NATIONAL GUARD
REGULATION No. 27-40
AIR NATIONAL GUARD
REGULATION No. 110-24

HEADQUARTERS
DEPARTMENTS OF THE ARMY AND THE AIR FORCE
Washington, DC 20310, 31 August 1981

Legal Services

LITIGATION

This regulation directs actions and procedures for litigation involving the National Guard and National Guard personnel. Interim changes are not official unless authenticated by the Executive, NGB. Interim changes will be destroyed on their expiration dates unless sooner superseded or rescinded.

		Paragraph	Page
CHAPTER 1.	GENERAL		
	Scope	1-1	1-0
	References	1-2	1-0
	Responsibilities	1-3	1-0
2.	REPORTING REQUIREMENTS		
	Matters to be reported	2-1	2-1
	Types of reports and contents	2-2	2-1
3.	DOCUMENTS		
	Copies	3-1	3-0
	Certification	3-2	3-0
	Certification forms	3-3	3-0
	Assembly	3-4	3-0
4.	REPRESENTATION BY THE DEPARTMENT OF JUSTICE		
	Who may request	4-1	4-0
	Determination	4-2	4-0
	Format	4-3	4-0
	Supervisor's statement	4-4	4-0
	Timely submission	4-5	4-0
APPENDIX A.	Oral Notification Report		A-1
B.	Litigation Report Format		B-0
C.	Blank AG Affidavit		C-1
D.	Blank General Affidavit		D-1
E.	Blank Supervisor's Statement		E-0

CHAPTER 1

GENERAL

1-1. Scope. This regulation directs the actions and polices applicable for ARNG and ANG units and personnel concerning legal proceedings involving interests of the ARNG, ANG, or which may otherwise affect the interests of the United States.

1-2. References. a. 28 U.S.C. 516.
b. AR 27-40.
c. AFR 110-24.

1-3. Responsibilities. a. The Department of Justice under the direction of the Attorney General of the United States is vested by law (28 U.S.C.A. 516) with the primary responsibility for supervising and conducting litigation in which the United States is a party or otherwise has an interest.

b. Subject to the supervision and control of litigation by the Attorney General and the Department of Justice, the Judge Advocate Generals of the Army and Air Force, through their Litigation Divisions, acting on behalf of their respective Secretaries, are responsible for the administration, supervision and control of litigation arising from activities or interests of their respective departments.

c. The National Guard Bureau is the channel of communication between the States and the judge advocates general on all National Guard matters, including litigation. All litigation-related inquires and requests from other Federal agencies should be referred to NGB-JA. After concurrence of the appropriate Litigation Divisions, NGB-JA may under certain circumstances authorize direct communication between States and other Federal agencies in individual cases when time constraints or other reasons preclude use of normal channels. Also, after approval by the appropriate Litigation Division as an exception to this policy, close consultation between local National Guard officials and the Assistant United States Attorney handling the case concerned is permitted, but NGB-JA and the appropriate Litigation Division must be kept fully informed of such consultation. NGB-JA has the responsibility for legal liaison between the ARNG and ANG and the respective Secretaries through their Judge Advocate Generals. Information and reports required by this regulation are required by the respective Judge Advocate Generals as essential elements of information required to protect the interests of the United States.

d. (1) The Adjutant General will designate as litigation coordinator a full-time officer technician to serve as the State point of contact between the State and the National Guard Bureau for all litigation matters. Upon designation, the name, rank, position, and telephone number for this person will be furnished to NGB-JA. This person is responsible for all oral reporting requirements (paragraph 2-2b) to NGB-JA, assists the senior staff judge advocate assigned litigation responsibility for the State, which may include preparation of the litigation report, and serves as the State point of contact by the Litigation Division of the respective services, the United States Attorney, or other Federal agencies as may be authorized by NGB-JA.

(2) A senior judge advocate should be designated as litigation supervisor by the Adjutant General. This person will assist in the preparation and review of all litigation reports prepared by the litigation coordinator or staff judge advocate, as may be the case.

(3) The preparation of litigation reports should be assigned to a qualified judge advocate whenever possible. The use of special training man-days for this purpose is authorized to the extent such man-days are available to the State. As time is always a significant factor in preparing litigation reports, this mission cannot be delayed until normal drill periods.

CHAPTER 2

REPORTING REQUIREMENTS

2-1. Matters to be reported. All lawsuits and potential lawsuits involving the National Guard and National Guard personnel must be reported by telephone to NGB-JA immediately upon receipt by the State of any information indicating that a suit has been or will be filed. Reporting should not be delayed pending service of process or other receipt of official notification.

2-2. Types of reports and contents. a. Contact. All reports, oral and written, will be directed to NGB-JA Washington, D.C. 20310. Immediate telephone reports of new or potential lawsuits must be made to NGB-JA, AUTOVON 225-1588 or 227-5632, commercial (202) 695-1588 or (202) 697-5632.

b. Oral notification. An advisory oral report must be given immediately to NGB-JA when litigation, or legal action, or the imminent possibility of such action is discovered. Any "short fuse" motions or developments, such as applications for temporary restraining orders, should also be called in at once. All litigation should be reported whether or not a Federal interest appears to be involved. Oral reports will provide the information set forth in appendix A.

c. Written requests and reports.

(1) Requests for representation by the Department of Justice must be made promptly after oral notification of litigation if defendents are sued in their individual capacities.

(2) Copies of all summons, complaints and related pleadings should be mailed to NGB-JA immediately upon receipt by the State. When time constraints require, arrangements for electronic facsimile transmission (telecopier) may be made by phone with NGB-JA.

d. Litigation report.

(1) General. As soon as possible, a full litigation report will be prepared and submitted to NGB-JA. Litigation reports will contain the information specified in appendix B. For additional guidance refer to AR 27-40 or AFR 110-24, as appropriate.

(2) Special instructions. Special attention should be given to providing a complete and detailed statement of facts, as in many cases this section will be the most important part of the litigation report. The statement of facts should be set forth in a chronological manner and in numbered paragraphs with specific reference to the relevant part of the supporting documents (e.g., Exhibit A, p 10). If there is a hearing transcript, references to it should be made by page number (e.g., H/T p 7). As this statement of facts will serve as the basis for pleadings, discovery, early pretrial preparation, or settlement consideration, it is imperative that it include both favorable and unfavorable information. A memorandum of law is not required unless the case is significantly affected by State or local law. In such cases, a brief analysis of such law should be included in the report. If State or local statutes or court decisions are involved, copies thereof should be included. All potential witnesses should be interviewed and summaries of the interview attached to the list of witnesses. When possible, the report should include knowledgeable comments as to the credibility of witnesses, their relationship to the parties and interest, if any, in the outcome of the case, and any other factors bearing on the usefulness to the Government of each witness' testimony.

CHAPTER 3

DOCUMENTS

3-1. Copies. The litigation report and all supporting documents will be submitted in six copies.

3-2. Certification. All official documents, records, and transcripts, including copies of applicable State and local laws and regulations must be certified by the custodian of the item concerned. Only one of the six copies need be certified. An item that is too bulky may be broken down into two or more units, provided each unit is certified.

3-3. Certification forms. For ARNG matters, use DA Form 4. For ANG matters, use AF Form 44. The certifying custodian must complete the top part of the appropriate form; the respective Secretary concerned will complete the lower portion of the form. A correctly executed sample form is shown at figure 3-1. (DA Form 4) The appropriate form must be filled out as an original whenever used. Partially preprinted or mimeographed inserts are not acceptable.

3-4. Assembly. a. Part I. The complete, cross-referenced statement of facts should appear first, followed by the summons, complaint and related pleading, supporting documents, records, statements, transcripts, local statutes, and exhibits arranged chronologically as they are used in the statement of facts. The supporting material should be tabbed for ready reference. The resulting report should constitute the complete administrative record in the case.

b. Part II. Pleadings should be examined paragraph by paragraph to determine if the allegations made in them can be answered by the facts and documents prescribed in part I. The reviewer should make specific reference to line and page or tab portions of part I when commenting on each paragraph of the pleading. For example: "Paragraph III (Complaint)-see statement of facts, page 1, lines 6-7, 21-22 and Tab D (Medical History)."

United States of America

DEPARTMENT OF THE ARMY

Lansing, Michigan (PLACE) 4 Nov 80 (DATE)

I HEREBY CERTIFY that the attached documents are true and correct copies of official documents relating to , which are located and maintained in the Technician Personnel Office, Michigan Department of Military Affairs, Lansing, Michigan.

Col, MI ARNG
Technician Personnel Officer
Custodian

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, , Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this day of , 19

Secretary of the Army.

By ***Administrative Assistant.***

DA FORM 1 MAR 66 4 REPLACES EDITION OF 1 OCT 47, WHICH WILL BE USED.

Figure 3-1. Sample of Custodian's Certificate

CHAPTER 4

REPRESENTATION BY THE DEPARTMENT OF JUSTICE

4-1. Who may request. ARNG or ANG personnel including National Guard members, Federal civilian employees, and agents of the Federal Government who are sued in their individual capacities may request legal representation by the U.S. Department of Justice in the defense of legal actions arising as a result of their status as Federal employees or out of their performance of official Federal duties. If the defendants are sued in their official capacities only, no requests for representation are required.

4-2. Determination. Submitting a request for representation does not insure that representation will be granted. This determination may be made only by the Department of Justice. Individually sued defendants are always entitled to retain private counsel. However, the Federal Government cannot pay the fees of private counsel, except in certain cases where specific authority exists. Moreover, the United States cannot pay an adverse judgment granted against a defendant in his individual capacity.

4-3. Format. Prepare a request for representation by the Attorney General of the United States similar to the recommend affidavit forms shown in appendices C and D. A separate request should be prepared for each named defendant who desires to request representation. It is essential that the affidavit specifically indicates why the requester is entitled to Federal representation. This will normally include statements to the effect that while doing the acts complained of, the requester was acting within the scope of his/her Federal employment or in line of Federal duty, or was carrying out some Federal law or directive. In the case of individually sued defendants who are not Federal employees, this statement will be a significant factor in whether Department of Justice representation is granted. The form should be prepared in an original and five copies. Telephone consultation with NGB-JA when preparing requests for representation is encouraged to insure accuracy and completeness.

4-4. Supervisors' statement. The immediate supervisor, or another supervisory official with knowledge of the duties of the individually sued defendant, must prepare a statement which confirms the official duty statement of the defendant. In the case of an Adjutant General, this statement will be prepared by NGB-JA. See appendix E for an example.

4-5. Timely submission. Requests for Department of Justice representation must be submitted as soon as possible directly to NGB-JA. The NGB-JA will forward requests through the Judge Advocate General of the Army or the Air Force as appropriate, to the Department of Justice for determination. Under no circumstances, should submission of requests for representation be delayed pending completion of other reporting requirements or forwarded directly to either the local United State Attorney or the Department of Justice.

APPENDIX A

ORAL NOTIFICATION REPORT

The oral notification report will include the following information, to the extent it is known.

1. Names and official positions of the plaintiff(s) and defendants(s).

2. Name and address of plaintiff's attorney.

3. Name and location of court.

4. Case number.

5. Date filed.

6. Date of service.

7. Nature of the complaint.

8. Relief requested. Particularly, is a temporary restraining order requested? Money damages?

9. Are the defendant(s) sued in their official capacities? As individuals? Both?

10. Are the defendant(s) Federal or State employees?

11. Who has been served with process? How? When?

12. Has any order been entered by the court? Are any hearings scheduled? If so, when, and on what subject?

Followup reports by telephone are necessary when any of the above information, not known at the time of the initial report, becomes known, or when there is a change in previously reported information (for example, service of process on a previously unserved defendant).

APPENDIX B

LITIGATION REPORT FORMAT

Litigation reports will include the following information, to the extent practicable and relevant, in the report:

a. Identification of the parties to the litigation and the court involved, including the docket number of the case.

b. The nature of the litigation and a complete summary of known facts giving rise to the litigation, including detailed comments with respect to each and every allegation of the pleadings. (In the case of lawsuits brought against former or present NG personnel or employees in connection with the performance of activities that fall within the scope of their office or Federal employment, all information on whether the individual concerned was acting within the scope of his/her office or Federal employment must be fully detailed. For example, if an NG employee is sued for personal injuries allegedly sustained by the plaintiff when he/she was struck by an NG motor vehicle being operated by the employee, and it appears that the employee was acting within the scope of his/her employment at the time of the accident, indicate the nature of the employee's duties, the means of conveyance authorized, his/her authorized destination, liability insurance carried by him/her, and all other pertinent information that would facilitate action by the United States Attorney under 28 U.S.C. 2679.)

c. The amount of damages and/or other relief sought.

d. Comments on available defenses and/or counter-claims.

e. Complete information regarding service of process and pleading suspense dates.

f. Any Government indemnity rights, such as insurance, bonds, guaranty agreements, etc.

g. Prior action taken with regard to the subject matter of the litigation.

h. The names and addresses of witnesses and summaries of their expected testimony in statement form.

i. Discussion of relevant State or local law or regulation, as appropriate.

j. List of exhibits.

k. Proposed answer to the complaint.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE

_____

_____,
Plaintiff

Civil No.

v.

_____,
defendant

AFFIDAVIT

_____, being duly sworn, says:

I am a federally recognized Major General in the Army National Guard of the State of _____, and the duly appointed Adjutant General of such State. Under the provisions of the National Guard Technician Act of 1968 (32 U.S.C. 709), I am the official charged with the employment and administration of National Guard Technicians within the State of _____, and in that capacity act as an agent of the Federal Government.

_____, the plaintiff in this case, was a National Guard Technician within the State of _____. In doing all of the acts complained of _____ Complaint, I was acting in my capacity as an agent of the Federal Government under U.S.C. 709 and within the scope of my official duties. Accordingly, I believe myself entitled to, and hereby request, that the Attorney General of the United States, or his agent, designate counsel to defend me, both in my official and individual capacity, in this case.

In support of this request, I now declare, under penalty of perjury, that I have read the allegations in the complaint filed in this case, that all actions taken by me in this matter were performed in my official capacity, were all within the scope of my official duties, were performed in my reasonable, good faith belief that my actions were in conformity with the law. I am not aware of any relevant criminal investigation or proceeding now pending.

I understand that if my request for representation is approved by the Department of Justice, I will be represented by a United States Attorney or his assistant; that any final adverse money judgment rendered against me personally cannot be paid by the United States or any of its agencies, including the Department of the Army, and that I am entitled to retain private counsel at my own expense. I further understand that the Army expresses no opinion as to the advisability of retaining private counsel.

(SIGNED)_____

STATE OF _____
COUNTY OF _____, to wit:

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid, this _____ day or _____, 19__.

_____
NOTARY PUBLIC

(NOTE: This sample is for format only. Obviously, the content must be varied to suit the facts of the particular case. Local law prescribes the form of the oath and notorial acknowledgment and under 28 U.S.C. 1746 is not required. If the case is brought in a court other than a United States District Court, the caption must be changed, or may be omitted entirely.)

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE

_____

_____,
plaintiff

Civil No.

v.

_____,
defendant

AFFIDAVIT

_____, _____, being duly sworn,
Title

hereby request: that the Attorney General of the United States, or his agent, designate counsel to defend me, both in my official and individual capacity, in this case.

I am a National Guard technician and the acts complained of are from the performance of my official duties as a Federal employee. Describe fully the circumstances of the allegation, or

Fully explain why, although not a Federal employee, the individually sued defendant should be granted representation by the Department of Justice.

In support of this request, I now declare, under penalty of perjury, that I have read the allegations in the complaint filed in this case, that all actions taken by me in this matter were performed in my official capacity, were all within the scope of my official duties, were performed in my reasonable, good faith belief that my actions were in conformity with the law. I am not aware of any relevant criminal investigation or proceeding now pending.

I understand that if my request for representation is approved by the Department of Justice, I will be represented by a United States Attorney or his assistant; that any final adverse money judgment rendered against me personally cannot be paid by the United States or any of its agencies, including the Department of the Army; and that I am entitled to retain private counsel at my own expense. I further understand that the Army expresses no opinion as to the advisability of retaining private counsel.

/s/

STATE OF _____
COUNTY OF _____
Subscribed and sworn to before me, this _____ day of _____, 19__.

_____
NOTARY PUBLIC

APPENDIX E

SUPERVISOR'S STATEMENT

I, _____(name)_____ , _____(title or duty position)_____ , hereby state:

As a result of my official position, I am sufficiently aware of the facts of the incident involving (individually sued defendant) to certify that (individually sued defendant) was within the scope of his employment as a (duty position) and was furthering the interests of the United States Government. All actions taken by him in this matter were performed in his official capacity, and were all within the scope of his official duties.

_____

Users of this regulation are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) to NGB-JA, Washington, DC 20310.

By Order of the Secretaries of the Army and the Air Force:

LA VERN E. WEBER
Lieutenant General, USA
Chief, National Guard Bureau

Official:

RUSSELL C. DAVIS
Colonel, USAF
Executive, National Guard Bureau

Distribution: AB