stigmatized in ways specific to black women in particular). Despite this diversity of impact and complexity of harm, the bottom line is that we tend to discount the trustworthiness of all women who appear to be motivated by a desire to get something, either from the government or from their male partners.

This social myth is particularly lethal for women seeking safety from intimate partner violence, especially those who are trying to exit their abusive relationships. Most survivors need concrete resources to bring about this fundamental change in their living situation. Although a woman’s informal network of support, made up of family and friends, may be able to help by providing a place to stay, transportation, childcare, or financial assistance,¹²⁰ these resources may well not be sufficient and are often stop-gap or finite in nature. Eventually, many abuse survivors need to secure additional resources, frequently by turning to the social welfare system or the safety furnished by a civil protection order.¹²¹ This quest for some sort of subsidized autonomy is, once again, a reflection of the underlying dynamics of domestic abuse.¹²²

118 See Emily Chang, “Oh My God, This Is So F---ed Up”: Inside Silicon Valley’s Secretive, Orgiastic Dark Side, VANITY FAIR (Feb. 2018), <https://www.vanityfair.com/news/2018/01/brotopia-silicon-valley-secretive-orgiastic-inner-sanctum> (“Whether there really is a significant number of such women is debatable. The story about them is alive and well, however, at least among the wealthy men who fear they might fall victim.”).

119 Premilla Nadasen, *From Widow to “Welfare Queen”: Welfare and the Politics of Race*, 1 BLACK WOMEN, GENDER & FAMILIES, 52 (2007), 69–70.

120 Ruth E. Fleury-Steiner et al., *Contextual Factors Impacting Battered Women’s Intentions to Reuse the Criminal Legal System*, 34 J. COMMUNITY PSYCHOL. 327, 339 (2006); Lisa A. Goodman & Katya Fels Smyth, *A Call for a Social Network-Oriented Approach to Services for Survivors of Intimate Partner Violence*, 1 PSYCHOL. OF VIOLENCE 79, 81 (2011); Stephanie Riger, Sheela Raja & Jennifer Camacho, *The Radiating Impact of Intimate Partner Violence in Women’s Lives*, 17 J. INTERPERSONAL VIOLENCE 184, 198–200 (2002).

121 See, e.g., ELEANOR LYON, SHANNON LANE & ANNE MENARD, NAT’L INST. JUSTICE, MEETING SURVIVORS’ NEEDS: A MULTI-STATE STUDY OF DOMESTIC VIOLENCE SHELTER EXPERIENCES iv (2008) (noting that “domestic violence shelters address compelling needs that survivors cannot meet elsewhere”); PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 52 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> [<https://perma.cc/3TSQ-6PKY>] (noting that a substantial percentage of women survivors of intimate partner violence seek a civil protection order).

122 See *supra* text accompanying notes 112, 114.

An all-too-common strategy of abusers is to force women into social isolation, thus limiting their access to those family and friends who might have been willing to provide them with help.¹²³ The law in most states authorizes system officials to provide survivors assistance such as priority in shelter access, or a protection order provision ordering their abusive partner to vacate a home in which they share a legal interest.¹²⁴ Again, these resources for survivors are built into our law and policy for good reason—survivors need them to stave off repeat violence.¹²⁵ But when women actually pursue such concrete, practical assistance, they often suffer an immediate credibility discount; their trustworthiness is now colored by the suspicion that they are motivated by a desire to obtain shelter or sole access to a residence, rather than by the urgent need to protect themselves from violence.¹²⁶

I (the first author) have participated in numerous judicial training sessions with judges in the D.C. Superior Court's Domestic Violence Unit. Year after year, I have listened as veteran judges warn those who are more junior, cautioning that "so many times I hear these stories and something seems wrong; then I realize the woman is just here to get shelter, or to kick her ex out of the house without having to go through a divorce. Keep an eye out for that." These judges are encouraging their colleagues to discount the personal trustworthiness of women based on their efforts to seek legally authorized resources on their path to safety.¹²⁷

123 LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 107 (2009); see also Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1021-22 (2000) ("[Battered women] frequently become estranged from family and friends who might otherwise provide them with material aid."); Jody Raphael, *Rethinking Criminal Justice Responses to Intimate Partner Violence*, 10 VIOLENCE AGAINST WOMEN 1354, 1357 (2004) ("Women are not allowed to talk on the telephone, visit their friends, attend church, decide on their own what to wear, or go to school or work.").

124 SUSAN L. KEILITZ, PAULA L. HANNAFORD & HILLERY S. EFKEMAN, NAT'L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE, 12-14 (1997), <https://www.ncjrs.gov/pdffiles1/Digitization/164866NCJRS.pdf> [<https://perma.cc/3SXH-SJ6E>].

125 See, e.g., MONICA McLAUGHLIN, NAT'L LOW INCOME HOUS. COAL., HOUSING NEEDS OF VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING, 1 (2017), http://nlihc.org/sites/default/files/AG-2017/2017AG_Cho6-So1_Housing-Needs-of-Victims-of-Domestic-Violence.pdf [<https://perma.cc/SJT7-2DBX>] (explaining that "safe housing can give a survivor a pathway to freedom").

126 As noted above, women of color may be especially likely to experience such credibility discounts due to the racialized nature of the stereotypes that drive them.

127 One more example: In a 2012 Baltimore protection order case, Judge Bruce S. Lamdin listened to Heather Myrick-Vendetti testify about her husband's abuse, including the following statement: "He pinned me to a shelf, busted my arm open, left a gash in my forearm. He then threw me down on the floor and stomped me in the ribs so hard that I peed my pants. My oldest, who was 12 years old, got my son and hid in a closet with a hammer and called someone to come get us." *Judge Bruce Lamdin Interrogates Woman Seeking Restraining Order*, WASH. POST (Sept. 9, 2012), <https://www.washingtonpost.com/opinions/judge-bruce-lamdin-interrogates-woman-seeking->

And attorneys representing survivors pick up on the power that these unfair stereotypes can exert in the courtroom. Until recently, I (the first author) had often joined the ranks of many other victim advocates in doing just that: when representing a client who is privileged enough not to need much assistance from the court (perhaps she doesn't have children with her abusive partner, she doesn't live with him, or their relationship was relatively limited so she was more easily able to cut him out of her life), I have argued that the court should find my client especially credible *for this reason*. In other words, because my client is seeking only narrowly limited, safety-based remedies, rather than requesting the full range of relief legally available to her, the court should view her as particularly credible. I've done this for the same reason lawyers use to make every strategic decision: because my audience—the court—is likely to buy the argument. My lawyering instincts tell me that a judge will, in fact, understand a more limited request for relief as a real indication of a survivor's credibility.¹²⁸

But I have belatedly come to realize that in pursuing this approach I am helping one client but simultaneously lending support to a prejudicial, gender-based credibility discount. Logically, the flip side of my argument must also be true: judges view survivors who seek more extensive remedies as *less* credible—as women who may be fabricating or exaggerating their allegations in order to obtain resources such as shelter and financial support.¹²⁹

It is worth noting here that these judicial suspicions—discounting credibility when a woman asks for the full scope of available relief—simply do not arise in contexts that are not dominated by women litigants. It is laughable to imagine a judge suspecting the credibility of a business owner if, after presenting a colorable legal claim, that owner sought to recover an

restraining-order/2012/09/09/614fd664-faae-11e1-875c-4c21cd68f653_video.html?tid=areinl; see also *Baltimore County Judge Bruce Lamdin Faces Complaint* (WBAL TV television broadcast Sept. 4, 2012), <https://www.wbalv.com/article/911-dispatcher-responds-to-call-at-his-own-home-i-just-handled-it-like-any-other-call/25239609> [<https://perma.cc/PP3K-83BB>]. Ms. Myrick-Vendetti then described her husband's attempt to burn down their house a few days later. *Id.* When she told the judge that her husband constituted a threat to her safety and requested that he be ordered to leave the home they shared, Judge Lamdin responded, "Ma'am there are shelters," and "It confounds me that people tell me they are scared for their life and then they stay in a situation where they can remove themselves and go to a shelter." *Id.* Although this story is an extreme one, it reflects a deeply held suspicion that woman seeking resources are operating from false motives and cannot be trusted.

¹²⁸ Other lawyers representing survivors report doing the same. See, e.g., Interview with Megan Challenger, Supervising Attorney, Md. Ctr. for Legal Assistance (July 12, 2017) (reporting that she has observed lawyers making these arguments in court on multiple occasions); Interview with Margo Lindauer, Assoc. Teaching Professor & Dir. of the Domestic Violence Inst., Ne. Univ. Sch. of Law (Jan. 21, 2018).

¹²⁹ One survivor attorney recently shared an experience where the judge in a Washington, D.C., civil protection order case explicitly ruled that the survivor was credible because "she was not asking for anything other than to be left alone." Interview with Megan Challenger, *supra* note 128; see also Interview with Courtney K. Cross, Assistant Clinical Professor of Law & Dir., Domestic Violence Clinic, Univ. of Ala. Sch. of Law (July 12, 2017).

extensive range of statutorily enumerated remedies. Why are women subjected to male violence held to a different standard?

Credibility discounts based on the grasping woman stereotype extend beyond the judicial realm to other gatekeepers. In Washington, D.C., for example, court-appointed attorney negotiators meet with unrepresented parties in civil protection order cases and attempt to resolve matters without the need for a contested trial. Several of these negotiators have, on many occasions, shared the view that petitioners are not “real” victims of domestic violence, but instead are there to get housing and other resources.¹³⁰ These suspicions about survivors’ motives color the work of the D.C. Superior Court’s Crime Victim’s Compensation (“CVC”) program as well. The CVC provides a variety of material and housing-related resources to local victims of crime. A survivor is entitled to obtain emergency shelter based on an initial, emergency judicial determination that she is entitled to a short-term temporary protection order. CVC officials then monitor her actions. If the court docket reveals that she ultimately has dropped her request for a permanent order—regardless of whether this decision was made because she was reassaulted and intimidated into doing so, she decided to move to another jurisdiction to better protect herself, or she was unable to accomplish the necessary service of process—the CVC will peremptorily terminate her request for assistance.¹³¹

This grasping woman stereotype puts survivors in a terrible bind. We know that victims of domestic violence frequently are unable to successfully handle the violence in their lives without seeking outside help.¹³² Many, if not most, need the full set of remedies permitted in civil protection order statutes, such as shelter, financial support, and other assistance. By superimposing stereotype-based credibility assessments onto women’s requests for relief, we are forcing these women to make an untenable choice: they may either seek the full range of assistance they actually need to achieve safety, but risk suffering a court-imposed credibility discount; or they may make a bid to appear more credible by forgoing essential resources needed for protection. And, of course, the women who are most disadvantaged, and thus need the greatest amount of help, are the ones who are least likely to be believed.

¹³⁰ This observation is based on the first author’s extensive experience litigating hundreds of civil protection order cases. See *supra* note 9. Other D.C. domestic violence advocates confirm the routine nature of such comments. See, e.g., Interview with Gillian Chadwick, *supra* note 58; Interview with Courtney K. Cross, *supra* note 129.

¹³¹ See Interview with Janese Bechtol, Chief, Domestic Violence Section, Office of the Attorney General for the District of Columbia (Aug. 17, 2018). For an overview of the Washington, D.C., crime victim compensation program, see *Crime Victim Compensation & Services in Washington, D.C.*, Interview by Len Sipes with Laura Banks Reed, Dir., Crime Victims’ Compensation Program of the D.C. Superior Court (Mar. 3, 2014), <https://media.csosa.gov/podcast/transcripts/category/audiopodcast/page11/> [<https://perma.cc/LYK5-8H5V>].

¹³² See LYON, LANE & MENARD, *supra* note 121.

b. *The Woman Seeking Unfair Advantage in a Child Custody Dispute*

Women seeking to escape violent relationships often must turn to the family courts to resolve custody and other issues with their abusive partners. And virtually every state custody statute requires family court judges to consider intimate partner abuse as a factor weighing against an award of custody to the parent-abuser.¹³³ Indeed, the U.S. House of Representatives recently passed a concurrent resolution urging state courts to determine family violence claims and risks to children before turning to the consideration of any other custody factors.¹³⁴

The rationale for such legal provisions is that parent-on-parent violence harms not only the victim-parent, but also the children, who may witness the violence or its aftermath.¹³⁵ But women's experience in these courts defies the sense of the law as written: in fact, mothers' allegations of domestic violence are discounted or even fully discredited by family court judges.

Recent studies of family court custody decisions reveal that mothers who allege intimate partner violence are actually *more* likely to lose custody than mothers who do not make such assertions.¹³⁶ In other words, a claim of parent-on-parent violence operates to *undermine, rather than strengthen*, custody requests made by survivor-mothers. Judges tend to conclude, typically with no evidence other than the perpetrator-father's uncorroborated assertion, that women are fabricating abuse allegations as part of a strategic effort to alienate the children from their father.¹³⁷ The mother's experience of abuse is turned on its head to support the perpetrator's claim that he is the better parent.

¹³³ AM. BAR ASS'N, *Custody Decisions in Cases with Domestic Violence Allegations*, https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/domestic_violence_chart1.pdf (demonstrating that Connecticut is the sole exception to this rule).

¹³⁴ H.R. Con. Res. 72, 115th Cong. (Sept. 25, 2018).

¹³⁵ See Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797, 797 (2008) ("This review finds that children and adolescents living with domestic violence are at increased risk of experiencing emotional, physical and sexual abuse, of developing emotional and behavioral problems and of increased exposure to the presence of other adversities in their lives.").

¹³⁶ See Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 L. & INEQUALITY 311, 328 (2017) ("Overall, fathers who were accused of abuse and who accused the mother of alienation won their cases 72% of the time; slightly *more* than when they were *not* accused of abuse (67%)."); see also Janet R. Johnston, Soyoung Lee, Nancy W. Olesen & Marjorie G. Walters, *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 290 (2005).

¹³⁷ Meier & Dickson, *supra* note 136, at 318. This credibility discount is particularly disconcerting in light of studies examining the reliability of domestic violence allegations in the context of family law proceedings. Such studies have found that the allegations of women-mothers are substantiated—in other words, corroborated by sources in addition to the testimony of the woman who asserted them—in a high percentage of cases. See, e.g., Johnston et al., *supra* note 136, at 290 (finding corroboration rate of sixty-seven percent). Although the remainder of these allegations lack independent corroboration, this does not mean that they are false; instead, it simply means that insufficient additional information exists beyond the parent's testimony.

Family court studies further reveal that when a father alleges that a mother has engaged in “parental alienation,”¹³⁸ his chances of being awarded custody increase even when his allegations are not credited or are left unresolved by the court.¹³⁹ The judicial assumption that women falsely allege or exaggerate domestic violence in an effort to obtain custody runs so deep that family court judges appear to cling to it even in cases where they themselves determine that such a claim is untrue.¹⁴⁰

The credibility discounting operates in the reverse direction as well. At a 2016 “Bench–Bar” social event, two judges involved with the D.C. domestic violence court commented that they were well aware that women who file for protection orders after having already initiated custody proceedings are trying to “pull the wool over [the judge’s] eyes.”¹⁴¹

The result is that survivor-mothers often leave family court having been wrongly denied custody of their children, and may be unfairly discredited and denied relief in their civil protection order hearings as well. A judicial willingness to discount their trustworthiness can have repercussions that will last throughout their own lives and those of their children.

3. Social Location

Cognitive psychology teaches us that our wider culture—as translated by the media, authority figures, family members, etc.—transmits stereotypes to individuals that we then adopt on a deep, unconscious level.¹⁴² Our most

¹³⁸ Parental alienation syndrome is a hypothesized disorder first proposed by psychiatrist Richard Gardner in 1985. Gardner believes that the disorder arises primarily in the context of child custody disputes and involves a child being manipulated by one parent into internalizing the unjustified denigration of the other parent. In the more than thirty intervening years, the diagnosis has yet to be accepted in the mental health community. See Holly Smith, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. MASS. L. REV. 64, 64 (2016). Instead, a great deal of psychological and legal literature has critiqued the construct, and both leading researchers and most professional institutions have renounced the concept as lacking in empirical basis or objective merit. See Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 236 (2009) (“The critiques of Gardner’s PAS are legion . . .”). Despite all of this, claims of parental alienation syndrome have come to dominate custody litigation in family court, especially in cases involving allegations of abuse. *Id.* at 233.

¹³⁹ Meier & Dickson, *supra* note 136, at 331 (“[W]hen courts believed mothers were alienating, they switched custody to the father 69% of the time; and even when the alienation claim was rejected or not decided, they transferred custody of the children to an allegedly abusive father 25–50% of the time.”).

¹⁴⁰ This refusal to accept facts that contradict a person’s theory of how the world works is explained in part by the concept of confirmation bias. See *supra* text accompanying note 41.

¹⁴¹ Interview with Andrew Budzinski, Graduate Teaching Fellow, Georgetown Univ. Law Ctr. Domestic Violence Clinic (Jan. 22, 2018).

¹⁴² See, e.g., RACHEL D. GODSILE ET AL., PERCEPTION INST., 2 SCIENCE OF EQUALITY: THE EFFECTS OF GENDER ROLES, IMPLICIT BIAS, AND STEREOTYPE THREAT ON THE LIVES OF WOMEN AND GIRLS 12 (2016), <https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Volume-2.pdf> [<https://perma.cc/5Q62-R9U7>] (“Popular culture plays an important part in

commonly held derogatory stereotypes include those that devalue the words of women, people of color, those living in poverty, and other marginalized groups. Once formed, these stereotypes tend to be highly resistant to counterevidence.¹⁴³ As philosopher Miranda Fricker explains, “If we examine stereotypes of historically powerless groups such as women, African Americans, or poor/working-class people, they often are associated with attributes related to poor truth-telling in particular: things like over-emotionality, lack of logical thinking, inferior intelligence, being on the make, etc.”¹⁴⁴

Although it is outside our scope to make a full case for each of these social categories, we will examine one of them in detail here: the practice of discounting *women’s credibility as women*. In Rebecca Solnit’s compelling essay, *Cassandra Among the Creeps*,¹⁴⁵ she describes the myth of Cassandra, daughter of the king of Troy. When the god Apollo tried to seduce her, Cassandra rejected him. In retribution, Apollo cursed Cassandra so that, although she could accurately foresee the future, her people always disbelieved her and shunned her as a crazy liar. Solnit notes,

I have been thinking of Cassandra as we sail through the choppy waters of the gender wars, because credibility is such a foundational power in those wars and because women are so often accused of being categorically lacking in this department. Not uncommonly, when a woman says something that impugns a man . . . or an institution . . . the response will question not just the facts of her assertion but her capacity to speak and her right to do so.¹⁴⁶

This refusal to listen to women’s stories of male abuses of power runs so deep that it may have played a significant role in Sigmund Freud’s early decision to upend his entire psychoanalytic theory.¹⁴⁷ Early in his career, Freud listened as his female patients told him story after story of their experiences of childhood sexual abuse, often at the hands of their fathers.¹⁴⁸ Freud believed these stories and, in the late 1880s developed his “seduction theory,” arguing that early childhood

reinforcing these gendered associations. Implicit biases are not the result of individual psychology—they are a social phenomenon that affects us all.”).

¹⁴³ Jeremy Wanderer, *Varieties of Testimonial Injustice*, in *ROUTLEDGE HANDBOOK*, *supra* note 80, at 28.

¹⁴⁴ See FRICKER, *supra* note 49, at 32; *supra* text accompanying note 41 (discussing confirmation bias).

¹⁴⁵ Rebecca Solnit, *Cassandra Among the Creeps*, *HARPER’S MAG.*, Oct. 2014, at 4.

¹⁴⁶ *Id.* Professor Catharine MacKinnon, the theorist who created the term “sexual harassment” notes: “I kept track of . . . cases of campus sexual abuse over decades; it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person.” Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, *N.Y. TIMES* (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

¹⁴⁷ See, e.g., SIGMUND FREUD, *AN AUTOBIOGRAPHICAL STUDY* 62-65 (James Strachey trans., W. W. Norton & Co. 1963) (1925).

¹⁴⁸ *Id.* at 62.

sexual abuse constituted the root cause of his patients' neuroses.¹⁴⁹ Later, however, Freud abandoned this idea, proclaiming instead that his patients' stories were not based in actual experience, but instead on fabricated, wishful fantasies that all women experience.¹⁵⁰ Freud's shift from crediting to discrediting women eventually led him to develop his profoundly influential theory of psychosexual development.¹⁵¹

For almost a century, conventional psychoanalytic wisdom held that Freud's shift represented an appropriate course correction—an important move toward greater accuracy in analyzing his traumatized patients. In the early 1980s, however, Jeffrey Masson, a former Sanskrit professor who had subsequently trained as a psychoanalyst and become Projects Director of the Freud Archives, turned this assumption on its head. Based on correspondence between Freud and a contemporary, Wilhelm Fliess, Masson argued that Freud did not abandon his belief in his original observation—that girls were being abused in huge numbers by male relatives—based on factual evidence.¹⁵² Instead, Freud was unable to accept the disturbing truth he had uncovered; he also may have been unwilling to risk the disapprobation of the conservative medical establishment.¹⁵³ Ultimately, Freud decided to abandon his original idea¹⁵⁴ and create a new theory based on the premise that women's stories of sexual violence were not fact, but fantasy.¹⁵⁵ In the words of psychiatrist Judith Herman, "[t]he dominant psychological theory of the next century was founded in the denial of women's reality."¹⁵⁶

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 63.

¹⁵¹ *Id.* at 63-64. Freud's theory of psychosexual development rests on the idea that from birth, human beings possess an instinctual sexual energy (libido) that develops in five stages. According to Freud, a person who experiences frustration during any one of these developmental stages experiences a resulting anxiety that can persist into adulthood in the form of neurosis. During the third stage, called the phallic phase, which occurs between the ages of two and five, a child focuses libidinal energy or sexual wishes on the opposite sex parent and experiences feelings of jealousy and rivalry toward the same sex parent. 7 SIGMUND FREUD, *Three Essays on the Theory of Sexuality*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1975).

¹⁵² JEFFREY MOUSSAIEFF MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* 107-13 (1984).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 110.

¹⁵⁶ HERMAN, *supra* note 39, at 14. It should be noted that Masson's claim provoked a good deal of controversy in the psychiatric community, where Freud is still largely revered. See, e.g., Judith Herman, *The Analyst Analyzed*, NATION (Mar. 10, 1984), at 293 (reviewing JEFFREY M. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984)) (arguing that Masson is "right and courageous"); Charles Rycroft, *A Case of Hysteria*, 31 N.Y. REV. BOOKS 3 (1984) (reviewing JEFFREY M. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984)) (accusing Masson of ignoring evidence contrary to his theory and presenting flimsy evidence to support it); Anthony Storr, *Did Freud Have Clay Feet?*, N.Y. TIMES, Feb. 12, 1984, at 3 (reviewing JEFFREY M. MASSON, *THE ASSAULT ON*

Contemporary culture continues to impart strong lessons about women's lack of trustworthiness. Our teenagers watch TV shows like *Pretty Little Liars*, *Don't Trust the Bitch in Apartment 23*, and *Devious Maids*; younger children watch animated movies like *Shark Tale*, which features a catchy tune that describes women as scheming.¹⁵⁷ Rap lyrics are full of stories of women deceiving and taking advantage of men.¹⁵⁸

The same insidious stereotype of women as unreliable-to-hysterical distorters of the truth has quietly overtaken the justice system, where women witnesses tend to be disbelieved more than their male counterparts. In one study in which a group of "credibility raters" assessed the believability of actual witnesses testifying in trials in a mid-sized Southern city, researchers found that male witnesses were considered more credible than female witnesses.¹⁵⁹ Similarly, the available evidence indicates that, as a general rule, judges view women as less credible witnesses and advocates than they do men.¹⁶⁰ And recent studies show that the police routinely discredit female survivors of intimate partner abuse. In the 2015 National Domestic Violence Hotline Survey, for example, a substantial percentage of women reported that the police did not believe their stories of intimate partner abuse because they were women.¹⁶¹

In addition, as no end of literary and cultural texts manifest, when women—such as victims of domestic violence—are burdened with the cultural script of acting other-than rationally, or permit themselves to succumb to expressions of emotional intensity, our tendency to discredit them as individuals gains new momentum.¹⁶² In a recent study, researchers asked a diverse group of college

TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY) (arguing that "[e]verything we know about [Freud's] character makes Mr. Masson's accusation wildly unlikely").

¹⁵⁷ Soraya Chemaly, *How We Teach our Kids that Women Are Liars*, ROLE REBOOT (Nov. 19, 2013), <http://www.rolereboot.org/culture-and-politics/details/2013-11-how-we-teach-our-kids-that-women-are-liars> [https://perma.cc/3N2E-RCEM].

¹⁵⁸ Terri M. Adams & Douglas B. Fuller, *The Words Have Changed but the Ideology Remains the Same: Misogynistic Lyrics in Rap Music*, 36 J. BLACK STUD. 938, 945, 948 (2006).

¹⁵⁹ Jacklyn E. Nagle, Stanley L. Brodsky & Kaycee Weeter, *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 BEHAV. SCI. & L. 195, 195, 203 (2014).

¹⁶⁰ Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 61 (1996); see also Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 629 (2000) ("[W]omen, more than men, are stereotyped as liars even though men and women are equally adept at telling lies."). It should be noted that existing data on judicial gender bias in credibility determinations are somewhat outdated; however, no evidence exists to indicate that the relevant findings have changed in recent years.

¹⁶¹ NATIONAL HOTLINE SURVEY, *supra* note 106, at 7.

¹⁶² "[I]t's also a common view, particularly in many Western patriarchal societies, that emotionality is at odds with rationality." McKinnon, *supra* note 80, at 169. For example, consider just one of many Internet memes: A young boy asks, "Dad can you explain women's logic?" His father replies, "You're grounded!" When the boy asks for the reason, the father replies with the non-sequitur: "Peanut Butter." Image, PINIMG.COM, <https://i.pinimg.com/474x/73/6b/43/736b43231b83b92e7f55b22e0a386ca9.jpg> [https://perma.cc/KJH7-AHYJ].

students to take on the role of mock jurors, and review a condensed version of a murder trial transcript. The researchers charged the students with making a preliminary decision as to how they would vote—guilty or not guilty. They were then asked to deliberate electronically with participants whom they believed to be their fellow jurors. The other participants, however, were actually the researchers themselves—an approach designed to ensure that there was always a single “holdout” on the jury, whose messages would sound increasingly angry over the course of deliberations. Participants whose holdout was assigned a clearly male-identified name began doubting their initial opinions; in contrast, those for whom the holdout was assigned a clearly female name became significantly more confident in their initial opinions, at a statistically significant level.¹⁶³ In sum, the tendency to discredit women *because they are women* is deeply embedded in our broader culture—and clearly influences the way credibility is assessed in the legal system.

People of color, particularly Black people, have the same experience. As many legal scholars have noted, American courts have a long history of discrediting African American witnesses on the basis of their blackness. Such discrediting can occur based on stereotypes that African Americans are less intelligent than are whites, or that they are untrustworthy and dishonest.¹⁶⁴ Based on all of the above, it stands to reason that black women risk being doubly disbelieved.

Poor people are also vulnerable to stereotypes about their trustworthiness, as in the earlier example of welfare queens, who cheat the system to take what is not theirs. Because so many survivors live at the intersection of all three of

¹⁶³ Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 L. & HUM. BEHAV. 581, 581 (2015).

¹⁶⁴ See, e.g., Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 467 (2016) (quoting Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42 (2000)). In one striking study of judicial racial bias, 133 state and local trial judges from multiple jurisdictions were given an Implicit Association Test in which they were asked to categorize photos of white and black faces with positive attitude words (like pleasure), or negative attitude words (like awful), as quickly as possible. As hypothesized, the judges responded consistently with the general population, associating black with bad and white with good. Next, the judges engaged in a nonconscious “priming” task, in which the experimenters flashed coded words on participants’ computer screens, too rapidly to be consciously processed. For example, the black prime consisted of flashed words like dreadlocks, hood, and rap; the control group prime consisted of words like summer, trust, and stress. After being primed, the judges were asked to make various determinations regarding a hypothetical case involving two juvenile defendants. Judges with higher implicit bias scores rendered harsher judgments when primed with the black racial category. See Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1198-99 (2009). Similarly, a recent study of 239 federal and state courts found that judges held strong to moderate implicit biases against both Asians and Jews relative to Caucasians and Christians, respectively, and that on a scenario-based task, they gave slightly longer prison sentences to Jewish defendants compared to identical Christian defendants. Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104 (2017).

these identities—they are poor women of color—these stereotypes feed into each other to further undermine assumptions about their trustworthiness.¹⁶⁵

And as one might expect, a woman who is mentally ill or abusing substances may experience even further credibility discounts. When a judge talks to a jury about how to assess credibility, the standard instruction emphasizes how important it is for witnesses to articulate strong and clear memories of the events they are relating, as well as their ability under the particular circumstances to have perceived—to have seen and heard—the events in question.¹⁶⁶ A survivor who has abused substances to cope with her partner's violence is less likely to meet this standard. So is a survivor struggling with a mental illness, regardless of whether that illness contributed to her original vulnerability, or was a consequence of it.

Each of these credibility discounts—story plausibility and individual trustworthiness—operate in a distinct fashion, but they are not necessarily independent of each other; in fact, they are often intertwined. As philosopher Karen Jones explains, “Testifiers who belong to ‘suspect’ social groups and who are bearers of strange tales can thus suffer a double disadvantage. They risk being doubly deauthorized as knowers on account of who they are and what they claim to know.”¹⁶⁷

Indeed, a wide array of women may be viewed as untrustworthy because of who they are—women, Black women, poor women, women who exhibit trauma symptoms that are easily conflated with a lack of credibility, and women who

¹⁶⁵ Carolyn M. West, *Violence Against Women by Intimate Relationship Partners*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143, 164-65 (Claire M. Renzetti et al. eds., 2001) (noting that African-American women are three times as likely as white women to be killed by an intimate partner). Women receiving public financial assistance are significantly more likely to experience domestic violence than are other women. Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 663 (2000). Moreover, intimate partner abuse pushes many women into homelessness. Across the United States, between twenty-two and fifty-seven percent of homeless women identify domestic violence as the immediate cause. GOODMAN & EPSTEIN, *supra* note 123, at 107; INST. FOR CHILDREN & POVERTY, *THE HIDDEN MIGRATION: WHY NEW YORK CITY SHELTERS ARE OVERFLOWING WITH FAMILIES* (2002), <https://rhyclearinghouse.acf.hhs.gov/library/2002/hidden-migration-why-new-york-city-shelters-are-overflowing-families> [<https://perma.cc/9F6E-XPYE>]; Rebekah Levin, Lisa McKean & Jody Raphael, *Pathways to and From Homelessness: Women and Children in Chicago Shelters*, CTR. FOR IMPACT RESEARCH (Jan. 2004), <http://www.http://advocatesforadolescentmothers.com/wp-content/uploads/homelessnessreport.pdf> [<https://perma.cc/PG8A-H2LA>]. In addition, African American women are thirty-five percent more likely to experience intimate partner violence than are white women. Women of Color Network, *Facts & Stats: Domestic Violence in Communities of Color*, DEP'T OF JUSTICE (June 2006), https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf [<https://perma.cc/6ZU3-6ATL>].

¹⁶⁶ See, e.g., John L. Kane, *Judging Credibility*, 33 LITIG. 31, 32 (2007); *Model Civil Jury Instructions for the District Courts of the Third Circuit, Rule 1.7* (2010), http://federalevidence.com/pdf/JuryInst/3d_Civ_Ch1-3_2010.pdf [<https://perma.cc/69AN-F2QJ>].

¹⁶⁷ Karen Jones, *The Politics of Credibility*, in A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 154, 158 (Louise M. Antony & Charlotte Witt eds., 2002).

are many or all of the above. This distrust, in turn, creates a broader hermeneutics of suspicion, through which the listener interprets the substance of her story. In other words, once a listener has discounted a woman's trustworthiness, he will be hyperalert for signs of deception, irrationality, or narrative incompetence in her story. He will tend to magnify inconsistencies and overlook the ways in which any inconsistencies might be explained away. In this way, Jones observes, "a low initial trustworthiness rating . . . can give rise to *runaway* reductions in the probability assigned to a witness's story."¹⁶⁸ Because women survivors tend to spark hermeneutic suspicion, both in terms of personal trustworthiness and story plausibility, they are particularly vulnerable to this kind of doubly disadvantaging credibility discount.

II. GATEKEEPER-IMPOSED EXPERIENTIAL DISCOUNTS

The discounts women survivors face are not limited to the credibility arena. All too frequently, system gatekeepers also discount the importance of women's actual experiences and of the ways in which the system itself exposes women to additional harms. Such experiential discounting occurs when, regardless of the plausibility of a survivor's story and regardless of her personal trustworthiness—in other words, *even when system actors believe her*—they nonetheless adopt and enforce laws and policies that, in practice, revictimize her.¹⁶⁹

These issues—credibility discounting and experiential discounting—cannot be considered in isolation. Such an approach would fail to capture the way that each relies on and reinforces the other, both in practical reality and through the personal lens of survivor experience. As Catherine MacKinnon explains, in the sexual harassment context:

Even when [a woman survivor] was believed, nothing [a male perpetrator] did to her mattered as much as what would be done to him if his actions against her were taken seriously. His value outweighed her . . . worthlessness. His career, reputation, mental and emotional serenity and assets counted. Hers didn't. *In some ways, it was even worse to be believed and not have [his actions] matter. It meant she didn't matter.*¹⁷⁰

Experiential discounting does not entail total disregard for harms inflicted on women, just as credibility discounting does not entail total disbelief of women's stories. Instead, gatekeepers impose experiential discounts when, in the pursuit of objectively worthy policy goals, they choose to ignore or trivialize

¹⁶⁸ *Id.* at 159.

¹⁶⁹ Lynn Hecht Schafran calls this women's "consequential credibility." Lynn Hecht Schafran, *Credibility in the Courts: Why is There a Gender Gap?*, 34 JUDGES' J. 5, 40-41 (1995).

¹⁷⁰ Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (emphasis added).

the attendant harm to survivors. Women receive the message that system actors are relatively indifferent to the realities of their lives and the risks that shape their experiences. For an individual woman survivor, this experiential (or ontological)¹⁷¹ discounting of the law's impact on her life exponentially increases the negative power of the credibility discounts she also must face.

The tendency to discount women's experiences permeates our society, including the social service and justice-based systems to which so many survivors turn for help in their efforts to be safe. The following examples illustrate this phenomenon.

A. Criminal Justice System

Despite enormous improvements in the responsiveness of police and prosecutors to domestic violence over the past several decades,¹⁷² the criminal justice system continues to discount important aspects of women's experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors. As one example, we have known for decades that participation in a criminal prosecution can increase a woman's risk of retaliatory violence: studies show that twenty to thirty percent of perpetrators reassault their targets before the criminal court process is over.¹⁷³ Data also show that women are at greater risk of homicide at the time of separation from their abusive partners (and prosecution, indeed, creates such separation).¹⁷⁴ It is hardly surprising that a major reason survivors cite for withholding cooperation from prosecutors is fear of future harm.¹⁷⁵

Nonetheless, prosecutors around the country often subpoena, arrest, and even jail survivors in an effort to ensure that they will testify against their abusive partners at trial.¹⁷⁶ The intent of these government lawyers is far from malicious;

¹⁷¹ This type of discounting could be conceptualized in philosophical terms as "ontological injustice," operating alongside the above-described categories of hermeneutic and epistemic injustice.

¹⁷² See, e.g., Epstein, *supra* note 82, at 13-16.

¹⁷³ See, e.g., Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 *TRAUMA, VIOLENCE & ABUSE* 141, 143, 159 (2005).

¹⁷⁴ Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 *AGGRESSION & VIOLENT BEHAV.* 514, 519 (2006).

¹⁷⁵ Lauren Bennett, Lisa A. Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 *J. INTERPERSONAL VIOLENCE* 761, 768-69 (1999); Sara C. Hare, *Intimate Partner Violence: Victims' Opinions About Going to Trial*, 25 *J. FAM. VIOLENCE* 765, 771 (2010).

¹⁷⁶ Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced To Participate in the Prosecution of Their Abusers?*, 7 *WM. & MARY J. WOMEN & L.* 383, 387 (2001); Betty Adams, *Battered Wife Jailed After Refusing To Testify Against Husband*, *PRESS HERALD* (June 3, 2014), <https://www.pressherald.com/2014/06/03/maine-domestic-violence-victim-jailed-after-refusing-to-testify/>; *Domestic Violence Victims Could Be Arrested if They Don't Show Up for Court To Face Accuser*, *WSMV.COM* (Apr. 25, 2013), <http://www.wsmv.com/story/22081502/domestic-violence-victims-in-rutherford-county-could-be-arrested-if-they-dont-show-up-for-court> [<https://perma.cc/TWVZ-XZEP>].

they hope to use the power of their office to put an end to intimate partner abuse, and they believe that mandating victim participation is—regardless of an individual survivor’s own analysis of her situation—the best way to accomplish this goal. But in the process, the secondary harms visited on victims are too often ignored. As Professor Jane Stoever notes, “[j]ail sentences for defendants in domestic violence cases are typically only several days long, and most offenders receive only probation, but abuse victims have been jailed for contempt for much lengthier periods for refusing to comply with subpoenas to testify.”¹⁷⁷ To obtain testimonial compliance, prosecutors threaten to refer victims to child protection agencies, where they could risk losing custody of their children, and they institute perjury prosecutions against women who have recanted prior statements, often obtaining lengthy jail sentences for survivors.¹⁷⁸ As one example, a 2016 investigation in Washington County, Tennessee, showed that women were routinely imprisoned for as long as a week for failing to testify against their abusive partners.¹⁷⁹ In the words of defense counsel representing one of the women: “I mean, it’s kind of chilling. Here’s a woman that called the police, because she needed help and now a couple months later she gets a voicemail that says now you might be the one that’s going to jail. Think about that.”¹⁸⁰ The local prosecutor refused to apologize for the practice, claiming that “I think we were doing the right thing.”¹⁸¹

Prosecutorial use of coercive tactics increased in the aftermath of U.S. Supreme Court decisions that made it far more difficult to engage in the practice of “victimless prosecutions.” See Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 585-86 (2010).

¹⁷⁷ Jane K. Stoever, *Parental Abduction and the State Intervention Paradox*, 92 WASH. L. REV. 861, 870-71 (2017).

¹⁷⁸ For an extensive compilation of stories of women subjected to such harms, see *id.*

¹⁷⁹ Nate Morabito, *Advocates Horrified After Domestic Violence Victims Jailed in Washington County, TN*, WJHL.COM (Sept. 11, 2016), <http://wjhl.com/2016/09/11/advocates-horrified-after-domestic-violence-victims-jailed-in-washington-county-tn/> [<https://perma.cc/KM36-5EXL>].

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Prosecutorial dismissal of women’s risk of harm also can be seen in Honolulu Prosecuting Attorney Ken Kaneshiro’s 2016 decision to restrict access to the city’s Family Justice Center shelter to victims who promised to testify against their abusive partners in a criminal trial. Kaneshiro claimed that the victims who declined to testify “did not know what’s good for them.” Rebecca McCray, *Jailing the Victim: Is It Ever Appropriate to Put Someone Behind Bars to Compel Her to Testify Against Her Abuser?*, SLATE (July 12, 2017, 12:07 PM), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/07/is_it_ever_appropriate_to_put_an_abuse_victim_in_jail_to_compel_her_to_testify.html. Honolulu’s approach to domestic violence prosecution sends a clear message to survivors: we discount the realities of your safety concerns and your risks of future harm. Unsurprisingly, during the first eight months the Honolulu shelter was open, sixteen of its twenty beds remained empty. *Id.* This example is, of course, an extreme one: no other Family Justice Center has a similar policy. *Id.* But extreme examples can offer a window into the less dramatic and more routine discounts women suffer in terms of their consequential credibility. In October 2015, a Florida judge jailed a victim of domestic violence who indicated that she would not appear to testify in the criminal prosecution of her abusive partner. She had endured terrifying violence at her husband’s hands: he had strangled her, threatened her with a kitchen knife, and smashed her head into a microwave. She told the judge that the abuse had caused her to struggle with depression and anxiety. In addition, her husband was the father of her one-year-

A similar theme sounds in the actions of police officers responding to domestic violence calls across the country. The 2015 ACLU survey reveals a serious lack of police concern regarding the harms experienced by survivors: eighty-three percent of polled service providers reported that their clients called the police only to find that they “sometimes or often” did not take allegations of domestic violence seriously.¹⁸²

The 2015 National Hotline Survey echoes this finding. In the words of one respondent, “I think [the police] feel that I do not matter, that as an ex-wife, I have to withstand the harassment and stalking.” Another woman put it this way: “They sympathized with him and said he [just] needed to stay away from me. Then they pointed me in the direction of [name of city withheld] and said to call someone when I got there . . . [They] left me by the side of the road alone in my car with my daughter and afraid.” Yet another said: “The cops acted as if they did not care . . . They sat in the drive while my ex poured gas all over my decks to my home and took what he wanted. Even though I had an [order of protection] and told them he could not enter the home.”¹⁸³ Another: “[The police] have threatened to arrest me more than once. I am the victim! They blame me for taking him back.”¹⁸⁴

Police officers also use their power to coerce victim testimony at trial. In the spring of 2018, a police sergeant in Buncombe County, North Carolina, told an advocate, “When I get to a domestic [violence call], if I get a sense that she’s not going to cooperate, I drive away.”¹⁸⁵ A minute later he added, “But when I go to my misdemeanor B&E’s [breaking and entering cases], I stay until I’ve got all the evidence.”¹⁸⁶

old daughter, and she was concerned about her ability to support her child if he went to jail and lost his job. She cried in open court as she explained, “I’m homeless now. I’m living at my parents’ house . . . I had to sell everything I own,” and added, “I’m just not in a good place right now.” The judge responded by mocking her, saying, “You think you’re going to have anxiety now? You haven’t even seen anxiety,” and ordered police to handcuff the woman, sending her to jail for three days. Kate Briquetelet, *Judge Berates Domestic Violence Victim—and Then Sends Her to Jail*, THE DAILY BEAST (Oct. 9, 2015, 1:00 AM), <https://www.thedailybeast.com/judge-berates-domestic-violence-victimand-then-sends-her-to-jail>.

¹⁸² RESPONSES FROM THE FIELD, *supra* note 106, at 12.

¹⁸³ NATIONAL HOTLINE SURVEY, *supra* note 106, at 6, 10.

¹⁸⁴ *Id.* at 10. Additional police coercion may be imposed on women in jurisdictions utilizing lethality or danger assessment protocols. These protocols are comprised of a series of questions, posed by police on the scene of a domestic violence call and designed to determine a survivor’s risk of future harm. In situations where this (relatively new) tool indicates “highest risk,” the protocol directs officers to manipulate women into separating from their abusive partner, by refusing to accept a woman’s decision to take no action, or by pressuring an unwilling victim to speak to a National Domestic Violence Hotline counselor. Margaret Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 536, 566-67 (2010). Lethality assessment programs are being used in counties in states including Delaware, Florida, Georgia, Indiana, Maryland, Missouri, and Vermont. *Id.* at 539.

¹⁸⁵ Interview with Kit Gruelle, domestic violence advocate (June 6, 2018).

¹⁸⁶ *Id.*

By discounting the importance of survivors' experiences and their risks of harm, police officers discourage women from seeking police assistance in subsequent emergency situations. As the ACLU Survey concluded, "Clients often do not call the police because they have had experiences in the past . . . in which they have received a negative response . . . in which the incident is minimized, the client is blamed, or the police simply take no action."¹⁸⁷ In all of these ways, the criminal justice system tends to dismiss its policies' effects on women's lives as relatively inconsequential, at least as compared to their effects on offender accountability.

In addition, the criminal justice system tends to devalue violence that is inflicted by an intimate partner as compared to a stranger. A 2005 Department of Justice report on Family Violence Statistics reveals that seventy-seven percent of those incarcerated for non-family assaults received sentences that were longer than two years.¹⁸⁸ In sharp contrast, this was true of only forty-five percent of those incarcerated for family assault.¹⁸⁹ Thus, the criminal justice system discounts the importance of women's experiences and, further, devalues the meaning of the harms they suffer at the hands of their partners.

B. *Subsidized Housing and Public Shelters*

This tendency to discount the impact of laws and policies on the lives of domestic violence survivors extends well beyond the justice system. The public housing system provides an important case in point, in part because the availability of affordable housing is essential to many women's ability to both escape abuse and to remain safe after leaving an abusive relationship.¹⁹⁰ Despite this fact, substantive discounting of survivors' experience is readily apparent in the already intense and bureaucratically intimidating struggle for public housing.

¹⁸⁷ RESPONSES FROM THE FIELD, *supra* note 106, at 16.

¹⁸⁸ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 2 (June 2005), <https://www.bjs.gov/content/pub/pdf/fvs.pdf> [<https://perma.cc/TD25-2HYZ>].

¹⁸⁹ Similar results were reached in a recent study conducted in Australia, where domestic violence offenders were compared to those who committed violent crimes outside of a familial/intimate relationship context. Moreover, domestic violence assaults were less likely to result in a prison sentence and, if incarcerated, intimate offenders received significantly shorter terms. Christine E. W. Bond & Samantha Jeffries, *Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases*, 54 BRITISH J. CRIMINOLOGY 849, 849 (2014).

¹⁹⁰ Survivors who cannot remain in public housing often are forced to choose between homelessness and returning to their abusive partners. "When we ask survivors why they had to stay [in their violent relationships], one of the top answers is always lack of access to housing," said Karma Cottman, executive director of the D.C. Coalition Against Domestic Violence. "They stay because they can't afford to go anywhere else." Elise Schmelzer, *Gentrification Eats Away at Shelter Options for Domestic-Abuse Victims*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/local/dc-politics/gentrification-eats-away-at-shelter-options-for-domestic-abuse-victims/2016/07/10/0470d18c-43c0-11e6-8856-f26de2537a9d_story.html?utm_term=.ad4ce2d6365a.

At the state and local levels, crime control or nuisance ordinances require public housing landlords to evict tenants for “disorderly behavior” if, within a specified time period, three calls are made to 911 about a particular apartment unit.¹⁹¹ Fifty-nine counties, cities, and other localities have such ordinances in place today.¹⁹² In 2013, Illinois alone had adopted more than 100 such ordinances;¹⁹³ in 2014, Pennsylvania had passed thirty seven.¹⁹⁴ The geographic areas these laws cover include the twenty largest cities in the country.¹⁹⁵ A landlord who fails to comply can be fined and have his rental license suspended. Accordingly, landlords have no discretion in enforcing this draconian measure—tenants have no realistic opportunity to appeal to their human empathy. To stay in business, a landlord *must* evict after three 911 calls.¹⁹⁶ To be clear, the underlying goal of these laws is the reduction of crime and the resulting safety of all residents; any impact on women survivors of domestic violence is solely incidental.

Despite this fact, these ordinances have a sizable negative impact on survivors of domestic violence. Thirty-nine of them explicitly include calls to 911 from domestic violence *victims* as a basis for prohibited activities that can result in eviction; only four explicitly exclude such calls.¹⁹⁷ And who ends up getting evicted? It’s not just the perpetrators; it’s the victims, too. The ordinances make no effort to distinguish between abusers and victims—if a victim chooses to use 911 emergency services to protect herself and her children on three or more occasions, she’ll lose her home.¹⁹⁸

A study conducted by Matthew Desmond and Nicole Valdez in Milwaukee found that close to one-third of the “excessive” 911 call citations over a two-year period were based on emergency reports of domestic violence; fifty-seven percent of these calls resulted in the victim being evicted, and another twenty-

191 PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 135 (2017).

192 *Id.* at 141.

193 Emily Werth, *The Cost of Being “Crime Free”: Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, SARGENT SHRIVER NAT’L CTR. ON POVERTY LAW 1 (2013), <http://povertylaw.org/files/docs/cost-of-being-crime-free.pdf> [https://perma.cc/K4XE-CFYS].

194 News Release, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction*, PA. COAL. AGAINST DOMESTIC VIOLENCE (Oct. 16, 2014), http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf [https://perma.cc/TS8P-MRFB].

195 EDELMAN, *supra* note 191, at 141.

196 *Id.*

197 *Id.*

198 *See, e.g.*, U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL, GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES 4 (2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF> [https://perma.cc/YW5F-SNKL].

six percent received formal threats of eviction.¹⁹⁹ Similarly, a 2015 ACLU study of two upstate New York ordinances found that domestic violence comprised the largest category of incidents resulting in nuisance enforcement, with citations frequently resulting in eviction of the victim.²⁰⁰ Peter Edelman describes the experience of one victim, Rosetta Watson, in St. Louis: “She called the police several times to ask for protection to keep her safe from her former boyfriend. They did not protect her and she was attacked by the man, and then she was literally banished from the city for six months”²⁰¹

Similarly, Lakisha Briggs of Norristown, Pennsylvania, was abused by her boyfriend, and her adult daughter called the police.²⁰² Before leaving, one of the officers warned Briggs that this was her first strike. After that warning, Briggs, who also had a three-year-old daughter, was reluctant to call the police when her boyfriend beat her up.²⁰³ But one night, he stabbed her in the neck with a broken ashtray.²⁰⁴ When she regained consciousness she found herself in a pool of blood, but knew she could not dial 911.²⁰⁵

“The first thing in my mind is let me get out of this house before somebody call,” she says. “I’d rather them find me on the street than find me at my house like this, because I’m going to get put out if the cops come here.”²⁰⁶ Just as she feared, a neighbor saw her bleeding outside and called the police.²⁰⁷ Briggs was airlifted to the hospital, and when she returned home

199 Matthew Desmond & Nicole Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 132-33 (2012). Racial bias influences police decisions regarding enforcement of these laws: tenants living in predominantly black Milwaukee neighborhoods were three times as likely to receive a nuisance citation as women living in predominantly white neighborhoods. *Id.*

200 ACLU, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 22-23 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisance-ord-rel3.pdf [<https://perma.cc/7EML-ETV3>].

201 EDELMAN, *supra* note 191, at 143. Nancy Markham had a similar experience in Surprise, Arizona. After making multiple calls to 911 because of abuse at the hands of her boyfriend, the local police department pressured her landlord to evict her—even though they had finally arrested her former partner for his violence against her. Sandra S. Park, *With Nuisance Law, Has “Serve and Protect” Turned Into “Silence and Evict”?*, MSNBC (Mar. 25, 2016), <http://www.msnbc.com/msnbc/nuisance-laws-has-serve-and-protect-turned-silence-and-evict> [<https://perma.cc/LF9D-TPV2>]. It took a federal lawsuit, filed by the ACLU Women’s Rights Project, for the city to repeal the nuisance ordinance. *Id.*

202 Pam Fessler, *For Low-Income Victims, Nuisance Laws Force Ultimatum: Silence or Eviction*, NATIONAL PUBLIC RADIO (June 29, 2016), <https://www.npr.org/2016/06/29/482615176/for-low-income-victims-nuisance-laws-force-ultimatum-silence-or-eviction> [<https://perma.cc/W2RC-ZWZQ>].

203 See Complaint at 10, 12, Briggs v. Borough of Norristown, No. 13-02191 (E.D. Pa. Apr. 24, 2013).

204 *Id.* at 15.

205 See Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, GUARDIAN, Sept. 11, 2015, <https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911>.

206 See Fessler, *supra* note 202.

207 Briggs, *supra* note 205.

several days later, she was evicted from her apartment.²⁰⁸ The ACLU sued, and the Norristown law was eventually repealed.²⁰⁹

But similar measures continue to be enacted as local communities try to get a handle on crime and safety. And despite a series of federal lawsuits challenging the plainly discriminatory impact of these ordinances, hardly any of the affected communities have voluntarily created an exception for domestic violence victims. Nor have they sought out ways to accomplish the overall goal of crime control without imposing new and additional harms on survivors, such as barring repeat perpetrators from the building or the housing complex. Such systemic discounting of women's needs and experiences is—of course—devastating to survivors of intimate partner abuse. It is difficult to comprehend how a legal system that takes survivors' experiences seriously could permit itself to visit on them the casually brutal choice between emergency police protection and affordable housing.

Such apparent disregard for survivors' risks and needs also exists in the closely related access-to-shelter context. In 2014, for example, the mayor of Washington, D.C., requested (for the second time in two years)²¹⁰ emergency authority to limit access to shelter for local families. Specifically, the mayor proposed that applicants be permitted to stay in a public shelter only on a provisional, two-week basis; during that time caseworkers would contact applicants' friends and relatives in an effort to assess whether they had any alternate housing option.²¹¹ Those who did would be given twenty-four hours to vacate the shelter. In the words of the mayor's office: "Our goal is to get people out of shelters . . . or never into shelters in the first place, even if that means living with a grandmother, a sister, whatever."²¹² But such a policy turns a blind eye to the risks facing domestic violence survivors, where "whatever" might mean a denial of shelter and being forced to return to the home of an abusive partner.²¹³ Although the mayor ultimately withdrew his request,²¹⁴ a similar rule was again proposed in 2017, as an amendment to the

²⁰⁸ *Id.*

²⁰⁹ See Fessler, *supra* note 202.

²¹⁰ *The Homeless Services Reform Amendment Act of 2014: Hearing Before the Washington, D.C., Comm. on Human Servs.* (D.C. 2014) (statement of Marta Beresin, The Washington Legal Clinic for the Homeless), available at <https://www.legalclinic.org/wp-content/uploads/2018/09/Testimony-MB-DHS-oversight-hearing.pdf> [<https://perma.cc/UMY9-2V6X>].

²¹¹ Aaron C. Davis, *D.C. Mayor Asks for Emergency Legislation to Deal with Surge of Homeless into Shelters*, WASH. POST (Feb. 19, 2014), http://wapo.st/1giNpOH?tid=ss_mail&utm_term=.31cabe14e6ed.

²¹² *Id.*

²¹³ Patty Mullahy Fugere, *There Is a Family Homelessness Crisis and Provisional Placement Is Not the Answer*, HUFFINGTON POST: THE BLOG (Feb. 21, 2014) (updated Apr. 23, 2014), https://www.huffingtonpost.com/patty-mullahy-fugere/there-is-a-family-homeles_b_4827364.html.

²¹⁴ Aaron C. Davis, *Gray Steps Back on Unpopular D.C. Homeless Legislation*, WASH. POST (Feb. 25, 2014), https://www.washingtonpost.com/local/dc-politics/gray-steps-back-on-unpopular-dc-homeless-legislation/2014/02/25/803bcf66-9e53-11e3-9ba6-800d1192d08b_story.html?utm_term=.e28673d02941.

city's Homeless Services Reform Amendment Act, this time requiring applicants to city shelters to prove, by clear and convincing evidence, that they had no other housing options.²¹⁵ Advocates testified, once again, that victims of domestic violence were "routinely being denied shelter" if their names were on a current lease with, for example, their abusive partner.²¹⁶

After intensive advocacy efforts, a domestic violence exception was added to the statute.²¹⁷ But the reintroduction of shelter laws with such draconian provisions, year after year, demonstrates a deep-seated tendency to discount the importance of survivors' lived experiences and to trivialize the harmful impact these policies will inflict on large numbers of women, in service of other policy priorities.

In sum, even when a woman survivor, seeking help from the criminal justice, subsidized housing, or public shelter systems, finds that her story of intimate partner abuse *is actually believed*, gatekeepers are likely to communicate some degree of indifference about her experiences, and to accept with apparent unconcern the harms that laws, policies, and practices impose on her. Many women experience this substantive, experiential discounting as directly connected to the credibility discounting they also face. Together, these discounts create a gauntlet of disbelief and dismissal that women must overcome in order to be safe from the first-order abuse they suffer at the hands of their intimate partners.

III. THE IMPACT OF CREDIBILITY DISCOUNTS ON WOMEN SURVIVORS

Survivors suffer a wide range of credibility and experiential discounts when they seek emergency help from the police, *and* when they try to convince judges to award them a civil protection order, *and* when they struggle to obtain a safe place to live, *and* when they try to get custody of their children. They may suffer these discounts because their true stories of abuse don't sound plausible, because they are perceived as personally untrustworthy, or because their stories just don't matter much to system gatekeepers.

All of this may feel like *déjà vu* for a survivor. Institution-based discounting closely replicates the dynamics of abuse she endures at home. Perpetrators of intimate partner violence, like system actors, often discredit both the plausibility of a survivor's story and her trustworthiness as a truth teller. It is all too common for a survivor to be subject to a constant barrage of: "No, that's

²¹⁵ Wash. Legal Clinic for the Homeless, *Requiring that Families Show "Clear and Convincing Evidence" of Homelessness*, PUBLIC (Aug. 22, 2017), <http://www.publicnow.com/view/F8B804EF4654FB4D115F7E08715D8867B561EF7B?2017-08-22-22:30:10+01:00-xxx9517> [https://perma.cc/3H8Y-79WT].

²¹⁶ *Id.*

²¹⁷ D.C. CODE § 4-753.02.a-4 (2018).

not what happened”; or “I would never have touched you if you didn’t keep provoking me”; or “You’re the only one who makes me this angry.”²¹⁸

Abusive partners often discredit the woman based on her personal trustworthiness. Frequent comments tend to sound like: “You always exaggerate”; or “You’re hysterical and over-emotional”; or “You’re crazy; I didn’t hurt you”; or “No one would believe you. Even *I* don’t believe you.”²¹⁹ Finally, perpetrators often dismiss the weight or consequences of the abuse: “Why do you always make such a big deal out of everything?”²²⁰

In other words, the credibility discounts imposed on a woman by the justice system and other institutions often echo those imposed by her abusive partner. These institutional and personal betrayals operate in a vicious cycle, each compounding the effects of the other. That web can cause women to doubt their power to remedy their situations and—in more extreme cases—the veracity of their own experiences.

System actors are not privy to that broader web of experience. A judge who doubts a survivor’s story in court is not likely to be aware that he is reinforcing other discrediting messages from her abusive partner and from that partner’s defense attorney. An advocate who perceives with indignation that a survivor’s credibility is being discounted in family court may not know that this experience mirrors an earlier one with a police officer, and yet another with her public housing landlord. In other words, for system gatekeepers, it is almost impossible to see the whole picture. But from the perspective of a survivor, on the receiving end of one credibility discount after another, these experiences coalesce into a single, interwoven fabric. Credibility discounts become as pervasive as the air these women breathe.

So what does it mean for a survivor to be caught within a web of credibility discounting? The consequences include two major categories of harms: (1) those related to psychological wellbeing; and (2) those related to accessing justice and safety.

A. *Psychological Harms and Institutional Gaslighting*

When a survivor undertakes the considerable risks involved in seeking help, she is looking for resources and safety, to be sure. But she is also hoping

²¹⁸ See, e.g., *Hashtag Activism*, *supra* note 62.

²¹⁹ As survivor and activist Beverly Gooden explains: Such statements are “easy to believe when it’s just the two of you.” *Id.*

²²⁰ The National Domestic Violence Hotline website, for example, provides the following examples of gaslighting: “Your abuser might call you ‘too sensitive’ or raise a skeptical eyebrow when you try to complain about his or her behavior, asking you why you would get upset over ‘something so dumb.’” *What Is Gaslighting?*, NAT’L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), <http://www.thehotline.org/what-is-gaslighting/> [<https://perma.cc/64K3-PYTA>].

for validation of the harm she has endured—in other words, to have her experience credited. As Rebecca Solnit puts it: “To tell a story and have it and the teller recognized and respected is still one of the best methods we have of overcoming trauma.”²²¹

Research provides ample evidence for this proposition. When Judith Herman interviewed twenty-two victims of violent crimes of all sorts on the meaning of justice, she found that wherever her interview subjects sought justice, their most important goal was to gain validation or “an acknowledgment of the basic facts of the crime and an acknowledgment of harm.”²²²

In the domestic violence context, a recent qualitative study of women in a Massachusetts family court has several women noting the importance of being credited. As one woman said: “Well, validation [from the court] is huge. It really is huge. When you’ve got someone telling you on a constant basis that you’re bad, you’re wrong, [you need the courts to say you are right] . . .”²²³

But when the institutions to which the survivor turns for help (often at great personal risk)²²⁴ refuse to acknowledge this harm, and instead echo a woman’s abusive partner by discounting her credibility, the effort to report and remedy abuse instead works to replicate the denial of a survivor’s experience that takes place at home—only, this time, at an institutional level. And the institutions involved are those purportedly charged with hearing victims’ stories and meting out justice. It’s no wonder that survivors find the experience of systemic discrediting in our police districts and courthouses particularly crippling.

²²¹ Solnit, *supra* note 145, at 4.

²²² Judith Lewis Herman, *Justice from the Victim’s Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 585 (2005). Herman goes on to explain:

Whether the informants sought resolution through the legal system or through informal means, their most important object was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgment of harm. Although almost all of the informants expressed a wish for the perpetrator to admit what he had done, the perpetrator’s confession was neither necessary nor sufficient to validate the victim’s claim. The validation of so-called bystanders was of equal or greater importance. Many survivors expressed a wish that the perpetrator would confess, mainly because they believed that this was the only evidence that their families or communities would credit. For survivors who had been ostracized by their immediate families, what generally mattered most was validation from those closest to them. For others, the most meaningful validation came from representatives of the wider community or the formal legal authorities.

Id.

²²³ Ellen Gutowski & Lisa A. Goodman, *Intimate Partner Violence Survivors’ Subjective Experiences of Probate and Family Court: A Qualitative Study* (2018) (unpublished manuscript) (on file with authors) [hereinafter *Massachusetts Family Court Study*].

²²⁴ See, e.g., Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 467-68 (2003).

Survivors suffer a range of harms when they find that their experiences are repeatedly discredited and invalidated. We conducted a focus group outside of Boston with twelve advocates who shared extensive experience working with survivors in a variety of systems. Participants described three distinct outcomes.

First, survivors develop *a sense of powerlessness and futility*, expressed in statements such as: “I have taken this enormous risk to share my most vulnerable experiences in public—and they can’t/won’t hear/see me. I can’t find the right words to make them help me. There is nothing I can do.” This is a feeling akin to how numerous survivors eventually come to feel in their abusive relationships; there is nothing they can say or do that will make the perpetrator of violence hear or really “see” me.²²⁵

Second, survivors develop *a sense of personal worthlessness*. “Maybe they believe my story and still—if no one does anything in response to my story, then my experience must not have worth or merit. My pain doesn’t matter. I myself must have no value.”²²⁶ This too replicates abuse dynamics: He has no empathy for me as a human being. I am worthless in his eyes.

Finally, survivors develop *a sense of self-doubt*, as the machinery of credibility discounting lurches into gear: “They are twisting my story, casting doubt, maybe I didn’t remember it right, maybe it didn’t happen as I think it did. I must be crazy.”²²⁷ This dynamic is well illustrated by the 1944 film

²²⁵ Platt, Barton & Freyd describe the experience of institutional betrayal for domestic violence survivors as follows:

[W]hen this same woman seeks assistance from the police, child protective services (CPS), or health care providers, she enters a world in which her agency cannot be taken for granted. She has no personal role with respect to decisionmaking by police, CPS, or the hospital and so is particularly vulnerable to objectification or betrayal. . . . When these institutions betray victims of domestic violence, the ‘secondary trauma’ from this experience can amplify the feelings of helplessness and loss of control elicited by abuse Betrayal in these situations may be more abstract than the betrayal by an intimate partner. But the violations of promises implied by their standing in the community—the promise to protect, or heal, or provide for children’s welfare—are no less devastating than a partner’s betrayal.

Melissa Platt, Jocelyn Barton & Jennifer J. Freyd, *A Betrayal Trauma Perspective on Domestic Violence*, in *VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: VICTIMIZATION AND THE COMMUNITY RESPONSE* 185, 201-02 (Evan Stark & Eve S. Buzawa eds., 2009).

²²⁶ In the Massachusetts Family Court Study, one participant described her experience of betrayal by the family court judge: “You think that somebody’s coming, is going to enter the picture that will help you. You’re so desperate and when you’re let down, it’s. And I you know, there’s some that are like, ‘I don’t even want to live anymore. I don’t want to live anymore.’” *Massachusetts Family Court Study*, *supra* note 223.

²²⁷ The National Domestic Violence Hotline website warns survivors to pay attention to this sort of dynamic:

“You’re crazy—that never happened.”

“Are you sure? You tend to have a bad memory.”

Gaslight,²²⁸ in which a man manipulates his wife's routine experiences in a concentrated effort to create opportunities to discredit her and convince her that she is insane. He does this so effectively that she eventually comes to doubt her own perceptions and memory, and ultimately accepts his story that she is delusional and mentally unsound.²²⁹

Abusive men gaslight their women partners when they express love and affection on the heels of a violent episode, or deny that certain promises or commitments were ever made, or simply deny that events took place. Over time, these small incidents build until, like the wife in *Gaslight*, survivors may come to doubt their own memory, perception, and experience.²³⁰

Judy Herman explains:

After every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it on herself; and in any case it is time to forget the past and move on. The more powerful the perpetrator, the greater is his prerogative to name and deny reality, and the more completely his arguments prevail.²³¹

A quote from the Massachusetts Family Court study illustrates this phenomenon:

It's always that you're overreacting, you're too emotional. He'd do something like the night I woke up with him with his hands around my neck and I was like, "What are you doing?" I start crying, and he started laughing. And he said, "I was dreaming." . . . "I wasn't going to do anything. I was just

"It's all in your head."

Does your partner repeatedly say things like this to you? Do you often start questioning your own perception of reality, even your own sanity, within your relationship? If so, your partner may be using what mental health professionals call "gaslighting."

Gaslighting typically happens very gradually in a relationship; in fact, the abusive partner's actions may seem harmless at first. Over time, however, these abusive patterns continue and a victim . . . can lose all sense of what is actually happening. Then they start relying on the abusive partner more and more to define reality, which creates a very difficult situation to escape.

What is Gaslighting?, NAT'L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), <http://www.thehotline.org/2014/05/29/what-is-gaslighting/> [<https://perma.cc/64K3-PYTA>].

²²⁸ The film is based on a 1938 Patrick Hamilton play of the same name, *Gaslight*. GASLIGHT (Metro-Goldwin-Mayer 1944).

²²⁹ *Id.*

²³⁰ Darlene Lancer, *How To Know if You're a Victim of Gaslighting*, PSYCHOL. TODAY (Jan. 13, 2018), <https://www.psychologytoday.com/blog/toxic-relationships/201801/how-know-if-youre-victim-gaslighting>.

²³¹ HERMAN, *supra* note 39, at 8.

dreaming.” He was laughing, and then he says, “Stop overreacting. I wouldn’t hurt you. Stop overreacting.” And I would believe that I was overreacting: Right?. [Maybe] he didn’t really hurt me. I mean really?²³²

As one of the first author’s clients put it:

He found my most vulnerable point, a tiny kernel of insecurity in my soul, and he exploited it to trap me in a painfully confusing state of nearly total self-doubt. I spent more than a year working so hard to regain trust in my own perceptions and my own humanity. But now I find that the legal system doubts me too, even as I share my more painful and personal story. I get hurt again and again. It is painfully confusing and I find that it has caused a significant regression in my overall healing.²³³

These individual experiences are reinforced by the institutional gaslighting women experience in the form of system-based credibility discounts and experiential trivialization. When our official bodies of justice and law enforcement effectively collaborate in the same patterns utilized by perpetrators of abuse, survivors may be even more likely to doubt their own abilities to perceive reality and understand their own lives.

B. Harms Related to Access to Justice and Safety

The sense of institutional gaslighting that commonly accompanies the progress of abuse claims through the justice system has immediate and baleful consequences for survivors: the system itself becomes an impediment to, rather than a conduit toward, justice. Indeed, credibility discounts are analogous to other, more tangible obstacles that are already all too familiar to those who work in the domestic violence field, such as economic dependence, isolation, and fear.

First, as we’ve already seen, credibility discounting may discourage women from continuing to pursue justice or other forms of support. Having their claims met with system-wide denial and disbelief gives women ample cause to distrust, and then possibly avoid, the institutions ostensibly there to help them.²³⁴ As the Gender Bias Study of the Court System in

²³² *Massachusetts Family Court Study*, *supra* note 223.

²³³ Communication from client to Deborah Epstein (July 28, 2017).

²³⁴ Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution. Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 *AM. PSYCHOLOGIST* 575, 575 (2014). The secondary victimization of women seeking legal services in the aftermath of interpersonal violence is described by researcher Rebecca Campbell, who found that when survivors reach out for help, often at a time of great vulnerability and need, “they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help.” Rebecca Campbell, *The Psychological Impact of Rape Victims’ Experiences with the Legal, Medical, and Mental Health Systems*, 63 *AM. PSYCHOLOGIST* 702, 703 (2008); *see also* Platt et al., *supra* note 225, at 202; Heidi Grasswick, *Epistemic Injustice in Science*, in *ROUTLEDGE HANDBOOK*, *supra* note 80, at 313.

Massachusetts explains: “The tendency to doubt the testimony of domestic violence victims and to ‘blame’ them for their predicament not only hampers the court’s ability to provide victims with the protection they deserve, it also has a chilling effect on the victims’ willingness to seek relief.”²³⁵

A woman in the Massachusetts Family Court study captured this fatalistic process in heartbreaking detail:

[The court] didn’t believe [the abuse] . . . so I felt like it didn’t matter The way my case was handled, I am very afraid of [the government in] this state now I’m so afraid of all he needs to do is just file a motion and bang! He’ll get, he’ll prove me wrong, you know, I’ll get discredited again. So I just always keep a watchful eye.²³⁶

Perhaps most perniciously, each individual woman’s experience can have a large-scale chilling effect. As one advocate described it, “A judge discredits one woman, and it’s like a bomb that goes off in the community, affecting a hundred women. Within many communities, these stories spread like wildfire.”²³⁷

A woman in the Massachusetts Family Court study voiced much the same criticism:

[My advice to other women is:] Just don’t say anything about it. The way the system is now . . . you’ve got to talk to your priest, talk to your family, tell them your story of woe and you know, the fact that you’ve been abused. Have the support, get therapy if you need therapy, do talk to them. But don’t, don’t, don’t bring it into the courtroom, because . . . [the judge will think] ‘oh, that couldn’t have happened to you.’²³⁸

Such advice—editing one’s speech so that it includes only what the listener is ready or able to hear—is described in the philosophy literature as “testimonial smothering.”²³⁹

In the 2015 National Domestic Violence Hotline study,²⁴⁰ both women who had called the police and those who hadn’t shared a strong reluctance to turn to law enforcement for help. One in four women reported that they would not call the police in future, and more than half said doing so would

²³⁵ FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL & GENDER BIAS IN THE JUSTICE SYSTEM 405 (2003).

²³⁶ *Massachusetts Family Court Study*, *supra* note 223. In addition, women who do not receive the support they need from law enforcement are less likely to turn to law enforcement in the future. See Ruth E. Fleury et al., “Why Don’t They Just Call the Cops?: Reasons for Differential Police Contact Among Women with Abusive Partners,” 13 *VIOLENCE & VICTIMS* 333, 342 (1998).

²³⁷ Interview with Ronit Barkai, Assistant Dir., Transition House (Dec. 20, 2017).

²³⁸ *Massachusetts Family Court Study*, *supra* note 223.

²³⁹ Dotson, *supra* note 112, at 249.

²⁴⁰ NATIONAL HOTLINE SURVEY, *supra* note 106, at 9.

make things worse.²⁴¹ Why? Two-thirds or more said they were afraid the police would not believe them—or would do nothing, if they called.²⁴²

Credibility discounts and experiential trivialization harm women in an abundance of ways—up to and including the supremely destabilizing process of prompting women to question the truth of their own experience. Women are devalued and gaslighted from every direction, discouraging them from continuing to seek systemic support. Ripple effects discourage the broader community of women from seeking the help they need. And our entire society suffers from the failure to fully understand, credit, and value a substantial portion of the human experience. Together, these harms operate to form a formidable obstacle to women's healing, safety, and ability to obtain justice.

IV. MOVING FORWARD: INITIAL STEPS TOWARD ERADICATING CREDIBILITY DISCOUNTS IN THE JUSTICE SYSTEM

At this point, we have a fairly comprehensive sense of how the justice system and influential actors in related social service networks unfairly discredit women and their stories of abuse, and devalue their most difficult experiences. How can we recalibrate these core institutions to tear down the gauntlet of doubt, disbelief, and dismissal women face in their efforts to be safe and achieve justice?

Several forms of credibility discounting may be amenable to fairly straightforward interventions—specifically, those that derive from listeners' failure to understand a woman's experience of intimate partner violence. For example, gatekeepers within the justice system often lack information about the effects of violence-based neurological and psychological trauma on information processing and memory, about the way that potent courtroom triggers can affect witness demeanor, and about the ways survivors understand their options and prioritize their harms.²⁴³ The best way to cure these knowledge gaps is—of course—improved understanding. Intensive training could, in theory, allow individual judges, police officers, prosecutors, clerks, and social service providers to better understand the medical, mental health, and experiential correlates of domestic violence. Such education should help to eradicate those credibility discounts that are rooted in incomplete understandings.

A cautionary note, however, is in order here. For decades, antidomestic violence activists have engaged in intensive judicial training efforts throughout the country. Some individuals have absorbed this learning and are far more adept at avoiding knowledge-based pitfalls in assessing survivor credibility. For others, however, knowledge gaps persist despite exposure to

²⁴¹ *Id.* at 5.

²⁴² *Id.* at 4.

²⁴³ See *supra* text accompanying notes 19–95.

high quality training, raising doubts that training alone may be enough. Training must be accompanied by a genuine commitment to absorbing new and sometimes complex understandings about the world.²⁴⁴

Other forms of credibility discounting described above—particularly those rooted in negative stereotypes and bias—are more resistant to change and may require a more complex set of interventions. The cultural assumption that women tend to be improperly motivated by an outsized concern for financial, material, or child custodial gain—and the related assumption that women simply lack full capacity as truth-tellers—are longstanding and deeply held.²⁴⁵

Regardless of the type of credibility discount in question, change will not come easily; it will require a combination of motivation, awareness, and effort. The responsibility here lies with the listening audience—justice and social service system gatekeepers—to intentionally, consciously shift their assumptions. In Fricker's words, the listener must adopt "an alertness or sensitivity to the possibility that the difficulty one's [witness] is having as she tries to render something communicatively intelligible is due not to its being [a] nonsense or her being a fool, but rather to some sort of gap in [the existing interpretive] resources."²⁴⁶

The crucial first step is to shift away from an automatic, uninformed disbelief of women's stories—to begin, in other words, to distrust one's own distrust. Philosopher Karen Jones proposes the imposition of a "self-distrust rule": gatekeepers should allow "the presumption against . . . believing an apparently untrustworthy witness [to] be rebutted when it is reasonable to distrust one's own distrust or [one's own] judgments of implausibility."²⁴⁷

²⁴⁴ These conclusions are based on the first author's extensive experience in conducting trainings with judges, police officers, and prosecutors, as well as numerous conversations with other trainers in the field of intimate partner violence.

²⁴⁵ See *supra* text accompanying notes 112–168. A central challenge here is that many system gatekeepers are unaware of the gender-based stereotypes that are, in fact, shaping their perceptions and decisions. As long as these biases remain unconscious, change is unlikely. Psychologists interested in challenging unconscious prejudicial perceptions, also called "implicit biases," have shown that participants who develop both a strong negative attitude toward prejudice and a strong belief that they themselves are indeed prejudiced, are able to reduce the manifestations of their implicit bias. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164 (2007). One of the most prominent and well-researched approaches to bias reduction is called the "prejudice habit-breaking intervention." Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1267 (2012). Once participants achieve awareness of their own biases and of the damage such biases can cause, they use cognitive strategies to accomplish behavioral change, such as stereotype replacement, perspective-taking, and counter-stereotypic imaging. One notable study based on such strategies demonstrated that habit-breaking interventions produced long-term changes in key outcomes related to implicit racial bias, increased concern about discrimination, and greater reported beliefs that there could be bias present in participants' thoughts, feelings, and behaviors. These changes endured two months following the intervention. *Id.*

²⁴⁶ FRICKER, *supra* note 49, at 169.

²⁴⁷ Jones, *supra* note 167, at 164.

Let us be clear: We are in no way arguing that by distrusting one's instincts to distrust a survivor, state actors must go to the other extreme and automatically credit all survivor stories. Instead, system actors need only resist the reflexive presumption *against* crediting women's stories, make an effort to avoid false assumptions, overcome hermeneutic gaps, and open their minds to accepting a broader range of stories and storytellers. We might call this process one of cultivating a capacity for "virtuous listening."²⁴⁸

System gatekeepers can build this openness into their traditional approaches to assessing credibility. Contributing factors such as the internal and external consistency of story, as well as witness demeanor, can easily expand to accommodate new understandings. For example, a judge who notices temporal gaps in a survivor's story can resist the urge to automatically discount her credibility. Instead, the judge can ask follow up questions in an effort to obtain more concrete factual information and avoid making unjustified assumptions. Such questions might include:

- What kinds of injuries did you sustain?
- Did you ever feel unable to breathe for any period of time?

Additional questions might focus on obtaining information about the impact of trauma on the witness. For example:

- Are you able to remember the full story of what happened, from beginning to end?
- It's fine if you can't tell me what happened in complete detail; just tell me any specific part of this experience that you *do* remember.
- How would you describe your ability to remember what happened here? Do you remember some pieces, like visual images, smells, sounds, or anything like that? Tell me about those.
- Is your memory of what happened consistent over time? How does it change?
- Is this a good or a bad day for your memory of what happened? Do you sometimes remember more or less than what you've been able to recall today?
- Is your memory of what happened similar to or different from your memory of other events in your life? How so?

A gatekeeper listening to a woman describe her experience of abuse with either a flat affect or a tone overwhelmed with hysteria or fury might ask:

- I notice you seem completely calm right now. Does that reflect how you felt at the time of the events you're describing?

²⁴⁸ Jose Medina, *Varieties of Hermeneutical Injustice*, in *ROUTLEDGE HANDBOOK*, *supra* note 80, at 48.

- (If not): What do you think explains the difference?

or:

- I notice you seem extremely upset/angry right now. Can you help me understand what you're feeling, and why?

When receiving testimony focused on psychological, rather than physical abuse, listeners can use a prompt along these lines:

- You've talked about the psychological harm you experienced in your relationship. Was there ever physical violence? Can you help me understand why you have focused primarily on the emotional aspects of your experience?

When suspecting that a woman is improperly motivated by a desire to access housing/shelter, or to gain an advantage in a custody case:

- You've spent a lot of time explaining that you need to have a safe place to live. Can you help me understand why you've focused more on this issue than you have on the violence you've described?
- I see that you filed a permanent custody case a few weeks ago. Can you help me understand why you have filed your protection order case now? I need you to explain to me why you didn't file this case first.

To help counter the more general tendency to discredit women *as women*, a judge might take the issue on directly:

- One of the most basic things a judge has to do is to decide whose story to believe. In this case, like so many others, each of you is telling me a different story. Can you help me see the reasons I should credit, or believe, your side of the story, as well as the reasons I should not credit the story told by the other party?

The judge may ultimately find a woman's story implausible, or find her personally untrustworthy. But by engaging in a systematic reorientation of their beliefs, judges can begin to reverse unfair and automatic presumptions of distrust and thus avoid inflicting testimonial and hermeneutic injustice.

In addition, in cases where a judge or other system gatekeeper concludes that a survivor is, indeed, telling the truth, the gatekeeper should explicitly communicate that to her. In light of the frequency with which women face credibility discounts and the psychological harm such discounts impose, a counter-message of belief and support (where warranted) can be deeply cathartic.²⁴⁹

²⁴⁹ See *supra* text accompanying notes 218–223. Being believed is critical to a survivor's ability to heal. A judge's explicit statement that a survivor is credible can serve as a stark counter narrative

And judges must be held accountable for instituting such changes. Court watch programs should expand to include observations about individual judicial efforts (and failures) to look beyond surface indicators of credibility and ask questions targeted at more accurate assessments. Court watch reports, shared with the local judiciary and made available to the public, would create much-needed pressure to follow through with a change in existing credibility assessment tools.

Still, experience has taught us that judicial training has its limits; accordingly, suggestions for changing gatekeeper behavior are not enough. Reform efforts also must focus on improving survivors' access to powerful forms of corroborative evidence. The story of White House staff secretary Rob Porter serves as a potent reminder that a picture—there, one that showed his ex-wife's black eye—can dramatically reduce the initial credibility discounting imposed on women's stories of abuse.²⁵⁰ But survivors often lack such evidence. Many perpetrators routinely look through their targeted victim's phones, deleting any incriminating photos, texts, or voice mails that are stored there. Many women are afraid to maintain such evidence in the first instance, due to fear that discovery will lead to further abuse.

Recent technological innovations have created safe spaces for women seeking to maintain corroborative evidence. The SmartSafe+ mobile app, developed by the Domestic Violence Resource Centre in Victoria, Australia, enables survivors to create an online diary containing written, photographic, video, and audio entries that are stored on a cloud account, rather than on their phones.²⁵¹ It also contains guidance about the most important forms of corroborative evidence that can be useful in a courtroom.²⁵² On the phone itself, the app looks like a routine news feed. It can be downloaded, free of charge, at domestic violence advocacy organizations, where service providers have been trained to ascertain whether a survivor's phone is being monitored and ensure that the download cannot be detected.²⁵³

Efforts also are underway to develop online programs that use plain language to improve survivor access to justice.²⁵⁴ Such efforts could be expanded to educate

to her abusive experiences, reinforcing the validity of her own perceptions and helping to restore the sense of self-worth she may have lost.

²⁵⁰ See, e.g., Maggie Haberman & Katie Rogers, *Rob Porter, White House Aide, Resigns After Accusations of Abuse*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/us/politics/rob-porter-resigns-abuse-white-house-staff-secretary.html>.

²⁵¹ *Family Violence App Wins Inaugural Premier's iAward*, CIVIL VOICES (June 30, 2016) <https://probonoaustralia.com.au/news/2016/06/family-violence-app-wins-inaugural-premiers-iaward/> [<https://perma.cc/3PV9-5L4X>].

²⁵² See, e.g., SmartSafe+ Mobile App, <https://www.youtube.com/watch?v=o9tdxEr1nww> (last visited Oct. 16, 2018).

²⁵³ *Id.*

²⁵⁴ Brigitte Lewis, Lisa Harris & Georgina Heydon, *The Conversation We Need to Have: Victoria Has Made Progress on Tackling Domestic Violence, But There Is Still Much to Be Done*, ASIA & PAC.

survivors about the importance of focusing courtroom storytelling around applicable legal standards. Community education focused on storytelling could prompt women to highlight their experiences of physical harm, for example, helping them to focus on what is most important for their legal case, rather than what might be most emotionally salient to them on a personal level. In addition, online programs and in-person advocates could help women think through how to effectively communicate how trauma might be impairing their ability to effectively tell their story in court, or to any system gatekeeper.

Together, these initial reforms could have a substantial individual and institutional impact, with a concomitant diminution in discounting women's credibility. But, as noted above, two prerequisite conditions—whether in reducing the “willful interpretive gap” in understanding women's experiences, in eradicating cultural stereotypes of women as inherent untrustworthy, or in taking women's experiences seriously—are the *acknowledgement of gender-based bias, and the will to change*.

Progress is possible. The #MeToo moment represents the beginning of a shift in cultural understanding and good will. The floodgate of stories from blue collar workers to Hollywood A-listers has forced society to face the realities encountered by so many women in the American workplace. Similarly, the #WhyIStayed campaign brought into sharp relief the ways that women are often trapped in abusive relationships. And the January 2018 sentencing hearing in the criminal prosecution of Larry Nassar, a sports therapist at Michigan State University who sexually assaulted more than 150 female students over two decades, raised national awareness about women's experiences of sexual assault.²⁵⁵

Perhaps most importantly, the Nassar case represents an initial effort to break crucial barriers directly related to credibility discounting. The women Nassar exploited told the court and the wider world, explicitly and in painful detail, their stories of being discredited by the institutions ostensibly designed to help them. Over 150 women from Michigan State University (“MSU”) came forward with story after story of how they

told MSU administrators, explicitly and more than once, that Nassar was sexually abusing them during medical appointments. [The administrators] listened to women describe the rubbing back and forth, the digital penetration that sometimes lasted 15 minutes, the ungloved hands. But when

POL'Y SOC'Y (Sept. 6, 2016), <http://www.policyforum.net/the-conversation-we-need-to-have/> [<https://perma.cc/5AQA-697Z>].

²⁵⁵ Caroline Kitchener, *Larry Nassar and the Impulse to Doubt Female Pain*, ATLANTIC (Jan. 23, 2018), <https://www.theatlantic.com/health/archive/2018/01/larry-nassar-and-the-impulse-to-doubt-female-pain/551198/>.

those women said there was a problem—that this didn't feel right, that they were hurt—the administrators didn't believe them.²⁵⁶

Instead, school administrators consistently discounted the credibility of Nassar's victims, telling them: "He's an Olympic doctor"; or "No way"; or "[You] must be misunderstanding what was going on."²⁵⁷ When asked about the women's reports of abuse, the university's Title IX investigator, Kristine Moore, said "the women likely did not understand the 'nuanced difference' between proper medical procedure and sexual abuse."²⁵⁸

The sentencing hearing in this case was a groundbreaking opportunity for women to share both their experiences of sexual assault and, in painful detail, their experiences of credibility discounting. The seven days of hearings were cathartic for the survivors; they also shone a light on the institutional gaslighting that women routinely experience.²⁵⁹ It is time to build on the momentum of this new awareness and take concrete steps to implement meaningful reform in the justice and social service systems.

CONCLUSION

Women experience credibility discounts in their homes and in the systems they turn to for help. As the torrent of #MeToo stories have made clear, these same discounts pervade workplaces where women are sexually harassed. The Larry Nassar case further shows that these discounts are rampant among campus administrators responsible for handling sexual assaults. The routine experience of credibility discounting indeed is an integral part of male abuses of power, making those experiences far more painful and difficult for women to surmount.

But assaults on women's credibility also exist independently of those abusive contexts. In fact, women routinely face credibility discounting in multiple spheres of their lives. As we have worked on this essay, we've started to notice credibility discounting in our own lives everywhere we turn. When we've talked to colleagues and friends about this project, they too reliably respond with a story of their own, typically from the past few days.

For example, one colleague—an extremely well-known legal theorist—exclaimed, "That happens to me, all the time!"²⁶⁰ She told us the story of a dinner party she had just attended, where the conversation turned to the question of who would succeed to the presidency if Donald Trump, Mike Pence, and Paul Ryan were all somehow removed from office. Our colleague

²⁵⁶ *Id.* (emphasis added).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Sophie Gilbert, *The Transformative Justice of Judge Aquilina*, ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/>.

²⁶⁰ Thanks to Professor Robin West for providing us with this story.

(a woman) volunteered that she'd been thinking about this quite a bit, and that the next person in line was Orrin Hatch—the President Pro Tempore of the Senate. The other guests responded with deep skepticism: “That can’t be right,” etc. She insisted that she was certain, but she was ignored. Several guests pulled out their phones and started to Google the question; others brainstormed possibilities among themselves. Eventually, the group concluded that the next in line was . . . Orrin Hatch.²⁶¹ No one acknowledged that our colleague had ever even suggested this answer. Not only was there no apology for doubting her; it was as though she had never spoken at all.

Other friends and colleagues shared experiences where they reported unusual physical symptoms to male medical professionals. They were concerned, in advance, that they might be dismissed as “hysterical” or as exaggerating their experiences, and, in fact, they often were told that the problem was likely “all in their heads.”²⁶² Gender-based credibility discounting is a serious concern in the medical field: among emergency room patients complaining of abdominal pain, women are thirteen to twenty-five percent less likely than men to receive high-strength “opioid” pain medication; in addition, women wait an average of sixteen minutes longer than men to receive treatment.²⁶³

Indeed, credibility discounting stands on its own as an essential aspect of the female experience. Doubt, skepticism, and trivializing are familiar phenomena to women. In other words, credibility discounting and experiential trivializing are distinct injuries women experience, as part of, and *in addition to*, other forms of gender-based, discriminatory harms.

It is time for a credibility-discounting #MeToo movement. Women need to come forward in massive numbers to tell their stories of discounts based on

261 This story has a sharp ironic edge. Orrin Hatch took a leading role in the Clarence Thomas confirmation hearings before the Senate Judiciary Committee. *See, e.g., Thomas Hearing Day 1, Part 1*, C-SPAN, at 48:37–57:02 (Oct. 12, 1991), <https://www.c-span.org/video/?21974-1/thomas-hearing-day-1-part-1>. Reflecting on these hearings nearly twenty years later, in an interview with CNN, Hatch reasserted his view that Anita Hill fabricated her story about Thomas’ harassment, but “talked herself into believing it.” Hatch explains:

I believe that Anita Hill was an excellent witness. I think she actually believed, and talked herself into believing, what she said. There was a sexual harasser at that time, according to the sources I have, and he was her supervisor. He just wasn’t Clarence Thomas. And I think she transposed that to where she believed it . . .

Why Ask for Anita Hill’s Apology Now?, CNN (Oct. 20, 2010), <https://www.youtube.com/watch?v=6Og0LRu028Q>.

262 For a more in-depth look at this type of credibility discount, see Jennifer Brea, *They Told Me My Illness Was All in My Head. Was It Because I’m a Woman?*, BOS. GLOBE (Dec. 27, 2017), <https://www.bostonglobe.com/magazine/2017/12/27/they-told-illness-was-all-head-was-because-woman/47zuihgBfZqPdNe7S40hSJ/story.html>.

263 Esther H. Chen et al., *Gender Disparity in Analgesic Treatment of Emergency Department Patients with Acute Abdominal Pain*, 15 ACAD. EMERGENCY MED. 414, 414 (2008).

story plausibility and storyteller trustworthiness, as well as ways in which their experiences have been minimized and dismissed, in an effort to force society to see with clarity this distinct form of gender-based harm.²⁶⁴ And perhaps once the scale of this injustice is made manifest, we can, at long last, enact a body of genuine institutional remedies, so that women already victimized by abuse, sexual assault, and harassment need not fear that the legal system and the broader culture is set up to perpetuate, rather than alleviate, their harms.

²⁶⁴ Playwright Timberlake Wertenbaker puts it well:

What the #MeToo moment is besides sexual harassment is the end of women being quiet. And that is almost more important—that is, the ability and the right of women to speak up about what's happened to them or what they think in general, without being told to shut up I hope that's what lasts forever."

Nelson Pressley, *Second Women's Voices Theater Festival Arrives as #MeToo Is in the Spotlight*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/entertainment/theater_dance/second-womens-voices-theater-festival-arrives-in-metoo/2018/01/04/bfadec08-e66e-11e7-833f-155031558ff4_story.html?utm_term=.fed8f623d01b.

Ashby Jones

From: Ashby Jones
Sent: Sunday, January 15, 2023 8:47 PM
To: Ashby Jones
Subject: Implicit Bias Test

<https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-test/>

Implicit Bias Test

This is an online test of quick responses to a series of words and pictures; the test measures response time to the computer images as a proxy for implicit bias. Many—including those who are major researchers in the field of implicit bias and who have committed themselves to work for civil rights, equality, and diversity—find the bias reflected by their scores to be surprising and troubling. The site itself offers this disclaimer:

It is well known that people do not always 'speak their minds', and it is suspected that people do not always 'know their minds'. Understanding such divergences is important to scientific psychology. This web site presents a method that demonstrates the conscious-unconscious divergences much more convincingly than has been possible with previous methods. This new method is called the Implicit Association Test, or IAT for short.

We will ask you (optionally) to report your attitudes toward or beliefs about these topics, and provide some general information about yourself. These demonstrations should be more valuable if you have also tried to describe your self-understanding of the characteristic that the IAT is designed to measure. Also, a variety of factors may influence your IAT performance. The score is provided for entertainment purposes only.

Data exchanged with this site are protected by SSL encryption, and no personally identifying information is collected. IP addresses are routinely recorded, but are completely confidential.

Important disclaimer: In reporting to you results of any IAT that you take, we will mention possible interpretations that have a basis in research done at the University

of Washington, University of Virginia, Harvard University, and Yale University. However, these Universities, as well as the individual researchers who have contributed to this site, make no claim for the validity of these suggested interpretations. **If you are unprepared to encounter interpretations that you might find objectionable, please do not proceed further.** You may prefer to examine [general information about the IAT](#) before deciding whether or not to proceed.

As the Harvard disclaimer suggests, not all researchers are in agreement on the value of the IAT, or on its relevance and significance in terms of actual behavior. The [bibliography](#) contains some of the research on this point.

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MAKING SENSE OF THE INITIAL HOME VISIT: THE ROLE OF INTUITION IN CHILD AND FAMILY SOCIAL WORKERS' ASSESSMENTS OF RISK

This article conceptualises the role of intuition in professional judgement. It draws on findings from an empirical study of home visiting in child and family social work. The study used a psychosocial analysis of narrative interviews (n = 18) to investigate how workers constructed a professional judgement in relation to an initial home visit. In contrast to deliberative or analytic reasoning, intuition is defined as a non-conscious mode of reasoning, allowing the individual to reach a rapid judgement about a situation or person, often with striking accuracy. In this study, CFSWs' intuitions during their first encounter with the family were an important source of information for their assessment of risk – their emotional responses, 'niggles' and 'gut feelings' sensitised them to potentially salient information before it was rationally accessible. The study identifies five patterns used by Child and Family Social Workers (CFSWs) to assess risk during the initial encounter with parents: openness, coherence, emotional congruence, child focus and personal responsibility. It is argued that intuition is a product of experience, and is an important part of CFSWs' decision-making toolkit. However, when accepted uncritically, intuitive reasoning can represent a risk for professional judgement through the creation of bias. The article identifies specific biases relevant to judgements made on the basis of an initial visit.

Keywords Professional judgement; assessment; intuition; emotion; risk; reasoning

Introduction

Everyday throughout the developed world, child and family social workers (CFSWs) prepare to meet new families, knock on doors and enter the private space of the family home. Their task during the initial visit is complex – they need to establish a relationship with the family, begin an assessment, investigate reported concerns and manage a sensitive conversation. Following the initial encounter, CFSWs must arrive at a judgement about what to do next (for instance, whether to close the case, to escalate

concerns, to intervene or to conduct further assessment). Such judgements are often made in the context of time constraints, emotional pressure and high caseloads. This paper examines how CFSWs made sense of the initial visit, focusing on the role of intuition in professional judgement. The assessment process that follows a referral of concern is common across the western world (Samsonsen & Turney 2017). The findings from this study will, therefore, be relevant to child welfare decision-making across countries and settings where assessments are carried out.

Professional judgement

The concept of professional judgement has been a focus of international social work research. In the UK, this interest has been prompted by concerns around the quality of social work judgement. Research has identified a tendency towards poor risk assessments, descriptive rather than sufficiently analytical assessments and 'fixed thinking' and bias on the part of professionals (Brandon et al. 2009) which can lead to children being left at risk of abuse and neglect. There has been concern that the scope for professional judgement has been curtailed due to increasing regulation and administrative systems intended to increase accountability (Broadhurst et al. 2010). Comparisons have been drawn between the UK and other European countries, such as Norway, which appear to place a greater emphasis on professional discretion (Samsonsen & Turney 2017). A key question is how we can learn from the intuitive expertise of experienced workers, while remaining alert to avoidable biases.

The concept of intuition

Intuition is the process by which we come to know something 'without being able to explain how we know' (Vaughan 1979 cited in Topolinski 2011, p.275). It has been defined as a form of 'nonconscious holistic information processing' (Sinclair 2010, p.378). Expert intuition 'strikes as magical' when we see it in action (Kahneman 2012, p.11). It is sometimes described as a sixth sense, or gut feeling, that is later proven correct. For this reason, researchers have begun to explore the role of intuition in the diagnostic judgements of professionals, such as doctors, entrepreneurs (Baldacchino, Ucbasaran, Cabantous, & Lockett 2015) and most recently, CFSWs (Kirkman & Melrose 2014; Saltiel 2015).

In the psychological literature, intuition is defined in contrast to deliberation. Deliberative reasoning involves a conscious, effortful thinking process to reach a judgement. By contrast, intuitive reasoning is fast and non-conscious, with judgements experienced as occurring spontaneously (Kahneman 2012). The naturalistic decision-making (NDM) tradition conceptualises intuition as the product of 'large numbers of patterns gained through experience, resulting in different forms of tacit knowledge' (Klein 2015, p.164). The expert decision-maker has accumulated a rich and varied repertoire of patterns and is able to draw on these in order to make sense of complex situations.

In addition to experience, emotion has been recognised as a component of intuition (Sinclair 2010). From an evolutionary perspective, our emotional responses provide us

with an immediate sense of whether we should approach or avoid particular objects or people before we are able to articulate why (Fiske, Cuddy, & Glick 2007). Emotional processes have been identified as crucial for the effective assessment of risk, our feelings 'efficiently and effortlessly' helping us to 'simplify complex scenarios and resolve ambiguity' (Finucane & Holup 2006, p.143). In relation to social work practice, Morrison (2007, p.225) suggests that the emotions of the social worker may act as 'deep level signals about information that demands attention' during assessment.

Intuition and professional judgement

What is remarkable about intuition is the frequency with which our intuitive judgements are correct. This is particularly true of social cognition. For instance, after viewing thin slices (very brief observations of a person's non-verbal behaviour) participants of psychological studies can predict intelligence, personality traits and even work performance with astonishing accuracy (see Topolinski 2011). It appears that reading people is an intuitive process which, at least at first-pass, is automatic and non-conscious.

In time-limited, uncertain situations intuition may represent an adaptive strategy. Over time and repeated experiences, individuals build up patterns that enable them to make sense of situations quickly and efficiently, without having to compare options (Klein 2015) or consciously consider all variables. In social work assessment, attempting to consider all possible variables and potential outcomes is likely to result in a 'combinatorial explosion' (van de Luitgaarden 2009, p.250).

However, intuition can lead to error. A series of biases have been identified in the psychological literature, including confirmation bias (the tendency to interpret information in a way that confirms our preconceptions) and credibility bias (the tendency to believe statements to be true if they come from a source perceived as trustworthy). Our social cognitions are also prone to bias; we tend to infer certain personality traits based on appearance, gender, ethnicity, perceived warmth and competence (see Fiske et al. 2007) which may lead to stereotyping.

In the UK, Munro (1999) has examined the operation of cognitive bias in social work judgement. Confirmation bias has been identified as a pervasive feature of assessment. Hypotheses reached early-on in the life of a case are unduly influential, suggesting that in terms of initial assessment, 'first impressions' tend to stick. Recent studies have focused on the 'front door' (Kirkman & Melrose 2014) or entry of families into social care services, identifying the use of intuitive decision-making in the processing of referrals (Saltiel 2015) as well as the potential for bias (Broadhurst et al. 2010) in the way that referrals are assessed. Credibility bias has also been identified as a risk in the processing of referrals, with the perceived reliability of the referrer being used as an intuitive gauge of risk (Regehr, Bogo, Shlonsky, & LeBlanc 2010).

There is, therefore, a danger that professional judgement might begin and end with intuitive reasoning, rather than representing genuinely reflective and informed thinking. Munro (1999) argues that professional judgement needs to utilise both intuitive and deliberative reasoning, the limitations of intuitive reasoning balanced by the strengths of deliberative reasoning (and vice versa). In this way, the risk of bias can be reduced. The present study explored the role of intuition (and potential for bias) in CFSWs' judgements in relation to a specific situation – the initial home visit.

The home visit and professional judgement

Despite concerns around the increasingly office-based nature of social work practice, home visiting remains integral to assessment in child and family social work (Ferguson 2016). During the home visit, workers need to offer support, ask challenging questions and confront the 'emotionally indigestible' (Cooper 2014, p.271) facts of child abuse and neglect. Ferguson's (2016) ethnographic work has identified some of the challenges posed by home visiting, including the risk of professional immobilisation in the face of overwhelming emotion. Despite a few exceptions, the home visit has been largely neglected within both the UK and international literature, remaining a hidden aspect of social work practice. It has been identified that the social worker's impression of the parent, particularly in relation to their perceived cooperation or hostility, may have an impact on CFSWs' assessments of risk (Hackett & Taylor 2014; Regehr et al. 2010). However, relatively little is known about the way in which CFSWs make sense of their experiences during the home visit. How, for instance, do they select which aspects of their observations are salient? What signs do they tacitly regard as indicators of risk? How does their experience of the parent affect their assessment of risk?

The study

This qualitative research study used a psychosocial analysis of narrative interviews ($n = 18$) to investigate how workers constructed a professional judgement in relation to an initial visit.

The sample consisted of qualified CFSWs from two UK local authorities. At the point of data collection, both authorities divided front line children's services into Duty, Child in Need and Safeguarding teams. The interview sample included CFSWs from each of these teams. Duty workers featured more heavily (10/18) since they typically undertook a higher number of initial visits. CFSWs in the study had a broad range of experience.

Years in SW practice	Under 2 years	2–5 years	5–6 years	6–11 years	20+ years
Number of participants	5	2	5	3	3

Telephone interviews were undertaken with CFSWs immediately after they had carried out a home visit to a new family for the first time. The timing of the interviews reflected the need in the literature to investigate early assessment, as well as to capture workers' intuitive impressions. A narrative-inducing question was used: 'Tell me the story of the home visit you have just been on today in as much detail as you can remember'. Often workers were parked around the corner from the household they had just visited and the interview with the researcher acted as a debrief during which they organised their thoughts, impressions and emotions. Catching them at this point was crucial, since immediately following the home they were engaged in a process of sense-making.

CFSWs visited families for a wide range of reasons (see table below), often involving multiple presenting concerns (thus the presenting concerns total > 18). In two instances the presenting issue was unclear – due to this information not being provided during the research interview, or because the referral information was unclear to the worker at the point of referral.

Presenting concern at referral	Interviews
Children witness to domestic abuse and/or domestic dispute	7
Future parenting of an unborn child	5
Allegation of physical chastisement, abuse or assault	4
Child/Young person's behaviour at school	2
Child sexual exploitation	2
Young person at risk from community	1
Transfer-in from another LA	1
Unclear	2

As van de Luitgaarden (2009, p.255) observes, assessment involves 'story-building'. During the research interviews CFSWs were actively engaged in constructing narratives of the family to get a sense of their situation and arrive at a judgement. Psychosocial analysis (Clarke & Hoggett 2009) which makes use of narrative and psychodynamic theories, provided a framework for data analysis. The way in which CFSWs structured their narratives about the visit (including their pauses, hesitations and self-corrections) formed part of the analysis. Three themes were generated inductively from the data: sense-making (how workers generated hypotheses about need, risk and parenting capacity), self-regulation (how workers managed their own emotional responses during the home visit) and managing the encounter (how workers described directing the discussion during the initial visit). Interview transcripts were then re-coded under these three headings using NVIVO10, enabling further conceptual refinement. Intuition occurred at the intersection of sense-making and self-regulation – CFSWs often needed to manage their own emotional responses to the encounter with the family in the home (self-regulation). At the same time, these emotional responses often provided vital information in terms of their assessment of risk (sense-making).

Findings

Intuitive sense-making during the home visit

During the initial visit CFSWs were bombarded with sensory, affective, verbal and experiential data. They needed to make sense of interactions between children and parents, observe parental body language, examine the physical home conditions, consider which questions to ask and attend to the answers while ensuring that the family felt heard and respected. Understandably, families were often distressed at the prospect of a social work visit, so these tasks were often undertaken in a climate of distress, suspicion or hostility. For this reason, as one CFSW remarked:

When you go into household you're heightened. Your expressions, feelings, emotions, your senses are all aroused.

During the home visit CFSWs described how people came and went, and how they themselves moved from room to room. Arriving at a judgement in the context of the initial visit involved therefore making sense of multiple social cues, rapidly changing situations and uncertainty. Within this context, the need to heed, and to unpick, one's

intuitions was regarded by workers as crucial. As one CFSW cautioned, if 'you've got something in the back of your head you've *really* got to check it out!' Others gave examples of occasions when a 'bad vibe' which couldn't be articulated was later substantiated when more information about the family came to light. In the psychological literature, intuition has been described as the 'feeling of knowing' (Hogarth 2010, p.344). During the initial visit, workers' intuitive sense that something wasn't 'quite right', described by variously as a 'niggle', 'mental ping' or a 'gut feeling', allowed them to hone-in on factors that might be salient in terms of risk before they were able to say why. For instance, during one interview a CFSW repeatedly returned to a lack of 'flow' within the visit and her intuitive suspicion that something wasn't right in the home. The space provided by the research interview afforded her an opportunity to move from intuition to analysis – to reflect on her intuitions and what, if anything, they might mean. Another CFSW described a feeling of pleasure when watching an interaction between a mother and her young daughter, and his intuitive sense that the child was 'safe'.

Intuition has been associated with the ability to apprehend broad patterns in complex data (Klein 2015) as a result of prior experience. The ability to recognise patterns is an important skill for the professional social worker, particularly in identifying abuse (Taylor 2013). Workers' sensitivity to such patterns may become proficient given repeated experiences of working with families over the course of their career, allowing them to hone their intuitive capabilities. As one worker stated:

It's about your own life experience, it's almost like your templates for life... I think for me it's a *gut feeling*, it's hard to explain - when you walk into a home - this is good, this is poor, or I'm not sure about this. I think that's your starting point, that gut feeling, or professional feeling... it's an unconscious thing ... have I seen this before, or where have I seen this before and what was the result of that experience?

These eloquently termed 'templates for life', when drawn upon, allowed workers to quickly apprehend deviations to expected behaviours. CFSWs' intuitions, their 'gut feelings' and 'niggles' can, therefore, be regarded as an important part of their sense-making toolkit, developed through professional and personal experience. In relation to the initial visit, these intuitions appeared to act as an important starting point for assessment.

The role of pattern recognition in making sense of the initial visit

During the visit, CFSWs described inviting parents to 'tell their story'. What parents said in response informed workers' judgements in relation to parenting capacity and risk. I have used the term 'parental narrative' to refer to the 'story' told by the parent to the social worker (as described from the worker's perspective). CFSWs attended closely to what the parent said, as well *how* they said it. Five key patterns within the parental narrative were used by social workers to assess risk: openness, coherence, emotional congruence, child focus, personal responsibility.

1. Openness

When making sense of the information presented by the parent, CFSWs drew on their perception of 'openness' as an indicator of risk. The perceived 'openness' of the parent (i.e. the extent to which they talked 'freely' during the visit, offering information with

a minimum of prompting) appeared to be especially significant to social workers, and was mentioned by all of the CFSWs interviewed. Where CFSWs perceived parents as open they tended to come away from the visit feeling more reassured. For instance, one CFSW directly linked his favourable impression of the mother to his perception of her openness around sensitive issues:

Researcher: And what did you make of Mum?

SW5: Very good, actually. She spoke quite openly about the allegation. And again, she spoke openly about her family history.

A perception of openness could reduce the worker's level of concern even where the referral had indicated high levels of risk in relation to the child. For instance, one CFSW described how she was 'originally quite concerned' when reading the referral, yet left the visit 'feeling less concerned given that they [the parents] were quite open with me and told me quite a bit of information'. Workers were less reassured where they perceived the parent to be 'closed'. This was taken as a sign that matters were more complex or concerning. Openness acted as the worker's first-pass in relation to the parent, and was often treated as predictive of future parental cooperation. Where CFSWs perceived the parent to be open, they tended to leave the visit with a positive prognosis for the parent's engagement with social care services. This finding supports studies which suggest that perceived parental cooperativeness (e.g. in answering questions, providing information) is used by CFSWs to gauge risk (Hackett & Taylor 2014; Regehr et al. 2010). Most of the CFSWs interviewed were careful to balance their perception of parental openness with a consideration of wider factors, such as the case history and information from other agencies. However, in one research interview, the worker's perception of parental openness appeared to be the sole reason for the decision to close the case following the initial visit, despite a long history of similar concerns. There is therefore a danger that, when relied upon uncritically, this pattern may lead the worker to underestimate risk to the child and, potentially, to miss instances of disguised compliance. Since perceived openness led workers to a more positive first impression of parents, there is also a danger that service users who appear 'closed' may be unduly viewed with suspicion (e.g. those with English as a second language, anxiety or communication difficulties). Issues relating to ethnicity, class and gender may also lead workers to view parents as suspiciously closed when this may in fact be attributable to the power imbalance between worker and service user during the visit.

2. Coherence

When describing their discussion with the parent, CFSWs frequently referred to parents' ability to offer an account of their situation that 'made sense' and appeared to follow a logical structure. As one social worker said of a parent:

The things she said had flow – it wasn't as if she was jumping about all over the place, actually what she was saying and talking about *made sense*.

CFSWs appeared to associate coherence with parental competence. Parents able to give a clear account of their situation were described by CFSWs as 'switched on' and 'able to make decisions'. CFSWs' first sense of concern was often prompted by a break in

the 'flow' of the parent's account – an intuition of incoherence in relation to what the parent was saying, i.e. that in some way it 'didn't make sense'.

One CFSW described a visit to a father who had previously lost a child to adoption. Part-way through listening to the father's account, the social worker described being suddenly struck by the fact that the father was unable to recall very recent, prior contact with his previous social worker. This intuition of incoherence piqued the worker's interest before she was initially able to articulate why. She described how she had experienced a 'mental ping' during this part of the parent's story. During the research interview, the social worker then began to subject this intuition to scrutiny – to consider why this aspect of the encounter with the parent had troubled her to such an extent. Moving from intuition to analysis, she began to consider different hypotheses that might account for the father's difficulty in recalling what she considered to be important information. He might, for instance, have memory difficulties or not wish to recall painful experiences. Or, more worryingly from her perspective, he may be seeking to deliberately withhold information. As a result, the social worker resolved to return to the case file to get a more detailed sense of the history. Intuitions of incoherence can act as a prompt for us to stop and seek further information. As Topolinski (2011, p.279) suggests 'we then become suspicious and begin to wonder, analyse the situation more thoroughly, and often discover the hidden cause for our discomfort'. For CFSWs in the study, experiencing a 'bad vibe' or a feeling that something 'didn't make sense' acted as a trigger for them to probe further. In this way, CFSWs' intuitions, their 'gut feelings' 'niggles' and mental 'pings' served to alert them to potentially salient information in terms of risk.

A coherent narrative may well be indicative of parental insight, ability and as an important way to gauge motivation for change (see Morrison 2001). However, it may be that coherence and logical thinking evident in the parent's account is not mirrored in everyday parental decision-making. The majority of CFSWs in the study expressed their intention to cross-check their intuitive impressions against other available information. However, in one instance a social worker's positive impression of a parent (as a result of her clear, insightful narrative) appeared to outweigh evidence of consistently problematic parenting behaviours. In this case, there appeared to be something of a 'halo effect' (Nisbett & Wilson 1977) in the worker's judgement; the assumption that their global evaluation of the parent (as coherent and organised) also applied to the parent's individual attributes (such as their parenting behaviour).

3. Emotional congruence

CFSWs attended carefully to the emotions expressed by the parent. Workers honed-in on whether the parent's narrative was emotionally congruent both in terms of their verbal account, and the type and intensity of emotions expressed. Firstly, CFSWs used the parent's emotional responses as a gauge of truthfulness, attending to the level of congruence between what the parent *said* and their accompanying expressed emotion. Workers described attending to body language, such as tenseness in the shoulders, 'fidgety' hands and other physiological indicators of the parent's emotions. However, as stated earlier, reading body language is a largely non-conscious and intuitive process that is consequently hard to articulate. As one worker stated 'I just got a *feeling* she was telling the truth'. Where the parent's emotions did not seem congruent or 'didn't

match' with their verbal account, workers described investigating further, asking more probing questions and in some cases directly challenging the parent.

Secondly, workers considered the congruence between the parent's expression of emotion and the seriousness of the situation that had led to the referral. Workers attended to whether the parent was worried *enough* (whether there was congruence between the situation and the parent's emotional response and sense of concern), using this as an indicator of risk. For instance, one worker described feeling reassured that a mother 'was appropriately really angry' in relation to something that had happened to her child. In this instance, feeling angry (that one's child had been caused emotional distress) was regarded as an appropriate response from a protective mother. Conversely, CFSWs were more concerned when the parent's emotional response did *not* seem congruent. For instance, one worker described a situation in which the parent was 'saying the right things' and providing a coherent account of the situation, yet did not seem to be particularly distressed. The social worker herself had been quite affected by the details of what had happened to the children. When describing the home visit during the research interview, the worker kept coming back to the fact that the parent was not worried *enough* and tried to consider why this might be. 'Flatness' or 'despondency' in the parent's emotional response during the home visit was taken by some CFSWs as a particularly bad sign – indicative of a poor prognosis for engagement and lack of potential scope for change. This suggests that encountering someone who is depressed is overwhelming, instilling in the worker a similar sense of low mood and hopelessness. In these instances, there is a risk that the social worker's own emotional response to the situation might lead them to overestimate risk to the child and to underestimate the potential for positive change.

4. *Child focus*

The way that the child came alive in the parent's narrative had important implications for CFSWs' assessment of parenting capacity and their perception of risk. As one social worker summarised:

It's what the parents are saying about the kids, the language they use.

Firstly, workers attended to the extent to which the parent was able to maintain a 'child focus' in their narrative, with particular reference to the child's experiences and emotions. Secondly, CFSWs were reassured where the parent's talk about their child was characterised by warmth and enjoyment. For instance, one CFSW observed that:

She [The Mother] talked really warmly about the children... I asked about the children's favourite things to see what her view is of the children, and she talked warmly about the way they played ... she had a smile on her face and she was quite affectionate in the way that she spoke about them.

Conversely, workers were less reassured where they perceived the parent's description of the child to be focused on behaviour or problems, such as describing the child as the 'naughty one' among his siblings. The way that parents talk about their children may, indeed, be a helpful gauge of parenting capacity. For instance, the Working Model of Child Interview (WMCI) (Zeanah, Benoit, Hirshberg, Barton, & Regan 1994)

measures parent's representations of their child. These parental narratives have been shown to predict parenting behaviour and quality of the parent-child relationship. CFSWs in the present study seemed to draw the apparently reasonable inference that an emotionally 'warm' or 'fond' description of the child was likely to be mirrored in the parent's day-to-day responses to their child. However, the majority of initial visits described by workers (12/18) involved them visiting parents alone. CFSWs would typically go to see the child afterwards, at school or college. Although CFSWs were very aware of the need to test the parent's account of their relationship with the child by interviewing the child alone, some workers expressed an intention to close the case without observing the caregiver and child *together*. There is a danger that parental representations of the relationship with the child may carry undue weight in terms of worker's judgement and, when not combined with direct observation of parent/child interactions, could lead to the underestimation of risk.

5. Personal responsibility

Workers attended to indicators that the parent was willing and able to take responsibility for their child's welfare. CFSWs looked for a sense of *responsibility* in the parent's account – that is, a narrative in which parents located themselves as a rational agent, able to make choices.

The parent acknowledging the 'concerns' about their parenting (i.e. the risks that had been identified in the referral paperwork), and their role in bringing about these concerns was viewed by CFSWs as an important first step in bringing about positive change. Social workers described feeling often reassured where parents demonstrated a sense of culpability, or regret, in relation to past events. For instance, a CFSW identified the following aspect of his conversation with a parent as salient:

SW: He [the father] said 'if I had been more willing to consider what was being said to me, she might be in my care and not someone else's' ... He's obviously given it some thought and shows some responsibility for his actions back then and some understanding of the consequences.

The social worker viewed the father's ability to identify his own role in past difficulties as key to assessing his future parenting capacity. In terms of initial visit more generally, CFSWs tended to be reassured by 'warm' 'amicable' and 'relaxed' encounters with parents, or where initial hostility or rejection (such as the understandable reaction to a SW visiting the home) was resolved throughout the course of the visit. The psychological literature suggests that the 'warm-cold assessment is the social perceiver's immediate "first-pass" as to whether the target individual (or social group) can be trusted...' (Williams and Bargh (2008, p.606). Given this general human tendency, CFSWs need to be supported to consider the role of their emotional and intuitive reactions in their judgements about risk, recognising both the value and limitations of intuitive reasoning.

Discussion

Intuitive reasoning played a key role in CFSWs' judgements relating to the initial visit, acting as a starting point for their assessment of risk. Their immediate emotional responses, or 'gut feelings' during the visit drew their attention to potentially salient

information before it was rationally accessible. This appears to support the idea that emotion plays a crucial role in decision-making, and specifically, that affective intuitions are crucial in the assessment of risk (Finucane & Holup 2006).

Incoherence intuitions, or the 'instantaneous feeling of whether something makes sense or is wrong or inconsistent' (Topolinski 2011, p.277) were key to making sense of the initial visit. An intuition of incoherence in relation to the parent's account – a sense that something wasn't quite right – acted as a prompt for further investigation. However, this perhaps suggests a risk that CFSWs could be too readily persuaded by an open, consistent and congruent account of family life.

Expert intuition has been conceptualised as involving experience and pattern recognition (Klein 2015). It may be that workers' sensitivity to such patterns becomes proficient given repeated experiences of working with families. As one CFSW described, personal and professional experience may provide workers with 'templates' allowing them to quickly spot deviations to expected behaviours. Intuitive reasoning may, therefore, have much in common with the concept of practice wisdom.

What was striking during the research interviews was the differing extent to which individual CFSWs subjected their intuitive responses to scrutiny. Most workers spoke of their intention to seek further information to verify or disconfirm their intuitions, while a minority expressed a fixed judgement following the visit. Perhaps what is crucial for the effective use of intuition (and avoidance of bias) is the extent to which CFSWs subject their intuitions to critical scrutiny, using them as a starting point (rather than an end-point) for judgement.

Caution should be exercised in generalising from these findings to *all* home visits, since the initial visit represented a particularly focused type of assessment which may not be typical in the context of longer term assessment and intervention. This paper has focused in detail on how CFSWs made sense of a particular aspect of the visit – the parental narrative – in order to demonstrate how intuition contributes to professional judgement. However, other aspects of the social worker's observations such as the home conditions and interactions between carers, were also subject to similar intuitive sense-making processes.

This study examined CFSWs' perspectives on the home visit. Families are likely to have quite different experiences and views of what is important. In offering an account of home visiting from the perspective of the social worker, this research regarded as complementary to studies (e.g. Platt 2008) which have explored service users' perceptions of assessment.

Implications for practice

The findings from this study suggest that we need to acknowledge the value of affective and intuitive aspects of social work decision-making, while remaining alert to predictable biases. One way CFSWs can do this is to attempt to subject their judgements to critical scrutiny; to try to trace back the reasoning and the 'shortcuts' they may have used. Many workers in the study began this process during the research interview, exploring their thinking and considering how their intuitive responses may have shaped their judgement. The findings of this paper offer a framework through which CFSWs might begin this process – to consider how their intuitive impressions of the parent

may have influenced their perception of risk. The five patterns identified in this paper could form the basis of a reflective aid for use in supervision, especially necessary where workers are managing complex, high caseloads.

If intuitive expertise draws on prior experience (Klein 2015) and learning then it follows that 'intuition can be educated' if individuals are supported to 'learn the 'right' lessons from the interactions with the world' (Hogarth 2010, p.248). To develop their intuition, CFSWs need to know the results of previous decisions they have made. Given the inherent uncertainty involved in social work judgements, we cannot say whether they were 'correct' but it may be useful for SWs to know the outcome. To find out, for instance, whether a case closed following an initial visit was re-opened a week later. The findings of this study support Kirkman and Melrose's (2014) conclusion that feedback loops could be a valuable feature of assessment teams.

The research interviews gave CFSWs a space for reflection – an opportunity to move from intuition to analysis. Interpersonal spaces, including supervision and the social work office (Saltiel 2015) provide similar opportunities for reflection. Although reflective practice is widely regarded as valuable, within the context of financial austerity supervision and support for reflection is often threatened by time constraints. This study suggests that reflection in social work is essential for effective professional judgement – CFSWs need to be supported to subject their judgements to scrutiny on both an individual and organisational level. If they do not, the risk of bias increases along with the risk to the children and families subject to their decisions.

Conclusion

Arriving at a professional judgement in relation to the initial visit involves the integration of sensory, intuitive, emotional and relational information. This is complex, skilled and demanding work, requiring workers to draw on their personal and practice experience. Intuition has been identified as an important part of CFSWs' sense-making toolkit. Workers' intuitions alerted them to potentially salient information amongst the innumerable data presented to them during the visit. This study has identified some of the risks for professional judgement when CFSWs' 'gut feelings' are not subjected to reflection. However, it should be noted that most CFSWs in the study appeared to use their intuitions as a starting point, rather than an end-point for their professional judgement. Professional intuitions are perhaps best regarded as hypotheses to be tested. In terms of social work judgement, this means using intuition as an aid, rather than substitute for, analysis.

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Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences

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ARTICLE

DISCOUNTING WOMEN: DOUBTING DOMESTIC VIOLENCE SURVIVORS' CREDIBILITY AND DISMISSING THEIR EXPERIENCES

DEBORAH EPSTEIN† & LISA A. GOODMAN††

In recent months, we've seen an unprecedented wave of testimonials about the serious harms women all too frequently endure. The #MeToo moment, the #WhyIStayed campaign, and the Larry Nassar sentencing hearings have raised public awareness not only about workplace harassment, domestic violence, and sexual abuse, but also about how routinely women survivors face a Gaslight-style gauntlet of doubt, disbelief, and outright dismissal of their stories. This pattern is particularly disturbing in the justice system, where women face a legal twilight zone: laws meant to protect them and deter further abuse often fail to achieve their purpose, because women telling stories of abuse by their male partners are simply not believed. To fully grasp the nature of this new moment in gendered power relations—and to cement the significant gains won by these public campaigns—we need to take a full, considered look at when, how, and why the justice system and other key social institutions discount women's credibility.

We use the lens of intimate partner violence to examine the ways in which women's credibility is discounted in a range of legal and social service system settings. First, judges and others improperly discount as implausible women's stories of abuse,

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based on a failure to understand both the symptoms arising from neurological and psychological trauma, and the practical constraints on survivors' lives. Second, gatekeepers unjustly discount women's personal trustworthiness, based on both inaccurate interpretations of survivors' courtroom demeanor and negative cultural stereotypes about women and their motivations for seeking assistance. Moreover, even when a woman manages to overcome all the initial modes of institutional skepticism that minimize her account of abuse, she often finds that the systems designed to furnish her with help and protection dismiss the importance of her experiences. Instead, all too often, the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse.

Two distinct harms arise from this pervasive pattern of credibility discounting and experiential dismissal. First, the discrediting of survivors constitutes its own psychic injury—an institutional betrayal that echoes the psychological abuse women suffer at the hands of individual perpetrators. Second, the pronounced, nearly instinctive penchant for devaluing women's testimony is so deeply embedded within survivors' experience that it becomes a potent, independent obstacle to their efforts to obtain safety and justice.

The reflexive discounting of women's stories of domestic violence finds analogs among the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus. For these women, too, credibility discounts both deepen the harm they experience and create yet another impediment to healing and justice. Concrete, systematic reforms are needed to eradicate these unjust, gender-based credibility discounts and experiential dismissals, and to enable women subjected to male abuses of power at long last to trust the responsiveness of the justice system.

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INTRODUCTION

We are at something of a feminist watershed moment in our society. For months, women have been coming forward in large numbers to share their stories about sexual harassment and assault in the workplace; stories of events that occurred over the course of decades, stories that survivors kept private until now.¹ It is both painful and exhilarating.

But as we hear this slow drip of horror stories, many of us struggle with the acute awareness that we've been here before. Back in 1991, during the Anita Hill–Clarence Thomas hearings,² the whole country confronted the ugly dynamic of sexual harassment—most particularly, how men use their power in the workplace hierarchy to subordinate women. (Some of us still have our “I believe Anita” buttons.) And yet here we are today, more than twenty-five years later, experiencing a similar sense of abrupt revelation and shock.

How can we still be surprised by these stories? It's not that workplace assault took a hiatus in the intervening quarter century. There were women all around us, women reading this essay right now, who continued to be sexually harassed. Women seeking legal protection from this kind of discriminatory abuse filed hundreds of thousands of complaints of sexual harassment and assault with the Equal Employment Opportunity

¹ See, e.g., Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME, Dec. 18, 2017; Anna Codrea-Rado, *#MeToo Floods Social Media With Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html?_r=0.

² When she was in her mid-twenties, Anita Hill worked for Clarence Thomas at the Equal Employment Opportunity Commission. When President George H.W. Bush nominated Thomas to replace Justice Thurgood Marshall on the U.S. Supreme Court, Hill testified that Thomas had subjected her to sexual harassment on the job. Millions watched the televised broadcast of the confirmation hearings, as members of the Senate Judiciary Committee, all male and all white, questioned Hill. Ultimately, Thomas was confirmed, with a vote of 52–48. See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994).

where many of your lived experiences are regularly misunderstood, distorted, dismissed, erased, or simply rejected as unbelievable.”⁷ But even this capacious understanding fails to capture the full dimensions of the problem. Women also face a legal twilight zone; laws meant to protect them, compensate them, and deter further abuse often fail in application, because women telling stories of abuse by their male partners are simply not believed.

This experience—the reflexive discounting of women’s stories of domestic violence—offers a useful vantage point into the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus.⁸ For all of these women, credibility discounts both deepen the harm they experience and create yet another obstacle to healing and justice.

This Article critically examines how the justice system and other key institutions of our society systematically discount the credibility of women survivors of domestic violence. Our analysis is based on a wide range of legal, psychological, philosophical, and cultural sources, including the more than twenty-five years of experience each of us has had, individually and in collaboration, representing survivors in civil protection order cases, conducting empirical research with survivors of intimate abuse, and consulting with local and national domestic violence organizations.⁹

A central focus here is on the civil justice system, with particular attention paid to women’s efforts to secure safety and a measure of redress in the form of civil protection orders—the legal remedy most commonly utilized by

⁷ Alison Bailey, *The Uneven Knowing Field: An Engagement with Dotson’s Third-Order Epistemic Oppression*, 3 SOC. EPISTEMOLOGY REV. & REPLY COLLECTIVE 62, 62 (2014).

⁸ See *infra* text accompanying notes 244–219.

⁹ Author Deborah Epstein has represented or closely supervised the representation of over 750 petitioners in civil protection order cases in D.C. Superior Court. She served as Co-Chair of the effort to create and implement the D.C. Superior Court’s integrated Domestic Violence Unit, Co-Director of the D.C. Superior Court’s Domestic Violence Intake Center, and Chair of the D.C. Domestic Violence Fatality Review Commission. She is the author of the D.C. Superior Court’s *Domestic Violence Benchbook*, has trained hundreds of police officers, worked in close collaboration with prosecutors on intimate partner violence cases, and written numerous articles addressing domestic violence issues. She has been a member of the D.C. Mayor’s Commission on Violence Against Women, and the National Football League Players’ Association Domestic Violence Commission, and has served on the Board of Directors of the D.C. Coalition Against Domestic Violence and the House of Ruth. Author Lisa Goodman has published over one hundred peer-reviewed articles based on her extensive research on the experience of intimate partner survivors as they move through systems designed to help them, including social service and justice systems. She has also supervised scores of domestic violence advocates working in a residential setting; conducted numerous evaluations of domestic violence programs; led workshops on trauma-informed approaches to domestic violence services, survivor-defined approaches to advocacy, and evaluating domestic violence programs; and consulted to the National Domestic Violence Resource Center, The National Domestic Violence Hotline, Futures Without Violence, The Full Frame Initiative, and The Second Step.

domestic violence survivors.¹⁰ Because the civil justice system offers no right to counsel, only those who can afford an attorney, or find a pro bono lawyer, are represented. These cases are quite different than those in the criminal courts, where the prosecution commands the investigative resources of the police and wields the full power of the state to subpoena corroborative evidence and compel witnesses to testify. In contrast, in approximately eighty percent of civil protection order and related family law cases,¹¹ neither the survivor nor the accused perpetrator has a lawyer, discovery is limited,¹² and virtually no one has the resources to retain a private investigator.¹³ As a result, few survivors have access to potentially powerful corroborative evidence. Moreover, they lack the benefit of legal advice about what types of more easily available evidence would be useful to bring to court.¹⁴

These forces all but guarantee that most civil protection order cases end up in the “he said/she said,” or “word on word” realm. It’s the survivor’s testimony against that of her intimate partner. This testimonial structure places enormous pressure on individual credibility. In the end, most protection order cases boil

¹⁰ Caroline Vaile Wright & Dawn M. Johnson, *Encouraging Legal Help Seeking for Victims of Intimate Partner Violence: The Therapeutic Effects of the Civil Protection Order*, 25 J. TRAUMATIC STRESS 675, 675 (2012).

¹¹ See, e.g., Amy Barasch, *Justice for Victims of Domestic Violence: One Thing They Really Need Is Lawyers*, SLATE (Feb. 19, 2015, 9:30 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/domestic_violence_protection_victims_need_civil_courts_and_lawyers.html (“[Eighty] percent of people in our civil courts do not have a lawyer . . .”); see also LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 52 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/KZL3-RGUD>] (“Low-income survivors of recent domestic violence or sexual assault received inadequate or no professional legal help for 86% of their civil legal problems in 2017.”); STATE OF MD. ADMIN. OFFICE OF THE COURTS, *DOMESTIC VIOLENCE MONTHLY SUMMARY REPORTING* (2017), http://jportal.mdcourts.gov/dv/DVCR_Statewide_2017_1.pdf [<https://perma.cc/4HCC-APE6>] (demonstrating that, in Maryland, 82.5% of petitioners were pro se in protective order cases during 2017) Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RIGHTS L. REV. 557, 567 (2006) (noting that in Illinois, neither party was represented in 83.4% of protective order cases).

¹² In a recent survey of chief judges in courts across the United States, thirty-three percent reported that pro se litigants faced challenges related to discovery issues that were sufficiently problematic that they could affect the case in most or all cases. DONNA STIENSTRA ET AL., *FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES* 21-23 (2011), <https://www.fjc.gov/content/assistance-pro-se-litigants-us-district-courts-report-surveys-clerks-court-and-chief-judge-1> [<https://perma.cc/3WWE-N6RG>].

¹³ Many survivors of domestic violence, and thus many petitioners in protection order cases, are low income. See *infra* text accompanying note 141.

¹⁴ A survivor may have access to some corroborative evidence, typically in the form of voice mails, photographs, texts, and social media posts. In many cases, however, a survivor no longer has access to such evidence; particularly in the absence of legal advice, she may have deleted the relevant files, either inadvertently or because they were too upsetting to retain. And because these cases are scheduled as emergency litigation, they typically move from filing to trial in two to three weeks—insufficient time to subpoena useful evidence in the absence of focused legal advice, even in jurisdictions providing nonlawyers with subpoena power.

down to this: if a survivor is believed, the judge will award her protection. If she is not believed, the judge will deny it. This fact—the central importance of a survivor's credibility in the protection order and broader civil justice system—led us to focus on that system as a core area of inquiry.

We examine credibility discounting from a variety of perspectives. In Part I, we analyze the two essential ways in which justice and social service system gatekeepers discount the credibility of women survivors seeking safety. First, judges and others *improperly discount as implausible women's stories of abuse*, due to a failure to understand the symptoms arising from neurological and psychological trauma as well as the practical realities of survivors' lives. Second, gatekeepers *unjustly discount women's personal trustworthiness*, based on inaccurate interpretations of survivors' courtroom demeanor, as well as negative cultural stereotypes about women and their motivations for seeking assistance.

In Part II, we explore how these credibility discounts are reinforced by the broader context of legal and social service systems that are willing to tolerate the harmful impact of laws, policies, and practices on survivors. Even when a woman makes it through the credibility discount gauntlet, she often finds that the systems to which she turns for help *dismiss her experiences and trivialize the importance of her harms*, adopting and enforcing policies with little or no regard for the ways in which they operate to her detriment.

In Part III, we examine the harms inflicted by this combination of discounting women's credibility and dismissing women's experiences. First, these harms can be measured as an additional psychic injury to survivors, an institutional betrayal that echoes the psychological abuse imposed by individual perpetrators. Second, the pervasive nature of these harms creates a distinct obstacle to survivors' ability to access justice and safety, in addition to the many, more concrete stumbling blocks with which domestic violence victims are all too familiar.

Finally, in Part IV, we offer suggestions for initial efforts to eradicate these unjust, gender-based credibility discounts and experiential dismissals. Adopting these reforms would allow women subjected to male abuses of power to trust the responsiveness of the justice system and our larger society.

I. TYPES OF GATEKEEPER-IMPOSED CREDIBILITY DISCOUNTS

Women survivors of abuse inflicted by their intimate partners encounter doubt, skepticism, or disbelief in their efforts to obtain justice and safety from judges and other system gatekeepers.¹⁵ First, their stories of abuse appear less plausible than other stories told in the justice system. We tend to believe stories

¹⁵ The most complete exploration of credibility-based obstacles to date can be found in the brief but insightful essay by Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES' J., Winter 1995, at 42.

that are internally consistent—they have a linear thread and are emotionally and logically coherent. But domestic violence often results in neurological and psychological trauma, both of which can affect a survivor's comprehension and memory. The result is a story that, to the untrained ear, sounds internally inconsistent and therefore implausible. In addition, we tend to believe stories that are externally consistent—that fit in with how we believe the world works. But many aspects of the domestic violence experience are foreign, and therefore incomprehensible, to most nonsurvivors. The result is a story that appears on its surface to lack external consistency, and therefore—again—to be less plausible. Second, our assessments of women's personal trustworthiness suffer from skepticism rooted in perceptions of survivors' apparent "inappropriate" demeanor, prejudicial stereotypes regarding women's false motives, and the long-standing cultural tendency to disbelieve women simply because they are women.

A. Story Plausibility

Narrative theorists and cognitive scientists agree that human beings are hard-wired to organize facts into "meaningful patterns."¹⁶ This "need for narrative form is so strong that we don't really believe something is true unless we can see it as a story."¹⁷ And storytelling is central to the justice system as well;¹⁸ it is the primary method judges and juries use to assess the reliability of facts presented at trial. Accordingly, any time a survivor needs to go through a gatekeeper to access resources or justice or safety, she has to tell some sort of story about her domestic violence experience. And if she is to succeed, her story must be a plausible one. So what makes a story plausible?

1. Internal Consistency

First, we believe stories that are *internally consistent*. That is, we grant credibility to stories that make logical and emotional sense, have a continuous,

¹⁶ CAROLYN GROSE & MARGARET E. JOHNSON, *LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS* 15-16 (2017); see also DAVID CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* 93-94 (2002); LISA CRON, *WIRED FOR STORY: THE WRITER'S GUIDE TO USING BRAIN SCIENCE TO HOOK READERS FROM THE VERY FIRST SENTENCE* 185-199 (2012); Kay Young & Jeffrey Saver, *The Neurology of Narrative*, *SUBSTANCE*, Mar. 2001, at 74.

¹⁷ H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 44 (2d ed. 2008). "For anyone who has read to a child or taken a child to the movies and watched her rapt attention, it is hard to believe that the appetite for narrative is something we learn rather than something that is built into us through our genes." *Id.* at 3.

¹⁸ "[T]he law is awash in storytelling." ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110 (2000).

linear thread, form a coherent whole, and contain no significant, unexplained gaps in time or action.¹⁹

But for many domestic violence survivors, telling the truthful story of their abusive experience involves a narrative that is more impressionistic than linear, and that appears somewhat illogical or emotionally off-kilter. The tension between our desire for internal consistency and the realities of survivor stories can be explained in part by some of the neurological and psychological consequences of domestic violence itself, such as traumatic brain injury and posttraumatic stress disorder.

a. *Neurological Trauma: Traumatic Brain Injury*

Traumatic Brain Injury (TBI) can result from either blunt-force trauma to the head (for example, being hit by an object, having your head smashed against something, or being violently shaken), or from reduced oxygen to the brain (for example, through strangulation).²⁰ Blows to the head can cause cranial bleeding or damage cranial blood vessels and nerves. A lack of oxygen can result in the decreased function or death of brain cells.²¹

In domestic violence cases, both blunt force trauma and strangulation are relatively common. One study of women in three New York domestic violence

¹⁹ GROSE & JOHNSON, *supra* note 16, at 16. These correlations apply in the courtroom as well; research demonstrates strong correlations between courtroom credibility determinations and the internal consistency of stories. Numerous studies reveal a strong belief that inconsistencies indicate inaccuracies, and this perception guides juror decisionmaking. See, e.g., Garrett L. Berman, Douglas J. Narby & Brian L. Cutler, *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability, and Verdicts*, 19 LAW & HUM. BEHAV. 79 (1995); Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. APPLIED PSYCHOL. 170 (1996); Neil Brewer et al., *Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony*, 13 APPLIED COGNITIVE PSYCHOL. 297 (1999); Neil Brewer & R.M. Hupfeld, *Effects of Testimonial Inconsistencies and Witness Group Identity on Mock-Juror Judgments*, 34 J. APPLIED SOC. PSYCHOL. 493 (2004); Sarah L. Desmarais, *Examining Report Content and Social Categorization to Understand Consistency Effects on Credibility*, 33 LAW & HUM. BEHAV. 470 (2009); Rob Potter & Neil Brewer, *Perceptions of Witness Behaviour–Accuracy Relationships Held by Police, Lawyers and Mock Jurors*, 6 PSYCHIATRY, PSYCHOL. & L. 97, 101 (1999). The centrality of internal consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. See, e.g., PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 58 (5th ed. 2013).

²⁰ OR. DEP'T OF JUSTICE, TRAUMATIC BRAIN INJURY AND DOMESTIC VIOLENCE, http://www.doj.state.or.us/wp-content/uploads/2017/08/traumatic_brain_injury_and_domestic_violence.pdf [<https://perma.cc/7ZVD-XBWJ>] (last visited Jan. 23, 2018); PARTNERS FOR PEACE, *Understanding Traumatic Brain Injury, Concussion and Strangulation in Domestic Violence* (Oct. 11, 2016), <http://www.partnersforpeace.org/understanding-traumatic-brain-injury-concussion-strangulation-domestic-violence/> [<https://perma.cc/D7CX-V9F9>].

²¹ NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, *Traumatic Brain Injury: Hope Through Research: How Does TBI Affect the Brain*, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Hope-Through-Research/Traumatic-Brain-Injury-Hope-Through#3218_2 [<https://perma.cc/C8HD-SBEL>] (last modified June 28, 2017).

shelters found that ninety-two percent of the women questioned had been hit in the head by their partners more than once; eighty-three percent had been hit in the head and shaken severely; and eight percent had been hit in the head over twenty times in the preceding year.²² Forty percent of these women lost consciousness as a result of at least one of the assaults they endured.²³ In another study, emergency room data indicated that sixty-seven percent of women treated for intimate partner violence–related injuries reported problems consistent with a diagnosis of head injury.²⁴

Even mild TBI—which can occur after only a short period without oxygen to the brain—can result in a significant and profound impact on memory and behavior, inducing symptoms such as confusion, poor recall, inability to link parts of the story together or to articulate a logical sequence of events, uncertainty about detail, and even recanting of stories (i.e., renouncing them as untrue after accurately reporting them to friends, family, police, or even judges).²⁵ In many ways, this is hardly surprising; people with an impaired sense of the consistency of their own experience are unlikely to produce consistent narratives of that experience on demand.

Because research demonstrating the frequency of TBI in the domestic violence context is relatively new, however, few justice system gatekeepers are aware of its potential neurological effects.²⁶ Even in hospital emergency rooms, where medical professionals now routinely perform TBI screens when

²² Helene Jackson, Elizabeth Philp, Ronald L. Nuttall & Leonard Diller, *Traumatic Brain Injury: A Hidden Consequence for Battered Women*, 33 *PROF. PSYCHOL.: RES. & PRAC.* 39, 41, 42 (2002) (showing that correlations between frequency of being hit in the head and severity of cognitive symptoms were statistically significant).

²³ *Id.* at 41.

²⁴ John D. Corrigan et al., *Early Identification of Mild Traumatic Brain Injury in Female Victims of Domestic Violence*, *AM. J. OBSTETRICS & GYNECOLOGY*, May 2003, at S71, S74. Yet another sampled women from both shelter and non-shelter populations who all had sustained at least one physically abusive encounter and found nearly seventy-five percent of the entire sample reported a domestic violence–related TBI. Eve M. Valera & Howard Berenbaum, *Brain Injury in Battered Women*, 71 *J. CONSULTING & CLINICAL PSYCHOL.* 797, 799 (2003).

²⁵ Valera & Berenbaum, *supra* note 24, at 801; Eve Valera, *Increasing Our Understanding of an Overlooked Public Health Epidemic: Traumatic Brain Injuries in Women Subjected to Intimate Partner Violence*, 27 *J. WOMEN'S HEALTH* 735, 735 (2018) (“[T]he greater the number and more recent . . . the TBIs, the more poorly women tended to perform on measures of memory, learning, and cognitive flexibility, and the higher . . . the levels [of PTSD symptoms].”); see also Gwen Hunnicut, Kristine Lundgren, Christine Murray & Loreen Olson, *The Intersection of Intimate Partner Violence and Traumatic Brain Injury: A Call for Interdisciplinary Research*, 32 *J. FAM. VIOLENCE* 471, 474 (2017); Maria E. Garay-Serratos, *A Secret Epidemic: Traumatic Brain Injury Among Domestic Violence Victims*, *L.A. TIMES* (Oct. 12, 2015), <http://beta.latimes.com/opinion/op-ed/la-oe-1012-garay-serratos-tbi-domestic-abuse-20151012-story.html>; Rachel Louise Snyder, *No Visible Bruises: Domestic Violence and Traumatic Brain Injury*, *NEW YORKER* (Dec. 30, 2015), <https://www.newyorker.com/news/news-desk/the-unseen-victims-of-traumatic-brain-injury-from-domestic-violence>.

²⁶ See Kevin Davis, *Brain Trials: Neuroscience Is Taking a Stand in the Courtroom*, 98 *A.B.A. J.* 37, 37-38 (2012).

a patient presents with certain kinds of athletic injuries, partner abuse victims are rarely screened.²⁷ And because most injuries caused by strangulation are internal, patients admitted in the absence of such screens are unlikely to be considered for a TBI diagnosis.²⁸ As a result, survivors themselves are unlikely to know that they are at risk for TBI, unlikely to get treatment, and unlikely to know about the possible symptoms they may later experience.²⁹ This creates a perfect storm of ignorance: a survivor is more likely to tell justice system gatekeepers a story that lacks internal consistency; the survivor herself is unlikely to be able to understand or explain this apparent failing; and those gatekeepers, in turn, are more likely to hear her story as less plausible and, accordingly, impose an unjust credibility discount on her narrative.

The following true story illustrates the problem.³⁰ Grace Costa³¹ was diagnosed with mild TBI, caused when her ex-boyfriend strangled her with a telephone cord. She's inconsistent when she tries to tell the story: the date changes; sometimes she remembers the assault taking place in one year; other times, another. Her memory varies as to which of her adult children were present. Sometimes she thinks they were about to eat dinner, sometimes that they were talking about a half-eaten apple on the kitchen floor.

Grace can't tell her story with a linear narrative. She says memories of the incident come to her in flashes, one image at a time—apple, blood, cord—but the disparate pieces never fit together as a whole.

Grace's explanation of events is confused. Pieces of her story hang untethered in her mind. She remembers being inside, then outside; being down, then up, and maybe down again. The police weren't there, then they were. Half the time, she says, she doesn't "remember much of anything."

27 See Eve Valera & Aaron Kucyi, *Brain Injury in Women Experiencing Intimate Partner-Violence: Neural Mechanistic Evidence of an "Invisible" Trauma*, 11 *BRAIN IMAGING BEHAV.* 1664, 1664 (2017) ("TBI treatments are typically absent and IPV interventions are inadequate."); see also Garay-Serratos, *supra* note 25; Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 *J. EMERGENCY MED.* 303, 308 (2001).

28 This challenge is illustrated by a study of 300 nonfatal domestic violence strangulation cases, where researchers found that only fifteen percent of victims had injuries that were sufficiently visible for police officers to photograph; they further found that even where the injuries were visible, they were often minimized in police descriptions with terms such as "redness, cuts, scratches, or abrasions to the neck." Strack et al., *supra* note 27, at 303, 305-06.

29 See Jacquelyn C. Campbell et al., *The Effects of Intimate Partner Violence and Probable Traumatic Brain Injury on Central Nervous System Symptoms*, 27 *J. WOMEN'S HEALTH* 761, 762 (2018) (noting that "for many abused women, head injuries occur multiple times, in an escalating pattern, and cognitive or psychological effects are often viewed within the context of abuse rather than as a specific medical injury" (i.e., cognitive effects are attributed to mental health conditions resulting from the abuse, rather than a TBI)); Valera & Kucyi, *supra* note 27; Valera, *supra* note 25, at 735 (majority of abuse-related TBIs in study sample "were considered to be mild TBIs for which medical attention [was] almost never sought").

30 This story relies heavily on the account written by Rachel Louise Snyder, *supra* note 25.

31 This is not her real name. *Id.*

To a trauma expert, the way Grace tells her story strongly indicates that she was, indeed, strangled and deprived of brain oxygen that night. The disjointed, incoherent way she tells her story makes it all the more plausible.³²

But the opposite is true when Grace is telling her story to justice system gatekeepers. To the untrained ear, her story's disjointed, inconsistent nature makes it sound *implausible*, and therefore she is likely to incur a credibility discount if she tells it to the police, deciding whether to make an arrest; to prosecutors, deciding whether to bring a criminal case; or to a judge, deciding whether to issue a protection order. The more Grace tries to remain faithful to what she actually remembers, the more likely she is to be denied assistance and protection.

b. *Psychological Trauma: Post-Traumatic Stress Disorder*

Psychological trauma can operate similarly to neurological trauma in undermining the internal consistency of a survivor's story; like TBI, it commonly produces memory lapses or dissociative states.³³ Research shows that a majority of survivors meet diagnostic criteria for Post-Traumatic Stress Disorder (PTSD),³⁴ and many more women exhibit serious symptoms of psychological trauma, though not enough to reach the threshold of a formal diagnosis. These symptoms are another common source of internal inconsistency in survivor accounts provided to police, judges, and other system gatekeepers.

The symptoms that comprise PTSD include avoidance, hyperarousal, and intrusive destabilizing experiences such as dissociative flashbacks and intense or prolonged emotional responses to reminders of the original traumatic event.³⁵ These reminders are commonly known as "triggers."³⁶ For many survivors, being in a courtroom, in close proximity to an abusive partner—particularly while being instructed to review his abusive behavior in detail—constitutes a potent trigger.³⁷ Instead of providing the judge with a clear, logical narrative, a

³² See *supra* text accompanying notes 20–25.

³³ See, e.g., Jonathan E. Sherin & Charles B. Nemeroff, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13 *DIALOGUES CLINICAL NEUROSCIENCE* 263, 263 (2011) ("Several pathological features found in PTSD patients overlap with features found in patients with traumatic brain injury . . .").

³⁴ A meta-analysis of eleven studies investigating the prevalence of PTSD among IPV survivors demonstrated a weighted mean prevalence of 63.8%. See Jacqueline M. Golding, *Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 *J. FAM. VIOLENCE* 99, 116 (1999); see also Loring Jones, Margaret Hughes & Ulrike Unterstaller, *Post Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 *TRAUMA, VIOLENCE, & ABUSE* 99, 100 (2001).

³⁵ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 271-72 (5th ed. 2013) [hereinafter *DSMD*].

³⁶ See, e.g., BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 182 (2014).

³⁷ NAT'L CTR. ON DOMESTIC VIOLENCE, *TRAUMA AND MENTAL HEALTH, PREPARING FOR COURT PROCEEDINGS WITH SURVIVORS OF DOMESTIC VIOLENCE: TIPS FOR CIVIL LAWYERS*

survivor may have flashbacks or feel overwhelmed by emotion. The predictable result is that she will skip, or forget, certain parts of her story—or, indeed, be unable to speak key elements of it out loud.³⁸ Again, this disconnected, inconsistent testimony is in fact evidence of the truth of her narrative; to the untrained ear, however, it makes her story suspect.

Psychological trauma, or even extreme stress, can affect the memory as well. As Judith Herman puts it: “Traumatic memories have a number of unusual qualities. They are not encoded like the ordinary memories of adults in a verbal, linear narrative that is assimilated into an ongoing life story.”³⁹ Instead, these memories often lack verbal narrative detail and context; they are encoded in the form of sensations, flashes, and images, often with little or no story.⁴⁰ And as with neurological trauma, psychologically traumatic memories encode the physical and psychic harms that generate them in a way that is prone to create a steep credibility discount based on the seeming implausibility of a survivor’s story.

The tendency to discount survivors’ stories based on internal inconsistencies is not restricted to police and judges alone. Courthouse clerks, for example—whose essential function is to create and maintain case files—often take on the role of credibility-assessors and system gatekeepers.⁴¹ This happens even though clerks have no formal authority to determine whether a complaint has merit; such power is reserved to members of the judiciary, through Article III of the Constitution. Here is one example, from attorney and law professor Jane Stoeber:

I recall waiting in a Domestic Violence Unit clerk’s office . . . and seeing a clerk confront an unrepresented abuse survivor about the lack of specific dates in her

AND LEGAL ADVOCATES 1 (2013), <http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH-2013-Preparing-for-Court-Proceedings.pdf> [<https://perma.cc/2UDK-JPRL>].

³⁸ Jerrell Dayton King & Donna J. King, *A Call for Limiting Absolute Privilege: How Victims of Domestic Violence, Suffering with Post-Traumatic Stress Disorder, Are Discriminated Against by the U.S. Judicial System*, 6 DEPAUL J. WOMEN, GENDER & L. 1, 29 (2017) (testifying in court can cause a survivor to reexperience trauma and dissociate); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1313 (1993) (noting that dissociation can make testimony appear “plastic” or “fake” while hyperarousal can make survivors appear overly excitable”).

³⁹ JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 37 (1997).

⁴⁰ *Id.* at 38. An inability to recall key features of the trauma is one criterion of the posttraumatic stress disorder diagnosis. See DSM-5, *supra* note 35, at 271. As Dr. Jim Hopper explains: “Remembering always involves reconstruction and is never totally complete or perfectly accurate . . . [G]aps and inconsistencies are simply how memory works – especially for highly stressful and traumatic experiences . . . where the differential encoding and storage of central versus peripheral details is the greatest. Such gaps and inconsistencies are never, on their own, proof of anyone’s credibility, innocence, or guilt.” Jim Hopper, *Sexual Assault and Neuroscience: Alarmist Claims Vs. Facts*, PSYCHOL. TODAY (Jan. 22, 2018), <https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/201801/sexual-assault-and-neuroscience-alarmist-claims-vs-facts> [<https://perma.cc/RG6P-EX38>].

⁴¹ This observation is based on the first author’s twenty-seven years of experience representing survivors in hundreds of civil protection order cases. See *supra* note 9.

petition. The clerk insisted that the litigant had to plead with specificity, which included identifying specific calendar dates. When the *pro se* survivor was unable to remember exact dates for the years of abuse she had endured, the clerk tore up her petition [and refused to let her file a protection order case].⁴²

2. External Consistency

In addition to crediting stories based on their degree of *internal* consistency, we are far more likely to credit stories that are *externally* consistent—i.e., chronicles of abuse that resonate with our pre-existing and publicly sanctioned narratives about how the world works.⁴³ An example taken from Professors Carolyn Grose and Margaret Johnson underlines this dynamic:

A narrative that tells of a person entering a home and closing a wet, dripping umbrella while exclaiming, “I just walked through a fire!” would not fit with our sense of normal. To be externally consistent, she should have burnt clothes, not a dripping wet umbrella, or be coughing from the smoke.⁴⁴

The demand for external credibility, however, is complicated by the unconscious process of “false consensus bias”—the tendency to see one’s “own behavioral choices and judgments as relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, or inappropriate.”⁴⁵ In other words, we tend to assume that our own personal experiences are universal: what *we* would likely do, say, and feel is what *all others* would do, say, and feel.⁴⁶

In reality, of course, these assumptions are misleading. Passengers who have survived a serious car crash tend to react quite differently to a driver’s sudden slamming of the brakes than those who have experienced only unremarkable

⁴² Interview with Jane Stoeber, Clinical Professor of Law, Univ. Cal., Irvine Sch. of Law (Jan. 6, 2018).

⁴³ GROSE & JOHNSON, *supra* note 16, at 15-16. As with internal consistency, the importance of external consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. *See, e.g.*, BERGMAN, *supra* note 19, at 62-63.

⁴⁴ GROSE & JOHNSON, *supra* note 16, at 16.

⁴⁵ Lee Ross, David Greene & Pamela House, *The “False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1976); *see also* Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCHOL. BULL. 72, 72 (1987) (noting that over a ten-year period, “over 45 published papers have reported data on perceptions of false consensus and assumed similarity between self and others”); Leah Savion, *Clinging to Discredited Beliefs: The Larger Cognitive Story*, 9 J. SCHOLARSHIP TEACHING & LEARNING 81, 87 (2009) (“People tend to over-rely on instances that confirm their beliefs, and accept with ease suspicious information”); Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1268 (2008).

⁴⁶ *See* Marks & Miller, *supra* note 45; Ross, Greene & House, *supra* note 45; Solan, Rosenblatt & Osherson, *supra* note 45.

car rides.⁴⁷ Veterans who have spent time in military conflict tend to react quite differently to loud, unexpected noises than do civilians leading peaceful lives.⁴⁸ In each of these examples, a profound difference in experience results in fundamentally different expectations about how the world works. And such expectations tend, in turn, to provoke diverse behaviors.

The most consequential experiential gap that separates domestic violence survivors from gatekeepers of the justice system involves, of course, the behaviors that stem from suffering abuse at the hands of an intimate partner. Despite decades of activism and research, the experiences of women survivors fall into what philosopher Miranda Fricker calls a persistent “gap in collective interpretive resources” that prevents the dominant culture from making sense of a particular kind of social experience.⁴⁹ In the intimate abuse context, this gap prevents most nonsurvivors from being able to make sense of how survivors might actually behave.

a. *Women Who Stay*

To see the real-world impact of this interpretive gap, consider a quandary that has assailed survivors since the early days of the anti-domestic violence movement.⁵⁰ We know that many women stay with their abusive partners in the aftermath of violent episodes. This tends to occur in the context of relationships characterized by coercive control, a pattern of domination that

⁴⁷ See J. Gayle Beck & Scott F. Coffey, *Assessment and Treatment of PTSD After a Motor Vehicle Collision: Empirical Findings and Clinical Observations*, 38 *PROF. PSYCHOL. RES. & PRAC.* 629, 629 (2007) (explaining that survivors of motor vehicle accidents are at heightened risk of post-traumatic stress disorder and may experience intrusive symptoms or avoid driving altogether).

⁴⁸ See, e.g., Anke Ehlers, Ann Hackmann & Tanja Michael, *Intrusive Re-Experiencing in Post-Traumatic Stress Disorder: Phenomenology, Theory, and Therapy*, 12 *MEMORY* 403, 407 (2004).

[M]any of the trigger stimuli are cues that do not have a strong meaningful relationship to the traumatic event, but instead are simply cues that were temporally associated with the event, for example physical cues similar to those present shortly before or during the trauma (e.g., a pattern of light, a tone of voice); or matching internal cues (e.g., touch on a certain part of the body, proprioceptive feedback from one’s own movements). People with PTSD are usually unaware of these triggers, so intrusions appear to come out of the blue.

Id. (emphasis omitted) (citation omitted). For a vivid visual/aural exposition of the triggers veterans face in daily life, see David Lynch Found., *Sounds of Trauma*, YOUTUBE (Apr. 11, 2017), <https://www.youtube.com/watch?v=bgpRw92d1MA>.

⁴⁹ MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 1 (2007).

⁵⁰ See, e.g., Nancy R. Rhodes & Eva Baranoff McKenzie, *Why Do Battered Women Stay?: Three Decades of Research*, 3 *AGGRESSION AND VIOLENT BEHAV.* 391 (1998).

includes tactics to isolate, degrade, exploit and control the survivor.⁵¹ The perpetrator creates and enforces a set of “rules” governing numerous aspects of his partner’s life—“her finances, clothes, contact with friends and family, even what position she sleeps in.”⁵² Once a perpetrator of abuse has appropriated the power to verbally restrict his partner’s day-to-day life choices, physical violence then serves as both the abuser’s means of enforcing that control and the punishment for attempts to resist it.⁵³ Many of us, but perhaps especially those privileged enough to live lives untouched by violence and with easy access to supportive resources, respond to stories of women who stay by focusing obsessively on the question “Why didn’t she leave?”⁵⁴ The question is really more of an accusation: “In her shoes, I would most definitely have left.” Or, in the words of a judge presiding over a civil protection order case: “[S]ince I would not let that happen to me, I can’t believe that it happened to you.”⁵⁵

In recent years, judges are less likely to make such explicit statements on the record, but many continue to perceive a woman’s decision to stay as externally inconsistent.⁵⁶ Judges tend to express their belief in the connection between women staying and story plausibility in less formal contexts, such as judicial training sessions and casual conversations outside of the courtroom.⁵⁷ And this failure of understanding affects case outcomes. In 2015, for example, one of the first author’s clinic clients lost her civil protection order suit based on a judge’s discrediting the woman’s story. The judge explained that her credibility determination derived from photographs, introduced by the perpetrator boyfriend, showing that, not long after a particularly serious violent episode and just a few days after she obtained a temporary protection order, the woman had

51 Evan Stark, Re-Presenting Battered Women: Coercive Control and the Defense of Liberty (2012) (unpublished manuscript), http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf [<https://perma.cc/DJK3-LVW7>].

52 Deborah Epstein & Kit Gruelle, *Should an Abused Wife Be Charged in Her Husband’s Crime?* N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/opinion/noor-salman-vegas-shooting-trial.html>.

53 Scholar Michael Johnson has developed a widely used typology of intimate partner violence, based on the extent to which coercive control is involved. Relationships that take the form of “intimate terrorism” are characterized by one partner’s use of coercive control to exert power over the other. In contrast, “situational couple violence” is not embedded within a broader pattern of controlling behaviors. Survivors who tend to seek help from social services and the justice systems are more likely to be involved in relationships of coercive control than are survivors in the general population. See Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322, 323-24, 347 (2005).

54 See *infra* text accompanying notes 60–66.

55 Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1275 (1993).

56 This observation is based on the first author’s twenty-seven years of experience representing survivors in hundreds of civil protection order cases. See *supra* note 9.

57 The first author has observed or participated in several such conversations at judicial training sessions, conferences, and in informal social settings over the last ten years.

gone to a Red Lobster restaurant with him.⁵⁸ The judge was not interested in hearing about why the woman had decided to have dinner with her abusive partner—whether it was because she believed that the best way to ensure her immediate safety was to comply with her boyfriend's requests, because she was struggling with the challenges of ending a long-term relationship, or because she wanted her children to be able to see their father. Instead, the judge simply concluded that the photographs proved her incredibility.⁵⁹

This persistent interpretive gap separating survivor and nonsurvivor understandings of the world was a powerful theme of the recent #WhyIStayed movement. In the fall of 2014, Baltimore Ravens running back Ray Rice assaulted his then-fiancée Janay Palmer in an elevator, knocking her unconscious. The video of the incident, which also showed Rice dragging Palmer's limp body out of the elevator, was made public.⁶⁰ Both the media and the general public focused their attention disproportionately on variations of the victim-blaming question, "Why didn't she leave?" Far more ink was spilled discussing whether Janay provoked the assault (she slapped Rice in the face) and on Janay's longer-term response to the incident (electing to stay with Rice and eventually marrying him) than was devoted to Rice's knock-out punch to her head.⁶¹

Frustrated with the media response to the Rice–Palmer story, survivor Beverly Gooden decided to share with her family and friends, for the first time, the abusive conduct that had besieged her own marriage.⁶² She did so by sending out the following three tweets under the hashtag #WhyIStayed:

I tried to leave the house once after an abusive episode, and he blocked me.
He slept in front of the door that entire night - #WhyIStayed.

I stayed because my pastor told me that God hates divorce. It didn't cross my
mind that God might hate abuse, too - #WhyIStayed.

He said he would change. He promised it was the last time. I believed him.
He lied - #WhyIStayed.⁶³

⁵⁸ Interview with Gillian Chadwick, Assoc. Professor, Washburn Univ. Sch. of Law (Jan. 1, 2018).

⁵⁹ *Id.*

⁶⁰ See, e.g., Charles M. Blow, *Ray Rice and His Rage*, N.Y. TIMES (Sept. 14, 2014), <https://www.nytimes.com/2014/09/15/opinion/charles-blow-ray-rice-and-his-rage.html>.

⁶¹ See, e.g., Greg Howard, *Does the NFL Think Ray Rice's Wife Deserved It?*, DEADSPIN (July 31, 2014), <https://deadspin.com/does-the-nfl-think-ray-rices-wife-deserved-it-1612138248> [<https://perma.cc/7D MH-22R4>]; Mel Robbins, *Lesson of Ray Rice Case: Stop Blaming the Victim*, CNN (Sept. 16, 2014), <http://www.cnn.com/2014/09/08/opinion/robbins-ray-rice-abuse/index.html> [<https://perma.cc/EV9Y-MF24>].

⁶² *Hashtag Activism in 2014: Tweeting 'Why I Stayed'*, NAT'L PUB. RADIO (Dec. 23, 2014), <https://www.npr.org/2014/12/23/372729058/hashtag-activism-in-2014-tweeting-why-i-stayed> [<https://perma.cc/XT7G-99MX>] [hereinafter *Hashtag Activism*].

⁶³ *Id.*

Much to Gooden's surprise—she had previously used Twitter only to make relatively mundane comments about the details of her day⁶⁴—the hashtag was soon trending; it remained steadily active for weeks and continued to receive daily contributions for over a year.⁶⁵

The numbers are telling here. Within hours, #WhyIStayed had unleashed thousands of tweets, with an avalanche of more than 100,000 in the first four months.⁶⁶ The sheer scale of the response is a strong indication of a pent-up sense among survivors that their stories are simply not understood by the larger culture.

b. *Physical Versus Psychological Harm*

The pronounced disconnect between survivor and nonsurvivor understandings of the world also strongly shapes common judicial expectations about experiences of harm. Most judges in our courts are men⁶⁷ and presumably—based on statistical probabilities alone—most are also nonsurvivors.⁶⁸ Anyone working in the justice system (including the first author) knows that many nonsurvivor judges in civil protection order cases tend to assume that, if they were to find themselves in an abusive relationship,

⁶⁴ *Id.*

⁶⁵ Melissa Jeltsen, *The Ray Rice Video Changed the Way We Talk About Domestic Violence*, HUFFINGTON POST (Sept. 8, 2015), https://www.huffingtonpost.com/entry/ray-rice-janay-video-domestic-violence_us_55ec7228e4b002d5c07646cb [<https://perma.cc/R92T-F4FH>]. The top three reasons cited by survivors in the first year of #WhyIStayed posts were: a desire to keep the family intact, love of the abusive partner, and fear of the dangers inherent in leaving. *Id.* Early responses to the hashtag included:

@HToneTastic #WhyIStayed - Because his abuse was so gradual and manipulative, I didn't even realize what was happening to me.

@BBZaftig #WhyIStayed - Because he told me that no one would love me after him, and I was insecure enough to believe him.

@MonPetitTX - Because I had watched my mother stay and she had watched hers before that.

Hashtag Activism, supra note 62.

⁶⁶ *Hashtag Activism, supra note 62*; Lizzie Crocker, *Harsh Truths about Domestic Violence: Why Voicing Terrible Experiences Can Help Others*, THE DAILY BEAST (Sept. 20, 2014), <https://www.the-dailybeast.com/harsh-truths-about-domestic-violence-why-voicing-terrible-experiences-can-help-others> [<https://perma.cc/5Q5B-AUES>].

⁶⁷ Thirty percent of judges in U.S. state courts (where domestic violence cases typically are heard) are women. NAT'L ASS'N OF WOMEN JUDGES, 2016 U.S. STATE COURT WOMEN JUDGES (2016), <https://www.nawj.org/statistics/2016-us-state-court-women-judges> [<https://perma.cc/LV2M-W9EF>].

⁶⁸ National survey data show that nearly one in three women and one in four men will experience domestic violence at some point in their lives. MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL & CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 2 (2010).

the most troubling aspect would be the physical, not the psychological, violence.⁶⁹ This prioritization of physical over psychological harm is reflected in the written law: criminal law, most of tort law, and civil protection order statutes all focus heavily on physical assaults and threats of violence, rather than emotional abuse or threats of psychological harm.⁷⁰ For judges and other justice system actors, the law tends to dictate psychic reality: what the law prohibits *must* be what is harmful. The end result is that most judges assume that the way the world works, and therefore what is externally consistent, is that physical violence is far worse than psychological abuse.⁷¹

How does this assumption translate into courtroom expectations? A common judicial expectation is that a “real” victim will lead with physical violence in telling her story on the witness stand.⁷² But in fact, many survivors tell their stories quite differently. For many women, abusive relationships are characterized by episodic, sometimes relatively infrequent, outbursts of physical violence and threats.⁷³ The day-to-day, routine abuse often occurs solely in the psychological realm.⁷⁴ Psychologists explain that in many abusive relationships victims are subjected to their partners’ coercive control through a wide variety of psychological tactics, including, for example, “fear and intimidation[,] . . . emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles.”⁷⁵ An abusive partner might effectively isolate a woman and increase his control over her life by sabotaging her efforts to find or keep a job or to attend a job-training session by refusing to allow her to

⁶⁹ This prioritization of physical over psychological harm is reflected in the written law: both criminal statutes and civil protection order laws focus on heavily on physical assaults and threats of violence rather than emotional abuse or threats of psychological harm. See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1143-44 (2009).

⁷⁰ *Id.* at 1134-38

⁷¹ *Id.* at 1143. This assumption may well vary depending on the particularities of a survivor’s identity. The stereotype of women as especially frail and vulnerable, for example, derives primarily from cultural images of white, heterosexual women.

⁷² This observation is based on the first author’s twenty-seven years of litigating hundreds of civil protection order cases. See *supra* note 9.

⁷³ See NAT’L CTR. FOR VICTIMS OF CRIME, *INTIMATE PARTNER VIOLENCE* (2017) (on file with authors) (demonstrating that emotional and psychological abuse more prevalent than physical violence); WORLD HEALTH ORG., *UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN: INTIMATE PARTNER VIOLENCE* (2012), http://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=72E1B41F23450EB8BFA1B9A66985F90E?sequence=1 [<https://perma.cc/4M79-8R8M>] (showing lifetime reported prevalence rate of emotional abuse higher than rate of physical abuse).

⁷⁴ In one study of 1443 women, 86.2% of those who had experienced physical violence also reported emotional abuse without physical/sexual violence. Ann L. Coker et al., *Frequency and Correlates of Intimate Partner Violence by Type: Physical, Sexual, and Psychological Battering*, 90 AM. J. PUB. HEALTH 553, 557 (2000).

⁷⁵ Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 245 (2000).

sleep the night before a job interview, hiding or destroying her work clothing, inflicting noticeable injuries to create a disincentive to appear in public, hiding car keys or disabling her family car, threatening to kidnap the children if she leaves them with a babysitter or at day care, and harassing her at work.⁷⁶

These pervasive, abusive experiences lead an overwhelming number of survivors to feel that the emotional harm inflicted by their partners is far more damaging than the physical injuries.⁷⁷ And this response is consistent with what we know from research; women report that psychological abuse is by far the greatest source of their distress,⁷⁸ regardless of the frequency or severity of the physical harm they've experienced.

So when a judge in a civil protection order court says to a woman: "tell me what happened," she may well focus on the harm that is most salient to her—the constant derogatory name calling, the way he made her feel that everything was her fault, the way he always checked her phone to see who she was talking to. The physical violence and threats may take a back seat; she might not even mention them unless specifically asked.⁷⁹ Thus, survivors often frame their courtroom stories in a way that fails to fit the expectations of most judges, and even of the law itself: what may feel to victims like the most insidious and intimate brand of abuse can come across to legal gatekeepers as something that really doesn't count as abuse at all.

The result is what philosophers call a serious "epistemic asymmetry" between marginally situated survivors and the judges who serve as their audience.⁸⁰ I (the first author) have frequently been in courtrooms and

⁷⁶ Jody Raphael, *Battering Through the Lens of Class*, 11 J. GENDER, SOC. POL'Y. & L. 367, 369 (2003); see also Postmus, *supra* note 75, at 246. For an excellent discussion of the failure of the legal system to incorporate the full range of survivor harms, see generally Johnson, *supra* note 69.

⁷⁷ The authors have observed this prioritization throughout their over fifty years of combined experience talking to women survivors.

⁷⁸ See, e.g., Mary Ann Dutton, Lisa A. Goodman & Lauren Bennett, *Court-Involved Battered Women's Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse*, 14 VIOLENCE & VICTIMS 89, 101-02 (1999) (finding that symptomatic responses to abuse, including PTSD and depression, were largely predicted by psychological abuse, rather than by physical violence); Mindy B. Mechanic, Terri L. Weaver & Patricia A. Resick, *Mental Health Consequences of Intimate Partner Abuse*, 14 VIOLENCE AGAINST WOMEN 634, 649-50 (2008). In addition, the psychological component of intimate partner violence appears to be the strongest predictor of posttraumatic stress disorder. See Maria Angeles Pico-Alfonso, *Psychological Intimate Partner Violence: The Major Predictor of Posttraumatic Stress Disorder in Abused Women*, 29 NEUROSCIENCE & BIOBEHAV. REVS. 181, 189 (2005) ("When the role of psychological, physical, and sexual aspects of intimate partner violence were considered separately, the psychological component turned out to be the strongest predictor [of PTSD].").

⁷⁹ This has been a consistent experience of the first author in representing many hundreds of women survivors, and watching thousands more, not represented by counsel, tell their stories in civil protection order court.

⁸⁰ See, e.g., Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, in ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 167, 170 (Ian James Kidd et al. eds., 2017) [hereinafter ROUTLEDGE HANDBOOK].

witnessed judges, presiding over protection order cases, get frustrated with women who testify at length about their mental anguish at their partner's hands. These survivors—more than eighty percent of whom proceed without the benefit of legal representation⁸¹—have no idea that this part of their stories will not trigger legal relief. It is often only after aggressive judicial questioning that survivors volunteer information about physical abuse or threats, and when they do, they may sound—to the judges, at any rate—less concerned about those aspects of their stories than about the day-to-day psychic harms they have endured. In this context, the admission of physical abuse can sound to judges like something of an afterthought. Because so many judges do not understand survivors' frames for their experiences, they may suspect that women's too-little, too-late testimony about physical violence is either exaggerated or fabricated out of whole cloth; that they are adding it only after belatedly realizing that the law demands such facts.

This profound gap in understanding—assuming a woman survivor's story is less plausible when it fails to meet her judicial audience's expectations about how the world works—creates real obstacles for survivors. The survivor has tried her best to faithfully recount her story as she experienced it, and thus with actual fidelity to the truth. But the judge has a fundamentally different understanding of how the world works, and he may well assume his is a universal one. As a result, the woman may well suffer a credibility discount based not on a fair assessment of her case, but rather on a fundamental failure of understanding.

As the above discussion illustrates, even after nearly five decades of anti-domestic violence advocacy, many justice system gatekeepers still lack a sophisticated understanding of what constitutes a truly plausible story about women's experiences of intimate partner abuse. Extensive and often high-profile media coverage, radical changes in the civil and criminal laws, the creation of specialized domestic violence courts, support for a massive proliferation of shelters and advocacy programs, and millions of dollars' worth of research⁸² have not realigned the way many officials go about making sense of plausible survivor behavior.

The dominant culture's persistent failure to absorb the different experiences shared among a marginalized group may well derive from what philosopher Gaile Pohlhaus calls a "willful hermeneutical ignorance."⁸³ Pohlhaus describes how our culture's asymmetrical authority systems essentially downgrade women into a status of less competent "knowers" than men.⁸⁴ Men, in contrast, are:

⁸¹ See Barasch, *supra* note 11.

⁸² See, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 3-4 (1999).

⁸³ Gaile Pohlhaus, Jr., *Varieties of Epistemic Injustice*, in ROUTLEDGE HANDBOOK, *supra* note 80, at 17.

⁸⁴ *Id.*

[E]ncouraged to develop a kind of epistemic arrogance in order to maintain that their experience of the world is generalizable to the entirety of reality, a close-mindedness to the possibility that others may experience the world in ways they cannot, and an epistemic laziness with regard to knowing the world well in light of those [who are] oppressed⁸⁵

The result here is that members of the predominantly male, nonsurvivor culture place too much weight on their own—uninformed, inexperienced—perceptions about key features of domestic violence, and too little on the perceptions of survivors with firsthand experience. When male authority figures are made aware of how their perceptions conflict with the stories of women survivors, they resolve the conflict by doubting women's articulated experience.⁸⁶ Cognitive scientists refer to this phenomenon as "belief perseverance"—the process by which people tend to hold onto a set of beliefs as true, even when ample discrediting evidence exists.⁸⁷

Women victimized by domestic violence often fail to offer narratives that are recognized as internally consistent, due, paradoxically enough, to symptoms of neurological and psychological trauma that *are themselves the effects of abuse*. Such women also fail to tell stories that fit the way nonsurvivors believe the world operates, resulting in the appearance of external inconsistency and, as an all-too predictable outcome, the reflexive dismissal of their experience within the justice system and the broader culture. Together, these apparent—but not real—inconsistencies in survivors' stories cast doubt on the stories' plausibility. And the real-world costs are steep indeed: judges, police officers, and other justice system gatekeepers are likely to impose credibility discounts that interfere with a woman's ability to obtain justice, safety, and healing.

B. *Storyteller Trustworthiness*

In addition to obstacles rooted in story plausibility, survivors face serious challenges in convincing justice system gatekeepers to accept them as personally trustworthy storytellers. In other words, regardless of the *content* of her story, a woman may be considered an unreliable reporter of her own experiences. In the philosophy literature, this is referred to as "testimonial injustice": a discriminatory disbelief of the storyteller herself, independent of the story she tells.⁸⁸

Three of the most critical factors that contribute to our assessments of storyteller trustworthiness are (1) the storyteller's demeanor;⁸⁹ (2) the

⁸⁵ *Id.* at 17.

⁸⁶ McKinnon, *supra* note 80, at 170-71.

⁸⁷ *See, e.g.*, Savion, *supra* note 45, at 81.

⁸⁸ FRICKER, *supra* note 49, at 4.

⁸⁹ *See infra* text accompanying notes 912-111.

storyteller's motive;⁹⁰ and (3) the storyteller's social location.⁹¹ All three of these factors are particularly salient in the experiences of women domestic violence survivors trying to establish credibility in the eyes of justice system gatekeepers.

1. Demeanor

As discussed above,⁹² when a survivor tells the story of the abuse she has experienced, her demeanor may be symptomatic of psychological trauma induced by extended abuse. Three core aspects of PTSD—numbing, hyperarousal, and intrusion⁹³—can influence demeanor in obvious ways. And despite the proliferation of police and judicial training, many gatekeepers continue to misinterpret—and, as a result, discount—the credibility of women who display each set of symptoms when telling their stories of abuse.

A survivor can respond to overwhelming trauma by becoming emotionally numb, a compensating psychic response that often manifests as a highly constrained affect.⁹⁴ This symptom can profoundly shape the way a woman appears in court and, in turn, how a judge or other justice system gatekeeper perceives her. Numbing may cause many survivors to testify about emotionally charged incidents with an entirely flat affect or render them unable to remember dates or details of violent incidents.⁹⁵ A woman may tell a story about how her partner sexually assaulted her as if she is talking about the weather outside. The disconnect between expectations about affect and story can be jarring and can result in the imposition of a credibility discount.

PTSD also alters demeanor via hyperarousal—that is, an anxious posture of alertness and reactivity to an imminent danger.⁹⁶ This “[h]yperarousal can cause a victim to seem highly paranoid or subject to unexpected outbursts of rage in response to relatively minor incidents.”⁹⁷ In the courtroom, for example, an accused abusive partner may give the survivor a particular look or adopt a particular tone of voice. The judge may not notice anything out of the ordinary, but the partner does: She knows that the abuser is communicating a message of intimidation or threat. As a result, she may suddenly break down on the witness stand, gripped by fear, frustration, fury, or all three. But to the judge, who has no window into the triggering event, the survivor is likely to sound

⁹⁰ See *infra* text accompanying notes 112–141.

⁹¹ See *infra* text accompanying notes 143–165.

⁹² See *supra* text accompanying notes 33–40.

⁹³ DSM-5, *supra* note 35, at 271–72.

⁹⁴ *Id.* at 272.

⁹⁵ See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221 (1993); see also HERMAN, *supra* note 39, at 45.

⁹⁶ DSM-5, *supra* note 35, at 272.

⁹⁷ Epstein, *supra* note 82, at 41.

out of control, even a bit crazy.⁹⁸ The survivor now fits the stereotypical classic hysterical female—an image commonly associated with exaggerated unreliability.⁹⁹ The judge is therefore more likely to apply a credibility discount in such settings and assume that, regardless of the content of her story, the survivor is not a fully trustworthy witness.

Finally, as discussed in the context of story plausibility, PTSD symptoms affect demeanor through *intrusion*—reliving the violent experience as if it were occurring in the present, often through flashbacks.¹⁰⁰ Such unbidden re-experiencing of traumatic events may badly impair a witness' ability to testify in a narratively seamless—or indeed, even a roughly sequential—fashion.¹⁰¹

Once more, domestic violence complainants can find themselves in a double bind. The symptoms of their trauma—the reliable indicators that abuse has in fact occurred—are perversely wielded against their own credibility in court. Because PTSD symptoms can make abused women appear hysterical, angry, paranoid, or flat and numb, they contribute to credibility discounts that may be imposed by police, prosecutors, and judges.¹⁰²

Even demeanor “evidence” that is not symptomatic of trauma but that is a “normal” response to stressful courtroom circumstances can lead judges to discount a survivor's credibility. In a 2017 Boston trial court proceeding, for example, a woman seeking a one-year extension of her existing protection order testified about her abiding fear of her former partner. Following a contested trial, the judge awarded her the extension. Sitting next to her attorney as she listened to the court's ruling, she smiled and slumped in her seat, her torso sagging with relief. A few days later, the trial judge, *sua sponte*, set a reconsideration hearing. He told the woman that, in his view, she had appeared “too celebratory” when he had ruled in her favor at the previous hearing. As a result, he realized that she was not, in fact, a credible witness. The judge then vacated his previous decision to extend her protection order.¹⁰³

⁹⁸ See Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1078 (2011).

⁹⁹ See *id.* at 1079 (“Female jurors, according to one study, already believe that women are generally ‘less rational, less trustworthy, and more likely to exaggerate than men.’”).

¹⁰⁰ DSM-5, *supra* note 35, at 275.

¹⁰¹ Epstein, *supra* note 82, at 41.

¹⁰² See, e.g., *id.*; Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1878 (1996); Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 742 (2003).

¹⁰³ Interview with Community Advocate, Transition House, in Cambridge, Mass. (Dec. 18, 2017). The classic example of the justice system's misuse of affective evidence is Albert Camus's novel, *The Stranger*. The protagonist, Meursault, is sentenced to death for a murder based in part on a condemnation of his unrelated, “inappropriate” actions in the days following his own mother's death. Witnesses testified that Meursault did not cry but smoked a cigarette and drank coffee as he sat near his mother's coffin, and that the day after her funeral he swam in the ocean, saw a comedy film, and then made love with a woman he'd long been romantically interested in. This behavior, inconsistent

Credibility discounts based on presumed inappropriate demeanor are imposed by other justice system gatekeepers as well. One attorney recalls a recent California case as follows:

In my county, domestic violence cases involving children may be referred to court evaluators to meet with the parties and provide the judge with an assessment as to the veracity of the allegations. One client went to her appointment with the evaluator and reported that her ex-boyfriend had been texting her in violation of an initial, temporary protection order. She showed her phone to the evaluator, who saw that she had saved her ex-boyfriend's phone number under an expletive, instead of using his actual name. Based on this evidence of the woman's anger, the evaluator determined that she was not afraid of the respondent (a fact irrelevant to the applicable legal standard), and for this reason deemed her domestic violence claim inconclusive.¹⁰⁴

At the same time, abusive men often provide a sharp credibility contrast; they tend to excel at presenting themselves as self-confident and in control, are adept at manipulation, and "are commonly able to lie persuasively, sounding sincere," all of which tends to trigger assumptions that they are in fact credible.¹⁰⁵ A 2015 study of survivors conducted by the National Domestic

with society's image of a grieving son, led the community to despise him and a jury to condemn him for a murder to which he had no connection. See ALBERT CAMUS, *THE STRANGER* 8, 20-21, 64 (Matthew Ward trans., Vintage Books 1988) (1942). The tendency, in both the public and the justice system, to discount credibility and assume guilt persists today, as demonstrated by the case of Amanda Knox, a young woman from Seattle who went to Perugia, Italy, and was twice convicted in Italian courts—and, years later, fully exonerated—of murdering her housemate. See Martha Grace Duncan, *What Not to Do When Your Roommate Is Murdered in Italy: Amanda Knox, Her "Strange" Behavior, and the Italian Legal System*, HARV. J.L. & GENDER-CREATIVE CONTENT, Sept. 19, 2017, <http://harvardjlg.com/2017/09/what-not-to-do-when-your-roommate-is-murdered-in-italy-amanda-knox-her-strange-behavior-and-the-italian-legal-system-by-martha-grace-duncan/> [<https://perma.cc/VBS7-P23B>]. Amanda's initial conviction was heavily dependent on her "inappropriate" actions in the days following the murder, including kissing her boyfriend not far from the scene, cuddling with him at the police station, turning a cartwheel—at a police officer's request—while waiting to be interviewed, and shopping for underwear not long after the murder (because she had no access to her apartment, which was locked down as a crime scene). *Id.* at 10-23. Similarly, Lindy Chamberlain was convicted of murdering her infant daughter while camping in the Australian outback. Clyde Haberman, *Vindication at Last for a Woman Scorned by Australia's News Outlets*, N.Y. TIMES (Nov. 16, 2014), <https://www.nytimes.com/2014/11/17/us/vindication-at-last-for-a-woman-scorned-by-australias-news-media.html>. Public sentiment condemned Chamberlain early on, based largely on her attire and affect in the courtroom. Lindy described feeling "trapped in a no-win situation. 'If I smiled, I was belittling my daughter's death . . . If I cried, I was acting.'" *Id.* Forensic evidence subsequently exonerated Chamberlain, confirming the accuracy of her report that a wild dog pulled her daughter out of a tent and killed her. *Id.*

¹⁰⁴ Interviews with Jane Stoeber, Clinical Professor of Law, Univ. of Cal., Irvine Sch. of Law (Jan. 6 & 9, 2018).

¹⁰⁵ LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT* 15-16 (1st ed. 2002); see also Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 174

Violence Hotline is full of examples of this profoundly damaging credibility gap, including this one from a female survivor: The police made “things worse and act[ed] like I was the bad guy because I came in crying, but my abuser was calm after 2 years of hell—duh[,] I was scared and he was fine.”¹⁰⁶

The skeptical reactions of justice system gatekeepers to survivor demeanor can trigger a vicious cycle of credibility discounts. The more a police officer or judge appears to doubt a survivor’s credibility, the more likely she is to feel upset, destabilized, or even (re)traumatized.¹⁰⁷ This reaction may trigger an increase in the intensity of her emotionally “inappropriate” demeanor, making her appear even less credible.¹⁰⁸ In other words, the testimonial injustice that women experience as they seek to be recognized as credible witnesses to their own abuse can become a self-fulfilling phenomenon: they internalize the court’s image of themselves as unreliable narrators of their own experience.¹⁰⁹

Social psychologists have coined the term “stereotype threat” to explain such harm. Stereotype threat arises when a person feels that she is at risk of conforming to a cultural stereotype about her particular social group. The existence of negative stereotypes—regardless of whether an individual herself accepts them—can make that individual anxious, and harm her ability to perform.¹¹⁰ Thus, the existence of

(2009)(“[B]atterers tend to be self-confident and ultra-controlled in their outward appearance and thus testify in a way that is traditionally perceived as truthful.”).

¹⁰⁶ TK LOGAN & ROB VALENTE, NAT’L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 9-10 (2015), <http://www.thehotline.org/resources/law-enforcement-responses> [<https://perma.cc/CC5Z-Z56H>] [hereinafter National Hotline Survey]. Two national studies, both conducted in 2015, help us understand what is happening on the ground in terms of police refusal to credit survivor stories. One study, conducted by the ACLU, surveyed more than 900 domestic violence service providers about their clients’ experiences with police. ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE AND POLICING (2015), www.aclu.org/responsesfromthefield [<https://perma.cc/3CKD-6J9E>] [hereinafter Responses from the Field]. The other, conducted by the National Domestic Violence Hotline, surveyed survivors themselves. National Hotline Survey, *supra* note 106, at 2. In the National Domestic Violence Hotline survey, just over half of the 637 women surveyed reported that they had never called the police for help when they experienced domestic violence. *Id.* at 2. When asked for the reason, fifty-nine percent of these participants said that their decision was based on either their fear that the police would not believe them or—and this is where we get to consequential credibility—that they would do nothing in response to their reports of abuse. *Id.* at 4. Much the same perceived deficit in consequential credibility hampered the reporting efforts of the remaining 309 women interviewed in the National Hotline Survey who *had* in fact interacted with the police: two-thirds of these women reported that they were “somewhat or extremely afraid” to call again in the future, based on the same sets of concerns. *Id.* at 8.

¹⁰⁷ See Jennifer Saul, *Implicit Bias, Stereotype Threat, and Epistemic Injustice*, in ROUTLEDGE HANDBOOK, *supra* note 80, at 236-38.

¹⁰⁸ See *supra* text accompanying notes 91-107; *infra* notes 109-110.

¹⁰⁹ Saul, *supra* note 107.

¹¹⁰ See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 617 (1997); Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379, 389 (2002).

such stereotypes, and women's concern about conforming to them, can diminish survivors' ability to effectively communicate their experiences.¹¹¹

2. Motive

To assess the trustworthiness of a woman's account of domestic violence, judges and other gatekeepers are inevitably (though perhaps unconsciously) influenced by stereotypical beliefs about women, particularly in the context of intimate relationships.¹¹² Although such beliefs vary by the individual, certain fundamental cultural tropes about women's motives to lie and manipulate tend to resonate here. Two of the most persistent and crude stereotypes about women's false allegations about male behavior are the grasping, system-gaming woman on the make and the woman seeking advantage in a child custody dispute.

A recent review of the first twenty websites to appear in a Google search of the term "domestic violence false allegations" underlines the power of these stereotypes in the legal context. The vast majority of the "hits" in response to this search were websites maintained by small firm and sole practitioner defense attorneys; in other words, lawyers available to represent those accused of domestic violence, typically in the face of criminal prosecution. These lawyers post advice for potential clients, and most explain that "false allegations" of domestic violence tend to derive from women scheming for some sort of material payday or other advantage, such as a leg up in a child custody case.¹¹³ Each of these stereotypes, and their implications for women's credibility, is explored below.

¹¹¹ See Saul, *supra* note 107, at 238.

¹¹² Philosopher Kristie Dotson calls this "testimonial quieting." Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 *HYPATIA* 236, 242-43 (2011).

¹¹³ See Memorandum Analyzing First Twenty Hits for "Domestic Violence False Allegations" (Nov. 15, 2017) (on file with authors). The twenty websites are: <https://www.breedenfirm.com/domestic-violence/defending-false-accusations-domestic-violence>; <https://billingsandbarrett.com/new-haven-criminal/domestic-violence-lawyer/false-accusations>; <https://www.adamyounglawfirm.com/Criminal-Defense/Violent-Crimes/False-Allegations-Of-Domestic-Violence.shtml>; <https://criminallawdc.com/dc-domestic-violence-lawyer/false-accusations>; <https://www.bajajdefense.com/san-diego-domestic-violence-attorney>; <https://www.jonathanmharveyattorney.com/Domestic-Violence/False-Allegations.shtml>; <https://www.lafaurielaw.com/Criminal-Defense/Domestic-Violence-Order-of-Protection-in-Family-IDV-Courts/False-Domestic-Violence-Accusations.shtml>; <https://chicago.criminaldefenselawyer.com/false-accusations-domestic-violence>; <http://www.amcoffey.com/Criminal-Defense-Overview/False-Domestic-Violence-Allegations.shtml>; <https://criminallawyermaryland.net/maryland-domestic-violence-lawyer/false-accusations>; <http://www.lnlegal.com/blog/2017/february/have-you-been-falsely-accused-of-domestic-violence>; <http://www.scottriethlaw.com/blog/2017/06/how-false-allegations-of-domestic-violence-can-ruin-your-life.shtml>; <https://www.weinbergerlawgroup.com/domestic-violence/false-allegations/defending-faqs>; <https://www.dworinlaw.com/false-domestic-violence-austin-texas>; <https://stearns-law.com/family-law-services/domestic-violence/false-accusations>; <http://www.inlandempiredomesticviolence.com/Domestic-Violence/Falsely-Accused-of-Domestic-Violence.aspx>; <https://www.carlahartleylaw.com/Domestic-Violence-And-Criminal-Law/False-Accusations-Of-Domestic-Violence.shtml>; <http://www.bosdun.com/Blog/2017/March/What-To-Do-if-You-Have->

a. *The Grasping Woman on the Make*

The grasping woman stereotype flourished in the Reagan era, when legislators portrayed poor women as “welfare queens,” whose family planning decisions were solely dependent on a desire to expand their monthly benefit check by a few dollars. Though factually discredited,¹¹⁴ the welfare queen image continues to have an impact on the law: to this day, fifteen states prohibit families from receiving higher benefit levels if a baby is born while the household is on assistance, in an effort to ensure that cash aid will not serve as a putative incentive for poor women to have more children.¹¹⁵

This same stereotype is reflected in our contemporary obsession with women as “gold diggers,” based on the 1933 movie of that name.¹¹⁶ This stereotype imbues the lyrics of the eponymous hip hop song about women who target wealthy men, falsely claim that these men are the fathers of their children, and then soak them for child support.¹¹⁷ It is readily apparent in Silicon Valley,

Been-Wrongly-Accused-of-D.aspx; <http://www.flowermoundcriminaldefense.com/domestic-violence>; <https://www.kefalinoslaw.com/miami-domestic-violence-defense-lawyer>.

¹¹⁴ See Stephen Pimpare, *Laziness Isn't Why People Are Poor. And iPhones Aren't Why They Lack Health Care*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/posteverything/wp/2017/03/08/laziness-isnt-why-people-are-poor-and-iphones-arent-why-they-lack-health-care/?utm_term=.59f65871be13; Eduardo Porter, *The Myth of Welfare's Corrupting Influence on the Poor*, N.Y. TIMES (Oct. 20, 2015), <https://www.nytimes.com/2015/10/21/business/the-myth-of-welfares-corrupting-influence-on-the-poor.html>.

¹¹⁵ Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 249 (2014).

¹¹⁶ GOLD DIGGERS OF 1933 (Warner Bros. 1933) (portraying aspiring actresses experiencing financial hardship who conspire to find wealthy husbands).

¹¹⁷ Kanye West's song, *Gold Digger*, contains the following lyrics:

Eighteen years, eighteen years
 She got one of your kids got you for eighteen years
 I know somebody payin' child support for one of his kids
 His baby mama car and crib is bigger than his
 You will see him on TV, any given Sunday
 Win the Super Bowl and drive off in a Hyundai
 She was supposed to buy your shorty Tyco with your money
 She went to the doctor, got lipo with your money
 She walkin' around lookin' like Michael with your money . . .
 If you ain't no punk
 Holla “We want prenup! We want prenup!” (Yeah!)
 It's somethin' that you need to have
 'Cause when she leave yo' ass she, gon' leave with half
 Eighteen years, eighteen years
 And on the eighteenth birthday he found out it wasn't his?!
 . . . Now I ain't saying she a gold digger . . .
 But she ain't messin' with no broke n* . . .

KANYE WEST, *Gold Digger*, on LATE REGISTRATION (Roc-A-Fella Records & Def Jam Recordings 2005).

where tech magnates swap warnings about women they refer to as “founder hounders.”¹¹⁸ These gender stereotypes are, of course, shaped by race, class, and other identity-based assumptions. The image of the welfare queen, as one example, was purposefully designed to draw its power from racialized narratives;¹¹⁹ at the same time, it operates more broadly to negatively affect societal perceptions of all women, perhaps especially those who are also poor or low income. As with all stereotypes, those that affect women as women are not monolithic in their impact: gender stereotypes are racialized (the unrapeable black woman, for example), and racial discounts are gendered (blackness in women is stigmatized in ways specific to black women in particular). Despite this diversity of impact and complexity of harm, the bottom line is that we tend to discount the trustworthiness of all women who appear to be motivated by a desire to get something, either from the government or from their male partners.

This social myth is particularly lethal for women seeking safety from intimate partner violence, especially those who are trying to exit their abusive relationships. Most survivors need concrete resources to bring about this fundamental change in their living situation. Although a woman’s informal network of support, made up of family and friends, may be able to help by providing a place to stay, transportation, childcare, or financial assistance,¹²⁰ these resources may well not be sufficient and are often stop-gap or finite in nature. Eventually, many abuse survivors need to secure additional resources, frequently by turning to the social welfare system or the safety furnished by a civil protection order.¹²¹ This quest for some sort of subsidized autonomy is, once again, a reflection of the underlying dynamics of domestic abuse.¹²²

118 See Emily Chang, “Oh My God, This Is So F---ed Up”: Inside Silicon Valley’s Secretive, Orgiastic Dark Side, VANITY FAIR (Feb. 2018), <https://www.vanityfair.com/news/2018/01/brotopia-silicon-valley-secretive-orgiastic-inner-sanctum> (“Whether there really is a significant number of such women is debatable. The story about them is alive and well, however, at least among the wealthy men who fear they might fall victim.”).

119 Premilla Nadasen, *From Widow to “Welfare Queen”: Welfare and the Politics of Race*, 1 BLACK WOMEN, GENDER & FAMILIES, 52 (2007), 69–70.

120 Ruth E. Fleury-Steiner et al., *Contextual Factors Impacting Battered Women’s Intentions to Reuse the Criminal Legal System*, 34 J. COMMUNITY PSYCHOL. 327, 339 (2006); Lisa A. Goodman & Katya Fels Smyth, *A Call for a Social Network-Oriented Approach to Services for Survivors of Intimate Partner Violence*, 1 PSYCHOL. OF VIOLENCE 79, 81 (2011); Stephanie Riger, Sheela Raja & Jennifer Camacho, *The Radiating Impact of Intimate Partner Violence in Women’s Lives*, 17 J. INTERPERSONAL VIOLENCE 184, 198–200 (2002).

121 See, e.g., ELEANOR LYON, SHANNON LANE & ANNE MENARD, NAT’L INST. JUSTICE, MEETING SURVIVORS’ NEEDS: A MULTI-STATE STUDY OF DOMESTIC VIOLENCE SHELTER EXPERIENCES iv (2008) (noting that “domestic violence shelters address compelling needs that survivors cannot meet elsewhere”); PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 52 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> [<https://perma.cc/3TSQ-6PKY>] (noting that a substantial percentage of women survivors of intimate partner violence seek a civil protection order).

122 See *supra* text accompanying notes 112, 114.

An all-too-common strategy of abusers is to force women into social isolation, thus limiting their access to those family and friends who might have been willing to provide them with help.¹²³ The law in most states authorizes system officials to provide survivors assistance such as priority in shelter access, or a protection order provision ordering their abusive partner to vacate a home in which they share a legal interest.¹²⁴ Again, these resources for survivors are built into our law and policy for good reason—survivors need them to stave off repeat violence.¹²⁵ But when women actually pursue such concrete, practical assistance, they often suffer an immediate credibility discount; their trustworthiness is now colored by the suspicion that they are motivated by a desire to obtain shelter or sole access to a residence, rather than by the urgent need to protect themselves from violence.¹²⁶

I (the first author) have participated in numerous judicial training sessions with judges in the D.C. Superior Court's Domestic Violence Unit. Year after year, I have listened as veteran judges warn those who are more junior, cautioning that "so many times I hear these stories and something seems wrong; then I realize the woman is just here to get shelter, or to kick her ex out of the house without having to go through a divorce. Keep an eye out for that." These judges are encouraging their colleagues to discount the personal trustworthiness of women based on their efforts to seek legally authorized resources on their path to safety.¹²⁷

123 LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 107 (2009); see also Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1021-22 (2000) ("[Battered women] frequently become estranged from family and friends who might otherwise provide them with material aid."); Jody Raphael, *Rethinking Criminal Justice Responses to Intimate Partner Violence*, 10 VIOLENCE AGAINST WOMEN 1354, 1357 (2004) ("Women are not allowed to talk on the telephone, visit their friends, attend church, decide on their own what to wear, or go to school or work.").

124 SUSAN L. KEILITZ, PAULA L. HANNAFORD & HILLERY S. EFKEMAN, NAT'L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE, 12-14 (1997), <https://www.ncjrs.gov/pdffiles1/Digitization/164866NCJRS.pdf> [<https://perma.cc/3SXH-SJ6E>].

125 See, e.g., MONICA McLAUGHLIN, NAT'L LOW INCOME HOUS. COAL., HOUSING NEEDS OF VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING, 1 (2017), http://nlihc.org/sites/default/files/AG-2017/2017AG_Cho6-So1_Housing-Needs-of-Victims-of-Domestic-Violence.pdf [<https://perma.cc/SJT7-2DBX>] (explaining that "safe housing can give a survivor a pathway to freedom").

126 As noted above, women of color may be especially likely to experience such credibility discounts due to the racialized nature of the stereotypes that drive them.

127 One more example: In a 2012 Baltimore protection order case, Judge Bruce S. Lamdin listened to Heather Myrick-Vendetti testify about her husband's abuse, including the following statement: "He pinned me to a shelf, busted my arm open, left a gash in my forearm. He then threw me down on the floor and stomped me in the ribs so hard that I peed my pants. My oldest, who was 12 years old, got my son and hid in a closet with a hammer and called someone to come get us." *Judge Bruce Lamdin Interrogates Woman Seeking Restraining Order*, WASH. POST (Sept. 9, 2012), <https://www.washingtonpost.com/opinions/judge-bruce-lamdin-interrogates-woman-seeking->

And attorneys representing survivors pick up on the power that these unfair stereotypes can exert in the courtroom. Until recently, I (the first author) had often joined the ranks of many other victim advocates in doing just that: when representing a client who is privileged enough not to need much assistance from the court (perhaps she doesn't have children with her abusive partner, she doesn't live with him, or their relationship was relatively limited so she was more easily able to cut him out of her life), I have argued that the court should find my client especially credible *for this reason*. In other words, because my client is seeking only narrowly limited, safety-based remedies, rather than requesting the full range of relief legally available to her, the court should view her as particularly credible. I've done this for the same reason lawyers use to make every strategic decision: because my audience—the court—is likely to buy the argument. My lawyering instincts tell me that a judge will, in fact, understand a more limited request for relief as a real indication of a survivor's credibility.¹²⁸

But I have belatedly come to realize that in pursuing this approach I am helping one client but simultaneously lending support to a prejudicial, gender-based credibility discount. Logically, the flip side of my argument must also be true: judges view survivors who seek more extensive remedies as *less* credible—as women who may be fabricating or exaggerating their allegations in order to obtain resources such as shelter and financial support.¹²⁹

It is worth noting here that these judicial suspicions—discounting credibility when a woman asks for the full scope of available relief—simply do not arise in contexts that are not dominated by women litigants. It is laughable to imagine a judge suspecting the credibility of a business owner if, after presenting a colorable legal claim, that owner sought to recover an

restraining-order/2012/09/09/614fd664-faae-11e1-875c-4c21cd68f653_video.html?tid=areinl; see also *Baltimore County Judge Bruce Lamdin Faces Complaint* (WBAL TV television broadcast Sept. 4, 2012), <https://www.wbalv.com/article/911-dispatcher-responds-to-call-at-his-own-home-i-just-handled-it-like-any-other-call/25239609> [<https://perma.cc/PP3K-83BB>]. Ms. Myrick-Vendetti then described her husband's attempt to burn down their house a few days later. *Id.* When she told the judge that her husband constituted a threat to her safety and requested that he be ordered to leave the home they shared, Judge Lamdin responded, "Ma'am there are shelters," and "It confounds me that people tell me they are scared for their life and then they stay in a situation where they can remove themselves and go to a shelter." *Id.* Although this story is an extreme one, it reflects a deeply held suspicion that woman seeking resources are operating from false motives and cannot be trusted.

¹²⁸ Other lawyers representing survivors report doing the same. See, e.g., Interview with Megan Challenger, Supervising Attorney, Md. Ctr. for Legal Assistance (July 12, 2017) (reporting that she has observed lawyers making these arguments in court on multiple occasions); Interview with Margo Lindauer, Assoc. Teaching Professor & Dir. of the Domestic Violence Inst., Ne. Univ. Sch. of Law (Jan. 21, 2018).

¹²⁹ One survivor attorney recently shared an experience where the judge in a Washington, D.C., civil protection order case explicitly ruled that the survivor was credible because "she was not asking for anything other than to be left alone." Interview with Megan Challenger, *supra* note 128; see also Interview with Courtney K. Cross, Assistant Clinical Professor of Law & Dir., Domestic Violence Clinic, Univ. of Ala. Sch. of Law (July 12, 2017).

extensive range of statutorily enumerated remedies. Why are women subjected to male violence held to a different standard?

Credibility discounts based on the grasping woman stereotype extend beyond the judicial realm to other gatekeepers. In Washington, D.C., for example, court-appointed attorney negotiators meet with unrepresented parties in civil protection order cases and attempt to resolve matters without the need for a contested trial. Several of these negotiators have, on many occasions, shared the view that petitioners are not “real” victims of domestic violence, but instead are there to get housing and other resources.¹³⁰ These suspicions about survivors’ motives color the work of the D.C. Superior Court’s Crime Victim’s Compensation (“CVC”) program as well. The CVC provides a variety of material and housing-related resources to local victims of crime. A survivor is entitled to obtain emergency shelter based on an initial, emergency judicial determination that she is entitled to a short-term temporary protection order. CVC officials then monitor her actions. If the court docket reveals that she ultimately has dropped her request for a permanent order—regardless of whether this decision was made because she was reassaulted and intimidated into doing so, she decided to move to another jurisdiction to better protect herself, or she was unable to accomplish the necessary service of process—the CVC will peremptorily terminate her request for assistance.¹³¹

This grasping woman stereotype puts survivors in a terrible bind. We know that victims of domestic violence frequently are unable to successfully handle the violence in their lives without seeking outside help.¹³² Many, if not most, need the full set of remedies permitted in civil protection order statutes, such as shelter, financial support, and other assistance. By superimposing stereotype-based credibility assessments onto women’s requests for relief, we are forcing these women to make an untenable choice: they may either seek the full range of assistance they actually need to achieve safety, but risk suffering a court-imposed credibility discount; or they may make a bid to appear more credible by forgoing essential resources needed for protection. And, of course, the women who are most disadvantaged, and thus need the greatest amount of help, are the ones who are least likely to be believed.

¹³⁰ This observation is based on the first author’s extensive experience litigating hundreds of civil protection order cases. See *supra* note 9. Other D.C. domestic violence advocates confirm the routine nature of such comments. See, e.g., Interview with Gillian Chadwick, *supra* note 58; Interview with Courtney K. Cross, *supra* note 129.

¹³¹ See Interview with Janese Bechtol, Chief, Domestic Violence Section, Office of the Attorney General for the District of Columbia (Aug. 17, 2018). For an overview of the Washington, D.C., crime victim compensation program, see *Crime Victim Compensation & Services in Washington, D.C.*, Interview by Len Sipes with Laura Banks Reed, Dir., Crime Victims’ Compensation Program of the D.C. Superior Court (Mar. 3, 2014), <https://media.csosa.gov/podcast/transcripts/category/audiopodcast/page11/> [<https://perma.cc/LYK5-8H5V>].

¹³² See LYON, LANE & MENARD, *supra* note 121.

b. *The Woman Seeking Unfair Advantage in a Child Custody Dispute*

Women seeking to escape violent relationships often must turn to the family courts to resolve custody and other issues with their abusive partners. And virtually every state custody statute requires family court judges to consider intimate partner abuse as a factor weighing against an award of custody to the parent-abuser.¹³³ Indeed, the U.S. House of Representatives recently passed a concurrent resolution urging state courts to determine family violence claims and risks to children before turning to the consideration of any other custody factors.¹³⁴

The rationale for such legal provisions is that parent-on-parent violence harms not only the victim-parent, but also the children, who may witness the violence or its aftermath.¹³⁵ But women's experience in these courts defies the sense of the law as written: in fact, mothers' allegations of domestic violence are discounted or even fully discredited by family court judges.

Recent studies of family court custody decisions reveal that mothers who allege intimate partner violence are actually *more* likely to lose custody than mothers who do not make such assertions.¹³⁶ In other words, a claim of parent-on-parent violence operates to *undermine, rather than strengthen*, custody requests made by survivor-mothers. Judges tend to conclude, typically with no evidence other than the perpetrator-father's uncorroborated assertion, that women are fabricating abuse allegations as part of a strategic effort to alienate the children from their father.¹³⁷ The mother's experience of abuse is turned on its head to support the perpetrator's claim that he is the better parent.

¹³³ AM. BAR ASS'N, *Custody Decisions in Cases with Domestic Violence Allegations*, https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/domestic_violence_chart1.pdf (demonstrating that Connecticut is the sole exception to this rule).

¹³⁴ H.R. Con. Res. 72, 115th Cong. (Sept. 25, 2018).

¹³⁵ See Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797, 797 (2008) ("This review finds that children and adolescents living with domestic violence are at increased risk of experiencing emotional, physical and sexual abuse, of developing emotional and behavioral problems and of increased exposure to the presence of other adversities in their lives.").

¹³⁶ See Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 L. & INEQUALITY 311, 328 (2017) ("Overall, fathers who were accused of abuse and who accused the mother of alienation won their cases 72% of the time; slightly more than when they were not accused of abuse (67%)."); see also Janet R. Johnston, Soyoung Lee, Nancy W. Olesen & Marjorie G. Walters, *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 290 (2005).

¹³⁷ Meier & Dickson, *supra* note 136, at 318. This credibility discount is particularly disconcerting in light of studies examining the reliability of domestic violence allegations in the context of family law proceedings. Such studies have found that the allegations of women-mothers are substantiated—in other words, corroborated by sources in addition to the testimony of the woman who asserted them—in a high percentage of cases. See, e.g., Johnston et al., *supra* note 136, at 290 (finding corroboration rate of sixty-seven percent). Although the remainder of these allegations lack independent corroboration, this does not mean that they are false; instead, it simply means that insufficient additional information exists beyond the parent's testimony.

Family court studies further reveal that when a father alleges that a mother has engaged in “parental alienation,”¹³⁸ his chances of being awarded custody increase even when his allegations are not credited or are left unresolved by the court.¹³⁹ The judicial assumption that women falsely allege or exaggerate domestic violence in an effort to obtain custody runs so deep that family court judges appear to cling to it even in cases where they themselves determine that such a claim is untrue.¹⁴⁰

The credibility discounting operates in the reverse direction as well. At a 2016 “Bench–Bar” social event, two judges involved with the D.C. domestic violence court commented that they were well aware that women who file for protection orders after having already initiated custody proceedings are trying to “pull the wool over [the judge’s] eyes.”¹⁴¹

The result is that survivor-mothers often leave family court having been wrongly denied custody of their children, and may be unfairly discredited and denied relief in their civil protection order hearings as well. A judicial willingness to discount their trustworthiness can have repercussions that will last throughout their own lives and those of their children.

3. Social Location

Cognitive psychology teaches us that our wider culture—as translated by the media, authority figures, family members, etc.—transmits stereotypes to individuals that we then adopt on a deep, unconscious level.¹⁴² Our most

¹³⁸ Parental alienation syndrome is a hypothesized disorder first proposed by psychiatrist Richard Gardner in 1985. Gardner believes that the disorder arises primarily in the context of child custody disputes and involves a child being manipulated by one parent into internalizing the unjustified denigration of the other parent. In the more than thirty intervening years, the diagnosis has yet to be accepted in the mental health community. See Holly Smith, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. MASS. L. REV. 64, 64 (2016). Instead, a great deal of psychological and legal literature has critiqued the construct, and both leading researchers and most professional institutions have renounced the concept as lacking in empirical basis or objective merit. See Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 236 (2009) (“The critiques of Gardner’s PAS are legion . . .”). Despite all of this, claims of parental alienation syndrome have come to dominate custody litigation in family court, especially in cases involving allegations of abuse. *Id.* at 233.

¹³⁹ Meier & Dickson, *supra* note 136, at 331 (“[W]hen courts believed mothers were alienating, they switched custody to the father 69% of the time; and even when the alienation claim was rejected or not decided, they transferred custody of the children to an allegedly abusive father 25–50% of the time.”).

¹⁴⁰ This refusal to accept facts that contradict a person’s theory of how the world works is explained in part by the concept of confirmation bias. See *supra* text accompanying note 41.

¹⁴¹ Interview with Andrew Budzinski, Graduate Teaching Fellow, Georgetown Univ. Law Ctr. Domestic Violence Clinic (Jan. 22, 2018).

¹⁴² See, e.g., RACHEL D. GODSILE ET AL., PERCEPTION INST., 2 SCIENCE OF EQUALITY: THE EFFECTS OF GENDER ROLES, IMPLICIT BIAS, AND STEREOTYPE THREAT ON THE LIVES OF WOMEN AND GIRLS 12 (2016), <https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Volume-2.pdf> [<https://perma.cc/5Q62-R9U7>] (“Popular culture plays an important part in

commonly held derogatory stereotypes include those that devalue the words of women, people of color, those living in poverty, and other marginalized groups. Once formed, these stereotypes tend to be highly resistant to counterevidence.¹⁴³ As philosopher Miranda Fricker explains, “If we examine stereotypes of historically powerless groups such as women, African Americans, or poor/working-class people, they often are associated with attributes related to poor truth-telling in particular: things like over-emotionality, lack of logical thinking, inferior intelligence, being on the make, etc.”¹⁴⁴

Although it is outside our scope to make a full case for each of these social categories, we will examine one of them in detail here: the practice of discounting *women’s credibility as women*. In Rebecca Solnit’s compelling essay, *Cassandra Among the Creeps*,¹⁴⁵ she describes the myth of Cassandra, daughter of the king of Troy. When the god Apollo tried to seduce her, Cassandra rejected him. In retribution, Apollo cursed Cassandra so that, although she could accurately foresee the future, her people always disbelieved her and shunned her as a crazy liar. Solnit notes,

I have been thinking of Cassandra as we sail through the choppy waters of the gender wars, because credibility is such a foundational power in those wars and because women are so often accused of being categorically lacking in this department. Not uncommonly, when a woman says something that impugns a man . . . or an institution . . . the response will question not just the facts of her assertion but her capacity to speak and her right to do so.¹⁴⁶

This refusal to listen to women’s stories of male abuses of power runs so deep that it may have played a significant role in Sigmund Freud’s early decision to upend his entire psychoanalytic theory.¹⁴⁷ Early in his career, Freud listened as his female patients told him story after story of their experiences of childhood sexual abuse, often at the hands of their fathers.¹⁴⁸ Freud believed these stories and, in the late 1880s developed his “seduction theory,” arguing that early childhood

reinforcing these gendered associations. Implicit biases are not the result of individual psychology—they are a social phenomenon that affects us all.”).

¹⁴³ Jeremy Wanderer, *Varieties of Testimonial Injustice*, in *ROUTLEDGE HANDBOOK*, *supra* note 80, at 28.

¹⁴⁴ See FRICKER, *supra* note 49, at 32; *supra* text accompanying note 41 (discussing confirmation bias).

¹⁴⁵ Rebecca Solnit, *Cassandra Among the Creeps*, *HARPER’S MAG.*, Oct. 2014, at 4.

¹⁴⁶ *Id.* Professor Catharine MacKinnon, the theorist who created the term “sexual harassment” notes: “I kept track of . . . cases of campus sexual abuse over decades; it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person.” Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, *N.Y. TIMES* (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

¹⁴⁷ See, e.g., SIGMUND FREUD, *AN AUTOBIOGRAPHICAL STUDY* 62-65 (James Strachey trans., W. W. Norton & Co. 1963) (1925).

¹⁴⁸ *Id.* at 62.

sexual abuse constituted the root cause of his patients' neuroses.¹⁴⁹ Later, however, Freud abandoned this idea, proclaiming instead that his patients' stories were not based in actual experience, but instead on fabricated, wishful fantasies that all women experience.¹⁵⁰ Freud's shift from crediting to discrediting women eventually led him to develop his profoundly influential theory of psychosexual development.¹⁵¹

For almost a century, conventional psychoanalytic wisdom held that Freud's shift represented an appropriate course correction—an important move toward greater accuracy in analyzing his traumatized patients. In the early 1980s, however, Jeffrey Masson, a former Sanskrit professor who had subsequently trained as a psychoanalyst and become Projects Director of the Freud Archives, turned this assumption on its head. Based on correspondence between Freud and a contemporary, Wilhelm Fliess, Masson argued that Freud did not abandon his belief in his original observation—that girls were being abused in huge numbers by male relatives—based on factual evidence.¹⁵² Instead, Freud was unable to accept the disturbing truth he had uncovered; he also may have been unwilling to risk the disapprobation of the conservative medical establishment.¹⁵³ Ultimately, Freud decided to abandon his original idea¹⁵⁴ and create a new theory based on the premise that women's stories of sexual violence were not fact, but fantasy.¹⁵⁵ In the words of psychiatrist Judith Herman, "[t]he dominant psychological theory of the next century was founded in the denial of women's reality."¹⁵⁶

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 63.

¹⁵¹ *Id.* at 63-64. Freud's theory of psychosexual development rests on the idea that from birth, human beings possess an instinctual sexual energy (libido) that develops in five stages. According to Freud, a person who experiences frustration during any one of these developmental stages experiences a resulting anxiety that can persist into adulthood in the form of neurosis. During the third stage, called the phallic phase, which occurs between the ages of two and five, a child focuses libidinal energy or sexual wishes on the opposite sex parent and experiences feelings of jealousy and rivalry toward the same sex parent. 7 SIGMUND FREUD, *Three Essays on the Theory of Sexuality*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1975).

¹⁵² JEFFREY MOUSSAIEFF MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* 107-13 (1984).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 110.

¹⁵⁶ HERMAN, *supra* note 39, at 14. It should be noted that Masson's claim provoked a good deal of controversy in the psychiatric community, where Freud is still largely revered. See, e.g., Judith Herman, *The Analyst Analyzed*, NATION (Mar. 10, 1984), at 293 (reviewing JEFFREY M. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984)) (arguing that Masson is "right and courageous"); Charles Rycroft, *A Case of Hysteria*, 31 N.Y. REV. BOOKS 3 (1984) (reviewing JEFFREY M. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984)) (accusing Masson of ignoring evidence contrary to his theory and presenting flimsy evidence to support it); Anthony Storr, *Did Freud Have Clay Feet?*, N.Y. TIMES, Feb. 12, 1984, at 3 (reviewing JEFFREY M. MASSON, *THE ASSAULT ON*

Contemporary culture continues to impart strong lessons about women's lack of trustworthiness. Our teenagers watch TV shows like *Pretty Little Liars*, *Don't Trust the Bitch in Apartment 23*, and *Devious Maids*; younger children watch animated movies like *Shark Tale*, which features a catchy tune that describes women as scheming.¹⁵⁷ Rap lyrics are full of stories of women deceiving and taking advantage of men.¹⁵⁸

The same insidious stereotype of women as unreliable-to-hysterical distorters of the truth has quietly overtaken the justice system, where women witnesses tend to be disbelieved more than their male counterparts. In one study in which a group of "credibility raters" assessed the believability of actual witnesses testifying in trials in a mid-sized Southern city, researchers found that male witnesses were considered more credible than female witnesses.¹⁵⁹ Similarly, the available evidence indicates that, as a general rule, judges view women as less credible witnesses and advocates than they do men.¹⁶⁰ And recent studies show that the police routinely discredit female survivors of intimate partner abuse. In the 2015 National Domestic Violence Hotline Survey, for example, a substantial percentage of women reported that the police did not believe their stories of intimate partner abuse because they were women.¹⁶¹

In addition, as no end of literary and cultural texts manifest, when women—such as victims of domestic violence—are burdened with the cultural script of acting other-than rationally, or permit themselves to succumb to expressions of emotional intensity, our tendency to discredit them as individuals gains new momentum.¹⁶² In a recent study, researchers asked a diverse group of college

TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY) (arguing that "[e]verything we know about [Freud's] character makes Mr. Masson's accusation wildly unlikely").

¹⁵⁷ Soraya Chemaly, *How We Teach our Kids that Women Are Liars*, *ROLE REBOOT* (Nov. 19, 2013), <http://www.rolereboot.org/culture-and-politics/details/2013-11-how-we-teach-our-kids-that-women-are-liars> [<https://perma.cc/3N2E-RCEM>].

¹⁵⁸ Terri M. Adams & Douglas B. Fuller, *The Words Have Changed but the Ideology Remains the Same: Misogynistic Lyrics in Rap Music*, 36 *J. BLACK STUD.* 938, 945, 948 (2006).

¹⁵⁹ Jacklyn E. Nagle, Stanley L. Brodsky & Kaycee Weeter, *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 *BEHAV. SCI. & L.* 195, 195, 203 (2014).

¹⁶⁰ Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 *S. CAL. REV. L. & WOMEN'S STUD.* 1, 61 (1996); see also Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 *J. GENDER RACE & JUST.* 625, 629 (2000) ("[W]omen, more than men, are stereotyped as liars even though men and women are equally adept at telling lies."). It should be noted that existing data on judicial gender bias in credibility determinations are somewhat outdated; however, no evidence exists to indicate that the relevant findings have changed in recent years.

¹⁶¹ NATIONAL HOTLINE SURVEY, *supra* note 106, at 7.

¹⁶² "[I]t's also a common view, particularly in many Western patriarchal societies, that emotionality is at odds with rationality." McKinnon, *supra* note 80, at 169. For example, consider just one of many Internet memes: A young boy asks, "Dad can you explain women's logic?" His father replies, "You're grounded!" When the boy asks for the reason, the father replies with the non-sequitur: "Peanut Butter." Image, *PINIMG.COM*, <https://i.pinimg.com/474x/73/6b/43/736b43231b83b92e7f55b22e0a386ca9.jpg> [<https://perma.cc/KJH7-AHYJ>].

students to take on the role of mock jurors, and review a condensed version of a murder trial transcript. The researchers charged the students with making a preliminary decision as to how they would vote—guilty or not guilty. They were then asked to deliberate electronically with participants whom they believed to be their fellow jurors. The other participants, however, were actually the researchers themselves—an approach designed to ensure that there was always a single “holdout” on the jury, whose messages would sound increasingly angry over the course of deliberations. Participants whose holdout was assigned a clearly male-identified name began doubting their initial opinions; in contrast, those for whom the holdout was assigned a clearly female name became significantly more confident in their initial opinions, at a statistically significant level.¹⁶³ In sum, the tendency to discredit women *because they are women* is deeply embedded in our broader culture—and clearly influences the way credibility is assessed in the legal system.

People of color, particularly Black people, have the same experience. As many legal scholars have noted, American courts have a long history of discrediting African American witnesses on the basis of their blackness. Such discrediting can occur based on stereotypes that African Americans are less intelligent than are whites, or that they are untrustworthy and dishonest.¹⁶⁴ Based on all of the above, it stands to reason that black women risk being doubly disbelieved.

Poor people are also vulnerable to stereotypes about their trustworthiness, as in the earlier example of welfare queens, who cheat the system to take what is not theirs. Because so many survivors live at the intersection of all three of

¹⁶³ Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 L. & HUM. BEHAV. 581, 581 (2015).

¹⁶⁴ See, e.g., Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 467 (2016) (quoting Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42 (2000)). In one striking study of judicial racial bias, 133 state and local trial judges from multiple jurisdictions were given an Implicit Association Test in which they were asked to categorize photos of white and black faces with positive attitude words (like pleasure), or negative attitude words (like awful), as quickly as possible. As hypothesized, the judges responded consistently with the general population, associating black with bad and white with good. Next, the judges engaged in a nonconscious “priming” task, in which the experimenters flashed coded words on participants’ computer screens, too rapidly to be consciously processed. For example, the black prime consisted of flashed words like dreadlocks, hood, and rap; the control group prime consisted of words like summer, trust, and stress. After being primed, the judges were asked to make various determinations regarding a hypothetical case involving two juvenile defendants. Judges with higher implicit bias scores rendered harsher judgments when primed with the black racial category. See Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1198-99 (2009). Similarly, a recent study of 239 federal and state courts found that judges held strong to moderate implicit biases against both Asians and Jews relative to Caucasians and Christians, respectively, and that on a scenario-based task, they gave slightly longer prison sentences to Jewish defendants compared to identical Christian defendants. Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104 (2017).

these identities—they are poor women of color—these stereotypes feed into each other to further undermine assumptions about their trustworthiness.¹⁶⁵

And as one might expect, a woman who is mentally ill or abusing substances may experience even further credibility discounts. When a judge talks to a jury about how to assess credibility, the standard instruction emphasizes how important it is for witnesses to articulate strong and clear memories of the events they are relating, as well as their ability under the particular circumstances to have perceived—to have seen and heard—the events in question.¹⁶⁶ A survivor who has abused substances to cope with her partner's violence is less likely to meet this standard. So is a survivor struggling with a mental illness, regardless of whether that illness contributed to her original vulnerability, or was a consequence of it.

Each of these credibility discounts—story plausibility and individual trustworthiness—operate in a distinct fashion, but they are not necessarily independent of each other; in fact, they are often intertwined. As philosopher Karen Jones explains, “Testifiers who belong to ‘suspect’ social groups and who are bearers of strange tales can thus suffer a double disadvantage. They risk being doubly deauthorized as knowers on account of who they are and what they claim to know.”¹⁶⁷

Indeed, a wide array of women may be viewed as untrustworthy because of who they are—women, Black women, poor women, women who exhibit trauma symptoms that are easily conflated with a lack of credibility, and women who

¹⁶⁵ Carolyn M. West, *Violence Against Women by Intimate Relationship Partners*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143, 164-65 (Claire M. Renzetti et al. eds., 2001) (noting that African-American women are three times as likely as white women to be killed by an intimate partner). Women receiving public financial assistance are significantly more likely to experience domestic violence than are other women. Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 663 (2000). Moreover, intimate partner abuse pushes many women into homelessness. Across the United States, between twenty-two and fifty-seven percent of homeless women identify domestic violence as the immediate cause. GOODMAN & EPSTEIN, *supra* note 123, at 107; INST. FOR CHILDREN & POVERTY, *THE HIDDEN MIGRATION: WHY NEW YORK CITY SHELTERS ARE OVERFLOWING WITH FAMILIES* (2002), <https://rhyclearinghouse.acf.hhs.gov/library/2002/hidden-migration-why-new-york-city-shelters-are-overflowing-families> [<https://perma.cc/9F6E-XPYE>]; Rebekah Levin, Lisa McKean & Jody Raphael, *Pathways to and From Homelessness: Women and Children in Chicago Shelters*, CTR. FOR IMPACT RESEARCH (Jan. 2004), <http://www.http://advocatesforadolescentmothers.com/wp-content/uploads/homelessnessreport.pdf> [<https://perma.cc/PG8A-H2LA>]. In addition, African American women are thirty-five percent more likely to experience intimate partner violence than are white women. Women of Color Network, *Facts & Stats: Domestic Violence in Communities of Color*, DEP'T OF JUSTICE (June 2006), https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf [<https://perma.cc/6ZU3-6ATL>].

¹⁶⁶ See, e.g., John L. Kane, *Judging Credibility*, 33 LITIG. 31, 32 (2007); *Model Civil Jury Instructions for the District Courts of the Third Circuit, Rule 1.7* (2010), http://federalevidence.com/pdf/JuryInst/3d_Civ_Ch1-3_2010.pdf [<https://perma.cc/69AN-F2QJ>].

¹⁶⁷ Karen Jones, *The Politics of Credibility*, in A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 154, 158 (Louise M. Antony & Charlotte Witt eds., 2002).

are many or all of the above. This distrust, in turn, creates a broader hermeneutics of suspicion, through which the listener interprets the substance of her story. In other words, once a listener has discounted a woman's trustworthiness, he will be hyperalert for signs of deception, irrationality, or narrative incompetence in her story. He will tend to magnify inconsistencies and overlook the ways in which any inconsistencies might be explained away. In this way, Jones observes, "a low initial trustworthiness rating . . . can give rise to *runaway* reductions in the probability assigned to a witness's story."¹⁶⁸ Because women survivors tend to spark hermeneutic suspicion, both in terms of personal trustworthiness and story plausibility, they are particularly vulnerable to this kind of doubly disadvantaging credibility discount.

II. GATEKEEPER-IMPOSED EXPERIENTIAL DISCOUNTS

The discounts women survivors face are not limited to the credibility arena. All too frequently, system gatekeepers also discount the importance of women's actual experiences and of the ways in which the system itself exposes women to additional harms. Such experiential discounting occurs when, regardless of the plausibility of a survivor's story and regardless of her personal trustworthiness—in other words, *even when system actors believe her*—they nonetheless adopt and enforce laws and policies that, in practice, revictimize her.¹⁶⁹

These issues—credibility discounting and experiential discounting—cannot be considered in isolation. Such an approach would fail to capture the way that each relies on and reinforces the other, both in practical reality and through the personal lens of survivor experience. As Catherine MacKinnon explains, in the sexual harassment context:

Even when [a woman survivor] was believed, nothing [a male perpetrator] did to her mattered as much as what would be done to him if his actions against her were taken seriously. His value outweighed her . . . worthlessness. His career, reputation, mental and emotional serenity and assets counted. Hers didn't. *In some ways, it was even worse to be believed and not have [his actions] matter. It meant she didn't matter.*¹⁷⁰

Experiential discounting does not entail total disregard for harms inflicted on women, just as credibility discounting does not entail total disbelief of women's stories. Instead, gatekeepers impose experiential discounts when, in the pursuit of objectively worthy policy goals, they choose to ignore or trivialize

¹⁶⁸ *Id.* at 159.

¹⁶⁹ Lynn Hecht Schafran calls this women's "consequential credibility." Lynn Hecht Schafran, *Credibility in the Courts: Why is There a Gender Gap?*, 34 JUDGES' J. 5, 40-41 (1995).

¹⁷⁰ Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (emphasis added).

the attendant harm to survivors. Women receive the message that system actors are relatively indifferent to the realities of their lives and the risks that shape their experiences. For an individual woman survivor, this experiential (or ontological)¹⁷¹ discounting of the law's impact on her life exponentially increases the negative power of the credibility discounts she also must face.

The tendency to discount women's experiences permeates our society, including the social service and justice-based systems to which so many survivors turn for help in their efforts to be safe. The following examples illustrate this phenomenon.

A. Criminal Justice System

Despite enormous improvements in the responsiveness of police and prosecutors to domestic violence over the past several decades,¹⁷² the criminal justice system continues to discount important aspects of women's experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors. As one example, we have known for decades that participation in a criminal prosecution can increase a woman's risk of retaliatory violence: studies show that twenty to thirty percent of perpetrators reassault their targets before the criminal court process is over.¹⁷³ Data also show that women are at greater risk of homicide at the time of separation from their abusive partners (and prosecution, indeed, creates such separation).¹⁷⁴ It is hardly surprising that a major reason survivors cite for withholding cooperation from prosecutors is fear of future harm.¹⁷⁵

Nonetheless, prosecutors around the country often subpoena, arrest, and even jail survivors in an effort to ensure that they will testify against their abusive partners at trial.¹⁷⁶ The intent of these government lawyers is far from malicious;

¹⁷¹ This type of discounting could be conceptualized in philosophical terms as "ontological injustice," operating alongside the above-described categories of hermeneutic and epistemic injustice.

¹⁷² See, e.g., Epstein, *supra* note 82, at 13-16.

¹⁷³ See, e.g., Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 *TRAUMA, VIOLENCE & ABUSE* 141, 143, 159 (2005).

¹⁷⁴ Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 *AGGRESSION & VIOLENT BEHAV.* 514, 519 (2006).

¹⁷⁵ Lauren Bennett, Lisa A. Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 *J. INTERPERSONAL VIOLENCE* 761, 768-69 (1999); Sara C. Hare, *Intimate Partner Violence: Victims' Opinions About Going to Trial*, 25 *J. FAM. VIOLENCE* 765, 771 (2010).

¹⁷⁶ Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced To Participate in the Prosecution of Their Abusers?*, 7 *WM. & MARY J. WOMEN & L.* 383, 387 (2001); Betty Adams, *Battered Wife Jailed After Refusing To Testify Against Husband*, *PRESS HERALD* (June 3, 2014), <https://www.pressherald.com/2014/06/03/maine-domestic-violence-victim-jailed-after-refusing-to-testify/>; *Domestic Violence Victims Could Be Arrested if They Don't Show Up for Court To Face Accuser*, *WSMV.COM* (Apr. 25, 2013), <http://www.wsmv.com/story/22081502/domestic-violence-victims-in-rutherford-county-could-be-arrested-if-they-dont-show-up-for-court> [<https://perma.cc/TWVZ-XZEP>].

they hope to use the power of their office to put an end to intimate partner abuse, and they believe that mandating victim participation is—regardless of an individual survivor’s own analysis of her situation—the best way to accomplish this goal. But in the process, the secondary harms visited on victims are too often ignored. As Professor Jane Stoever notes, “[j]ail sentences for defendants in domestic violence cases are typically only several days long, and most offenders receive only probation, but abuse victims have been jailed for contempt for much lengthier periods for refusing to comply with subpoenas to testify.”¹⁷⁷ To obtain testimonial compliance, prosecutors threaten to refer victims to child protection agencies, where they could risk losing custody of their children, and they institute perjury prosecutions against women who have recanted prior statements, often obtaining lengthy jail sentences for survivors.¹⁷⁸ As one example, a 2016 investigation in Washington County, Tennessee, showed that women were routinely imprisoned for as long as a week for failing to testify against their abusive partners.¹⁷⁹ In the words of defense counsel representing one of the women: “I mean, it’s kind of chilling. Here’s a woman that called the police, because she needed help and now a couple months later she gets a voicemail that says now you might be the one that’s going to jail. Think about that.”¹⁸⁰ The local prosecutor refused to apologize for the practice, claiming that “I think we were doing the right thing.”¹⁸¹

Prosecutorial use of coercive tactics increased in the aftermath of U.S. Supreme Court decisions that made it far more difficult to engage in the practice of “victimless prosecutions.” See Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 585-86 (2010).

¹⁷⁷ Jane K. Stoever, *Parental Abduction and the State Intervention Paradox*, 92 WASH. L. REV. 861, 870-71 (2017).

¹⁷⁸ For an extensive compilation of stories of women subjected to such harms, see *id.*

¹⁷⁹ Nate Morabito, *Advocates Horrified After Domestic Violence Victims Jailed in Washington County, TN*, WJHL.COM (Sept. 11, 2016), <http://wjhl.com/2016/09/11/advocates-horrified-after-domestic-violence-victims-jailed-in-washington-county-tn/> [<https://perma.cc/KM36-5EXL>].

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Prosecutorial dismissal of women’s risk of harm also can be seen in Honolulu Prosecuting Attorney Ken Kaneshiro’s 2016 decision to restrict access to the city’s Family Justice Center shelter to victims who promised to testify against their abusive partners in a criminal trial. Kaneshiro claimed that the victims who declined to testify “did not know what’s good for them.” Rebecca McCray, *Jailing the Victim: Is It Ever Appropriate to Put Someone Behind Bars to Compel Her to Testify Against Her Abuser?*, SLATE (July 12, 2017, 12:07 PM), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/07/is_it_ever_appropriate_to_put_an_abuse_victim_in_jail_to_compel_her_to_testify.html. Honolulu’s approach to domestic violence prosecution sends a clear message to survivors: we discount the realities of your safety concerns and your risks of future harm. Unsurprisingly, during the first eight months the Honolulu shelter was open, sixteen of its twenty beds remained empty. *Id.* This example is, of course, an extreme one: no other Family Justice Center has a similar policy. *Id.* But extreme examples can offer a window into the less dramatic and more routine discounts women suffer in terms of their consequential credibility. In October 2015, a Florida judge jailed a victim of domestic violence who indicated that she would not appear to testify in the criminal prosecution of her abusive partner. She had endured terrifying violence at her husband’s hands: he had strangled her, threatened her with a kitchen knife, and smashed her head into a microwave. She told the judge that the abuse had caused her to struggle with depression and anxiety. In addition, her husband was the father of her one-year-

A similar theme sounds in the actions of police officers responding to domestic violence calls across the country. The 2015 ACLU survey reveals a serious lack of police concern regarding the harms experienced by survivors: eighty-three percent of polled service providers reported that their clients called the police only to find that they “sometimes or often” did not take allegations of domestic violence seriously.¹⁸²

The 2015 National Hotline Survey echoes this finding. In the words of one respondent, “I think [the police] feel that I do not matter, that as an ex-wife, I have to withstand the harassment and stalking.” Another woman put it this way: “They sympathized with him and said he [just] needed to stay away from me. Then they pointed me in the direction of [name of city withheld] and said to call someone when I got there . . . [They] left me by the side of the road alone in my car with my daughter and afraid.” Yet another said: “The cops acted as if they did not care . . . They sat in the drive while my ex poured gas all over my decks to my home and took what he wanted. Even though I had an [order of protection] and told them he could not enter the home.”¹⁸³ Another: “[The police] have threatened to arrest me more than once. I am the victim! They blame me for taking him back.”¹⁸⁴

Police officers also use their power to coerce victim testimony at trial. In the spring of 2018, a police sergeant in Buncombe County, North Carolina, told an advocate, “When I get to a domestic [violence call], if I get a sense that she’s not going to cooperate, I drive away.”¹⁸⁵ A minute later he added, “But when I go to my misdemeanor B&E’s [breaking and entering cases], I stay until I’ve got all the evidence.”¹⁸⁶

old daughter, and she was concerned about her ability to support her child if he went to jail and lost his job. She cried in open court as she explained, “I’m homeless now. I’m living at my parents’ house . . . I had to sell everything I own,” and added, “I’m just not in a good place right now.” The judge responded by mocking her, saying, “You think you’re going to have anxiety now? You haven’t even seen anxiety,” and ordered police to handcuff the woman, sending her to jail for three days. Kate Briquet, *Judge Berates Domestic Violence Victim—and Then Sends Her to Jail*, THE DAILY BEAST (Oct. 9, 2015, 1:00 AM), <https://www.thedailybeast.com/judge-berates-domestic-violence-victimand-then-sends-her-to-jail>.

¹⁸² RESPONSES FROM THE FIELD, *supra* note 106, at 12.

¹⁸³ NATIONAL HOTLINE SURVEY, *supra* note 106, at 6, 10.

¹⁸⁴ *Id.* at 10. Additional police coercion may be imposed on women in jurisdictions utilizing lethality or danger assessment protocols. These protocols are comprised of a series of questions, posed by police on the scene of a domestic violence call and designed to determine a survivor’s risk of future harm. In situations where this (relatively new) tool indicates “highest risk,” the protocol directs officers to manipulate women into separating from their abusive partner, by refusing to accept a woman’s decision to take no action, or by pressuring an unwilling victim to speak to a National Domestic Violence Hotline counselor. Margaret Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 536, 566-67 (2010). Lethality assessment programs are being used in counties in states including Delaware, Florida, Georgia, Indiana, Maryland, Missouri, and Vermont. *Id.* at 539.

¹⁸⁵ Interview with Kit Gruelle, domestic violence advocate (June 6, 2018).

¹⁸⁶ *Id.*

By discounting the importance of survivors' experiences and their risks of harm, police officers discourage women from seeking police assistance in subsequent emergency situations. As the ACLU Survey concluded, "Clients often do not call the police because they have had experiences in the past . . . in which they have received a negative response . . . in which the incident is minimized, the client is blamed, or the police simply take no action."¹⁸⁷ In all of these ways, the criminal justice system tends to dismiss its policies' effects on women's lives as relatively inconsequential, at least as compared to their effects on offender accountability.

In addition, the criminal justice system tends to devalue violence that is inflicted by an intimate partner as compared to a stranger. A 2005 Department of Justice report on Family Violence Statistics reveals that seventy-seven percent of those incarcerated for non-family assaults received sentences that were longer than two years.¹⁸⁸ In sharp contrast, this was true of only forty-five percent of those incarcerated for family assault.¹⁸⁹ Thus, the criminal justice system discounts the importance of women's experiences and, further, devalues the meaning of the harms they suffer at the hands of their partners.

B. *Subsidized Housing and Public Shelters*

This tendency to discount the impact of laws and policies on the lives of domestic violence survivors extends well beyond the justice system. The public housing system provides an important case in point, in part because the availability of affordable housing is essential to many women's ability to both escape abuse and to remain safe after leaving an abusive relationship.¹⁹⁰ Despite this fact, substantive discounting of survivors' experience is readily apparent in the already intense and bureaucratically intimidating struggle for public housing.

¹⁸⁷ RESPONSES FROM THE FIELD, *supra* note 106, at 16.

¹⁸⁸ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 2 (June 2005), <https://www.bjs.gov/content/pub/pdf/fvs.pdf> [<https://perma.cc/TD25-2HYZ>].

¹⁸⁹ Similar results were reached in a recent study conducted in Australia, where domestic violence offenders were compared to those who committed violent crimes outside of a familial/intimate relationship context. Moreover, domestic violence assaults were less likely to result in a prison sentence and, if incarcerated, intimate offenders received significantly shorter terms. Christine E. W. Bond & Samantha Jeffries, *Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases*, 54 BRITISH J. CRIMINOLOGY 849, 849 (2014).

¹⁹⁰ Survivors who cannot remain in public housing often are forced to choose between homelessness and returning to their abusive partners. "When we ask survivors why they had to stay [in their violent relationships], one of the top answers is always lack of access to housing," said Karma Cottman, executive director of the D.C. Coalition Against Domestic Violence. "They stay because they can't afford to go anywhere else." Elise Schmelzer, *Gentrification Eats Away at Shelter Options for Domestic-Abuse Victims*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/local/dc-politics/gentrification-eats-away-at-shelter-options-for-domestic-abuse-victims/2016/07/10/0470d18c-43co-11e6-8856-f26de2537a9d_story.html?utm_term=.ad4ce2d6365a.

At the state and local levels, crime control or nuisance ordinances require public housing landlords to evict tenants for “disorderly behavior” if, within a specified time period, three calls are made to 911 about a particular apartment unit.¹⁹¹ Fifty-nine counties, cities, and other localities have such ordinances in place today.¹⁹² In 2013, Illinois alone had adopted more than 100 such ordinances;¹⁹³ in 2014, Pennsylvania had passed thirty seven.¹⁹⁴ The geographic areas these laws cover include the twenty largest cities in the country.¹⁹⁵ A landlord who fails to comply can be fined and have his rental license suspended. Accordingly, landlords have no discretion in enforcing this draconian measure—tenants have no realistic opportunity to appeal to their human empathy. To stay in business, a landlord *must* evict after three 911 calls.¹⁹⁶ To be clear, the underlying goal of these laws is the reduction of crime and the resulting safety of all residents; any impact on women survivors of domestic violence is solely incidental.

Despite this fact, these ordinances have a sizable negative impact on survivors of domestic violence. Thirty-nine of them explicitly include calls to 911 from domestic violence *victims* as a basis for prohibited activities that can result in eviction; only four explicitly exclude such calls.¹⁹⁷ And who ends up getting evicted? It’s not just the perpetrators; it’s the victims, too. The ordinances make no effort to distinguish between abusers and victims—if a victim chooses to use 911 emergency services to protect herself and her children on three or more occasions, she’ll lose her home.¹⁹⁸

A study conducted by Matthew Desmond and Nicole Valdez in Milwaukee found that close to one-third of the “excessive” 911 call citations over a two-year period were based on emergency reports of domestic violence; fifty-seven percent of these calls resulted in the victim being evicted, and another twenty-

191 PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 135 (2017).

192 *Id.* at 141.

193 Emily Werth, *The Cost of Being “Crime Free”: Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, SARGENT SHRIVER NAT’L CTR. ON POVERTY LAW 1 (2013), <http://povertylaw.org/files/docs/cost-of-being-crime-free.pdf> [https://perma.cc/K4XE-CFYS].

194 News Release, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction*, PA. COAL. AGAINST DOMESTIC VIOLENCE (Oct. 16, 2014), http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf [https://perma.cc/TS8P-MRFB].

195 EDELMAN, *supra* note 191, at 141.

196 *Id.*

197 *Id.*

198 *See, e.g.*, U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL, GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES 4 (2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF> [https://perma.cc/YW5F-SNKL].

six percent received formal threats of eviction.¹⁹⁹ Similarly, a 2015 ACLU study of two upstate New York ordinances found that domestic violence comprised the largest category of incidents resulting in nuisance enforcement, with citations frequently resulting in eviction of the victim.²⁰⁰ Peter Edelman describes the experience of one victim, Rosetta Watson, in St. Louis: “She called the police several times to ask for protection to keep her safe from her former boyfriend. They did not protect her and she was attacked by the man, and then she was literally banished from the city for six months”²⁰¹

Similarly, Lakisha Briggs of Norristown, Pennsylvania, was abused by her boyfriend, and her adult daughter called the police.²⁰² Before leaving, one of the officers warned Briggs that this was her first strike. After that warning, Briggs, who also had a three-year-old daughter, was reluctant to call the police when her boyfriend beat her up.²⁰³ But one night, he stabbed her in the neck with a broken ashtray.²⁰⁴ When she regained consciousness she found herself in a pool of blood, but knew she could not dial 911.²⁰⁵

“The first thing in my mind is let me get out of this house before somebody call,” she says. “I’d rather them find me on the street than find me at my house like this, because I’m going to get put out if the cops come here.”²⁰⁶ Just as she feared, a neighbor saw her bleeding outside and called the police.²⁰⁷ Briggs was airlifted to the hospital, and when she returned home

199 Matthew Desmond & Nicole Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 132-33 (2012). Racial bias influences police decisions regarding enforcement of these laws: tenants living in predominantly black Milwaukee neighborhoods were three times as likely to receive a nuisance citation as women living in predominantly white neighborhoods. *Id.*

200 ACLU, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 22-23 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisance-ord-rel3.pdf [<https://perma.cc/7EML-ETV3>].

201 EDELMAN, *supra* note 191, at 143. Nancy Markham had a similar experience in Surprise, Arizona. After making multiple calls to 911 because of abuse at the hands of her boyfriend, the local police department pressured her landlord to evict her—even though they had finally arrested her former partner for his violence against her. Sandra S. Park, *With Nuisance Law, Has “Serve and Protect” Turned Into “Silence and Evict”?*, MSNBC (Mar. 25, 2016), <http://www.msnbc.com/msnbc/nuisance-laws-has-serve-and-protect-turned-silence-and-evict> [<https://perma.cc/LF9D-TPV2>]. It took a federal lawsuit, filed by the ACLU Women’s Rights Project, for the city to repeal the nuisance ordinance. *Id.*

202 Pam Fessler, *For Low-Income Victims, Nuisance Laws Force Ultimatum: Silence or Eviction*, NATIONAL PUBLIC RADIO (June 29, 2016), <https://www.npr.org/2016/06/29/482615176/for-low-income-victims-nuisance-laws-force-ultimatum-silence-or-eviction> [<https://perma.cc/W2RC-ZWZQ>].

203 See Complaint at 10, 12, Briggs v. Borough of Norristown, No. 13-02191 (E.D. Pa. Apr. 24, 2013).

204 *Id.* at 15.

205 See Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, GUARDIAN, Sept. 11, 2015, <https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911>.

206 See Fessler, *supra* note 202.

207 Briggs, *supra* note 205.

several days later, she was evicted from her apartment.²⁰⁸ The ACLU sued, and the Norristown law was eventually repealed.²⁰⁹

But similar measures continue to be enacted as local communities try to get a handle on crime and safety. And despite a series of federal lawsuits challenging the plainly discriminatory impact of these ordinances, hardly any of the affected communities have voluntarily created an exception for domestic violence victims. Nor have they sought out ways to accomplish the overall goal of crime control without imposing new and additional harms on survivors, such as barring repeat perpetrators from the building or the housing complex. Such systemic discounting of women's needs and experiences is—of course—devastating to survivors of intimate partner abuse. It is difficult to comprehend how a legal system that takes survivors' experiences seriously could permit itself to visit on them the casually brutal choice between emergency police protection and affordable housing.

Such apparent disregard for survivors' risks and needs also exists in the closely related access-to-shelter context. In 2014, for example, the mayor of Washington, D.C., requested (for the second time in two years)²¹⁰ emergency authority to limit access to shelter for local families. Specifically, the mayor proposed that applicants be permitted to stay in a public shelter only on a provisional, two-week basis; during that time caseworkers would contact applicants' friends and relatives in an effort to assess whether they had any alternate housing option.²¹¹ Those who did would be given twenty-four hours to vacate the shelter. In the words of the mayor's office: "Our goal is to get people out of shelters . . . or never into shelters in the first place, even if that means living with a grandmother, a sister, whatever."²¹² But such a policy turns a blind eye to the risks facing domestic violence survivors, where "whatever" might mean a denial of shelter and being forced to return to the home of an abusive partner.²¹³ Although the mayor ultimately withdrew his request,²¹⁴ a similar rule was again proposed in 2017, as an amendment to the

²⁰⁸ *Id.*

²⁰⁹ See Fessler, *supra* note 202.

²¹⁰ *The Homeless Services Reform Amendment Act of 2014: Hearing Before the Washington, D.C., Comm. on Human Servs.* (D.C. 2014) (statement of Marta Beresin, The Washington Legal Clinic for the Homeless), available at <https://www.legalclinic.org/wp-content/uploads/2018/09/Testimony-MB-DHS-oversight-hearing.pdf> [<https://perma.cc/UMY9-2V6X>].

²¹¹ Aaron C. Davis, *D.C. Mayor Asks for Emergency Legislation to Deal with Surge of Homeless into Shelters*, WASH. POST (Feb. 19, 2014), http://wapo.st/1giNpOH?tid=ss_mail&utm_term=.31cabe14e6ed.

²¹² *Id.*

²¹³ Patty Mullahy Fugere, *There Is a Family Homelessness Crisis and Provisional Placement Is Not the Answer*, HUFFINGTON POST: THE BLOG (Feb. 21, 2014) (updated Apr. 23, 2014), https://www.huffingtonpost.com/patty-mullahy-fugere/there-is-a-family-homeles_b_4827364.html.

²¹⁴ Aaron C. Davis, *Gray Steps Back on Unpopular D.C. Homeless Legislation*, WASH. POST (Feb. 25, 2014), https://www.washingtonpost.com/local/dc-politics/gray-steps-back-on-unpopular-dc-homeless-legislation/2014/02/25/803bcf66-9e53-11e3-9ba6-800d1192d08b_story.html?utm_term=.e28673d02941.

city's Homeless Services Reform Amendment Act, this time requiring applicants to city shelters to prove, by clear and convincing evidence, that they had no other housing options.²¹⁵ Advocates testified, once again, that victims of domestic violence were "routinely being denied shelter" if their names were on a current lease with, for example, their abusive partner.²¹⁶

After intensive advocacy efforts, a domestic violence exception was added to the statute.²¹⁷ But the reintroduction of shelter laws with such draconian provisions, year after year, demonstrates a deep-seated tendency to discount the importance of survivors' lived experiences and to trivialize the harmful impact these policies will inflict on large numbers of women, in service of other policy priorities.

In sum, even when a woman survivor, seeking help from the criminal justice, subsidized housing, or public shelter systems, finds that her story of intimate partner abuse *is actually believed*, gatekeepers are likely to communicate some degree of indifference about her experiences, and to accept with apparent unconcern the harms that laws, policies, and practices impose on her. Many women experience this substantive, experiential discounting as directly connected to the credibility discounting they also face. Together, these discounts create a gauntlet of disbelief and dismissal that women must overcome in order to be safe from the first-order abuse they suffer at the hands of their intimate partners.

III. THE IMPACT OF CREDIBILITY DISCOUNTS ON WOMEN SURVIVORS

Survivors suffer a wide range of credibility and experiential discounts when they seek emergency help from the police, *and* when they try to convince judges to award them a civil protection order, *and* when they struggle to obtain a safe place to live, *and* when they try to get custody of their children. They may suffer these discounts because their true stories of abuse don't sound plausible, because they are perceived as personally untrustworthy, or because their stories just don't matter much to system gatekeepers.

All of this may feel like *déjà vu* for a survivor. Institution-based discounting closely replicates the dynamics of abuse she endures at home. Perpetrators of intimate partner violence, like system actors, often discredit both the plausibility of a survivor's story and her trustworthiness as a truth teller. It is all too common for a survivor to be subject to a constant barrage of: "No, that's

²¹⁵ Wash. Legal Clinic for the Homeless, *Requiring that Families Show "Clear and Convincing Evidence" of Homelessness*, PUBLIC (Aug. 22, 2017), <http://www.publicnow.com/view/F8B804EF4654FB4D115F7E08715D8867B561EF7B?2017-08-22-22:30:10+01:00-xxx9517> [https://perma.cc/3H8Y-79WT].

²¹⁶ *Id.*

²¹⁷ D.C. CODE § 4-753.02.a-4 (2018).

not what happened”; or “I would never have touched you if you didn’t keep provoking me”; or “You’re the only one who makes me this angry.”²¹⁸

Abusive partners often discredit the woman based on her personal trustworthiness. Frequent comments tend to sound like: “You always exaggerate”; or “You’re hysterical and over-emotional”; or “You’re crazy; I didn’t hurt you”; or “No one would believe you. Even *I* don’t believe you.”²¹⁹ Finally, perpetrators often dismiss the weight or consequences of the abuse: “Why do you always make such a big deal out of everything?”²²⁰

In other words, the credibility discounts imposed on a woman by the justice system and other institutions often echo those imposed by her abusive partner. These institutional and personal betrayals operate in a vicious cycle, each compounding the effects of the other. That web can cause women to doubt their power to remedy their situations and—in more extreme cases—the veracity of their own experiences.

System actors are not privy to that broader web of experience. A judge who doubts a survivor’s story in court is not likely to be aware that he is reinforcing other discrediting messages from her abusive partner and from that partner’s defense attorney. An advocate who perceives with indignation that a survivor’s credibility is being discounted in family court may not know that this experience mirrors an earlier one with a police officer, and yet another with her public housing landlord. In other words, for system gatekeepers, it is almost impossible to see the whole picture. But from the perspective of a survivor, on the receiving end of one credibility discount after another, these experiences coalesce into a single, interwoven fabric. Credibility discounts become as pervasive as the air these women breathe.

So what does it mean for a survivor to be caught within a web of credibility discounting? The consequences include two major categories of harms: (1) those related to psychological wellbeing; and (2) those related to accessing justice and safety.

A. *Psychological Harms and Institutional Gaslighting*

When a survivor undertakes the considerable risks involved in seeking help, she is looking for resources and safety, to be sure. But she is also hoping

²¹⁸ See, e.g., *Hashtag Activism*, *supra* note 62.

²¹⁹ As survivor and activist Beverly Gooden explains: Such statements are “easy to believe when it’s just the two of you.” *Id.*

²²⁰ The National Domestic Violence Hotline website, for example, provides the following examples of gaslighting: “Your abuser might call you ‘too sensitive’ or raise a skeptical eyebrow when you try to complain about his or her behavior, asking you why you would get upset over ‘something so dumb.’” *What Is Gaslighting?*, NAT’L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), <http://www.thehotline.org/what-is-gaslighting/> [<https://perma.cc/64K3-PYTA>].

for validation of the harm she has endured—in other words, to have her experience credited. As Rebecca Solnit puts it: “To tell a story and have it and the teller recognized and respected is still one of the best methods we have of overcoming trauma.”²²¹

Research provides ample evidence for this proposition. When Judith Herman interviewed twenty-two victims of violent crimes of all sorts on the meaning of justice, she found that wherever her interview subjects sought justice, their most important goal was to gain validation or “an acknowledgment of the basic facts of the crime and an acknowledgment of harm.”²²²

In the domestic violence context, a recent qualitative study of women in a Massachusetts family court has several women noting the importance of being credited. As one woman said: “Well, validation [from the court] is huge. It really is huge. When you’ve got someone telling you on a constant basis that you’re bad, you’re wrong, [you need the courts to say you are right] . . .”²²³

But when the institutions to which the survivor turns for help (often at great personal risk)²²⁴ refuse to acknowledge this harm, and instead echo a woman’s abusive partner by discounting her credibility, the effort to report and remedy abuse instead works to replicate the denial of a survivor’s experience that takes place at home—only, this time, at an institutional level. And the institutions involved are those purportedly charged with hearing victims’ stories and meting out justice. It’s no wonder that survivors find the experience of systemic discrediting in our police districts and courthouses particularly crippling.

²²¹ Solnit, *supra* note 145, at 4.

²²² Judith Lewis Herman, *Justice from the Victim’s Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 585 (2005). Herman goes on to explain:

Whether the informants sought resolution through the legal system or through informal means, their most important object was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgment of harm. Although almost all of the informants expressed a wish for the perpetrator to admit what he had done, the perpetrator’s confession was neither necessary nor sufficient to validate the victim’s claim. The validation of so-called bystanders was of equal or greater importance. Many survivors expressed a wish that the perpetrator would confess, mainly because they believed that this was the only evidence that their families or communities would credit. For survivors who had been ostracized by their immediate families, what generally mattered most was validation from those closest to them. For others, the most meaningful validation came from representatives of the wider community or the formal legal authorities.

Id.

²²³ Ellen Gutowski & Lisa A. Goodman, *Intimate Partner Violence Survivors’ Subjective Experiences of Probate and Family Court: A Qualitative Study* (2018) (unpublished manuscript) (on file with authors) [hereinafter *Massachusetts Family Court Study*].

²²⁴ See, e.g., Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 467-68 (2003).

Survivors suffer a range of harms when they find that their experiences are repeatedly discredited and invalidated. We conducted a focus group outside of Boston with twelve advocates who shared extensive experience working with survivors in a variety of systems. Participants described three distinct outcomes.

First, survivors develop *a sense of powerlessness and futility*, expressed in statements such as: “I have taken this enormous risk to share my most vulnerable experiences in public—and they can’t/won’t hear/see me. I can’t find the right words to make them help me. There is nothing I can do.” This is a feeling akin to how numerous survivors eventually come to feel in their abusive relationships; there is nothing they can say or do that will make the perpetrator of violence hear or really “see” me.²²⁵

Second, survivors develop *a sense of personal worthlessness*. “Maybe they believe my story and still—if no one does anything in response to my story, then my experience must not have worth or merit. My pain doesn’t matter. I myself must have no value.”²²⁶ This too replicates abuse dynamics: He has no empathy for me as a human being. I am worthless in his eyes.

Finally, survivors develop *a sense of self-doubt*, as the machinery of credibility discounting lurches into gear: “They are twisting my story, casting doubt, maybe I didn’t remember it right, maybe it didn’t happen as I think it did. I must be crazy.”²²⁷ This dynamic is well illustrated by the 1944 film

²²⁵ Platt, Barton & Freyd describe the experience of institutional betrayal for domestic violence survivors as follows:

[W]hen this same woman seeks assistance from the police, child protective services (CPS), or health care providers, she enters a world in which her agency cannot be taken for granted. She has no personal role with respect to decisionmaking by police, CPS, or the hospital and so is particularly vulnerable to objectification or betrayal. . . . When these institutions betray victims of domestic violence, the ‘secondary trauma’ from this experience can amplify the feelings of helplessness and loss of control elicited by abuse Betrayal in these situations may be more abstract than the betrayal by an intimate partner. But the violations of promises implied by their standing in the community—the promise to protect, or heal, or provide for children’s welfare—are no less devastating than a partner’s betrayal.

Melissa Platt, Jocelyn Barton & Jennifer J. Freyd, *A Betrayal Trauma Perspective on Domestic Violence*, in *VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: VICTIMIZATION AND THE COMMUNITY RESPONSE* 185, 201-02 (Evan Stark & Eve S. Buzawa eds., 2009).

²²⁶ In the Massachusetts Family Court Study, one participant described her experience of betrayal by the family court judge: “You think that somebody’s coming, is going to enter the picture that will help you. You’re so desperate and when you’re let down, it’s. And I you know, there’s some that are like, ‘I don’t even want to live anymore. I don’t want to live anymore.’” *Massachusetts Family Court Study*, *supra* note 223.

²²⁷ The National Domestic Violence Hotline website warns survivors to pay attention to this sort of dynamic:

“You’re crazy—that never happened.”

“Are you sure? You tend to have a bad memory.”

Gaslight,²²⁸ in which a man manipulates his wife's routine experiences in a concentrated effort to create opportunities to discredit her and convince her that she is insane. He does this so effectively that she eventually comes to doubt her own perceptions and memory, and ultimately accepts his story that she is delusional and mentally unsound.²²⁹

Abusive men gaslight their women partners when they express love and affection on the heels of a violent episode, or deny that certain promises or commitments were ever made, or simply deny that events took place. Over time, these small incidents build until, like the wife in *Gaslight*, survivors may come to doubt their own memory, perception, and experience.²³⁰

Judy Herman explains:

After every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it on herself; and in any case it is time to forget the past and move on. The more powerful the perpetrator, the greater is his prerogative to name and deny reality, and the more completely his arguments prevail.²³¹

A quote from the Massachusetts Family Court study illustrates this phenomenon:

It's always that you're overreacting, you're too emotional. He'd do something like the night I woke up with him with his hands around my neck and I was like, "What are you doing?" I start crying, and he started laughing. And he said, "I was dreaming." . . . "I wasn't going to do anything. I was just

"It's all in your head."

Does your partner repeatedly say things like this to you? Do you often start questioning your own perception of reality, even your own sanity, within your relationship? If so, your partner may be using what mental health professionals call "gaslighting."

Gaslighting typically happens very gradually in a relationship; in fact, the abusive partner's actions may seem harmless at first. Over time, however, these abusive patterns continue and a victim . . . can lose all sense of what is actually happening. Then they start relying on the abusive partner more and more to define reality, which creates a very difficult situation to escape.

What is Gaslighting?, NAT'L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), <http://www.thehotline.org/2014/05/29/what-is-gaslighting/> [<https://perma.cc/64K3-PYTA>].

²²⁸ The film is based on a 1938 Patrick Hamilton play of the same name, *Gaslight*. GASLIGHT (Metro-Goldwin-Mayer 1944).

²²⁹ *Id.*

²³⁰ Darlene Lancer, *How To Know if You're a Victim of Gaslighting*, PSYCHOL. TODAY (Jan. 13, 2018), <https://www.psychologytoday.com/blog/toxic-relationships/201801/how-know-if-youre-victim-gaslighting>.

²³¹ HERMAN, *supra* note 39, at 8.

dreaming.” He was laughing, and then he says, “Stop overreacting. I wouldn’t hurt you. Stop overreacting.” And I would believe that I was overreacting: Right?. [Maybe] he didn’t really hurt me. I mean really?²³²

As one of the first author’s clients put it:

He found my most vulnerable point, a tiny kernel of insecurity in my soul, and he exploited it to trap me in a painfully confusing state of nearly total self-doubt. I spent more than a year working so hard to regain trust in my own perceptions and my own humanity. But now I find that the legal system doubts me too, even as I share my more painful and personal story. I get hurt again and again. It is painfully confusing and I find that it has caused a significant regression in my overall healing.²³³

These individual experiences are reinforced by the institutional gaslighting women experience in the form of system-based credibility discounts and experiential trivialization. When our official bodies of justice and law enforcement effectively collaborate in the same patterns utilized by perpetrators of abuse, survivors may be even more likely to doubt their own abilities to perceive reality and understand their own lives.

B. Harms Related to Access to Justice and Safety

The sense of institutional gaslighting that commonly accompanies the progress of abuse claims through the justice system has immediate and baleful consequences for survivors: the system itself becomes an impediment to, rather than a conduit toward, justice. Indeed, credibility discounts are analogous to other, more tangible obstacles that are already all too familiar to those who work in the domestic violence field, such as economic dependence, isolation, and fear.

First, as we’ve already seen, credibility discounting may discourage women from continuing to pursue justice or other forms of support. Having their claims met with system-wide denial and disbelief gives women ample cause to distrust, and then possibly avoid, the institutions ostensibly there to help them.²³⁴ As the Gender Bias Study of the Court System in

²³² *Massachusetts Family Court Study*, *supra* note 223.

²³³ Communication from client to Deborah Epstein (July 28, 2017).

²³⁴ Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution. Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 *AM. PSYCHOLOGIST* 575, 575 (2014). The secondary victimization of women seeking legal services in the aftermath of interpersonal violence is described by researcher Rebecca Campbell, who found that when survivors reach out for help, often at a time of great vulnerability and need, “they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help.” Rebecca Campbell, *The Psychological Impact of Rape Victims’ Experiences with the Legal, Medical, and Mental Health Systems*, 63 *AM. PSYCHOLOGIST* 702, 703 (2008); *see also* Platt et al., *supra* note 225, at 202; Heidi Grasswick, *Epistemic Injustice in Science*, in *ROUTLEDGE HANDBOOK*, *supra* note 80, at 313.

Massachusetts explains: “The tendency to doubt the testimony of domestic violence victims and to ‘blame’ them for their predicament not only hampers the court’s ability to provide victims with the protection they deserve, it also has a chilling effect on the victims’ willingness to seek relief.”²³⁵

A woman in the Massachusetts Family Court study captured this fatalistic process in heartbreaking detail:

[The court] didn’t believe [the abuse] . . . so I felt like it didn’t matter The way my case was handled, I am very afraid of [the government in] this state now I’m so afraid of all he needs to do is just file a motion and bang! He’ll get, he’ll prove me wrong, you know, I’ll get discredited again. So I just always keep a watchful eye.²³⁶

Perhaps most perniciously, each individual woman’s experience can have a large-scale chilling effect. As one advocate described it, “A judge discredits one woman, and it’s like a bomb that goes off in the community, affecting a hundred women. Within many communities, these stories spread like wildfire.”²³⁷

A woman in the Massachusetts Family Court study voiced much the same criticism:

[My advice to other women is:] Just don’t say anything about it. The way the system is now . . . you’ve got to talk to your priest, talk to your family, tell them your story of woe and you know, the fact that you’ve been abused. Have the support, get therapy if you need therapy, do talk to them. But don’t, don’t, don’t bring it into the courtroom, because . . . [the judge will think] ‘oh, that couldn’t have happened to you.’²³⁸

Such advice—editing one’s speech so that it includes only what the listener is ready or able to hear—is described in the philosophy literature as “testimonial smothering.”²³⁹

In the 2015 National Domestic Violence Hotline study,²⁴⁰ both women who had called the police and those who hadn’t shared a strong reluctance to turn to law enforcement for help. One in four women reported that they would not call the police in future, and more than half said doing so would

²³⁵ FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL & GENDER BIAS IN THE JUSTICE SYSTEM 405 (2003).

²³⁶ *Massachusetts Family Court Study*, *supra* note 223. In addition, women who do not receive the support they need from law enforcement are less likely to turn to law enforcement in the future. See Ruth E. Fleury et al., “Why Don’t They Just Call the Cops?: Reasons for Differential Police Contact Among Women with Abusive Partners,” 13 *VIOLENCE & VICTIMS* 333, 342 (1998).

²³⁷ Interview with Ronit Barkai, Assistant Dir., Transition House (Dec. 20, 2017).

²³⁸ *Massachusetts Family Court Study*, *supra* note 223.

²³⁹ Dotson, *supra* note 112, at 249.

²⁴⁰ NATIONAL HOTLINE SURVEY, *supra* note 106, at 9.

make things worse.²⁴¹ Why? Two-thirds or more said they were afraid the police would not believe them—or would do nothing, if they called.²⁴²

Credibility discounts and experiential trivialization harm women in an abundance of ways—up to and including the supremely destabilizing process of prompting women to question the truth of their own experience. Women are devalued and gaslighted from every direction, discouraging them from continuing to seek systemic support. Ripple effects discourage the broader community of women from seeking the help they need. And our entire society suffers from the failure to fully understand, credit, and value a substantial portion of the human experience. Together, these harms operate to form a formidable obstacle to women's healing, safety, and ability to obtain justice.

IV. MOVING FORWARD: INITIAL STEPS TOWARD ERADICATING CREDIBILITY DISCOUNTS IN THE JUSTICE SYSTEM

At this point, we have a fairly comprehensive sense of how the justice system and influential actors in related social service networks unfairly discredit women and their stories of abuse, and devalue their most difficult experiences. How can we recalibrate these core institutions to tear down the gauntlet of doubt, disbelief, and dismissal women face in their efforts to be safe and achieve justice?

Several forms of credibility discounting may be amenable to fairly straightforward interventions—specifically, those that derive from listeners' failure to understand a woman's experience of intimate partner violence. For example, gatekeepers within the justice system often lack information about the effects of violence-based neurological and psychological trauma on information processing and memory, about the way that potent courtroom triggers can affect witness demeanor, and about the ways survivors understand their options and prioritize their harms.²⁴³ The best way to cure these knowledge gaps is—of course—improved understanding. Intensive training could, in theory, allow individual judges, police officers, prosecutors, clerks, and social service providers to better understand the medical, mental health, and experiential correlates of domestic violence. Such education should help to eradicate those credibility discounts that are rooted in incomplete understandings.

A cautionary note, however, is in order here. For decades, antidomestic violence activists have engaged in intensive judicial training efforts throughout the country. Some individuals have absorbed this learning and are far more adept at avoiding knowledge-based pitfalls in assessing survivor credibility. For others, however, knowledge gaps persist despite exposure to

²⁴¹ *Id.* at 5.

²⁴² *Id.* at 4.

²⁴³ See *supra* text accompanying notes 19–95.

high quality training, raising doubts that training alone may be enough. Training must be accompanied by a genuine commitment to absorbing new and sometimes complex understandings about the world.²⁴⁴

Other forms of credibility discounting described above—particularly those rooted in negative stereotypes and bias—are more resistant to change and may require a more complex set of interventions. The cultural assumption that women tend to be improperly motivated by an outsized concern for financial, material, or child custodial gain—and the related assumption that women simply lack full capacity as truth-tellers—are longstanding and deeply held.²⁴⁵

Regardless of the type of credibility discount in question, change will not come easily; it will require a combination of motivation, awareness, and effort. The responsibility here lies with the listening audience—justice and social service system gatekeepers—to intentionally, consciously shift their assumptions. In Fricker's words, the listener must adopt "an alertness or sensitivity to the possibility that the difficulty one's [witness] is having as she tries to render something communicatively intelligible is due not to its being [a] nonsense or her being a fool, but rather to some sort of gap in [the existing interpretive] resources."²⁴⁶

The crucial first step is to shift away from an automatic, uninformed disbelief of women's stories—to begin, in other words, to distrust one's own distrust. Philosopher Karen Jones proposes the imposition of a "self-distrust rule": gatekeepers should allow "the presumption against . . . believing an apparently untrustworthy witness [to] be rebutted when it is reasonable to distrust one's own distrust or [one's own] judgments of implausibility."²⁴⁷

²⁴⁴ These conclusions are based on the first author's extensive experience in conducting trainings with judges, police officers, and prosecutors, as well as numerous conversations with other trainers in the field of intimate partner violence.

²⁴⁵ See *supra* text accompanying notes 112–168. A central challenge here is that many system gatekeepers are unaware of the gender-based stereotypes that are, in fact, shaping their perceptions and decisions. As long as these biases remain unconscious, change is unlikely. Psychologists interested in challenging unconscious prejudicial perceptions, also called "implicit biases," have shown that participants who develop both a strong negative attitude toward prejudice and a strong belief that they themselves are indeed prejudiced, are able to reduce the manifestations of their implicit bias. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164 (2007). One of the most prominent and well-researched approaches to bias reduction is called the "prejudice habit-breaking intervention." Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1267 (2012). Once participants achieve awareness of their own biases and of the damage such biases can cause, they use cognitive strategies to accomplish behavioral change, such as stereotype replacement, perspective-taking, and counter-stereotypic imaging. One notable study based on such strategies demonstrated that habit-breaking interventions produced long-term changes in key outcomes related to implicit racial bias, increased concern about discrimination, and greater reported beliefs that there could be bias present in participants' thoughts, feelings, and behaviors. These changes endured two months following the intervention. *Id.*

²⁴⁶ FRICKER, *supra* note 49, at 169.

²⁴⁷ Jones, *supra* note 167, at 164.

Let us be clear: We are in no way arguing that by distrusting one's instincts to distrust a survivor, state actors must go to the other extreme and automatically credit all survivor stories. Instead, system actors need only resist the reflexive presumption *against* crediting women's stories, make an effort to avoid false assumptions, overcome hermeneutic gaps, and open their minds to accepting a broader range of stories and storytellers. We might call this process one of cultivating a capacity for "virtuous listening."²⁴⁸

System gatekeepers can build this openness into their traditional approaches to assessing credibility. Contributing factors such as the internal and external consistency of story, as well as witness demeanor, can easily expand to accommodate new understandings. For example, a judge who notices temporal gaps in a survivor's story can resist the urge to automatically discount her credibility. Instead, the judge can ask follow up questions in an effort to obtain more concrete factual information and avoid making unjustified assumptions. Such questions might include:

- What kinds of injuries did you sustain?
- Did you ever feel unable to breathe for any period of time?

Additional questions might focus on obtaining information about the impact of trauma on the witness. For example:

- Are you able to remember the full story of what happened, from beginning to end?
- It's fine if you can't tell me what happened in complete detail; just tell me any specific part of this experience that you *do* remember.
- How would you describe your ability to remember what happened here? Do you remember some pieces, like visual images, smells, sounds, or anything like that? Tell me about those.
- Is your memory of what happened consistent over time? How does it change?
- Is this a good or a bad day for your memory of what happened? Do you sometimes remember more or less than what you've been able to recall today?
- Is your memory of what happened similar to or different from your memory of other events in your life? How so?

A gatekeeper listening to a woman describe her experience of abuse with either a flat affect or a tone overwhelmed with hysteria or fury might ask:

- I notice you seem completely calm right now. Does that reflect how you felt at the time of the events you're describing?

²⁴⁸ Jose Medina, *Varieties of Hermeneutical Injustice*, in *ROUTLEDGE HANDBOOK*, *supra* note 80, at 48.

- (If not): What do you think explains the difference?

or:

- I notice you seem extremely upset/angry right now. Can you help me understand what you're feeling, and why?

When receiving testimony focused on psychological, rather than physical abuse, listeners can use a prompt along these lines:

- You've talked about the psychological harm you experienced in your relationship. Was there ever physical violence? Can you help me understand why you have focused primarily on the emotional aspects of your experience?

When suspecting that a woman is improperly motivated by a desire to access housing/shelter, or to gain an advantage in a custody case:

- You've spent a lot of time explaining that you need to have a safe place to live. Can you help me understand why you've focused more on this issue than you have on the violence you've described?
- I see that you filed a permanent custody case a few weeks ago. Can you help me understand why you have filed your protection order case now? I need you to explain to me why you didn't file this case first.

To help counter the more general tendency to discredit women *as women*, a judge might take the issue on directly:

- One of the most basic things a judge has to do is to decide whose story to believe. In this case, like so many others, each of you is telling me a different story. Can you help me see the reasons I should credit, or believe, your side of the story, as well as the reasons I should not credit the story told by the other party?

The judge may ultimately find a woman's story implausible, or find her personally untrustworthy. But by engaging in a systematic reorientation of their beliefs, judges can begin to reverse unfair and automatic presumptions of distrust and thus avoid inflicting testimonial and hermeneutic injustice.

In addition, in cases where a judge or other system gatekeeper concludes that a survivor is, indeed, telling the truth, the gatekeeper should explicitly communicate that to her. In light of the frequency with which women face credibility discounts and the psychological harm such discounts impose, a counter-message of belief and support (where warranted) can be deeply cathartic.²⁴⁹

²⁴⁹ See *supra* text accompanying notes 218–223. Being believed is critical to a survivor's ability to heal. A judge's explicit statement that a survivor is credible can serve as a stark counter narrative

And judges must be held accountable for instituting such changes. Court watch programs should expand to include observations about individual judicial efforts (and failures) to look beyond surface indicators of credibility and ask questions targeted at more accurate assessments. Court watch reports, shared with the local judiciary and made available to the public, would create much-needed pressure to follow through with a change in existing credibility assessment tools.

Still, experience has taught us that judicial training has its limits; accordingly, suggestions for changing gatekeeper behavior are not enough. Reform efforts also must focus on improving survivors' access to powerful forms of corroborative evidence. The story of White House staff secretary Rob Porter serves as a potent reminder that a picture—there, one that showed his ex-wife's black eye—can dramatically reduce the initial credibility discounting imposed on women's stories of abuse.²⁵⁰ But survivors often lack such evidence. Many perpetrators routinely look through their targeted victim's phones, deleting any incriminating photos, texts, or voice mails that are stored there. Many women are afraid to maintain such evidence in the first instance, due to fear that discovery will lead to further abuse.

Recent technological innovations have created safe spaces for women seeking to maintain corroborative evidence. The SmartSafe+ mobile app, developed by the Domestic Violence Resource Centre in Victoria, Australia, enables survivors to create an online diary containing written, photographic, video, and audio entries that are stored on a cloud account, rather than on their phones.²⁵¹ It also contains guidance about the most important forms of corroborative evidence that can be useful in a courtroom.²⁵² On the phone itself, the app looks like a routine news feed. It can be downloaded, free of charge, at domestic violence advocacy organizations, where service providers have been trained to ascertain whether a survivor's phone is being monitored and ensure that the download cannot be detected.²⁵³

Efforts also are underway to develop online programs that use plain language to improve survivor access to justice.²⁵⁴ Such efforts could be expanded to educate

to her abusive experiences, reinforcing the validity of her own perceptions and helping to restore the sense of self-worth she may have lost.

²⁵⁰ See, e.g., Maggie Haberman & Katie Rogers, *Rob Porter, White House Aide, Resigns After Accusations of Abuse*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/us/politics/rob-porter-resigns-abuse-white-house-staff-secretary.html>.

²⁵¹ *Family Violence App Wins Inaugural Premier's iAward*, CIVIL VOICES (June 30, 2016) <https://probonoaustralia.com.au/news/2016/06/family-violence-app-wins-inaugural-premiers-iaward/> [<https://perma.cc/3PV9-5L4X>].

²⁵² See, e.g., SmartSafe+ Mobile App, <https://www.youtube.com/watch?v=o9tdxEr1nww> (last visited Oct. 16, 2018).

²⁵³ *Id.*

²⁵⁴ Brigitte Lewis, Lisa Harris & Georgina Heydon, *The Conversation We Need to Have: Victoria Has Made Progress on Tackling Domestic Violence, But There Is Still Much to Be Done*, ASIA & PAC.

survivors about the importance of focusing courtroom storytelling around applicable legal standards. Community education focused on storytelling could prompt women to highlight their experiences of physical harm, for example, helping them to focus on what is most important for their legal case, rather than what might be most emotionally salient to them on a personal level. In addition, online programs and in-person advocates could help women think through how to effectively communicate how trauma might be impairing their ability to effectively tell their story in court, or to any system gatekeeper.

Together, these initial reforms could have a substantial individual and institutional impact, with a concomitant diminution in discounting women's credibility. But, as noted above, two prerequisite conditions—whether in reducing the “willful interpretive gap” in understanding women's experiences, in eradicating cultural stereotypes of women as inherent untrustworthy, or in taking women's experiences seriously—are the *acknowledgement of gender-based bias, and the will to change*.

Progress is possible. The #MeToo moment represents the beginning of a shift in cultural understanding and good will. The floodgate of stories from blue collar workers to Hollywood A-listers has forced society to face the realities encountered by so many women in the American workplace. Similarly, the #WhyIStayed campaign brought into sharp relief the ways that women are often trapped in abusive relationships. And the January 2018 sentencing hearing in the criminal prosecution of Larry Nassar, a sports therapist at Michigan State University who sexually assaulted more than 150 female students over two decades, raised national awareness about women's experiences of sexual assault.²⁵⁵

Perhaps most importantly, the Nassar case represents an initial effort to break crucial barriers directly related to credibility discounting. The women Nassar exploited told the court and the wider world, explicitly and in painful detail, their stories of being discredited by the institutions ostensibly designed to help them. Over 150 women from Michigan State University (“MSU”) came forward with story after story of how they

told MSU administrators, explicitly and more than once, that Nassar was sexually abusing them during medical appointments. [The administrators] listened to women describe the rubbing back and forth, the digital penetration that sometimes lasted 15 minutes, the ungloved hands. But when

POL'Y SOC'Y (Sept. 6, 2016), <http://www.policyforum.net/the-conversation-we-need-to-have/> [<https://perma.cc/5AQA-697Z>].

²⁵⁵ Caroline Kitchener, *Larry Nassar and the Impulse to Doubt Female Pain*, ATLANTIC (Jan. 23, 2018), <https://www.theatlantic.com/health/archive/2018/01/larry-nassar-and-the-impulse-to-doubt-female-pain/551198/>.

those women said there was a problem—that this didn't feel right, that they were hurt—the administrators didn't believe them.²⁵⁶

Instead, school administrators consistently discounted the credibility of Nassar's victims, telling them: "He's an Olympic doctor"; or "No way"; or "[You] must be misunderstanding what was going on."²⁵⁷ When asked about the women's reports of abuse, the university's Title IX investigator, Kristine Moore, said "the women likely did not understand the 'nuanced difference' between proper medical procedure and sexual abuse."²⁵⁸

The sentencing hearing in this case was a groundbreaking opportunity for women to share both their experiences of sexual assault and, in painful detail, their experiences of credibility discounting. The seven days of hearings were cathartic for the survivors; they also shone a light on the institutional gaslighting that women routinely experience.²⁵⁹ It is time to build on the momentum of this new awareness and take concrete steps to implement meaningful reform in the justice and social service systems.

CONCLUSION

Women experience credibility discounts in their homes and in the systems they turn to for help. As the torrent of #MeToo stories have made clear, these same discounts pervade workplaces where women are sexually harassed. The Larry Nassar case further shows that these discounts are rampant among campus administrators responsible for handling sexual assaults. The routine experience of credibility discounting indeed is an integral part of male abuses of power, making those experiences far more painful and difficult for women to surmount.

But assaults on women's credibility also exist independently of those abusive contexts. In fact, women routinely face credibility discounting in multiple spheres of their lives. As we have worked on this essay, we've started to notice credibility discounting in our own lives everywhere we turn. When we've talked to colleagues and friends about this project, they too reliably respond with a story of their own, typically from the past few days.

For example, one colleague—an extremely well-known legal theorist—exclaimed, "That happens to me, all the time!"²⁶⁰ She told us the story of a dinner party she had just attended, where the conversation turned to the question of who would succeed to the presidency if Donald Trump, Mike Pence, and Paul Ryan were all somehow removed from office. Our colleague

²⁵⁶ *Id.* (emphasis added).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Sophie Gilbert, *The Transformative Justice of Judge Aquilina*, ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/>.

²⁶⁰ Thanks to Professor Robin West for providing us with this story.

(a woman) volunteered that she'd been thinking about this quite a bit, and that the next person in line was Orrin Hatch—the President Pro Tempore of the Senate. The other guests responded with deep skepticism: “That can’t be right,” etc. She insisted that she was certain, but she was ignored. Several guests pulled out their phones and started to Google the question; others brainstormed possibilities among themselves. Eventually, the group concluded that the next in line was . . . Orrin Hatch.²⁶¹ No one acknowledged that our colleague had ever even suggested this answer. Not only was there no apology for doubting her; it was as though she had never spoken at all.

Other friends and colleagues shared experiences where they reported unusual physical symptoms to male medical professionals. They were concerned, in advance, that they might be dismissed as “hysterical” or as exaggerating their experiences, and, in fact, they often were told that the problem was likely “all in their heads.”²⁶² Gender-based credibility discounting is a serious concern in the medical field: among emergency room patients complaining of abdominal pain, women are thirteen to twenty-five percent less likely than men to receive high-strength “opioid” pain medication; in addition, women wait an average of sixteen minutes longer than men to receive treatment.²⁶³

Indeed, credibility discounting stands on its own as an essential aspect of the female experience. Doubt, skepticism, and trivializing are familiar phenomena to women. In other words, credibility discounting and experiential trivializing are distinct injuries women experience, as part of, and *in addition to*, other forms of gender-based, discriminatory harms.

It is time for a credibility-discounting #MeToo movement. Women need to come forward in massive numbers to tell their stories of discounts based on

261 This story has a sharp ironic edge. Orrin Hatch took a leading role in the Clarence Thomas confirmation hearings before the Senate Judiciary Committee. *See, e.g., Thomas Hearing Day 1, Part 1, C-SPAN*, at 48:37–57:02 (Oct. 12, 1991), <https://www.c-span.org/video/?21974-1/thomas-hearing-day-1-part-1>. Reflecting on these hearings nearly twenty years later, in an interview with CNN, Hatch reasserted his view that Anita Hill fabricated her story about Thomas’ harassment, but “talked herself into believing it.” Hatch explains:

I believe that Anita Hill was an excellent witness. I think she actually believed, and talked herself into believing, what she said. There was a sexual harasser at that time, according to the sources I have, and he was her supervisor. He just wasn’t Clarence Thomas. And I think she transposed that to where she believed it . . .

Why Ask for Anita Hill’s Apology Now?, CNN (Oct. 20, 2010), <https://www.youtube.com/watch?v=6Og0LRu028Q>.

262 For a more in-depth look at this type of credibility discount, see Jennifer Brea, *They Told Me My Illness Was All in My Head. Was It Because I’m a Woman?*, BOS. GLOBE (Dec. 27, 2017), <https://www.bostonglobe.com/magazine/2017/12/27/they-told-illness-was-all-head-was-because-woman/47zuihgBfZqPdNe7S40hSJ/story.html>.

263 Esther H. Chen et al., *Gender Disparity in Analgesic Treatment of Emergency Department Patients with Acute Abdominal Pain*, 15 ACAD. EMERGENCY MED. 414, 414 (2008).

story plausibility and storyteller trustworthiness, as well as ways in which their experiences have been minimized and dismissed, in an effort to force society to see with clarity this distinct form of gender-based harm.²⁶⁴ And perhaps once the scale of this injustice is made manifest, we can, at long last, enact a body of genuine institutional remedies, so that women already victimized by abuse, sexual assault, and harassment need not fear that the legal system and the broader culture is set up to perpetuate, rather than alleviate, their harms.

²⁶⁴ Playwright Timberlake Wertenbaker puts it well:

What the #MeToo moment is besides sexual harassment is the end of women being quiet. And that is almost more important—that is, the ability and the right of women to speak up about what's happened to them or what they think in general, without being told to shut up I hope that's what lasts forever."

Nelson Pressley, *Second Women's Voices Theater Festival Arrives as #MeToo Is in the Spotlight*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/entertainment/theater_dance/second-womens-voices-theater-festival-arrives-in-metoo/2018/01/04/bfadec08-e66e-11e7-833f-155031558ff4_story.html?utm_term=.fed8f623d01b.



South Carolina Bar

Continuing Legal Education Division

Tying It All Together– GAL Report Writing Best
Practices

Jenny Stevens

TYING IT ALL TOGETHER: WRITING THE GUARDIAN AD LITEM REPORT

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INTRODUCTION

Pursuant to South Carolina law, the Guardian ad Litem is required to submit reports to the parties and the Court. The statute requires **clear and comprehensive written reports, including, but not limited to a final written report regarding the child's best interest.** It also sets forth a deadline for the “final written report” as **20 days before the final hearing unless reduced to 10 days by consent of the parties or leave of the Court.** The statute further sets out expectations such as the requirement to **list the names, addresses, and phone numbers, of those interviewed during the investigation,** and that the Guardian must never make **any** recommendations as to which party should have custody.¹ Furthermore, the report **must** comply with the South Carolina Rules of Evidence².

Given all the rules, restrictions, and deadlines, it's no wonder writing the GAL Report is often the most dreaded of tasks for any Guardian. I admit, I have dreaded it myself more times than I care to count. It can be worse than any term paper, thesis, or legal brief you ever had to write in school. So much can ride on that one document, not to mention you will be subject to examination, under oath, at trial for anything you include (or choose not to include) in the report. Your presentation of the case facts may very well change the status quo for an entire family. Your recommendations for services, suggested restraints, or advice on how best to handle the issues you've spotted within the family may be ordered to the letter, or ignored, by the Court, thereby setting you up for the ire of disgruntled parents and/or children if your suggestions or advice fail miserably once the next hearing or the case is over.

¹ S.C. Code Ann. §63-3-830(A)(6) *emphasis added*.

² Hint: hearsay is not allowed unless allowable under the hearsay exception rules.

If one side perceives your investigation to be one-sided or biased, you may feel as if you are being skewered by one attorney (or both) when your examination begins during the trial. Then again, your take on the case may uncover a perspective which was necessary to end the fighting and lead to an amicable solution without the need for trial. Your suggestion of therapy may be exactly what was needed to heal the open wounds of a divided family and allow healthy co-parenting to begin. The voice you offer the child may be heard above all else by the judge, giving him or her the ability to craft an Order designed specifically with that child in mind - one that sets out crystal clear expectations for the parents in order to protect the child going forward.

Anyone who has handled contested child custody cases for more than a few years will know there are certain reports that are better than others; some that generate more positive feedback from judges and attorneys; and which present the required information more effectively, creatively, and/or efficiently than most. I have outlined the best practice pointers below for how to tie all the information you've been given, discovered, and pieced together throughout your investigation to craft the most useful and admissible document possible for the parties, the attorneys, and ultimately, the Court to use in making decisions for the child or children you represent.

START WITH THE BASICS

Use the first paragraph of a report to set forth your name, the details of your appointment, and the purpose of the Report. For example:

NOW COMES the undersigned Guardian ad Litem, A. Perfect Gal, and submits the following as her [Preliminary / Final / Interim / Supplemental] Report.

*The Plaintiff/Mother is currently Pro Se and Defendant/Father is represented by Joe Attorney, Esquire. The parties along with Mr. Attorney, consented to the appointment of a Guardian ad Litem (Order Appointing GAL filed January 2, 2014). This Report is based upon the investigation to-date together with the evidence and information before me. **I specifically reserve the right to change my recommendations, or any portion of this Report based upon additional evidence which may be brought before me and/or testimony which may be offered at any hearing or at trial.***

The final sentence is implied within the statute as a “right” of the Guardian, it is a good idea to include this language for the benefit of the parties who may not understand that the “Final Report” is never truly ‘final ’until all the testimony and evidence has been presented to the Court.

You may also consider including a summary of any attachments included with the report, if any, for quick and easy reference during or following the hearing. For example:

This report includes the following exhibits:

- *Exhibit A: SLED Background Check Report on Father*
- *Exhibit B: SLED Background Check Report on Mother*
- *Exhibit C: SLED Background Check Report on Father’s Girlfriend*
- *Exhibit D: Home Visit photos from Mother’s home*
- *Exhibit E: Home Visit photos from Father’s home*
- *Exhibit F: Child’s Final Report Card from last year (2nd grade)*
- *Exhibit G: Child’s Most Recent Report Card from 2nd Quarter, 3rd Grade*
- *Exhibit H: Emails between GAL and Mother re: concerns about Child’s behavior following visits at Dad’s home and meeting new girlfriend*
- *Exhibit I: Emails between parents regarding discussion about child meeting Father’s new girlfriend without telling mom*
- *Exhibit J: Email to parents from School Guidance Counselor re Concerns about Child*

By listing the basic information along with exhibits on the front page of the report, it is easy for the Judge and the Attorneys/Parties to skim over what is included and quickly flip to an exhibit if they are looking for something specific during the hearing. It’s also much easier for you to refer to various exhibits during your own testimony without wasting time flipping through the report or having to look to see what’s behind each exhibit tab while testifying.

SET THE SCENE FOR CONTEXT

Every report should include include a brief procedural history, or “Background” section, explaining how the action began; who the parties are; how they are related³; the allegations of fault; the type of custody (or adoption) each party is seeking of the child; the other child-related relief

³ Depending on the type of case you’ve been appointed to, it may be necessary to explain the relationships of the parties to each other and to the child who is the subject of your report.

sought by each party; the type of hearing which resulted in the GAL appointment; and any deadlines contained within that appointment. This opening information should be updated each time a report is filed with the Court. For example:

The parties were never married but they have one child together, namely, Sweetie Pie Smith, born December 30, 2019, now age 3. This action commenced with Plaintiff/Mother's filing of a Summons and Complaint for Custody Modification on December 1, 2022. The Defendant/Father filed an Answer and Counterclaim for Sole Custody on December 15, 2022. Plaintiff/Mother filed a "Plaintiff's Answer" (sic) on December 20, 2022. An Emergency Hearing was held on January 4, 2023. My investigation began January 4, 2023, upon my notification of my appointment by the Court and has continued since that time. The issues of custody, visitation, and child support are still contested. This report is submitted as the preliminary report required by my Order of Appointment, which required an immediate 30-Day investigation and submission of the report for the Court's review. The Emergency Hearing ruling has been deferred pending the submission of this report.

Consider using this section to also include photos of the child and the parties along with their name(s)⁴, age, and job title/place of work. By introducing the people discussed in your report early on, you assign an identity to them -- especially the child -- for the reader, which personalizes everything you present from that point forward.

Best Practice Note: When including photographs, however, be sure to also include any necessary context for the photo if implications could be made that would otherwise not be true to the facts of the case. For example, in one of my first cases, a child had marked on her face with a red marker while coloring just prior to my home visit. The marker, unbeknownst to the parent and child, was a permanent Sharpie marker. Upon seeing the marker on the child's face, the parent had tried, in vain, to wash the mark from her face, but the ink did not come off. In the attempt, however, the red ink did smear and was spread across the child's cheek. When I took my customary picture

⁴ The child's name should be properly shortened to a confidential identifier in accordance with [Court Rule 41.2](#).

of the parent and the child together at the end of the visit, the marker stain actually appeared to be a visible injury to the child's face. By adding a simple note underneath the photo to give the mark context, the parties were assured that the attorneys and/or judge would know exactly where the mark originated and that the mark did not indicate any neglect or abuse on the part of the parent.

INVESTIGATION – CONCERNS EXPRESSED BY EACH PARTY

Before your report gets into the details of your home visits, witness interviews, and any other evidence, it is usually very helpful to outline the allegations each parent has presented both to the Court and to you. While this is certainly very relevant information for the Court to have as part of the Guardian's testimony, as a practical practice tip, this is a great way to make sure the investigation and the resulting Report addresses each and every allegation to the fullest extent necessary considering the facts of each case. For example:

This action was initiated by Mother, who in her Complaint and "Plaintiff's Reply" has alleged that Father, who is the current primary custodian of the minor child, is involved with a known drug dealer (Father's Girlfriend), uses drugs, and is a habitual consumer of alcohol. Further, Mother alleges that through these actions, Father has exposed the minor child to drugs and various random women. Based on Mother's Pro Se pleadings filed in this action Mother has indicated she wants expanded visitation with the minor child, however, during the investigation and information received from Mother, it seems to this Guardian that she is seeking a modification in the current custody arrangement with a change to supervised visitation for Father.

According to Father's pleadings and information received from the father, the mother is a drug user and surrounds herself with "that lifestyle." He also claims that Mother never actually wanted the child and was not pleased when she found out about the pregnancy. He alleges that Mother's boyfriends are in and out of the home with such frequency, the child has trouble remembering their names. Father claims to be engaged to be married to Sally Prego and states they are expecting a child which is due in May 2023. Father alleges Mother's home has many safety concerns such as an empty in-ground pool with no safety fence; several cars on blocks around the yard; and that her water and power have been disconnected several times in the past several months. Father is seeking to maintain the current sole custody Order, but a modification to Mother's visitation schedule to only allow limited, supervised visitation with Mother until she can provide proof to the Court the above issues have been properly addresses and resolved.

INVESTIGATION - INTERVIEWS WITH PARTIES

This section should be used to expound on the allegations and relief sought by each party from within the pleadings. When interviewing the parties, ask specific questions related to their allegations and the result they wish to achieve with the litigation, but also ask for documents, pictures, and other evidence which may support their allegations. If any of these items are

produced and deemed to be both relevant (i.e., not excluded by the Rules of Evidence for any reason) consider including them as an attachment or exhibit to the Report. However, if your investigation has not produced any evidence to support an allegation raised within the pleadings, the *lack of supporting evidence* should be noted, as well.

Best Practice Note: If you are making a note that no supporting evidence has been provided or found, always include a statement inviting the parties and attorneys to provide such evidence to you, if it exists. This serves as a great reminder to the parties that you need evidence to review the credibility and veracity of the allegations. It will also be a good way to keep your own records straight at a final trial of information that was shared with you during the case versus information that did not come to light until the end of a case that might change your assessment of what's in the best interest of the child.

It's common that the parties will have many more allegations and concerns which were not fully described within the pleadings or affidavits presented to the Court. This section should be used to concisely explain those additional concerns to the Court. Many times, this is a critical section for the mediator in the case to get a full picture of the contested issues and the dynamics that may or may not allow an agreement to be reached. This section will be most powerful if you describe the concerns in the parties' own words, including documents or other evidence that may have not been included in the Temporary Hearing packets. Many mediators request a copy of the GAL Report prior to mediation, therefore including detailed explanations of major concerns will allow the mediator to make sure those issues have either been resolved prior to mediation or that suitable resolutions are explored during the mediation process. For example:

Father's Concerns: *Father has indicated that Mother has engaged in numerous relationships with various men, several of whom are known drug dealers, and has been arrested herself for drugs and/or alcohol related charges. He states that he has not been an eyewitness to these issues but has learned of them through their mutual friends. Father further states that Mother was recently married to "Terry Bull" for a few months right after Father and Mother separated, but she divorced very quickly. Father did not know the state or county of this marriage and could not produce any evidence of the marriage or divorce. Further, no evidence was found to support this allegation during my investigation. If such evidence is found, this Guardian requests it be forwarded to her office for review as soon as possible.*

Father is also concerned about Mother's ability to support the minor child financially as well as providing adequate living arrangements. He believes Mother and child are currently living in a 2-bedroom home with a total of seven (7) people. He states he has never actually been to her home. He also believes Mother has had the child in the vehicle with her while she was intoxicated and even once when she was arrested for DUI. Father produced a mugshot printed from Mugshots.GoUpstate.com along with a photocopy of an Incident Report (see Exhibit D) which noted that the minor child was taken into protective custody at the time

of Mother's arrest on June 1, 2021. This is when the child was initially put in Father's sole custody following the related SCDSS action filed against Mother.

Father also expressed his concerns that Mother is exposing the minor child to her current boyfriend, Lex Luther, and that she allows the minor child to call Mr. Luther "daddy", instead of telling the child it's inappropriate to call other men "daddy". Father produced printouts from a Facebook page which seems to be Mother's account of the child and another man with the caption "With Daddy."

Mother's Concerns:

INVESTIGATION - HOME VISITS

Home visits can be a tricky area to describe diplomatically given the variety of homes a Guardian may be tasked with visiting during any given case. Therefore, the best policy is to stick with pictures whenever possible to allow the reader to draw their own conclusions.

However, when specific concerns have been raised about the home by the parties or the Court, the Report must include the findings of the investigations and the conclusions the Guardian has reached based on those findings. It is also important to remember to include details in the Report which are not able to be seen in the photos you include such as the number of animals living in the home; the odor of the home; all occupants of the home and where each person sleeps; criminal backgrounds of other occupants (*if relevant*); safety concerns, especially when a picture does not do it justice; the distance from the child's school and/or activities; the distance between the parties' homes, especially when one party is asking for frequent transfers of the child during the school week; the number of sexual offenders who live within one mile of the home; etc. Typically, it is easy to include a clear picture of the exterior of the home within the body of the report, but when there are several photos to include from each home, it may be better to include those photos as an attached exhibit and simply refer to the exhibit within the body of the home description. For example:

Mother's home is a 3-bedroom, 2.5-bathroom two-story home located in the Sunny Acres neighborhood of Pleasantville, USA. She lives approximately two miles from the child's elementary school and 5 miles from the baseball field where the child's baseball team practices and holds its home games. The child's four best friends also live in the three homes closest to Mother's home.

While the home certainly appears from the exterior to be a typical middle-class home with ample safe play areas for the child, the interior of the home does have several areas of concern. Each bathroom cabinet and a cabinet located in the kitchen area contained multiple prescription pill bottles - some empty, some just filled, and some partially empty. Some prescriptions were for Mother, but others were written for Mother's boyfriend and an unknown person that Mother refused to reveal why that person's medicine was in her cabinet. Each cabinet was within easy reach of a child or a child standing on small stepstool. The prescriptions were for Oxycodone for "pain" (Mother and Boyfriend - 6 bottles); Triam for "thyroid

condition” (Mother - 4 bottles); and Vicodin for “pain” (Mother and Boyfriend - 10 bottles). The unknown person’s prescription bottle was written for Adderall for “ADHD” (See attached Exhibit K for all photos taken during this home visit).

The powerful pain medicines along with a bottle of stimulants under the name of a person with an unknown relation to the mother and her boyfriend, creates obvious concerns. It’s important to note that the thyroid medication listed “serious life-threatening” side effects if ingested “by those with normal thyroid conditions.” One bathroom cabinet containing these bottles is the bathroom used by the child for normal hygiene routines. The kitchen cabinet containing these bottles was the cabinet immediately next to the cabinet containing the child’s breakfast foods and snacks, which the child admitted he can access “whenever he is hungry.”

INVESTIGATION - WITNESS INTERVIEWS

Witness interviews can encompass a lot of information so it is very important to include subheadings within this section to clearly delineate which allegations or concerns your Report is addressing in that section. For example, you may have subheadings like “Abusive Treatment of Mother & Child”, “Drug/Alcohol Abuse”, “Nutritional Needs of the Child”, “Medical Neglect of the Child”, “Academic Concerns”, etc.

Under these subheadings, try to only include summaries of what each witness revealed. For example, the statute requires the GAL to report facts and conclusions drawn from those facts, so the summary may report that I interviewed Mr. Jones as a witness for Mother and that Mr. Jones offered many specific dates, times, and places where he witnessed Father being verbally abusive toward Mother and child. Those dates, times, and places coincided with the information gathered from several other witnesses and therefore, I found Mr. Jones to be a credible witness.

With witness interviews, be sure to also include any observations you make during the interview such as:

Father listed Jane Doe has the only non-familial witness who had first-hand knowledge of the abuse allegations raised by Mother, however Ms. Doe rescheduled her appointment with me four times and when she finally arrived at my office, she had a noticeable odor of alcohol about her, was very fidgety, seemed unable to sit still in her chair. She also failed to give any specific first-hand information regarding those allegations. Therefore, I’m unable to ascertain the veracity of the information she provided and I did not find her to be a credible witness in this matter.

Also, when interviewing the parents, if one parent seems fixated on only the negative attributes of the other parent, rarely discusses the child, or turns every question about the child into an attack on the other parent, be sure to note that pattern for the Court. However, if this pattern is only noted in the beginning of the case, but continues to taper off throughout the case, hopefully as the feelings of anger cool and a healthier co-parenting relationship develops, be sure to also note that change for the Court. It is always important to highlight the positive or negative progression of each party through the case, instead of only the worst highlights present at the beginning of the case, in order to give the Judge some insight into how litigation is affecting the parties, the child, and which problems may be long-lasting or made worse with protracted litigation.

INVESTIGATION - INTERVIEW(S) WITH THE CHILD

The interviews with the child should also be highlighted, however much care should be taken to avoid direct quotes from the child unless absolutely unavoidable. The Report will almost certainly be read and examined and picked apart by both parties, who once they read the child's actual words, may react poorly thus possibly affecting the child's relationship with that parent forever. Be very careful with how you present his or her preferences, also. The child may have a very strong preference to live in one home over the other, but it can be stated more delicately, such as *"Little Johnny prefers to spend time at Father's home, but he loves his mother very deeply and looks forward to his weekends and long summer break at her home."*

Whenever there are surprising or strongly held views expressed by the child, especially when supported by other information gathered throughout your investigation, quotes from the child may be necessary and unavoidable. However, a very smart Guardian (M.J. Goodwin) once advised, and my experience supports this as well, to always warn the child, if age appropriate, that you will be including those words in your Report to the Court. The kids assigned to any Guardian are typically going through one of the worst times of their lives, one in which they have little to no control over, and they have suffered enough from "surprises" from the adults closest to them. If the Guardian is going to be a true advocate for them, the Guardian needs to be as honest as possible, whenever possible with the child so he or she knows what to expect and that their Guardian can be

trusted. The Guardian may very well be the only person who keeps his or her word during some of these cases, so do everything possible not to break that trust.

Always try to round out your child interview sections with some positive observations and conclusions about the child. Not only will that help smooth the waters with the parties, especially if some hard blows have been delivered to their case elsewhere in within the Report, but also because it is important for the Court to hear and know the positives about every child before them. No matter how dysfunctional a family is, or how “messed up” the child may seem to others at the outset of the Guardian appointment, I have yet to meet a child that does not have at least one redeeming quality about him or her. Highlight the positive and make sure to say it verbally on the record whenever possible, also. It is not uncommon to hear about those parents who finally settled their custody dispute at an early mediation because the Guardian’s report reminded them that, if nothing else, they had managed to create a spectacular human being together and they decided they didn’t want to do anything further to “screw the kid up.”

CONCLUSIONS AND RECOMMENDATIONS

According to the statute, the Guardian is permitted to draw **factual conclusions** from the investigation and is also permitted to make certain recommendations, **but they are prohibited from making any recommendation “concerning which party should be awarded custody, nor may the guardian ad litem make a recommendation as to the issue of custody at the merits hearing unless requested by the court for reasons specifically set forth on the record.”**⁵

A good policy to follow for this section is to summarize quickly the factual conclusions found throughout your report and then offer suggestions for the Court to consider when making its Order, whether Temporary or Final. If you have educational materials from well-credentialed or recognized sources of expert information that directly related to the recommendations you are offering for the family, attach those materials as an exhibit for the Court’s review. For example:

Conclusions and Recommendations of the GAL: *Based on my investigation and my review of all the relevant pleadings, affidavits, witness statements, and other evidence in this matter, I have made the following conclusions:*

⁵ See S.C. Code § 63-3-830(A)(6), emphasis added.

- (1) *The parties separated on or about _____. The minor child, Suzie Q, lived primarily with Mother until the DSS Final Order in a previous matter dated _____, changed custody to Father and gave Mother a “standard” every other weekend visitation schedule.*
- (2) *I made the following observations of Mother...*
- (3) *I made the following observations of Mother’s home...*
- (4) *During my observations of Mother and child together, I noticed...*
- (5) *I made the following observations of Father...*
- (6) *I made the following observations of Father’s home...*
- (7) *During my observations of Mother and child together, I noticed...*
- (8) *The child’s school teachers have made the following concerns about the child known to this Guardian...*
- (9) *Suzie Q loves playing softball and has practice four (4) times a week after school during the season and twice a week in the off season. Her team has won several awards and she is likely to be awarded an athletic scholarship based on her skill in this sport.*
- (10) *Father introduced Suzie Q to the sport, and he has been the primary parent to adhere to Suzie Q’s practice and game schedule. Mother has delivered Suzie Q to practice late 15 out of the last 18 practices which were scheduled during Mother’s time. She has also not attended 5 of the last 7 games. Father has never been late to a practice or missed a game. Father’s girlfriend is a strong supporter of the minor child in this sport and is also the assistant coach to the child’s team, having played the sport herself at the collegiate level.*
- (11) *Suzie Q is a 7th grader at Pleasantville Junior High and maintains a straight-A average. She has expressed an interest in enrolling in AP level classes once she reaches high school.*
- (12) *Both parties submitted to drug tests (See Exhibit L). Father’s test was negative. Mother’s test was positive for marijuana, cocaine, and amphetamines. She has denied ever trying or using these drugs, but I did observe a prescription bottle in her kitchen cabinet for Adderall, but the bottle had an unknown person’s name on it, not Mother’s name.*

Therefore, this Guardian makes the following recommendations for the Court’s consideration:

- (1) *That the Court consider requiring Mother to submit to random drug tests with such results being provided directly to the Guardian and the attorneys of record.*
- (2) *That the Court consider Suzie Q’s extracurricular activities and team obligations in making any decisions to change or modify the current custody and visitation Order.*
- (3) *That the Court take into consideration the safety concerns which were noted in Mother’s home.*
- (4) *That the Court consider requiring Mother to take a parenting class such as _____ or _____ offered locally. (See attached brochures at Exhibit ____).*
- (5) *That the Court consider requiring the parties to enroll in a service like Our Family Wizard to better track and manage their co-parenting communication.*
- (6) *That the Court consider the witness statements about the people the mother is exposing the child to on a regular basis, as well as the child’s statements about her own feelings about these people when evaluating whether to require Mother’s visitation to be supervised.*

WHAT DOES NOT BELONG IN THE GUARDIAN’S REPORT

HEARSAY - A Guardian’s report must comply with the Rules of Evidence, but because the Guardian’s investigation may involve interviews with countless witnesses who may never be called to Court, the Guardian should put the attorneys on notice at the time of the submission of the

Report that hearsay may be present, and what the purpose of the hearsay is within the Report (i.e., necessary for context of other statements, etc.).

If the attorneys make an objection to those statements or pieces of information, the Guardian will know to subpoena that witness to trial, or find another way to corroborate the information, if their contribution or the facts they revealed to you are particularly relevant to the Court's ability to determine the best interests of the child involved.

RECOMMENDATIONS AS TO CUSTODY AND/OR VISITATION - As discussed above, the GAL statute in South Carolina specifically **prohibits** this unless called upon to do so by the Court, so don't do it. Plain and simple.

INCOMPLETE OR OUT OF CONTEXT INFORMATION - One of the worst things a Guardian can do is to eliminate or fail to disclose important contextual information. The Guardian is required to conduct an independent investigation. Independence becomes easy to attack when the Guardian refuses to consider information or willfully does not present relevant information presented by one party or the other simply because it does not line up with the Guardian's initial impression of the case, or the Guardian has formed a personal dislike of anyone in the case.

If the parties have each accused the other of alienation or other abusive behavior but your Report only includes information supporting one side's allegations about the other parent, and none of the information provided to support the allegations against the other, your Report will not be balanced or independent. **Best practice tip:** When in doubt, include the information presented to you and use facts and professional observations to give context to the veracity or credibility of the information. It's always better to include too much information, rather than to exclude information that is later deemed relevant and important to the matters at issue.

PERSONAL CHARACTERIZATIONS - As previously discussed, the stakes are high in any contested custody case, therefore the Report of the Guardian is an essential piece of the puzzle. This fact alone should imply that as Guardians, we owe a high standard of care and candor to the parties and to the Court. While Guardians are not currently governed by the same specific ethical guidelines that govern the traditional attorney-client relationship, we are held to ethical and statutory obligations to: (a) maintain our independence in any case in which we are appointed to serve, (b) present truthful, accurate, and comprehensive reports of our investigations and

conclusions, and (c) use resources as efficiently and effectively as possible to carry out the duties expected by the Court.

This means, when making observations about the homes, the parents, other parties, the children, or even witnesses within your report, you must be very careful to not interject your own personal biases, opinions, lifestyle choices, religious beliefs, moral code, or any other subjective characterizations into the analysis. Below are examples of improper statements seen in Guardian reports. Each statement has been written as it was presented to the Court within the Report (A), followed by (B) the proper way to submit the same information to the Court.

1(A): Throughout my investigations, Mother was lazy, unmotivated, and a drunk.

1(B): Each time I met with Mother (on January 4, 2023; January 10, 2023; and January 15, 2023) she seemed unwilling to complete the requests I made of her regarding gathering and submitting information needed to complete my investigation. She admitted to me on January 10, 2023, that she rarely woke up in time to get her child to school or sports practices on time. Further, when she presented herself at our two office meetings (January 4, 2023, and January 15, 2023), I observed a strong odor of alcohol on her person. She indicated that her boyfriend drove her to both appointments, which I verified when I escorted her to the parking lot after each appointment to ensure she was not going to be operating a vehicle in her condition.

2(A): Father lives in a perfect, picturesque home in which every child dreams of growing up, complete with a white-picket fence and a swing set in the backyard.

2(B): Father lives in a 3-bedroom, 2.5-bath single family home in the gated community of Peaceful Acres. His home was well-furnished, clean, and very organized. The home's landscaping was manicured and well-maintained. The backyard was spacious and includes a swing-set for the child to play.

3(A): Father has a track record of not being involved in the life of one of his older children. He has previously relinquished his rights to an older child by choice.

3(B): Father, who is now 35 years of age, admits to voluntarily terminating his rights to a child born out of wedlock to his high school girlfriend over fifteen years ago. His relationship with the mother ended and the mother had married her college boyfriend. Father voluntarily terminated his rights a year later and allowed the mother's husband to adopt the child as he felt it was in the best interest of the child to do so.

It should be clear that the **way** these statements are worded can be **very** powerful, indeed. Each statement technically delivers the same, or most of the same information, but the language used to deliver the facts can be damaging both to the Guardian's position of neutrality, but also to the Court's ability to draw **accurate** conclusions in the case.

IMPROPER FORMATTING - All pleadings and submissions to the Court must comply with Rule 10(d) of SCRCP which states that *"...papers shall be on legal cap paper, eight and one-half by eleven inches in size. They shall be plainly written with **not less than one and one-half spacing between the lines**. Each page shall be **numbered consecutively**, and pages shall be fastened at the top so as to read continuously. Papers in handwriting or typewriting **must have a blank margin of an inch and one-half on the left...**"* (emphasis added).

The Guardian who adheres to the statute and conducts a thorough and comprehensive investigation should want to make sure the parties, the attorneys and, most especially, the Court actually reads and considers all the information contained within the Report. Why make it hard for them?

There is nothing more daunting than to be walking into Court and being handed a 6-page, single spaced report from the Guardian you've never seen before. There's just no way to skim and comprehend all that information that quickly. And if there's no headings or other organization to describe what's contained within the Report, it's even worse. Even when it is a Final Report and there are at least twenty days to go through it, with all the other trial preparation going on, that review of a single-spaced, multi-page stream of conscience report will probably take a back seat, or at least be delineated to the pile of objections for evidence to be excluded.

By following the proper formatting guidelines found within the Rules along with the subheading system described above, the Guardian's Report can be a very easy document to navigate, understand, and apply to the facts at hand.

FINAL THOUGHTS

A Guardian's Report should be as comprehensive and balanced as humanly possible given the facts of the case. It is sometimes the only tool available to the Judge that offers him or her any true insight into what a child's life may really be like outside of the presentation of the parties in the courtroom. When submitting reports at hearings, always take extra copies of your Report to Court with you. Give a "working copy" and an "official copy" to the Judge. The "working copy" is one he or she can write on during the hearing, if they so choose, while the "official copy" is for the Court's file. It's also best to keep a working copy for yourself to make notes of questions and information you need to put on the record when you are examined by the attorneys, when you cross examine the witnesses, or when you are asked to make your oral presentation to the Court.

Include an Affidavit of Fees and a detailed itemized Bill with every Report submitted to the Parties and/or the Court. This will document the status of the parties' compliance with the payment provisions found within the Order of Appointment and alert everyone as to any noncompliance issues regarding payment of your fees. During most hearings, the Judge will ask the Guardian what is owed and who is current with their payments, so keeping everyone informed on this means there likely will not be any disputes when the Court addresses it.

All and all, never be afraid to use the Report to advocate for your ward. You may very well be the only person who ever truly does throughout the entire case.