

# SILENT PARTNER

## Using Interrogatories to Get Information from Uncle Sam

*Introduction: Silent Partner is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many Silent Partner infoletters on military pension division, the survivor Benefit Plan and other aspects of military divorce. Just go to [www.abanet.org/family/military](http://www.abanet.org/family/military) (the website of the above committee) or [www.nclamp.gov](http://www.nclamp.gov) (the website of the military committee, N.C. State Bar).*

### Introduction

The federal government's rules about getting information show that there is a greatly underused tool available for enforcement and discovery in family law cases. This is the use of interrogatories.

While stipulations as to income, deductions, allotments and tax withholding are the most efficient way of getting these data into evidence, sometimes that is not possible. There are always adverse parties or opposing counsel who will not stipulate to the use of documents and information in evidence. In these more difficult cases, when there is already a court order, judgment, decree or other "legal process" (as the rules describe court-imposed support duties), the attorney for the payee can get much income information from the federal government. As long as there is a court obligation, the best way to get answers for specific information may be through interrogatories to the government. It may also be the fastest.

### The Starting Point

*Legal process* is defined as court orders which obligate the government to withhold money from an individual who is receiving government payments.<sup>1</sup> The nature of the document is a wage assignment, court order, summons, writ of garnishment or attachment, levy, notice to withhold income or similar court document to hold back income.<sup>2</sup>

The "legal process" must be issued by a court of competent jurisdiction, which means a court that can properly exercise jurisdiction over the case, including a state court, or a court of competent jurisdiction in a foreign nation with which the United States has entered into an agreement requiring the U.S. to honor such process.<sup>3</sup> It also includes a state agency, such as one which collects child support, which is authorized to issue income withholding notices.<sup>4</sup>

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<sup>1</sup> The purpose and coverage of the rules is virtually universal regarding the federal government. According to 5 C.F.R. § 581.101(a), the moneys (i.e., entitlements based on remuneration for employment) involved are due from, or payable by, the U.S. government or the District of Columbia to any individual. The executive branch of the government includes all governmental entities, possessions and territories of the United States and the District of Columbia. 5 C.F.R. § 581.102 (a). By virtue of 5 C.F.R. § 581.102 (b), the term "governmental entity" means each department (civilian as well as military), agency office, commission, bureau or other administrative subdivision or creature of the executive branch and the government of the District of Columbia, as well as U.S. territories and possessions.

<sup>2</sup> 5 C.F.R. § 581.102 (f).

<sup>3</sup> 5 C.F.R. § 581.102 (f)(1)(i-iii).

<sup>4</sup> 5 C.F.R. § 581.102 (f)(iv). See also 42 U.S.C. § 666(b).

## Purpose of the Legal Process

The purpose of the legal process must be to compel a government agency, department or office to make a payment. The source of the payment is from funds which otherwise would be paid to an individual. The payment is to another party in satisfaction of a legal obligation of the individual for child support, alimony, or legal fees.<sup>5</sup>

The U.S. government must comply with legal process. A garnishment order will be honored if it is *regular on its face*,<sup>6</sup> meaning that there are no glaring errors or obvious inconsistencies.<sup>7</sup> An order for enforcement of alimony or child support will not be honored, as an exception to the *regular-on-its-face* rule, if the garnishment notice or order:

1. Would require the government to withhold funds which are not deemed moneys that are due from (or payable by) the federal government as remuneration for employment;
2. Does not comply with 5 C.F.R. Part 581;
3. Is barred because the government has been served with an order enjoining or suspending the garnishment order; or
4. Is on appeal by the SM-obligor, and state law requires suspension of the garnishment pending appeal.<sup>8</sup>

Unless the U.S. Department of Justice directs that the office or agency not comply with the legal process, the entity will respond directly to the court. If there is a problem with compliance for any of the above reasons, the office or agency will set forth – if applicable – its objections to compliance with the court’s order or other legal process. It will also inform the party requesting that the legal process be served, that the process will not be honored.<sup>9</sup>

## Deadlines

Timing is important in court cases, and much time can be consumed in obtaining discovery responses and gathering information for a hearing. Unless court rules allow for the *ex parte* signing of an order or a subpoena by a judge, it can take months for counsel to obtain a court date for a hearing on a request that the court sign an order or a subpoena to require the U.S. government to produce documents. Even then, there will likely be disputes and controversies about the order which is drafted – usually several days or weeks after the hearing – to demand the documents. The government’s production of documents will then take several weeks or months.

Service of interrogatories can cut the time involved in getting information. When the office or agency is properly served with legal process (pursuant to state law) consistent with federal requirements for support orders and income-withholding, the agency or office will comply with all applicable terms of

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<sup>5</sup> 5 C.F.R. § 581.102 (f)(2).

<sup>6</sup> 42 U.S.C. § 659(f).

<sup>7</sup> In *United States v. Morton*, 467 U.S. 822 (1984), the U.S. Supreme Court held that the military retired pay center (currently DFAS, the Defense Finance and Accounting Service) is not required to look behind the order to determine whether the trial court had personal jurisdiction over the defendant-SM, that this would provide an insurmountable burden for the limited personnel at the retired pay center, and that subject-matter jurisdiction was the proper scope of the government’s inquiry upon receipt of a garnishment order.

<sup>8</sup> 5 C.F.R. § 581.305(b).

<sup>9</sup> 5 C.F.R. § 581.305(c).

the above federal statute.<sup>10</sup> This means answers to interrogatories within 30 calendar days; if the information requested is not available to the entity to which the request was sent, the recipient will forward the interrogatory to the appropriate office or agency in enough time to allow for a timely response.<sup>11</sup>

The best-practice rule is always to submit interrogatories along with a copy of a court order for enforcement of support, as outlined above. One should not submit only the interrogatories to the agency or office involved. A cover letter should be sent with these documents, so that the official tasked with responding will have contact information in case clarification is needed or questions arise as to the procedure.

### **Jurisdiction and Service**

What can the government do if there appears to be no personal jurisdiction? When a governmental entity receives legal process which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the rules state that the entity is not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor.<sup>12</sup>

Where to send the interrogatories may be found in Appendix A to 5 C.F.R. § 581. This Appendix contains the addresses for service of legal process upon every conceivable agency, office or department in the U.S. government, including the Bureau of the Census, the civilian personnel office for the Army and Air Force Exchange Service, the Alaska Power Administration, and the Federal Prison Camp in Alderson, West Virginia.

### **Scope and Purpose**

The payment of child support, alimony and legal fees is the purpose of the legal process involved. The legal obligation in the court order may include current as well as past-due alimony and/or child support debts, depending on the law in the jurisdiction from which the legal process was issued.<sup>13</sup> There is no mention of “property division” or “distribution of military retired pay upon divorce.” There may, however be ways of addressing concerns on these issues and getting information, through the use of well-tailored questions to the government about such facts as residence, domicile, initial entry into military service, and accrued leave, as will be shown below.

Initially, most attorneys will direct their questions to issues of income and deductions. The interrogatories could include the following questions in regard to a federal civil service retiree:

- 1) What is the effective date for the retirement of the defendant, Roberta M. Roe, from federal civil service?
- 2) What is the gross annuity income of the defendant for the period January-October 2016?
- 3) What were the amounts of each of the deductions (mandatory as well as discretionary) from her income for the same period?

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<sup>10</sup> For Defense Finance and Accounting Service (DFAS) responses, the rules state that, “Within 30 days of effective service, or such longer period as may be allowed by applicable state law, the... [Defense Finance and Accounting Service, or DFAS] shall... file an answer to the legal process with the court in which the proceeding was brought and answer any interrogatories regarding the disposable earnings due the member.” DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay, Vol. 7B, ch. 27, para. 270403.B.

<sup>11</sup> 5 C.F.R. § 581.303(a)(4).

<sup>12</sup> 5 C.F.R. § 581.305(g).

<sup>13</sup> 5 C.F.R. § 581.102 (g).

- 4) Specify the nature of each such deduction.
- 5) What is the cost – if applicable – for a survivor annuity that is withheld from her retirement annuity?
- 6) State the amounts of each tax withholding for the defendant for December 2016.
- 7) Specify the nature and amount of each deduction of defendant for the month of December 2016.
- 8) As to allotments for the same period, state the names of each payee and the amount paid.
- 9) How many withholding allowance does the defendant claim for the period January-October 2016?

On the other hand, the following questions might be posed regarding an active-duty servicemember:

- 1) What is the gross income of the plaintiff, John P. Doe?
- 2) What was his base pay in each month for the following period: January-December 2016?
- 3) For the same period, what was his BAH (basic allowance for housing), if contained in his total entitlements?<sup>14</sup>
- 4) For the same period, what was his BAS (basic allowance for subsistence)?
- 5) What other special pays did he receive, and what was the amount of each for the period January-December 2016?
- 6) What were the amounts of each of the deductions (mandatory as well as discretionary) from his income for the same period?
- 7) Specify the nature of each deduction for that period.
- 8) As to allotments for the same period, state the names of each payee and the amount paid.
- 9) How many withholding allowance does he claim for the above period?

### **Other Issues, Other Payors**

As a third example, when the obligor is a military retiree, a different set of questions would apply. The inquiries may be directed to the gross amount of retired pay, the amount of a premium for Survivor Benefit Plan coverage, the relationship and birthdate of the survivor annuitant,<sup>15</sup> the amount of federal and state tax withholding, and the nature and amount of deductions and allotments, including any “VA waiver.”<sup>16</sup>

Disabled military retirees may also be receiving Combat-Related Special Compensation (CRSC) for wounds, illnesses or conditions associated with combat, training for combat, instrumentalities of war or award of the Purple Heart.<sup>17</sup> Since this program is administered by the Department of Defense, not the Department of Veterans Affairs, appropriate interrogatories to that department would request the date of application for CRSC, the date of the award, the percentage of disability recognized, the amount of monthly payment, and the date and amount of any retroactive payment to the individual.

For a veteran receiving VA disability compensation, the questions would be directed at the date of application for payments, the date payments started, the VA rating initially given, the current VA rating, and the monetary amounts associated with these ratings over the period involved. The inquiries might also ask for the banking information as to where the payments are electronically deposited.

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<sup>14</sup> Some servicemembers do not receive BAH if they are getting military housing on base.

<sup>15</sup> The name of the beneficiary is not shown on the Retiree Account Statement of a military retiree; only the relationship (e.g., “former spouse”) and the birthdate are displayed.

<sup>16</sup> 38 U.S.C. § 5304-5305.

<sup>17</sup> 10 U.S.C. § 1413a.

### **What's the Limit – Money Only?**

Note that almost all of the above questions and topics deal with money. There is, however, no requirement that the interrogatories ask only about monetary amounts available to the payor. The questions may be much more wide-ranging, asking about a soldier's state of tax residence (e.g., "What state did John Doe declare for his tax residence on DD Form 2058, State of Legal Residence Certificate?"), the state from which he entered military service, and the location of his bank; John Doe's connections with a particular state might be helpful in deciding jurisdiction under the Uniform Interstate Family Support Act or the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. The questions could also ask about his date for entry into military service (to determine the total amount of creditable service which he has for pension division purposes), his accrued leave (which is a divisible marital or community property asset in most states that have rulings on the subject), the names of the primary and secondary beneficiaries on John Doe's Servicemembers Group Life Insurance, and the dates of his recent TDY (temporary duty) to Montana (where his current girlfriend happens to live).

### **Evidence Concerns**

Sometimes one can get a stipulation from opposing counsel or the other party (when unrepresented) to allow the admission of the interrogatory responses. When that doesn't happen, then the applicant should be concerned about how to get the interrogatory response produced into evidence. Unless there is a specific discovery rule allowing the receipt of answers to third-party interrogatories as substantive facts and evidence, a set of interrogatory answers from a third party is nothing more than hearsay. It is an out-of-court declaration from a non-party which is offered to establish the truth of what it asserts.

How does one overcome the *hearsay objection*? The answer may be set out in state rules of evidence as the "public records exception" to the rule against hearsay.

Rule 803(8) of the Federal Rules of Evidence states that public records may be admitted as an exception to the hearsay rule. It defines such records as follows:

- (8) Public Records. A record or statement of a public office if:
  - (A) it sets out:
    - (i) the office's activities;
    - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
    - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
  - (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

To obtain this information and present it to the court, counsel should be sure to request not only answers to the interrogatories from the agency, but also execution of a cover sheet which is couched in language that tracks the above evidence requirements. The cover letter should be signed by the same official who signs the interrogatory answers. Here is an example:

Payroll Section, Small Animal Administration  
U.S. Division of Environmental Concerns  
2214 Constitution Blvd.  
Washington, DC 20330

Date: 9/24/2016

To: Clerk of the Court, Beeswax County Courthouse  
334 Maple Avenue  
Birmingham, NY 33455

Enclosed please find the following record: “Answers to Plaintiff’s Interrogatories to U.S. Government” in Case #2016-CV-3311.

The public office providing the enclosed record is the Small Animal Administration, Division of Environmental Concerns, located at the above address.

This office’s activities include the following: Maintenance of payroll records, health insurance information, life insurance coverage data, and deduction information for all civil service employees in the Small Animal Administration.

This office has a legal duty to report answers to the interrogatories served upon it pursuant to 5 C.F.R. § 303(a)(4).

This is a civil case, and the answers in the attached Answers to Interrogatories are factual findings from an investigation conducted by the undersigned official.

The investigation is legally authorized pursuant to 5 C.F.R. § 303(a)(4).

/s/

Alice B. Smith, Supervisor  
Payroll Section

Note that the Defense Finance and Accounting Service has its own specific rules which require investigation and response.<sup>18</sup> For all other responding entities, one would simply refer to 5 C.F.R. § 581.303(a)(4) as the authority for the investigation and answers.

### **Conclusion**

The use of interrogatories in a case which involves a support order can speed up the process of obtaining information on a payor’s income and deductions from federal sources. It can also lead to relevant and useful information outside the realm of finances. It is a simple matter to pose questions to obtain the needed data and facts. This is a valuable resource which should not be overlooked by the family law practitioner.

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<sup>18</sup> See note 10 above.