

Subpart D—Individual Liability**§ 516.27 Scope.**

This subpart guidance when DA personnel, as a result of the performance of their official duties, are either sued in their personal capacity, or are charged in a criminal proceeding. Examples of civil actions alleging individual liability include the following: a medical malpractice lawsuit against health care providers; suits resulting from motor vehicle accidents; constitutional torts; or, common law torts such as assault, libel, or intentional infliction of emotional distress. Likewise, state or Federal criminal charges can arise from the performance of official duties, including environmental crimes or motor vehicle accidents.

§ 516.28 Policy.

(a) *General.* Commanders, supervisors, and SJAs or legal advisers will give highest priority to compliance with the requirements of this chapter with regard to current or former DA personnel who face criminal charges or civil litigation in their individual capacity as a result of performance of their official duties.

(b) *DOJ policy on representation.* If in the best interest of the United States, upon request of the individual concerned, and upon certification by his agency that he was acting within the scope of his employment, DOJ may represent present and former DA personnel sued individually as a result of actions taken within the scope of their employment. Representation can be declined for a variety of reasons, including but not limited to the following: the employee was not acting within the scope of his office; there is a conflict of interest; or, actions were not taken in a good faith effort to conform to law.

§ 516.29 Federal statutes and regulations.

(a) *Federal Tort Claims Act (FTCA).* (28 U.S.C. 1346(b), 2671–2680). A waiver of sovereign immunity which, with certain exceptions, makes the United States liable for tort claims in the same manner as a private individual.

(b) *Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA or the Westfall Act, Pub. L.*

No. 100–694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. 2671, 2674, 2679). FELRTCA, by amending the Federal Tort Claims Act, makes the FTCA the exclusive remedy for common law tort claims arising from actions taken by Federal employees acting within the scope of employment. The law was passed to eliminate problems caused by *Westfall v. Erwin*, 484 U.S. 292 (1988).

(c) *10 U.S.C. 1089 (Defense of certain suits arising out of medical malpractice).* This provision, commonly referred to as the Gonzales Act, makes the FTCA the exclusive remedy for suits alleging medical malpractice against a military health care provider.

(d) *28 CFR 50.15 (Representation of Federal officials and employees by Department of Justice attorneys [. . .] in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities).* These DOJ regulations set out the policy and procedures for requesting representation in individual liability cases. See also 28 CFR part 15 (Defense of Certain Suits Against Federal Employees, etc.).

(e) 28 CFR 50.16 (Representation of Federal employees by private counsel at Federal expense).

§ 516.30 Procedures for obtaining certification and DOJ representation.

(a) *SJA or legal adviser procedures.* When an SJA or legal adviser learns of a criminal charge or of a lawsuit alleging individual liability against DA personnel as a result of performance of official duties, he will take the following actions:

(1) Immediately notify Litigation Division and the appropriate U.S. Attorney and FAX or express deliver copies of process and pleadings to each office. Where time for response is limited, request that the U.S. Attorney either petition the court for an extension of time, or provide temporary counsel and representation pending formal approval.

(2) Investigate whether the employee was acting within the scope of his office or employment. Obtain, if possible, statements from the defendant, supervisors, and witnesses.

§516.31

(3) Advise the individual defendant of the rights and conditions set out in 28 CFR 50.15, which include the following:

(i) His right to request representation by a DOJ attorney and, in appropriate cases, certification that he was acting within the scope of employment. (See 28 U.S.C. 2679; 28 CFR 50.15).

(ii) The right to request private counsel at government expense, subject to the availability of funds. (See 28 CFR 50.16).

(iii) That the United States is not obligated to pay or indemnify defendant for any judgment rendered against him in his individual capacity.

(4) If the defendant desires certification or DOJ representation, have him sign a request. (See figure D-1, appendix G, of this part). Obtain a signed scope of employment statement from the defendant's supervisor. (Figure D-2, appendix G, of this part).

(5) Prepare a report with, at a minimum, the following information: facts surrounding the incident for which defendant is being sued and those relating to scope of employment; the SJA's or legal adviser's conclusions concerning scope of employment; and, a recommendation whether certification by the Attorney General or representation by a DOJ attorney should be granted.

(6) In cases involving National Guard personnel, address also the following: whether defendant was acting in a state (Title 32 U.S.C.) or Federal (Title 10 U.S.C.) capacity during relevant periods (include orders); if defendant was acting under state authority, is it nevertheless in the interest of the United States to represent the individual; any impact on policies or practices of DA, the National Guard Bureau, or DOD; whether the relief requested can be granted only by a Federal officer or agency; and, whether Federal law or regulation required actions by state officials.

(7) Send the report, request for representation, and scope of employment statements to Chief, Litigation Division.

(b) *Chief, Litigation Division, procedures.* The Chief, Litigation Division, will review the report and evidence regarding representation and scope of employment and will determine wheth-

32 CFR Ch. V (7-1-09 Edition)

er certification and representation are appropriate. He will send his recommendation to the appropriate U.S. Attorney or office within DOJ. The Chief, Litigation Division, will notify the defendant of DOJ's decision.

§516.31 Private counsel at government expense.

(a) *General.* DA personnel, sued in their individual capacity or facing criminal charges as a result of performance of official duties, have no right to employ a private sector counsel at government expense or to expect reimbursement for the same. For proceedings in the United States, a request for employment of counsel at government expense may be approved by DOJ, contingent among other things upon availability of funds and a determination that employment of private counsel at government expense is in the best interests of the United States. (See 28 CFR 50.16). Special rules apply in overseas areas. (See paragraph (e) of this section).

(b) *Individual request procedures.* The individual will prepare a request that private counsel be employed for him at government expense. The request must also contain the following statement: "I understand that the United States is not required to employ private counsel on my behalf, and that I may be responsible for expenses incurred prior to proper authorization by the Department of the Army or the Department of Justice."

(c) *Supervisory and legal adviser procedures.* The request will be submitted through the individual's supervisors, who will make a recommendation and forward the packet to the local SJA or legal adviser. The SJA or legal adviser will prepare his own recommendation and forward the matter to Litigation Division.

(d) *Chief, Litigation Division, procedures.* If the Chief, Litigation Division, determines that the request for private counsel is meritorious, he will prepare an appropriate recommendation and forward the packet to Civil Division, DOJ, for final approval.

(e) *Special actions in foreign countries.* Employment of private counsel in foreign proceedings is governed by AR 27-