Family Law and the Servicemembers Civil Relief Act

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I. INTRODUCTION

II. OVERVIEW OF THE NEW STATUTE – SERVICEMEMBERS CIVIL RELIEF ACT

A. Purpose (50 U.S.C. App. § 502)

1. To enable servicemembers (SMs) to devote their entire energy to the defense needs of the Nation; and

2. to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service

B. Who is covered? (50 U.S.C. App. § 511)

1. Covered servicemembers include –

a. Those members of the Army, Navy, Air Force, Marine Corps and Coast Guard who are on active duty under 10 U.S.C. 101(d)(1);

b. Members of the National Guard who are called to active duty as authorized by the President or the Secretary of Defense for over 30 consecutive days under 32 U.S.C. 502(f) to respond to a national emergency declared by the President and supported by federal funds;

c. Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration.

2. A SM is also covered for periods of time when he or she is absent from duty because of sickness, wounds, leave or other lawful cause [i.e., he is still a SM even if absent from active duty for one of the above reasons]

3. 50 U.S.C. App. § 516, the protections of the Act are extended to members of the Reserve Components (RC) – the National Guard and Reserve – from receipt of orders to report for duty to the date that they report

4. Covered individuals under certain sections of the SCRA include dependents of a SM (a spouse, a child, or anyone for whom the SM provided over half of the person's support for the 180 days immediately preceding an application for relief under the Act)

C. What tribunals are covered?

1. 50 U.S.C. App. § 511(5) – any court or administrative agency of the United States, a state or a political subdivision thereof

2. Criminal proceedings are excluded under 50 U.S.C. App. § 512(b)

3. Does this mean the Maryland Department of Environmental Protection? The Orange County Board of Housing Appeals? The Zoning Commission of Seattle? The answer is YES to all the above!

D. What about the SM's lawyer? Under 50 U.S.C. App. § 519, whenever "servicemember" is used, it includes the attorney and/or the agent (under a power of attorney) of the SM

E. Can the SM <u>waive</u> his rights?

1. This is covered in 50 U.S.C. App. § 517. A waiver of SCRA rights is only effective if it is made during the period of military service.

2. In addition, certain waivers must be made in writing in at least 12-point type.

3. If the court wants to have the SM execute a written waiver in connection with a stay of proceedings so that the case may go forward and there is a clear record that the SM has knowingly and voluntarily waived his or her rights under the SCRA, this form should suffice:

WAIVER OF RIGHT TO REQUEST STAY OF PROCEEDINGS

I acknowledge that I have the right to request a stay of proceedings in this case under the Servicemembers Civil Relief Act. The stay of proceedings, or continuance, would postpone a hearing in this case if it were granted.

I hereby waive and give up the right to a stay of proceedings. I want to proceed with this case.

_____ Date:_____
(signature)

_____
Printed Name

[here print acknowledgment and notarization if required]

F. A summary of the major changes in the new Act can be found at ATCH-1.

III. STAY OF PROCEEDINGS

A. Where the SM has not made an appearance, 50 U.S.C. App. § 521 governs. A stay of proceedings under 50 U.S.C. App. § 521(d) is not be controlled by the procedures under 50 U.S.C. App. § 522, which apply when the SM has received actual notice of the action.

1. The court must first determine whether an absent or defaulting party is in the military service.

a. Before entry of a judgment for the plaintiff, the court (including "agency") shall require the plaintiff to file an affidavit. The affidavit shall state "whether or not the defendant is in the military service and showing necessary facts in support of the affidavit."

b. If it appears that the defendant is a SM, then a default judgment may not be taken until after the court appoints an attorney to represent the defendant.

c. If that attorney cannot locate the SM, the actions of the attorney cannot waive any defense of the SM or otherwise bind him or her.

d. If the court cannot determine whether the defendant is in military service, then the court may require the plaintiff to post a bond as a condition of entry of a default judgment. Should the defendant later be found to be a SM, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside).

e. Upon application by either side or the court, the Department of Defense must issue a statement as to military service. 50 U.S.C. App. § 582. The office in DOD to contact for information under the SCRA on whether a person is in the armed forces is:

Defense Manpower Data Center [Attn: Military Verification]
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593
[Telephone 703-696-6762 or -5790/ fax 703-696-4156]

f. Go to the DMDC website for SCRA inquiries, https://www.dmdc.osd.mil/owa/scra/home, and enter the last name and Social Security number of the individual. These are mandatory entries; the form on the main page also asks for a first name, middle initial and date of birth (DOB), which will help with the search. Further information is available on the "Help" section of the above website.

To execute a report, click on the "LookUp" button, which will open up a second window holding the report generated by DMDC. If the individual is on active duty, the report will show his or her branch of service and beginning date of active duty status. If DMDC does not have information as

to whether the individual is on active duty, the generated report will only list the supplied last name, first name and middle initial (if supplied), with the text:

> "Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty."

The report is signed by the DMDC Director.

If the Social Security number is unavailable, the requester may request by mail a manual search, using the DOB of the individual instead of the SSN. You must send a stamped, self-addressed envelope with your mail request.

f. Criminal penalties are provided for filing a knowingly false affidavit.

2. Then the court must decide on a stay of proceedings. In cases where the defendant is in military service –

a. The court shall stay the proceedings for at least 90 days (upon application of counsel or on the court's own motion) if the court determines that:

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant, or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

3. If a judgment has been entered against the SM during his period of military service (or within 60 days after the end of service), the court shall reopen the judgment to allow the SM to defend if

a. he was materially affected due to military service in asserting a defense, and

b. he has a meritorious or legal defense to the action or some part of it, so long as

c. the application is filed within 90 days after the end of military service. 50 U.S.C. App. § 521(g).

4. Reopening or vacating the judgment shall not impair right or title acquired by a bona fide purchaser for value under the default judgment.

B. 50 U.S.C. App. § 522 applies to a stay of proceedings where the SM has notice of the proceedings and has filed an application for stay (including an application filed within 90 days after the end of military service)

1. The court may (upon its own motion) and shall (upon motion of a SM) enter a stay of proceedings for at least 90 days if the motion includes

a. A statement as to how the SM's current military duties materially affect his ability to appear, and stating a date when the SM will be available to appear, and

b. A statement from the SM=s commanding officer stating that

(1) the SM=s current military duty prevents his appearance and

(2) military leave is not authorized for the SM at the time of the statement.

c. *Caveat:* There is no indication that either of these must be in the form of an affidavit or, for that matter, in any particular format whatsoever. Apparently a letter, a formal memo or even an e-mail message would suffice.

d. Further *caveat*: When you are assisting the SM and/or the commander in drafting statements to support a stay, use plain English – not "militarese." A judge cannot understand, and certainly can't sympathize with, the situation of a soldier whose commander writes: "According to the MOU between DivArty, DCSPER and the DIC, this soldier will be the ASP OIC 24/7 until REFRAD when he is not serving as SDO." *Huh???*

e. A sample motion for stay of proceedings can be found at ATCH-2.

f. A request for a stay does not constitute –

(1) an appearance for jurisdictional purposes, or

(2) a waiver of any defense, substantive or procedural. 50 U.S.C. App. §522(c).

g. The SM may request an additional stay based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. The same information as given above is required. 50 U.S.C. App. § 522(d)(1).

h. If the court refuses an additional stay, then the court must appoint an attorney to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).

(1) Questions: What does this attorney do? Who pays him or her? How does the attorney get in touch with the unavailable defendant or plaintiff? How can the attorney hope to represent the SM with no information, preparation or input by the "involuntary client"? Is the attorney supposed to try the entire case in the SM's absence? Whose malpractice policy is going to cover this nightmare?

(2) Further question: Which section applies when the SM has notice but has not made an appearance? That is, what governs when he has been served properly with the summons and complaint or petition but has not filed an answer or substantive motion? Both of them? Neither one?

IV. STAY OR VACATION OF EXECUTION OF JUDGMENTS, ATTACHMENTS AND GARNISHMENTS

A. In any action started against a SM before his period of military service, during it or within 90 after the end of service, when a SM's military duties materially affect his ability to comply with a court order or judgment, then the court may (on its own motion) and shall (on motion by the SM) –

1. stay the execution of any judgment or order entered against him, and

2. vacate or stay any attachment or garnishment of property, money or debts in the possession of the SM or a third party

3. regardless of whether it is before or after judgment. 50 U.S.C. App. § 524.

V. REQUEST FOR ANTICIPATORY RELIEF

A. The SCRA doesn't require breach or default before offering protections to covered individuals.

B. Example – the anticipatory relief provisions of 50 U.S.C. App. §591:

ANTICIPATORY RELIEF.
(a) APPLICATION FOR RELIEF.—A servicemember may, during military service or within 180 days of termination of or release from military service, apply to a court for relief— (1) from any obligation or liability incurred by the servicemember before the servicemember's military service; or (2) from a tax or assessment falling due before or during the servicemember's military service.

C. These anticipatory relief provisions can be used to request relief from pre-service obligations, such as child support or alimony, when a prospective breach is likely. For example, when the SM is earning more in his civilian job before mobilization than he will be earning on active duty, and the civilian wage garnishment will terminate upon his call to active duty, the SM should use this section to request a reduction in child support or alimony and to request a new garnishment from DFAS (Defense Finance and Accounting Service) to pay the other party on a timely basis.

VI. USING THE SCRA "STAY REQUEST" IN FAMILY LAW CASES

A. Defensive use on behalf of the servicemember – questions to ask the client:

1. Is delay necessary?

2. Is delay desirable? [e.g., build-up of arrears, citations for contempt as results]

3. If it is helpful at present, will a delay of the day of reckoning help in the long run?

B. Resisting the motion for a stay on behalf of the non-military partner or spouse:

1. Attack the stay request. Does it contain the mandatory elements?

SCRA Stay Request – a Checklist for Opposing the Initial 90-Day Stay

✔	**Elements of a Valid 90-Day Stay Request.** Does the request contain…
	A statement as to how the SM's current military duties materially affect his ability to appear?
	And stating a date when the SM will be available to appear?
	A statement from the SM=s commanding officer stating that the SM=s current military duty prevents his appearance?
	And stating that military leave is not authorized for the SM at the time of the statement?

2. How much leave has member accrued? Ask for a copy of the SM's LES (Leave and Earnings Statement) to find out.

3. What is the nature of the "military necessity" that prevents a hearing? Is the SM serving in Iraq, where he cannot be given leave and is facing hostile fire on a daily or weekly basis? Or is he serving as "backfill" at Ft. Bragg or Ft. Lewis so that others may deploy overseas, working a comfortable day shift of 7:30 – 4:30 with weekends off?

4. Sometimes a SM exaggerates the amount of time needed to be in court. Often a court case can be heard and resolved in a few hours or a few days. What happens if the SM complains to his commander that he will need to be gone for 30 days to take care of his case back in court? Answer – a letter from the commanding officer stating that the SM's duty requirements prevent appearance and that he is not authorized leave. Preempt this approach by specifying in the pleadings what is requested and approximately what amount of time will be required in court.

5. Is member's presence necessary?

6. What about video depositions? Use of the Internet? Is anyone truly "unavailable" any more?

a. In *Massey v. Kim*, 455 S.E.2d 306 (Ga. Ct. App. 1995), the SM asked for a stay of proceedings to delay pending discovery until the completion of his overseas tour of duty. The court denied his request, pointing out improvements in modern communications since the passage of the SSCRA.

b. In *Keefe v. Spangenberg*, 533 F. Supp. 49 (W.D. Okla. 1981), the court denied the SM's stay request to delay discovery, indicating that the SM should appear by videotape deposition pursuant to Fed. R. Civ. P. 30(B)(4).

c. One court specifically pointed out that "Court reporters may take depositions in Germany including videotape depositions for use in trials in this country." *In re Diaz*, 82 B.R. 162, 165 (Bankr. Ga. 1988).

7. What about summary judgment based on affidavits?

8. Can the matter be resolved on an interim basis with a temporary hearing? In *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989), the court determined that temporary modifications of child support, in general, do not materially affect the SM's rights since they are interlocutory and subject to modification.

9. Is the SM truly unable to appear? The Welfare Reform Act of 1996 requires that the armed forces issue regulations to ease the granting of leave for SMs to appear in court and administrative paternity and child support hearings. *See* DoD Directive 1327.5, Leave and Liberty (IO 4, 10 Sep. 1997).

10. When will the temporary exigency be over? There is nothing that prevents a judge from responding to the commanding officer to ask some questions that will help determine what can be done to move the case forward. Perhaps the SM can respond to discovery while he is unavailable for a court appearance.

11. See ATCH-3, a flow chart on defending against the SCRA, adapted from one found at Hooper, "The Soldier's and Sailors' Civil Relief Act of 1940 as Applied in Support Litigation: A Support Attorney's Perspective," 112 Mil. L. Rev. 93 (1986). At ATCH-4 is a flow chart on the request for an additional stay. At ATCH-5 is a checklist for judges.

12. See ATCH-6, "Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical," for more information.

VII. INTERNET SCRA RESOURCES:

Fire up your ISP (internet service provider) and start with a visit to the home page of the Army JAG School, http://www.jagcnet.army.mil/TJAGLCS. When you get there, click on "TJAGLCS Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Servicemembers Civil Relief Act Guide," a thorough examination of every section of the SCRA by the faculty of the Army JAG School.

Legal Services, http://www.jagcnet.army.mil/legal, the Army Judge Advocate General's Corps public preventive legal information site (Servicemember's Civil Relief Act information center).

"A Judge's Guide to the Servicemember's Civil Relief Act" is available at the website for the Military Committee of the ABA Family Law Section, www.abanet.org/family/military.

ATCH-1

SILENT PARTNER

SUMMARY OF SERVICEMEMBERS CIVIL RELIEF ACT

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain basic concepts about legal assistance issues. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page. This SILENT PARTNER was adapted from an advisory memorandum, "Servicemembers' Civil Relief Act Primer," prepared by Chris Rydelek, head of the Legal Assistance Branch, U.S. Marine Corps, an information paper prepared by the Legal Assistance Policy Division, Office of the Judge Advocate General, U.S. Army and an article," Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act," by John Meixell of that office*

On December 19, 2003, President Bush signed into law the "Servicemembers Civil Relief Act" (SCRA); the Act takes effect upon the President's signature (12/19/03) for all cases which have not reached final judgment. This law is a complete revision of the statute known as "The Soldiers' and Sailors' Civil Relief Act," or SSCRA.

Up until the passage of the SCRA, the basic protections of the SSCRA for the servicemember (SM) included:

1. Postponement of civil court hearings when military duties materially affected the ability of a SM to prepare for or be present for civil litigation;
2. Reducing the interest rate to 6% on pre-service loans and obligations;
3. Barring eviction of a SM's family for nonpayment of rent without a court order for monthly rent of $1,200 or less;
4. Termination of a pre-service residential lease; and
5. Allowing SMs to maintain their state of residence for tax purposes despite military reassignment to other states.

The SSCRA, enacted in 1940 and updated after the Gulf War in 1991, was still largely unchanged as of 2003. The SCRA was written to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA and to update the SSCRA to reflect new developments in American life since 1940. Here's an overview of what the SCRA does:

GENERAL RELIEF PROVISIONS

1. The SCRA expands the application of a SM's right to stay court hearings to include administrative hearings. Previously only civil courts were included, and this caused problems in cases involving administrative child support determinations as well as other agency determinations which impacted servicemembers. Criminal matters are still excluded. 50 U.S.C. App. § 511-512.

2. 50 U.S.C. App. § 519 defines a "legal representative" of the SM as either "[a]n attorney acting on the behalf of a servicemember" or "[a]n individual possessing a power of attorney." Under the SCRA a servicemember's legal representative can take the same actions as a servicemember.

3. The former statute referred to "dependents" and provided several protections that extended to them, but it never defined the term. 50 U.S.C. App. § 511(4) now contains a definition of the term "dependent." This includes anyone for whom the SM has provided more than half of his or her support during the 180 days before an application for relief under the SCRA. This is intended to include dependent parents and disabled adult children.

4. There are several provisions regarding the ability of a court or administrative agency to enter an order staying, or delaying, proceedings. This is one of the central points in the SSCRA and now in the SCRA – the granting of a continuance which halts legal proceedings.

5. In a case where the SM lacks notice of the proceedings, the SCRA requires a court or administrative agency to grant a stay (or continuance) of at least 90 days when the defendant is in military service and --
   a. the court or agency decides that there may be a defense to the action, and such defense cannot be presented in the defendant's absence, or
   b. with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

6. In a situation where the military member has notice of the proceeding, a similar mandatory 90-day stay (minimum) of proceedings applies upon the request of the SM, so long as the application for a stay includes:
   a. a letter or other communication that:
      i. states the manner in which current military duty requirements materially affect the SM's ability to appear, and
      ii. gives a date when the SM will be available to appear, and
   b. a letter or other communication from the SM's commanding officer stating that:
      i. the SM's current military duty prevents appearance, and
      ii. that military leave is not authorized for the SM at the time of the letter. 50 U.S.C. App. § 522.

[Query: How does this provision affect an action for custody by the non-custodial dad when mom, who has custody, gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in Florida? How does this provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve, leaving behind her "day job" and the monthly wage garnishment for support of their children? As of January 2004 there were about 180,000 Guard/Reserve servicemembers who had been placed on orders for active duty.]

7. An application for an additional stay may be made at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2)

[Query: What is the attorney supposed to do – tackle the entire representation of the SM, whom he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way? And, by the way, who pays for this?]

8. An application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). Previously the recommended practice was to avoid having the military attorney or the SM request a stay out of concern that the court might consider the stay request as a general appearance. 50 U.S.C. App. § 522(c) eliminates this concern. This new provision makes it clear that a stay request "does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense."

9. 50 U.S.C. App. § 521 clarifies how to proceed in a case where the other side seeks a default judgment (that is, one in which the SM has been served but has not entered an appearance by filing an answer or otherwise) if the tribunal cannot determine if the defendant is in military service.

10. The Act clarifies the rules on the 6% interest rate cap on pre-service loans and obligations by specifying that interest in excess of 6% per year must be forgiven. The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of 6% is merely deferred. 50 U.S.C. App. § 527(a)(2). It also specifies that a SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. § 527(b)(1). Once the creditor receives notice, the creditor must grant the relief effective as of the date the servicemember is called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the servicemember is required to make. 50 U.S.C. App. § 527(b)(2). The creditor may challenge the rate reduction if it can show that the SM's military service has not materially affected his or her ability to pay. 50 U.S.C. App. § 527(c).

RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS AND LEASES

11. The SSCRA provided that, absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent is $1200 or less. 50 U.S.C. App. § 531(a) modifies the eviction protection section by barring evictions from premises occupied by SMs for which the monthly rent does not exceed $2,400 for the year 2003. The Act also provides a formula to calculate the rent ceiling for future years. Using this formula, the 2006 monthly rent ceiling is $2615.16.

12. A substantial change is found in 50 U.S.C. App. § 534. Previously the statute allowed a servicemember to terminate a pre-service "dwelling, professional, business, agricultural, or similar" lease executed by or for the servicemember and occupied for those purposes by the servicemember or his dependents. It did not provide help for the SM on active duty who is required to move due to military orders. Section 305 remedies these problems. Under the old SSCRA, a lease covering property used for dwelling, professional, business, agricultural or similar purposes could be terminated by a SM if two conditions were met:
    a. The lease/rental agreement was signed before the member entered active duty; and
    b. The leased premises have been occupied for the above purposes by the member or his or her dependents.

13. The Act still applies to leases entered into prior to entry on active duty. It adds a new provision, however, extending coverage to leases entered into by active duty servicemembers who subsequently receive orders for a permanent change of station (PCS) or a deployment for a period of 90 days or more.

14. It also adds a new provision allowing the termination of automobile leases (for business or personal use) by SMs and their dependents. Pre-service automobile leases may be canceled if the SM receives orders to active duty for a period of 180 days or more. Automobile leases entered into while the SM is on active duty may be terminated if he or she receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more.

LIFE INSURANCE

15. Article IV of the SSCRA permitted a SM to request deferments of certain commercial life insurance premiums for the period of military service and two years thereafter. If the Department of Veterans Affairs approved the request, then the US government guaranteed the payments and the policy continued in effect. The SM had two years after the period of military service to repay all premiums and interest. There was a $10,000 limit for the total amount of life insurance that this program could cover. The SCRA, 50 U.S.C. App. § 542, increases this total amount to the greater of $250,000 or the maximum limit of the Servicemembers Group Life Insurance.

TAXES

16. The SCRA adds a provision that would prevent states from increasing the tax bracket of a nonmilitary spouse who earned income in the state by adding in the service member's military income for the limited purpose of

determining the nonmilitary spouse's tax bracket. This practice has had the effect of increasing the military family's tax burden. 50 U.S.C. App. § 571(d).

FURTHER RELIEF

17. The new Act adds legal services as a professional service specifically named under the provision that provides for suspension and subsequent reinstatement of existing professional liability (malpractice) insurance coverage for designated professionals serving on active duty. The SSCRA specifically named only health care services for protection in the 1991 amendment. The insurance provider would be responsible for any claims brought as a result of actions prior to the suspension. The carrier would not charge premiums during the period of suspension, and must reinstate the policy upon the request of the professional. Legal services have been covered since 3 May 1999 by Secretary of Defense designations. The SSCRA permitted such a Secretarial designation, but 50 U.S.C. App. § 593 clarifies this area.

18. Historically, the SSCRA applied to members of the National Guard only if they were serving in a Title 10 status. Effective 6 December 2002, the SSCRA protections were extended to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense. This continues in the SCRA. 50 U.S.C. App. § 511(2)(A)(ii).

The best source of information on the SSCRA, until this publication is updated to reflect the changes brought by the SCRA, is the Army JAG School's SSCRA Guide. This can be found at the School's website, www.jagcnet.army.mil/tjaglcs. Click on "TJAGLCS Publications," then scroll down to Legal Assistance, and then look for JA 260, which is the SSCRA Guide.

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* * *

SILENT PARTNER IS PREPARED BY COL MARK E. SULLIVAN (USAR, RET.). FOR REVISIONS, COMMENTS OR CORRECTIONS, CONTACT HIM AT 600 WADE AVENUE, RALEIGH, N.C. 27605 [919-832-8507]; E-MAIL – Mark.Sullivan@ncfamilylaw.com.

ATCH-2

Sample motion for stay of proceedings under Servicemembers Civil Relief Act (SCRA)

[HEADING OF CASE]

MOTION FOR STAY OF PROCEEDINGS

Pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. § 522, the defendant moves this court for [an initial 90-day stay of proceedings][a further stay of proceedings], showing that his ability to defend herein is materially affected by his military duties. In support of this motion and in compliance with the SCRA, the defendant has included --

As Encl # 1, a letter or other communication that:
states the manner in which current military duty requirements materially affect the defendant=s ability to appear, and gives a date when the defendant will be available to appear; and

As Encl # 2, a letter or other communication from the defendant's commanding officer stating that:
the defendant's current military duty prevents appearance, and that military leave is not authorized for the defendant at the time of the letter.

WHEREFORE the defendant prays that this court grant him a stay of proceedings until [date] and such other relief as is just and proper.

_____ Date:
Janet A. Smith, Attorney for Defendant
123 Bartlett Street, Salisbury, NC 26799
919-555-1234

.....

[Notes: While this motion is written by the defendant's attorney, the SCRA mentions the "application of the servicemember," which means the SM or his legal representative could file the motion, application, petition or other document requesting a stay of proceedings. The "SM's legal representative" would be his lawyer (civilian or military attorney) or an individual who holds his power of attorney. It may be addressed to the court, the clerk, the presiding judge, the defendant=s attorney, or the opposing counsel.

The statute appears to call for two statements, but the information required may be conveniently combined into *one* statement if that comes from the SM's commanding officer. While the examples here are two statements which give limited information, a good letter should set out the facts in detail -- not merely conclusions -- as to how the defendant=s military duties adversely affect his ability to prepare and present the case, including appearances at depositions, responses to interrogatories and document requests, and appearance at trial. Although not required by the SCRA, it is a wise idea to set out how much leave the defendant has accrued, whether he has asked for leave, how much leave was requested, and whether the request has been approved or denied, including who approved or denied it, the date of such action, the limitations, if any, on an approved leave, etc. The purpose of this is to show that the defendant is exercising good faith and due diligence in his application for a stay, rather than using the stay request purely for tactical advantage.]

Encl #1

Sergeant Leopold Legume, SSN 123-45-6789
Company C, 3d Battalion, 123d Underground Balloon Regiment
V Corps, U.S. Army
APO AE 91099

[date]

TO WHOM IT MAY CONCERN:

My current military duty requirements materially affect my ability to appear in the following manner: I am currently serving as a truck driver in the above unit at Camp Bondsteel in Kosovo. My tour of duty is for 180 days, beginning February 1, 2004. I was recalled to active duty in the U.S. Army from my assignment in the Army Reserve, which is the 122d Transportation Battalion, Salisbury, North Carolina. I am in the field every day of the week, and I am unavailable to appear at my hearing on child support. I have asked for one week=s leave in order to fly back to North Carolina and attend the hearing. This was denied by my commander.

I need to be personally present in court on my hearing date of May 1, 2004, to testify as to my compensation, both civilian (before the Reserve call-up) and military (a substantial reduction from my civilian pay), my reasonable living expenses (before and after the call-up) and certain bills of the plaintiff that I have taken over at her request since the last child support order herein that would constitute grounds for a variance from the Child Support Guidelines. I will be available to appear on or after September 10, 2004

[signature of defendant]
.....
Encl #2

Major Regina Richards, Commander
Company C, 3d Battalion, 123d Underground Balloon Regiment
V Corps, U.S. Army
APO AE 91099

[date]

TO WHOM IT MAY CONCERN:

1. I am the commanding officer of SGT Leopold Legume, SSN 123-45-6789.

2. His current military duty prevents his appearance in court on May 1, 2004.

3. He has requested one week=s leave for this court appearance. I denied his request, and military leave is not authorized for him at this time.

[signature of commanding officer]

SCRA Flow Chart for Opposing "Additional Stay"

Is the defendant a person in the military service (or within 90 days of discharge)?

NO → Proceed under state law; SCRA does not apply in this case.

YES ↓

Has the defendant requested an additional stay of proceedings under Section 202 of the SCRA?

NO → Proceed under state law; SCRA inapplicable.

YES ↓

Is the request in the form of an statement showing how his/her military duties have a material effect on his/her ability to appear? And giving a date when the SM will be available to appear?

NO → Demand one. This is a requirement of the SCRA, and it is the best protection in court for the nonmilitary party as to the truth of defendant's claims.

YES ↓

Does the request include a statement from the SM's commanding officer showing that the member's military duties prevent his appearance and that leave cannot be granted at this time?

NO → Demand this; it is also a requirement of the SCRA.

YES ↓

Has the servicemember established nonavailability due to *military* duties (e.g., a training exercise, or deployment in a hostile zone)?

NO → Demand that defendant's request address this issue. This is required by the SCRA, and proof of inability to take leave should be required to protect the nonmilitary party.

YES ↓

Does the request demonstrate that defendant cannot take leave (e.g., no leave remaining or the request was turned down)

NO → Demand this. Military personnel accrue 30 days of leave annually.

YES ↓

Does this request show that defendant's presence is necessary for defense in lawsuit?

NO → Argue that the stay should be denied. The power to grant a stay is based on inability to appear in person, which implies the need either to testify or to conduct/oversee the defense.

YES ↓

Is the defendant's presence in fact necessary in the lawsuit?

NO → See above; argue that the stay should be denied. In a child support case, argue that the member's LES* is all that is needed to determine the proper amount of support.

YES ↓

Does the SM's statement establish a valid defense?

NO → Argue that the stay request should be denied. If there is no valid defense, then granting the stay will only prolong and delay the proceeding needlessly.

YES ↓

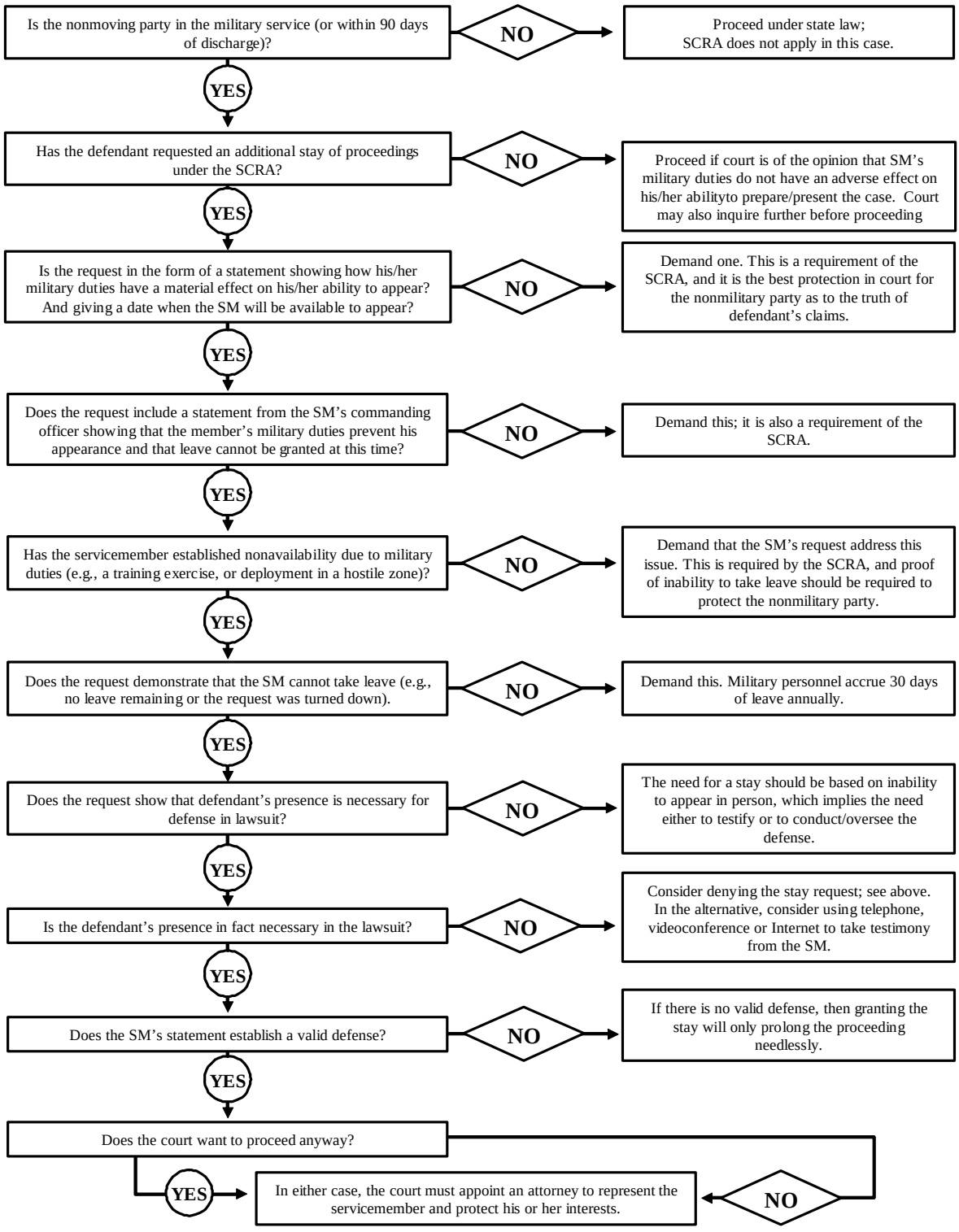
Does the court want to proceed anyway?

NO ↓

YES → In either case, the court must appoint an attorney to represent the servicemember and protect his or her interests.

*LES=Leave and Earnings Statement

ATCH 4 - SCRA Flow Chart for "Additional Stay"



ATCH 5 – CHECKLIST

The Servicemembers Civil Relief Act: A Judge's Checklist

[NOTE: The SCRA can be found at 50 U.S.C. Appendix § 501 et seq.]

In using this checklist, keep in mind the purpose of the Act: to enable servicemembers (SMs) to devote their entire energy to the defense needs of the nation, and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service. (50 U.S.C. App. § 502)

✔ **Who is covered?** (50 U.S.C. App. § 511) Those covered include:
 Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
 National Guard members called to active duty by President or Secretary of Defense for over 30 days under 32 U.S.C. 502(f) (national emergency declared by the President and supported by federal funds)
 Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration

✔ **Default situation** – no appearance by SM (servicemember) (50 U.S.C. App. § 521). You must -
 1. Require affidavit of military status by moving party
 2. Inquire into whether missing party is in military service by requesting check of records by Dept. of Defense[1]
 3. Don't enter default decree against SM – appoint an attorney to represent him/her
 4. If you cannot determine whether missing party is in military, require movant to post bond to indemnify the non-movant if:
 a. there may be a defense, and presence of SM is needed to make it, OR
 b. with due diligence, appointed attorney can't contact client or otherwise determine whether defense exists

✔ **Use of bond?** (50 U.S.C. App. § 522(b)(3))
 As condition of entry of default judgment, require bond if you cannot determine whether defendant is in military service.
 Bond may be used to indemnify defendant against loss/damage from default judgment (if later set aside) should he/she later be found to be a SM.

✔ **Request for stay** – SM or attorney requests suspension of case (50 U.S.C. App. § 522)
 Grant stay of proceedings (discretionary on court's own motion, mandatory on SM's motion) for at least 90 days if motion includes-
1. Statement as to how the SM's current military duties materially affect his ability to appear, and
2. stating a date when the SM will be available to appear, and
3. Statement from the SM=s commanding officer that SM=s current military duty prevents his appearance, and
4. military leave is not authorized for the SM at the time of the statement

✔ **Grant additional stay (beyond initial 90 days)?**
 Yes if continuing material effect of military duty on SM's ability to appear.
 Same information required as above.

✔ **Deny additional stay?**
 Only if you appoint attorney to represent the SM in the action or proceeding (50 U.S.C. App. § 522(d)(2)).
 Expect attorney to renew stay request since he/she cannot prepare, present case without assistance from the unavailable SM.

✔ **Unsure whether to grant or deny additional stay?**
 Ask for a copy of the SM's current LES (Leave and Earnings Statement), issued twice a month, to see how much leave SM has accrued, used in the past few months.
 Propound questions from the court to SM's commanding officer as to duty hours, days for the SM, his or her availability to attend court or to participate by telephone, Internet or videoteleconference

[1] Upon application by either side or the court, the military service must issue a statement as to military service. 50 U.S.C. App. ξ 582. Contact: Defense Manpower Data Center, 1600 Wilson Blvd., Suite 400, Attn: Military Verification, Arlington, VA 22209-2593, [telephone 703-696-6762 or –5790/fax 703-696-4156]

✔ **Execution of orders, judgments** (50 U.S.C. App. § 524)
 Must stay execution of any judgment, order entered against SM if SM shows military duties materially affect his/her ability to comply with court decree
 Also vacate or stay any attachment or garnishment of property, money or debts in possession of the SM or third party

✔ **Anticipatory relief** (50 U.S.C. App. § 591)
 Grant relief from obligation or liability incurred by SM before his/her military service
 Also for tax or assessment falling due before or during the SM's military service

✔ **Reopen judgment** (50 U.S.C. App. § 521(g))
 Must reopen order, judgment against SM if –
1. SM was materially affected due to military service in asserting defense, and
2. He/she has meritorious defense

✔ **Are waivers allowed?** (50 U.S.C. App. § 517)
 Only effective if made during period of military service.
 Usually must be in writing.

✔ **Don't penalize SM in stay request.** (50 U.S.C. App. § 522(c))
 Request for stay does not constitute appearance for jurisdictional purposes
 Also doesn't constitute waiver of any defense, substantive or procedural

✔ **Statute of limitations** (50 U.S.C. App. § 526)
 Period of military service may not be included in computing any limitation period for filing suit, either by or against SM.

✔ **Protect against mortgage foreclosure** (50 U.S.C. § 533)
 Court may stay foreclosure proceedings until SM can answer, extend mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by SM, or extend the period of redemption by period equal to the SM's military service.
 Conditions for above: if –
1. Relief is sought on security interest in real/personal property
2. Obligation originated before active duty
3. Property owned by SM or dependent before active duty
4. Property still owned by SM or dependent
5. Ability to meet financial obligation is materially affected by SM's military service
6. Action is filed during (or within 90 days after) SM's military service. (50 U.S.C. App. § 533)

✔ **Protect SM-tenant.**
 If the rent is paid in advance, require landlord to refund unearned portion. The servicemember is required to pay rent only for those months before the lease is terminated. (50 U.S.C. § 535(f))
 It is a misdemeanor for a landlord to seize, hold or detain the security deposit or personal property of a SM or dependent when there is a lawful lease termination under the SCRA, or to knowingly interfere with the removal of said property because of a claim for rent after the termination date. A security deposit must be refunded to the SM upon termination of the lease. 50 U.S.C. § 535(h)(1).

* * *

ATCH-6

LEGAL CONSIDERATIONS IN SCRA STAY REQUEST LITIGATION: THE TACTICAL AND THE PRACTICAL

Stays of Proceedings

Section 202 of the Servicemembers Civil Relief Act (SCRA), the successor to the Soldiers' and Sailors' Civil Relief Act (SSCRA), allows the servicemember (SM) to obtain an initial stay of at least 90 days upon production of a statement showing how the SM's current military duties materially affect his ability to appear and stating a date when the SM will be available to appear, along with a statement from the SM's commanding officer stating that the SM=s current military duty prevents his appearance and that military leave is not authorized for him at the time of the statement. This Section also allows the SM to request an additional stay, based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. The same information as given above is required. 50 U.S.C. App. § 522.

After the initial mandatory stay, which must be granted upon production of the above statements, the granting of an additional stay is in the discretion of the judge. The U.S. Supreme Court has held that this provision should be "liberally construed to protect those who have been obliged to ... take up the burdens of the nation."[2]

Do the courts have to grant an additional stay? No -- it is merely the purpose of the Act to focus the court's attention on whether a military member's ability to appear is *materially effected* by military service. If the court finds no "material effect," for example, the request for stay should be denied. The court is unlikely to find material effect, for example, when the courthouse is in close proximity to the base or post and the military member has a reasonable amount of annual leave accrued that can be used in trial preparation and attendance.

A finding of "material effect" on the ability to appear is likely, on the other hand, when the member is distant from the courthouse, lacks sufficient leave that may be used for travel, preparation, and attendance in court, or is on an assignment that precludes the granting of leave to take care of one's civil legal affairs. The trial court (federal or state) *must* grant a request for a stay when it finds that the member's military service has a "material effect" on the individual's ability to appear.[3] (See flow chart on stay of proceedings.)

Here are some arguments that may succeed even if the member cannot appear:

- The member's presence at trial is not necessary. In *Keefe v. Spangenberg*[4], the court denied a stay request to delay discovery and suggested that the servicemember consider a videotape deposition under Federal Rule of Civil Procedure 30(B)(4). In *Jackson v. Jackson*,[5] the court denied an SSCRA stay because under state law the obligor's presence was not necessary in a proceeding to review the amount of support. Finally, in *In re Diaz*,[6] the court stated that "Court reporters may take depositions in Germany including videotape depositions for use in trials in this country."
- The sole issue at trial amounts to uncontested facts, and thus no stay should be

[1] *Boone v. Lightner,* 319 U.S. 561 (1943).
[2] *Boone v. Lightner, supra.*
[4] *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 (W. D. Okla. 1981).
[3] *Jackson v. Jackson*, 403 N.W. 2d 248 (Minn. App. 1987).
[4] *In re Diaz*, 82 B.R. 162, 165 (U.S. Bankruptcy. Crt. 1988).

granted because no actual prejudice results from the soldier's non-appearance. This result can be obtained in uncontested divorce proceedings.[7]

- The military member is nominally involved but is not a "necessary party" to the contested litigation. In *Bubac v. Boston,*[8] the father was a military member. He was found by the court, however, not to be a necessary party to the litigation, which involved the mother's challenge to the maternal grandmother's retaining custody of the children.
- There is no "substantial prejudice," to the military member when a temporary order or an interlocutory decree is involved. In *Shelor v. Shelor*,[9] the court stated that, as a general rule, temporary modifications in child support do not materially affect the rights of a military defendant since they are interlocutory in nature and subject to future modification.

Determining 'Material Effect'

It is up to the trial judge to determine, on a case-by-case basis, what are the boundaries of "material effect." A good example can be found in *Cromer v. Cromer*.[10] In that case the defendant was serving on board a submarine that was scheduled for operations at sea during the period when his child-support case was set for trial. The Supreme Court remanded the case for consideration of the affidavit of the sailor's commanding officer in determining whether his military service and duties had a "material effect" on his ability to defend himself so as to justify a stay of proceedings under the Act.

There is no clear formulation of who has the burden of proof to show a "material effect." As stated by the U.S. Supreme Court in *Boone v. Lightner*:

> The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come.[11]

Although it is logical to require the burden of proof to be on the movant (*i.e.,* the service member who is requesting a stay of proceedings), some courts have stated that *both parties* may be required to produce evidence on the issues.[12]

A stay is not forever. Contrary to the popular notion of many servicemembers and some civilian practitioners, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. Military members accrue leave at the rate of 30 days per year, and courts can take judicial notice of this fact.[13] Current overseas postings usually last around three years for an "accompanied tour" (with family members), and much less for unaccompanied tours in such host countries as Turkey, Korea and Iceland.

In fact, the stay is intended to last only as long as the material effect lasts. Once this effect is lifted, the opposing party should immediately request the lifting of the stay of proceedings. In the event

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[7] *See, e.g., Palo v. Palo,* 299 N.W.2d 577 (S.D. 1980).
[6] *Bubac v. Boston, 600* So. 2d 951 (Miss. 1992).
[7] *Shelor v.* Shelor, 259 Ga. 462, 383 S.E. 2d 895(1989).
[8] *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).
[9] *Boone v. Lightner, supra.*
[10] *Gates v. Gates*, 197 Ga. 11, 25 S.E.2d 108 (1943).
[11] *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E.2d 905 (1982).

of further resistance by the military member, the court should require submissions upon affidavit for deciding the issue.

The statement of a service member -- and any other proof offered to show "material effect"--will ordinarily be scrutinized by the court to determine whether the member has exercised due diligence to secure counsel or to attend the hearing. In *Palo v. Palo*,[14] a South Dakota divorce and property division case, the parties were both in service, and both were stationed in Germany when the trial was scheduled. The wife had no leave accrued, but she borrowed money and took an advance on future leave to attend the hearing. The husband was absent at the trial and his affidavit stated that he had no money, wished to reconcile with his wife, did not have any remaining leave, and did not wish to take an advance on leave. The appellate court upheld the trial court's decision not to grant a stay to the husband because the evidence showed that the husband was unwilling, rather than unable, to attend the proceeding. The trial judge found that the husband should not be allowed to take advantage of the SSCRA's protections where the wife did not do so. The Supreme Court of South Dakota ruled that the husband failed to demonstrate due diligence in trying to attend the proceedings.

Unwritten Rules

A further rule that is applied by the courts but is not found in the Act is that the stay requested must be for a reasonable period of time. In *Plesniak v. Wiegand*,[15] the defendant requested four stays under the SSCRA between the filing of suit in 1969 and the final trial date in 1973.

When the final stay request was turned down, the court ruled that the service member had not made a reasonable effort to make himself available for trial. The court also ruled that the Act does not require indefinite continuances and that it was incomprehensible why the defendant, a commanding officer, could not take leave to attend trial.

A stay may last for such period as is just; the key is reasonableness. In *Keefe v. Spangenberg*,[16] the court granted a solder's stay request for a one-month continuance but denied his request for a stay until his expected date of discharge three years later.

If the unavailability of a servicemember is only temporary and will end at a fixed date in the near future, then the court will usually grant a stay. Such would be the case if the member were a sailor deployed for a six-month mission on a ship or if a soldier were on a field exercise for several weeks. Counsel for the member should avoid requesting stays that are unreasonably long since most courts understand the availability of leave for service personnel, even if they are stationed overseas. The courts will carefully scrutinize *extended unavailability*, particularly when it is *unexplained*. In these cases, the judge will usually demand that a member make some showing that he has attempted to delay his departure for an overseas assignment or to secure leave to return to the U.S. from an overseas duty station.

Be sure to check on whether the servicemember has requested leave to appear in court. If he hasn't, it will be impossible for him to obtain an initial 90-day stay and very difficult for him to obtain an additional stay since he won't be able to show the unwritten requirement of "due diligence." Military policy is to grant leave for the purpose of attending to important matters, which include court appearances. If leave was requested and denied, write to the commander and ask him or her when the member can be allowed to take leave.

In order to solve some of the problems associated with unavailability of military personnel, the Welfare Reform Act of 1996 requires that the military services must promulgate regulations to facilitate the granting of leave for servicemembers to appear in court and for administrative paternity and child

[12] *Palo v. Palo, supra.*
[13] *Plesniak v. Wiegand,* 31 I11. App.3d 923, 335 N.E.2d 131 (1975).
[14] *Keefe v. Spangenberg, supra* at note 3.

support hearings. *See* Pub. L. No. 104-193 § 363, 110 Stat. 2105 (1996) and DOD Dir. 1327.5, "Leave and Liberty," Change 4 (September 10, 1997). The Directive now states that when a servicemember requests leave to attend paternity or child support hearings, leave "shall be granted" unless the servicemember is serving in a contingency operation or unless "exigencies of service" require that leave be denied.

Counsel for the non-military party should request that the court examine whether the member has acted with "due diligence" and "in good faith." Most courts hold that a member must exercise due diligence and good faith in trying to arrange to appear in court.[17] When a servicemember demonstrates bad faith in his dealings with the court, no stay will be granted. In *Riley v. White*,[18] a soldier failed to submit to blood tests in a paternity action before going overseas and was aware of the court proceedings, had an attorney to represent him and was previously given a delay by the court to take the tests required; the court's denial of his stay request was upheld. In *Hibbard v. Hibbard*,[19] a soldier who had been in contempt for three years for refusing to comply with visitation orders was denied a stay in the ex-spouse's change of custody action. In *Judkins v. Judkins*,[20] a soldier received several continuances because of military duty during the Persian Gulf War, had an attorney, failed to comply with court discovery orders and sought additional stays or continuances after discovery order disobedience; the court denied his stay requests.

An affidavit or statement supporting the stay request should be carefully prepared by counsel with an eye toward the close scrutiny and possible skepticism of the trial court. It must also be prepared with a view toward appeal. A good affidavit will not only state that the defendant cannot be present at trial but also indicate why the defendant is unavailable, what efforts he or she has made to attend trial, and when the member will probably be able to be present.

Questions for the Servicemember

Some courts require more of such information whenever a stay application does not contain sufficient facts. One example is the set of questions used by the courts in Monterey County, California, to get information from the defendant's commander.[21] The author has added several additional inquiries, and these are formatted as interrogatories to the defendant (as opposed to questions by the court):

1. What have you done to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial in this court?
2. What results did these efforts produce?
3. How much leave did you request?
4. When did you request this leave?
5. Give the name, rank, title, address and commercial telephone number (if available) of the individual who denied your leave request.
6. Have you taken any leave in the last three months?
7. If so, how much and for what purpose?
8. How much leave do you currently have as reflected on your latest Leave and Earnings Statement (LES)?

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[15] *See e.g.*, *Boone v. Lightner*, 320 U.S. 809, 64 S. Ct. 26, 88 L. Ed. (1943), *Plesniak v. Wiegand*, 31 Ill. App. 3d 923, 927-30, 335 N.E. 2d 131 (1975), *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E. 2d 905 (1982), *Palo v. Palo*, 299 N.W. 2d 577 (SD S. Ct. 1980), and *Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139 (1994).

[16] 563 So. 2d 1039 (AL App. 1990).

[17] 230 Neb. 364, 431 N.W. 2d 637 (1988).

[18] *Judkins v. Judkins*, *supra* at note 15.

[19] Hooper, "The Soldier's and Sailors' Civil Relief Act of 1940 as Applied in Support Litigation: A Support Attorney's Perspective," 112 MIL. L. REV. 93, 95-96 (1986).

9. Provide a copy of your last three Leave and Earnings Statements with your responses to these questions.
10. What have you done to obtain a transfer to a military installation near this court on either a temporary or permanent basis?
11. What results did these efforts produce?
12. When were you assigned to the present duty station?
13. When are you due to be transferred on normal rotation or reassignment?
14. To what station will you probably be transferred?
15. (If the SM is an enlisted person) What is the date of your present enlistment contract?
16. When does the enlistment expire?
17. Do you intent to re-enlist?
18. Does your service record contain a bar to re-enlistment?
19. Is there any likelihood that you will obtain an early release from active duty and, if so, when is this expected to occur?
20. State any and all reasons why you cannot respond to written interrogatories in this case.
21. State any and all reasons why you cannot respond to written document requests in this case, so long as the documents request are readily available to you.
22. State any and all reasons why you cannot respond to written requests for admissions in this case.
23. Give the location (and distance) of the nearest legal assistance office (JAG office or staff judge advocate office) to you.
24. State your duty hours during the week.
25. State your duty hours on weekends.
26. State what means of communication are available between you and this court, specifically including telephone, e-mail, regular mail and videoteleconference (both individually and through you JAG office).

Default Judgments

Members are further protected from default judgments under the SCRA. The purpose of this is to protect those in the military from having default judgements entered against them without their knowledge and without a chance to defend themselves.[22] The SCRA allows a member who has not received notice of the proceeding to seek the reopening of a default judgment. The requirements are as follows:

- The member must apply to the trial court that rendered the original judgment of order.[23]
- The default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter.
- The member must apply for reopening the judgment while on active duty or within 90 days thereafter.
- The member must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service.[24]
- The member must show that there is a meritorious or legal defense to the initial claim.

[20] *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).
[21] *Davidson v. GFC*, 295 F. Supp. 878 (N.D. Ga. 1968).
[22] *Bell v. Niven*, 225 N.C. 395, 35 S.E.2d 182 (1945).

An important requirement of the reopening of a judgment is that the moving party have a meritorious or legal defense. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of effort and resources in opening default judgments in cases where servicemembers have no defense to assert. As part of a well-drafted motion or petition to reopen a default judgment or order, the SM should clearly delineate his claim or defense so that the court will have sufficient facts upon which to base a ruling.

The North Carolina Courts of Appeals most recently dealt with the "meritorious defense" issue in *Smith v. Davis*.[25] In that case, plaintiff served defendant with a complaint that charged him with nonsupport and requested an order of child support. In response, the member sent a letter to plaintiff's attorney asking that the attorney recognize his rights under the SSCRA. Defendant failed to appear at the hearing and the court, without appointing an attorney to represent the defendant, entered an order that defendant pay child support to plaintiff on behalf of the minor child.

Defendant then filed a motion to set aside the decree under several provisions of the SSCRA. The affidavit attached to the motion alleged that defendant was on active duty in the Marine Corps in California, that his military obligations prevented his attendance at the hearing, and that he was having "pay problems"-- he had not been paid in four months. On appeal, the order was set aside because "[d]efendant has alleged facts which at the time of the child support hearing were sufficient to constitute a legal defense to plaintiff's petition."[26]

How do you take a default judgment in a military case if you want to safeguard it against reopening? There must be an affidavit or other verified pleading which supports the default judgment. It must be prepared and filed by the plaintiff (or the moving party) and it must state sufficient facts to give the court a reasonable basis to determine whether the defendant/respondent is in the military.[27] The effect of failure to file such an affidavit is that no entry of judgment is allowed until a judge determines that the defendant is not in the military and has not requested a stay.

The court is not required to set aside a default judgment if there was no prejudice by reason of service in the armed forces. A New York court, for example, refused to set aside a default separation decree against a servicemember when he was fully advised of the tendency of the action, was always accessible to the court, and refused to accept notice by certified mail of the time and place of his trial. The court in this instance held that he was not prejudiced due to his military service in defending the action.[28] In a California case, the court ruled that if a member against whom a default judgment was entered had no desire to assert a defense and had so demonstrated by his prior conduct, then his military service didn't prejudice him.[29]

Meritorious Defense

When representing a servicemember, it is important to state early and clearly the meritorious defense that is involved. In cases where a servicemember has been sued, this is usually done in a pleading under Rule 8 of the Federal Rules of Civil Procedure (or the local jurisdiction's equivalent), giving adequate notice to the plaintiff of any defenses upon which defendant will rely.

One particular area where valid defenses will usually be difficult to assert is in cases involving the initial determination of child support. A copy of the military pay tables is available from most recruiters and also from the website of the Defense Finance and Accounting Service, www.dfas.mil. The

[23] *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).
[24] *Id*,. 364 S.E.2d at 159.
[25] *Millrock Plaza Associates v. Lively*, 153 Misc. 2d 254, 580 N.Y. S. 2d 815 (1990).
[26] *Burgess v. Burgess*, 234 N.Y.S. 2d 87 (N.Y. Sup., October 17, 1962).
[27] *Wilterdink v. Wilterdink*, 81 Cal. App. 2d 526, 184 P.2d 527 (1947).

laws of all states and territories require "expedited process" in child support determinations.[30] Ordinarily a preliminary determination of child support must be made within 60 days of filing suit. The child support guidelines usually prescribe a formula for child support based on the incomes of one or both parents.

Even if the military member does not show up in court for the hearing due to military duties elsewhere, the trial judge can easily determine his or her income for input into the child support guidelines. Most judges add the servicemember's taxable gross base pay to the nontaxable basic allowance for housing (BAH) and the nontaxable basic allowance for subsistence (BAS) in order to arrive at the member's gross pay. With airborne troops, an additional component termed "jump pay" is added; for aviators, this is called 'flight pay.'

Base pay, BAS and BAH can all be found on the published military pay tables. A recent leave-and-earnings statement of the member will contain an accurate picture of the total entitlements, statutory deductions, voluntary deductions and year-to-date totals. In addition, it will contain a category describing total leave accrued and leave time remaining, which are invaluable pieces of information for the trial court. These pay statements are easily available to every servicemember.

With all these tools available for an expedited and straightforward determination of child support (at least on a temporary basis), it is hard to see how the trial court would grant an additional stay at this stage of the proceedings absent a very good showing by military members of their "valid defense" requiring personal attendance at court for preparation and trial of the matter.

On the other hand, some valid defenses do exist in enforcement proceedings, as shown in *Smith v. Davis*. As a general rule, "[a]bsence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial."[31] In *Smith v. Davis*, the Court of Appeals held that it was reversible error to proceed with the trial without the defendant, and that his military service did prejudice his ability to defend the child-support action.[32]

A servicemember's defense could be based, for example, on any one of the following:

- Death or emancipation of the child;
- Transfer of physical of legal custody of the child;
- Prior payment of child support (but failure of the court, agency or custodial parent to credit same); or
- Military financial error (resulting in no paycheck or substantially reduced pay).

A personal appearance for testimony would probably be essential for each of these issues. In any of the above enforcement-defense cases, a clear statement of the defense which is sufficient to give notice of same to the other side, made under oath, should be sufficient to persuade the trial court to grant a stay for a reasonable period of time.

Three additional protections may help the servicemember. The Act requires the filing of an affidavit whenever judgment is taken by default. 50 U.S.C. App. § 521(b)(1). It contains provisions for the appointment of an attorney for the absent servicemember. 50 U.S.C. App. § 521(b)(2). It also provides for the posting of a bond, in the discretion of the court, by the party requesting a default judgment. 50 U.S.C. App. § 521(b)(3).

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[28] N.C. Gen. Stat. § 50-32.
[29] *Boone v. Lightner*, 319 U.S. at 575; *see also Chenausky v. Chenausky*,128 N.H. 116, 509 A.2d 156 (1986).
[30] *Smith v. Davis*, *supra* at note 23.

PROFESSIONAL RESPONSIBILITY FOR THE LEGAL ASSISTANCE ATTORNEY

Mark. E. Sullivan, COL, USAR (Ret.)

[problems adapted from TJAGSA outline – 1997 Professional Responsibility Seminar]

I. LEGAL ETHICS FOR LEGAL ASSISTANCE ATTORNEYS – SOME NOTES

A. Be cautious about giving a second opinion
   1. This is possibly unethical, and it's seriously problematic if you don't have the documents in front of you and know all of the facts.
   2. You may be able to get out of this by saying that you don't know the law in Ohio, Kentucky, etc., and thus cannot advise.

B. Don't assume the facts – use indirect discourse at all times except when you know whereof you speak [e.g., "The check was for $400, not $4,000 – I have the check right here in front of me; and it was dated the 25th, not the 1st of the month"]

C. Avoid conflicts.

Portions of the text below are from Colonel Mark E. Sullivan, *The Legal Assistance Chief's Handbook*, ARMY LAW., Sept. 2004, pp. 1-43.

Screening for Conflicts

Conflicts of interest are much more likely in the Army community due to the small size of many Army legal assistance offices and the fact that LA services are free. Make sure that there are procedures in place for the screening of potential clients to detect possible conflicts of interest. AR 27-3 places this responsibility on the shoulders of the LA chief.[1] Check your policy with those at other Army legal assistance offices to compare how they deal with this problem.

Tell your legal assistance attorneys to pay particular attention to "cocktail clients" who may cause conflicts. These are individuals who recognize you as a judge advocate at, say, a reception or a cookout. They approach you to begin a conversation and, before you know it, they are pouring out their life's stories to get legal advice from you. Especially when a domestic matter is involved, steer clear of such conversations. They can inadvertently create a conflict for the entire office which could be avoided by an ounce or two of polite caution in responding to such informal entreaties for advice.

Is There a Conflict?

Does your clerical support staff know how to find out if a conflict of interest exists with some previous client of the office? If so, do they know how to make a polite referral to

[1] AR 27-3, para 4-9*b*.

another office so that an LAA there can see this client?[2] Are there procedures in place to specify how to do this? Does the staff know where to find those procedures? Who is the person who does conflict-screening?

Do your clerical staff members also know how to do a referral without telling more than necessary? If an individual calls about setting up an appointment for divorce information, saying "CPT Brown can't see you because he already saw your husband this morning" is a sure give-away that the husband has just talked to a lawyer about a divorce, even though the clerk didn't specifically mention the subject of divorce when responding to the caller! How will you instruct your staff to handle such a call? Your clerical support staff needs to avoid revealing the substance of the interview expressly or by interference. How will you do this while complying with the requirement of AR 27-3*b*(2) that "[f]ull explanations are given to every client who cannot be assisted by attorneys in an Army legal office because of a conflict?"

D. Make competent referrals

1. Try to check out the credential of lawyers to whom you refer cases

2. If you don't know, then say so to the client so he or she can try other routes for referrals if necessary.

3. Use of ABA Family Law Section's Operation Stand-By (http://www.abanet.org/family/military/operationstandby.pdf) or the American Academy of Matrimonial Lawyers (www.aaml.org)

Another excerpt from the same article:

"Got Docs?"

It is hard to overstate the importance of the next topic – getting *all* the documents for the attorney to review. This should be top priority for the clerical staff. How often, LAAs frequently lament, do they conduct an interview only to find out that critical papers are missing, having been left behind by the client? The LAA will sit down for the interview about a traffic ticket, only to hear the client say, "Oh, you want to see the *ticket*? If left if back at my quarters. I didn't know you'd need to look at it." The same thing happens over and over again, whether it is about the eviction papers served on the client, the notice of hearing for a court date, or the separation agreement sent by the soldier's spouse from back in the States.

Make sure your staff asks the client what documents there are, *where* they are, and when they will *all* be available so that they can be brought to the attorney. Encourage the client to take extra steps to be sure that the attorney has all the documents at the initial meeting. And encourage your staff to ask lots of questions to find out if there's a document that they LAA should see, even when the client hasn't volunteered that information. An appointment about custody, for example, could involve a no-documents interview involving an impending separation involving the children of *the current marriage*, or it could involve modification or

[2] Conflicts of interest are covered in AR 27-3, para 4-8, 4-9.

enforcement of the custody order of the client *from a previous marriage*. Make sure the staff finds out which one it is.

G. Know the law
   1. Don't advise when you can't tell the client the state of the law in a particular area.
   2. Duty to associate competent co-counsel – esp. in case where incorporation of separation agreement is intended or pleadings are involved.

Another excerpt…

Know Your Limits – Malpractice Avoidance

Teach your legal assistance attorneys about how to avoid grievances and malpractice traps. Remember that civilian practitioners are not alone in their exposure to claims of legal negligence in the legal field in the drafting of wills and the preparation of separation agreements.[3] The target of the claim usually resides in a military legal assistance office. Most often the problem is a legal assistance attorney who is "in over his head" due to lack of experience, time, research, or practical knowledge of state cases and laws. Whether the legal malpractice is the result of a well-intentioned LAA wanting to "go the extra mile" for a client or some other reason, it is not the way to practice in the military. Dealing with such a problem can give one a serious case of the ulcers in terms of worrying about one's professional reputations, license to practice, OER and (possibly) personal liability.

Practicing Avoidance

Avoiding the problem of possible malpractice means knowing one's limits. It means training to prevent legal malpractice. It also means, on occasion, learning to say "No."

There are a certain number of areas where the problems of civilian attorneys do not carry a parallel into the world of military service. The principal problems for private practitioners include commingling of personal and trust funds, failure to file documents on time or perfect an appeal, and improper diversion of client trust accounts. Since the legal assistance attorney usually is not authorized to handle matters such as these, they should not be seen in the LAO.

Elsewhere, however, there is a clear parallel. Failure by a civilian attorney to refer to a specialist is a problem that may be shared by the LAA< as is failure to associate competent co-counsel. The same is true of the failure to warn a client of the statute of limitations (or other aspects of defenses and claims), and failure to decline cases for which the attorney is not qualified.

[3] For problems and solutions in malpractice avoidance, including specific examples of legal negligence claims against the government, *see* Mark E. Sullivan, *When to Say 'No,'* Legal Assistance Newsletter (ABA Standing Committee on Legal Assistance Military Personnel (LAMP)), Vol. 19, April 1984, at 22.

Common Problems

Part of the problem is the nature of military practice. Legal assistance attorneys are often asked to give answers to every question in the personal legal world of the client, a role that no attorney can fill. Legal assistance, with or without appointment, is usually given generously to all corners who meet the basic eligibility qualifications. LAAs are not told clearly and frequently enough that they may, indeed, *must* avoid or refuse legal work which they are not competent to handle, even if the services requested fall within the permitted area of delivery.[4]

And yet this is the world in which the LAA operates every day. This afternoon, for example, the next client of one of your LAAs might well be asking one of the following questions:

- Why can't I get a settlement from my car insurance company? It's been twelve months since that accident happened in Iowa. Should I hire a private attorney?
- Can my spouse get a share of my military pension in South Carolina if she hasn't been married to me for over ten years?
- My truck broke down again. This is the third time, and they guaranteed me the last time that it would run perfectly. What can I do?
- How do I file for divorce in Idaho?
- My wife just served me with a lawsuit asking for child support. Can I get the child support guideline amount reduced if I request joint custody and get it?
- Once my Illinois divorce is granted, will that bar my spouse from asking for alimony? Or do we need an extra clause in this separation agreement that says this?
- I was charged last night with DWI. Do I need to get a civilian lawyer to help me? What's the maximum punishment I can receive?

The questions demonstrate the difficult choices that LAAs are called upon to discuss and the complex answers that LAAs must give every day of the week. To handle the question, the choice or the issue properly, the LAA must first obtain full and accurate information from the client. Next, the attorney must be sufficiently well trained that he or she is actually be aware of the issues and the choice that needs to be made (or else a "choice by default" will be made). If the attorney is not sufficiently trained, perhaps some quick research or the advice of a friendly co-counsel in the civilian community (or a former LAA who has handle similar problems) will do. All of this must be done in order to advise the client properly and avoid malpractice.

Claims Against the Government

AR 27-3 specifically requires the supervisory attorney to maintain records "to protect the Government from liability from any claims that may arise."[5] Implicit in this directive is the idea that the LAA and the LA chief should take all reasonable and practical steps to avoid

[4] Indeed, only one sentence in AR 27-3 addresses the issue of what to do when an otherwise qualifying client or case involves legal expertise that is beyond the ability of the LA provider: "An attorney who provides legal assistance should refer a case to another lawyer (para. 3-7*h*.) whenever the client's needs exceed either the attorney's competence or authority to render assistance." AR 27-3, para. 4-7*b*.

[5] AR 27-3, para. 4-3*e*.

claims against the government arising from legal assistance practice. The reason for this is not just a selfish motive of protecting the U.S. Government from liability. It is also to uphold the highest professional standards of competent practice, to protect clients from legal negligence and to protect the LAA from avoidable complaints and grievances.

Claims against the government usually occur in areas where monetary damages are fairly easy to calculate and are substantial. It is unlikely to find a claim filed over a visitation dispute, a late divorce, or a truck repair bill of $50. On the other hand, substantial claims have been filed against the government in the area of wills and estates, and in the area of separation agreements and family law.[6] For these reasons, the supervisory attorney should spend a comparatively greater amount of training time for the office attorneys on how to practice competently and skillfully in these areas.

An Example: Family Law

For example, look at the monetary exposure involved in the area of separation agreements and family law, and at the potential for claims against the government. In *Smith v. Lewis*,[7] the husband was a member of the National Guard, and his retired pay from this employment was the only substantial marital asset. Although it was titled in the husband's name, it was considered to be community property. The wife's attorney failed to assert a claim on this potential asset, believing it not to be divisible. And, in fact, it was *not divisible at that time*, but it later became divisible under a change in the state statutes. Due to the failure of the attorney to perform a reasonable amount of research, even when a question of law was unsettled, the wife did not claim a share of the National Guard pension and she only received alimony of $400 a month and a small amount of divided community property. The California appellate court affirmed a jury award against the attorney for $100,000, state that an attorney had a legal duty to perform a reasonable amount of research, even when a question of law was unsettle.

Another example of malpractice in the family law area is found in *Bross v. Denny*,[8] In that case, the lawyer originally gave the wife legally correct advice about the law, stating that she could not receive a portion of her husband's military pension. He did no, apparently, stay current regarding developments in Congress. The Uniformed Services Former Spouses' Protection Act, which allowed military pension division, was passed several days before the separation agreement was signed and the dissolution hearing scheduled. The jury verdict, which assessed 25% of the blame to the wife, was reversed on appeal and judgment for the wife was ordered in the amount of $108.000.

A Template for Competent Practice

Legal malpractice is a real issue for each legal assistance attorney. Training your attorneys to avoid malpractice and practice competently means teaching them the questions that they

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[6] *See* Sullivan, note 3 supra.Mark E. Sullivan When to Say "No," Legal Assistance Newsletter (ABA Standing Committee on Legal Assistance Military Personnel (LAMP)), April 1984, at 22, 28-29.
[7] *Smith v. Lewis*, 13 Cal.3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (Cal. 1975).
[8] *Bross v. Denny*, 791 S.W.2d 416, (Mo. 1990).

need to ask when confronting a new problem (or a new issues in a familiar problem area). Some of the general questions they should ask are:

1. *Is the client (and his legal problem) eligible for legal assistance*?

2. *Is the particular service provided at the base legal office*? Even if the regulation does not specifically prohibit services in some areas, the base SJA may have developed guidelines on what matters cannot be handled by the legal assistance office due to lack of expertise or manpower constraints. It is a fairly common practice to prohibit the preparation of individual tax returns or lengthy trust agreements for these reasons.

3. *Ask hard questions*. Your inquiries should be centered around whether you can undertake this particular task. Have you ever handled a similar problem? Can you get some "tutoring" from TJAGSA or a civilian attorney? Perhaps a Reservist can act as co-counsel. Is the request for assistance a reasonable one? Is the problem too far off the beaten track, or is it something that can be done if time were available? Is it something that another legal assistance office could do, or perhaps could teach you how to do? Remember that a legal assistance attorney should refer a case or client to another lawyer whenever the needs of the client exceed either the LAAs competence or the authority to render legal assistance.[9]

4. *Don't make waves*. If the work can be done competently and without "rocking the boat," sometimes it is better to provide the services to the client, even at the risk of going outside the local or service guidelines, so long as it is done with the knowledge and consent of the SJA. The practical fact of the matter is that the SJA is directing that the work be performed and he or she will have a definite impact of the rating or evaluation of that officer at the appropriate time. This is not to say that *any* work required by the SJA should be done without question, without expertise or without authority. It is simply a reflection of "the facts of life" in a legal assistance office. A common example of this situation occurs when April 15 rolls around and the base commander wants someone to prepare his income tax return. Regardless of service regulations or station guidelines, it usually falls to the chief of legal assistance to prepare the necessary forms and schedules for the general or admiral.

5. *Make a record*. When something this important like this occurs, make sure there is a lengthy and detailed record of exactly what the client is requesting and how the response is handled. This may be necessary if there is a grievance filed or a claim against the government. Keep written and electronic records to protect yourself and to protect the government in case of the filing of a claim. Obtain written releases whenever possible.

6. *Use the chain of command*. When General Jones asks to have a lengthy and complex trust agreement prepared, this almost invariably involves legal work far beyond the present expertise of the LAA, and it should be entrusted to a legal practitioner with specialization in this area. The "chain of command" within the SJA office – LA

[9] AR 27-3, para 4-7*b*.

chief, deputy SJA, SJA – is the best way to resolve these problems. Often a candid discussion with one's supervisor will put the issue in perspective and shed some light on a possible solution. Make the supervisor award of the specific nature of the legal duty and your own limitations as the LAA to whom the problem has been entrusted. In additional provide the supervisor with some realistic proposed solutions to the problem. In the case of General Jones, for example, it would probably not be wise simply to refuse to help. A better solution would be to interview the General, obtain detailed information on the nature and extent of his assets as well as the primary goals of the estate plan, and review the law (both federal and state) for possible tax problems. After a discussion with the supervisor it may be possible to obtain the assistance of a local attorney (for referral or association in resolving the problem). Banks frequently provide trust officers and will manuals for assistance in estate planning matters. A Reserve or Guard attorney may have sufficient expertise to handle the trust. One or several of these proposed solutions may give the legal assistance attorney enough leeway to avoid what would almost certainly develop into a case of legal malpractice. In any event, it will help to develop a "record" in the case to show that the legal attorney identified a legal malpractice problem and took immediate steps to avoid it. As in all such cases, the taking and preserving of a complete set of notes and memoranda for the file will help to serve the client and protect the legal assistance attorney.

H. Don't give unnecessary advice – example: visitation order when client cannot afford to visit.

I. Don't call the judge – no ex parte communications

J. Watch out for the unauthorized practice of law in the LA office

Another excerpt…

Unauthorized Practice of Law

Remember that only your attorneys can give legal advice.[10] The rest of the office staff is strictly limited as to what information can be given to clients. Legal advice is, of course, on the forbidden list. *Legal advice*, strictly speaking, is information on what the law is, tailored to the individual client's situation.

Legal Resources and Information

On the other hand, the non-lawyer staff can certainly pass on certain legal information without the violation of this rule. When using a list approved by your office, they can be helpful in giving out names of civilian lawyers to whom the client will be referred, so long as there is no legal advice given in the process of the referral. This might occur, for example, when CPT Brown finishes advising Mrs. Gray and decides that she needs the names of three bankruptcy lawyers from the lawyer referral panel downtown. In such a situation, there is no good reason

[10] AR 27-3, para. 2-2*a*.

why CPT Brown could not delegate that task to the sergeant at the front desk for selection of the next three names on the list while CPT Brown moves on to the next interview or phone call.

Clerical staff can also be useful in giving information to clients on resources, legal and otherwise, that are available to them. The sergeant, for example, could give a competent and ethical referral to Mrs. Gray for the domestic violence program downtown, the Better Business Bureau, or the toll-free hotline to the consumer protection division of the state attorney general's office. This kind of help, properly supervised, can be a real time-saver for CPT Brown, who probably has enough work on her hands as it is.

What about factual information or straightforward and simple legal answers that do not apply to the individual situation of the client? For example, suppose you over hear SGT Smith saying, "The law here in East Virginia requires a 2-year separation before you can file for divorce" or "Guideline child support in this state is 25% of gross pay for two children." Is that forbidden legal advice? Or is it permissible to delegate this sort of information providing to the sergeant at the front desk?

How and Where to Draw the Line

This is a matter for each individual LA chief to decide after gaining sufficient experience with the current clerical staff and reviewing the current workload. You will have to make some judgments about the ability of the sergeant to understand questions, to discern the difference between legal advice to the individual and general legal information that is already printed in client handouts that are readily available. How old is the sergeant? How experienced? Has SGT Smith ever served in a legal office before? These and a host of other questions should be posed and answered before you reach a decision. Quite possibly you may decide that the SGT Smith lacks the judgment and experience necessary to undertake this type of delegated task. You might also decide that there isn't a heavy enough workload to justify giving this responsibility to the front desk staff.

On the other hand, if you decide that such information is within the capabilities of one or tow members of the office staff, then you should start out by writing and posting a set of guidelines that must be drilled into each delegated staff member and followed to the letter each time legal information is given. The rules should be posted in a conspicuous place (or several places) in the staff area of the front office. They should be revised and refined regularly, as well as taught to each arriving clerk, paralegal or enlisted person. They should emphasize that individual legal advice, tailored to the needs of a client, is solely the province of the LAA. They should also state that, when in doubt, the question should be referred to an attorney. Only if the question is clear and requests non-individualized information of a legal issue may the staff member give an answer, and then only by using printed guidelines provided by the LAO.

Continue to search for ways to delegate functions to intelligent and responsible members of your clerical support staff.

> The purpose of … delegation to clerks is not to abdicate your responsibilities, but to channel your efforts to those matters requiring professional expertise. You should be

constantly looking for new ways to increase productivity by more effectively using the… [staff].[11]

The Use of Common Questions, Answers

In order to accomplish this latter task, you should prepare a set of "Common Questions and Answers" that can be safely given by front desk staff for those inquiries that frequently arise over the phone or in person. This is an example:

Question	Answer
How do you get a divorce here in East Virginia?	Our legal clerks cannot give you specific legal advice. In general, there are three requirements for a divorce in this state: First, the husband or wife must be a legal resident of the staff. Secondly, they must have lived apart for more than a year. And third, the separation must have been intended to be permanent. We can send you by mail or e-mail our client handout, "Divorce in East Virginia," or we can set you up an appointment with one of our legal assistance attorneys.
Do you have to have a separation agreement to get a divorce here?	I'm not a lawyer, ma'am, so I can't give you legal advice. East Virginia law, however, doesn't require a separation agreement in order to get a divorce. Would you like an appointment? Can we send you our client brochure on "Separation Agreements"?
I'm not getting along with my husband. We've been married only two months and it was a mistake. Can't I just get an annulment?	I can't give you legal advice, ma'am, since I'm not an attorney. You can set up an appointment with one of our legal assistance attorneys as early as Thursday of this week. As to annulments, an annulment is not a divorce involving a short marriage. An annulment is granted if the marriage was not legal in the first place. All of this is explained in our office handout on "Annulment and Divorce." Would you like us to send you a copy by mail or b y e-mail? You can also download it from our office website.
Why can't I talk to an attorney before I set up an appointment?	Our legal assistance attorneys receive many phone calls each day. Due to the volume of clients whom we serve, we have the clients screened by a paralegal in order to ensure that our attorneys can devote their full attention to existing clients who have already retained us. We can send you a client handout on any of the subjects that would be involved in your case, and we have over 20 of these handouts.

Make sure the staff knows that, as soon as the questioning goes beyond the permitted ones, it's time to say, "You will need to speak with a legal assistance attorney about that, sir. Can I set you up for an appointment?" In the alternative, you might suggest to the staff that, if the individual just wants some general questions, answered, a couple of handouts might solve the problem instead of scheduling an appointment. Or perhaps the client could be given or sent the handout applicable to his or her situation and told to contact the office for an appointment if follow-up information is needed.

[11] Major Chuck R. Pardue, *Ten Steps to a more successful Legal Assistance Practice*, ARMY LAW., Oct. 1985, at 3.

K. Enforce confidentiality

Confidentiality

Confidentiality is essential to the LA office. Any communications between the LAA and the client are legally privileged and must be guarded to protect the confidentiality of the information, whether oral or written, that the client imparts to the LAA.[12] The source of the requirement is AR 27-26, "Rules of Professional Conduct for Lawyers." In general, Army Rule 1.6 states than an attorney shall not reveal any information regarding the representation of a client.[13] While this sounds very broad and sweeping, there are several exceptions which must be noted. The three permissive exceptions are:

- When a client consents to disclosure of information that otherwise would be confidential;
- When the disclosure is impliedly authorized to carry out the representation[14]; and
- When the lawyer needs to disclose this information to establish a claim or defense in a controversy with a client.

This single mandatory exception to the rule of confidentiality is in the situation where a client reveals information to the lawyer about a future crime. Even here, however, the Rule is very specific about when such information must be revealed; such disclosure is only required in cases where the lawyer reasonably believes it necessary to prevent a client form committing a crime that is likely to result in imminent death or substantial bodily harm, or significantly impair the readiness or capability of a military unit, vessel, aircraft, or weapon system. If the act doesn't fall within these parameters, then the lawyer may not reveal the intended crime.[15]

Make sure that your non-lawyer staff understands the importance of keeping communications confidential. When taking calls and screening potential clients, are voices kept low so that others in the nearby area will not know the matter being discussed? Are names avoided? Are letters kept in an area where clients cannot see them? Are staff members briefed upon arrival as to the importance of keeping privileged information within the legal assistance office? "Loose lips" are dangerous in a legal assistance office.

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[12] AR 27-3, para. 4-8*a*.
[13] *See also* AR 27-3, para 4-8*a*.-*c*. (containing rules on confidentiality for LA providers, those who assist LAAs and those who supervise LAAs).
[14] As, for an example, when an LAA releases information obtained from a client in a letter to the spouse's commander in regard to non-support, or in a letter to a used car dealer about a client's consumer complain.
[15] *See generally* Holland, *Confidentiality: The Evidentiary Rule versus the Ethical Rule*, ARMY LAW., May 1990 at 17, 19.

PROBLEMS

1. You just arrived at Fort Swampy from the Graduate Course and have been assigned as the Chief of Legal Assistance. You are standing in the open area where your clerks are slaving away and smile smugly to yourself as you survey your kingdom. The booming command voice of your NCOIC interrupts this daydream and you overhear this part of a phone conversation:

   NCOIC: *Hello, Mrs. Brown. It's been a couple of years since we talked. You've left Sergeant Brown and coming back here from Alaska? To get a divorce? Well, I think we can help you there. Yes, you'll need to be separated for more than a year. And you've got that? Okay. You also have to have the intention that it'll be permanent. OK, just give me a call when you arrive – we'll try to set you up. I think you might be able to do it inexpensively with a copy of some divorce papers from a friend of mine who went through a divorce just last year – I've got an extra copy you can have.*

What, if anything, do you do?

2. As the new Chief, you are invited by CPT Green into his office to supervise an interview with a domestic client, Mrs. Tan Chen Gray. As you sit down in a chair in the corner (after being introduced), Mrs. Gray says that she really needs help. She's ready for a divorce, but her husband has just told her that she can't get any of his military pension because of their separation agreement. When asked about the agreement, she says that it's back at her apartment.

CPT Green: *Well, Mrs. Gray, I don't think you have anything to worry about. You see, unless there's a specific waiver set out in the separation agreement, you have not given up your right to claim party of your husband's pension. I did your separation agreement last year and I remember it like the back of my hand.*

As for a divorce attorney, you should see Ron Bennett – he's a friend of mine just down on Swampy Boulevard outside the installation. He's taken care of the last three clients I've sent him for divorce – he and I often swap favors and I'm sure he'll help you out.

What's that? He's too expensive? Well, I'll get SGT Logan to show you the Yellow Pages. There are plenty of good divorce lawyers there. I've got to get going – my next appointment is waiting.

Do you see any problems?

3. It is will day in the legal assistance office and Sergeant and Mrs. Jones come in to see you for a will. They have been married for about six month and both have children by former marriages. Both explain that if they were to die and not be survived by their spouse, they would want to provide for their children from the former marriage as well as their spouse's children from their former marriage/

    a. May you ethically represent both Sergeant and Mrs. Jones?

    b. If so, what action should you take prior to undertaking the representation?

    c. If, after the initial appointment and prior to completion and execution of the wills, Sergeant Jones calls you and tells you he has changed his mind and no longer wants to provide for Mrs. Jones' children by former marriage, what action should you take?

4. You are a Legal Assistance Attorney at Fort Tarheel, North Carolina. Staff Sergeant Rough came to see you for assistance concerning marital problems. He explained that his wife, Sally, left him about twelve months ago after he beat her up for having an affair. SSG Rough indicated that jealousy caused him to lose his temper, and that he broke Sally's arm and knocked her unconscious during the assault. This was not the first violent confrontation during their marriage, but it convinced Sally to file for divorce. Pending a final decree of divorce, the court awarded custody of their three-year old child, Jill, to Sally and required SSG Rough to pay $250 per month in child support and $100 per month in alimony. Rough is outraged because his wife and daughter have moved in with Sally's boyfriend, Jodie. Rough now wants you to help him get custody of his daughter. As you explain the lengthy process involved in obtaining a modification of the court order, SSG Rough got angry. He said he would not wait for court assistance and told you that he was going to go over to Sally's boyfriend's house, "get even" with Sally and her boyfriend, and take Jill to his parents' home in Georgia so she would be in a more wholesome environment. What should you do?

5. You are Chief of Legal Assistance at Fort Tarheel. The LAA's appointment with SSG Rough discussed in problem 4 concluded twenty minutes ago. The LAA explains to you what Rough said and asks your advice as to what she should do. You advise her to report the conversation to the police. Your subordinate LAA disagrees and explains that the state which licensed her to practice law permits her to withhold the information and she does not want to get involved. She emphatically refuses to reveal the information. After you listen to this information, you recall that Mrs. Sally Rough was represented in the divorce by CPT Able, one of your other LAA's, and that he also discussed her case with you.

a. Has the LAA acted unethically by seeing SSG Rough since the office previously represented Mrs. Sally Rough?

b. Did the LAA act unethically by revealing the confidence to you?

c. Could the LAA rely on your determination of the ethical issue in the case (whether to reveal the communication) and to be protected from claims against him of unethical conduct?

d. As the legal supervisor of this LAA, knowing that she will not reveal the confidence, do you have any obligation to act? If so, what action should you take?

***

SUGGESTED SOLUTIONS

1. This problem highlights your supervisory responsibility over non-lawyer assistants and the requirement that you stop the unauthorized practice of law. It illustrates how difficult it is to differentiate between a legal technician performing a ministerial function, and on providing legal advice which requires the training, expertise, and certification of a licensed attorney.

   Rule 5.5 states that a lawyer shall not assist another in the unauthorized practice of law. The comment states that the lawyer may delegate legal work to subordinates as long as the lawyer supervises the legal work and remains responsible for it.

   This scenario presents a questionable case of unlicensed practice of law. One interpretation is that the legal assistance NCOIC is advising a client of the office on whether she can file for divorce in North Carolina. He is making a legal conclusion as to the elements of a lawsuit. This is legal advice and should come from a legal assistance attorney. It would have been appropriate for the legal NCOIC to act as a conduit between the LAA and the client if phone advice were necessary. In this instance, however, it is apparent the legal NCO intercepted the client's question, made a legal conclusion, and rendered the advice, not a lawyer.

   Another approach, however, is that the NCO's response is not the practice of law, but merely the performance of military duties. Legal NCOs are expected to assist LAA's in the running of the legal assistance office. Many of these actions do not require an attorney involvement, but the local practice may be to require a LAA review the paperwork. Further, each jurisdiction is entitled to define what the practice of law within that jurisdiction is. What the NCOIC said is legally correct – separation for more than a year and the intent for it to be permanent are required for a divorce in North Carolina. What about domicile? He didn't mention that. Is it because he knows the domicile of Mrs. Brown? Or is it because he is unaware of this legal requirement? You need to find out.

   Supervisors must always remember that Rule 5.3 makes all lawyers responsible for the actions of their non-lawyer assistants. First, if the lawyer either orders an action, or ratifies it, the lawyer is responsible. Second, if the lawyer knows of the conduct when its consequences can be avoided or mitigated, and fails to take such action, the lawyer is responsible.

   In this scenario, you should make certain that the NCO is being closely supervised and is not given advice which equates to the practice of law. He is under your supervision – you are directly responsible for him. Is he giving advice that should be reserved for attorneys? Or is he simply reciting the basic requirements of the law (and, in the process, saving attorney time for those LAA's who might have to see this client and explain the law to her first-hand).

   If an improper practice has been occurring with the knowledge of the supervisor of these non-lawyers, you need to consider whether that lawyer's actions give rise to a substantial question regarding his or her fitness to practice law. It may be necessary to initiate a professional inquiry against that lawyer under Rule 8.3 and AR 27-1.

   In addition to the above, there is also the question of whether the NCOIC is giving the phone advice to an ineligible person. How does he know that she is entitled to advice other than her representation on the phone that she is married to Sergeant Brown? He may know her personally, but he also may not know her at all. Advice should not be given to persons ineligible for legal assistance.

   A final caution is the advice about "do-it-yourself" divorce. While there's nothing wrong *per se* with providing a client with materials that can help a divorce, file a small claim court action or complain to the FTC, there is a major potential problem in North Carolina with obtaining a divorce in this way. When a divorce is granted without a pending claim for alimony or equitable distribution, these two items are "lost"; Mrs. Brown will be barred from obtaining them later. Since there may be substantial military pension rights (at the very least) and since she may be a dependent spouse, the loss of alimony and equitable distribution may be a costly mistake for her – as well as a potentially costly claim against the government.

2. The facts here involve three issues. The first is advising without seeing the document involved. This is an all-too-common problem in legal assistance offices. A client wants to talk to an attorney about a traffic ticket…but she let the ticket back home (or lost it). Another client wants advice about a contract he's signed…but he doesn't have it here, it's in the household goods shipment on its way here from Korea. Legal assistance attorneys have a duty to scrutinize each legal document involved in a case to determine whether there is a valid claim or defense for the client. How can this be done when the document itself is missing? How can this be done without the agreement? Even if he did it last year, CPT Green needs to see the agreement that was signed (since there may have been handwritten changes on it) or, at the very least, retrieve it on his computer. Except in emergency situations, never see a client without the document in question. The best way to ensure this is to catch it at the appointment-setting stage. Be sure that the legal NC or the receptionist who answers the phone always advises clients to bring in any documents that are involved in the subject matter of the consultation. [Note: In addition, CPT Green is wrong about the pension waiver issue. Even if there is no specific waiver in the agreement, it may be waived if there is (as in most separation agreements) a *general release clause* which states that "all rights, duties and claims of the parties arising out of the marriage are waived and release, except as providing herein ."]

   The second issue is the appearance of favoritism in referrals. One possible view of this is that CPT Green usually steers his divorce and domestic clients to a nearby attorney, Ron Bennett, and also that he receives some sort of compensation from Mr. Bennett for this service.

   But another view might be that Mr. Bennett has been the one to whom the last few divorce referrals have gone, but that other attorneys have gotten other cases from CPT Green so no favoritism is shown. The favors involved could simply mean that CPT Green occasionally helps out Mr. Bennett when a military issue comes up involving a military client – like SGLI or military pension division.

The third issue involves the method of referral. Not only should referrals not show favoritism, but they should also be done with courtesy and an eye toward competence. Is it kind and courteous to hand this client, who is probably foreign-born, a copy of the Yellow Pages basically telling hers, "Here, figure it out yourself…I'm too busy"? In addition, is CPT Green providing referral to a competent lawyer when he simply advises a client to pick a name out of the phone book? With a serious problem such as this client has, it would be wise to pick out one or two family law specialists, or at least some lawyers that CPT Green knows will handle the case effectively and competently, instead of making a blind referral.

3. Rule 1.7 permits attorneys to represent multiple clients if the attorney *reasonably believes* the representation will not be adversely affected and each client consents after consultation. The rule requires that, for multiple clients in a single matter, the attorney discuss the implications of a multiple representation with the client. The comment to the rules makes clear that the term *reasonably believes* refers to how a disinterested lawyer would view the situation. Thus, *when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot property ask for…[consent]*. The comment goes on to highlight an additional problem posed by the requirement of confidentiality. If one client refuses to grant the attorney permission to make the disclosures necessary to ask for the informed consent from the other client, the attorney cannot property ask the latter client for consent. Paragraph 4-9, AR 27-3 gives additional guidance on conflicts of interest in legal assistance. It specifically directs attorneys to resolve conflicts prior to representation when there is a joint request by spouses for a will or other estate planning document. The regulation specifically highlights the situation of children form prior marriages as an issue that underscores the need for careful consideration of the conflict.

   In resolving this conflict issue, attorneys should consult with their supervisors. The Rule does not necessarily preclude this representation since the comments saw that *common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.* If the supervisor approves the joint representation, the attorney must obtain informed consent from each client individually. This consent should be in writing. Paragraph 4-9, AR 27-3, places the responsibility on supervisors to ensure procedures are in place to avoid conflicts of interest. Additionally, prior to undertaking the representation, the attorney should discuss the risks of dual representation, including the fact that attorney-client privilege may be lost. Not that Rule 1.6 makes all *information to the representation* confidential, whether it is communicated by the client in confidence or not. Thus, communication would still be confidential.

   One practical solution that a supervisor may recommend is assigning a different attorney in the office to handle one of the spouses. This raises the issue of Imputed Disqualification under Rule 1.10. While the Army does not have a rigid rule of imputed disqualification like the model rules, it does require supervisors to perform a *functional analysis* of the circumstances when deciding whether to approve the representation. Again paragraph 4-9, AR 27-3 helps. It states the Army policy that representing both parties in **any legal dispute** is discouraged. It further requires supervisors to ensure that informed consent is obtained from both clients, that a record of that consent is made and stored in the client's file, and that they take action to protect confidential communications such as using different clerical personnel and segregating files and file locations.

   Part 3 of the question highlights the constant danger that is present in a dual representation situation. That is why attorneys should avoid representing both spouses in an estate planning case wherever possible. If attorneys do end up representing both parties, the attorneys must remain alert to potential conflicts arising. Sergeant Jones' change of heart in this case has now created an impermissible conflict of interest and the attorney needs to see his supervisor to withdraw form the representation of BOTH parties. Whether or not you have a duty to reveal this information to Mrs. Jones because of your obligation to her as your client and whether you are ALLOWED to reveal because of your confidentiality obligation to Sergeant Jones raise thorny issues that have not been formally resolved by disciplinary authorities. This dilemma B duty to communicate because your client's interests are threatened versus duty to withhold because your duty to another client requires it B simply serves to underscore the potential disaster of dual representation and why it is discouraged by Army policy.

4. Rule 1.6 <u>requires</u> disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a future crime which is likely to result in imminent death or substantial bodily harm (or which will impair the readiness or capability of a military unit, vessel, aircraft, or weapon system). Since the Military Rules govern the LAA's ethical conduct, it is necessary to determine whether Staff Sergeant Rough's statement that he will "get even" with Sally and her boyfriend involves the requisite intent to commit an offense reasonably likely to result in imminent death or substantial bodily harm. There is no guidance in Rule 1.6 or its commentary to help make the determination. Under the facts, however, SSG Rough's statement could be construed as an intention to commit a serious offense mandating disclosure under Rule 1.6. His history of physical violence and his expressed intent to avoid taking legal steps to resolve the dispute support a decision to release the information.

   Prior to releasing the information, however, the LAA should confront the client and seek to persuade him to take other more suitable action. If these steps fail, the LAA's disclosure should not be greater than that reasonably necessary to avoid the harm. One option he could consider is warning SSG Rough's wife and boyfriend, and withholding the information from the police and SSG Rough's commander.

   SSG Rough's statement that he intends to take Jill out of the state cannot be released by the LAA under Rule 1.6, even though the kidnapping would be a crime. Rule 1.6 contains no authorization, mandatory or permissive, to review threatened criminal acts unless they would impair military readiness or cause substantial physical harm. Thus, CPT Conceal must possess a reasonable belief that SSG Rough's threatened actions would be likely to result in substantial bodily harm before he could release the information.

   This hypothetical raises several issues that are indicated by the sub-questions.

   a. The first issue is whether the LAA was precluded from assisting SSG Rough because Rough's wife had previously been sent in the office. Rule 1.10 indicates that the approach to *imputed disqualification* taken by the Model Rules, do not automatically disqualify a lawyer from representing a client simply because another

attorney within the office saw the adverse client. The comment requires supervisors to approve using a *functional analysis*. This analysis requires consideration of whether the following will be compromised: preserving attorney-client confidentiality; maintaining independence of judgment; and avoiding positions adverse to the client. The comment also allows policies regarding imputed disqualification. As discussed above, the Army has expressed a policy of discouraging this representation in Paragraph 4-9, AR 27-3. A conflicting client should be referred to a nearby legal assistance office wherever possible. Representing both sides within the same office is a last resort. As the supervisor, you should review your system for screening for conflicts to see how this inadvertent conflict occurred. The LAA can probably continue to advise SSG Rough. However, you will need to take measures IAW Paragraph 4-9, AR 27-3 to get client consent, document that consent in the file, and take measures within the office to preserve confidentiality for both clients.

b. Rule 1.6 allows attorneys to review information when necessary to carry out the representation. The comments indicated that this implied authorization normally includes other lawyers, paralegals, and support personnel within your office. Of course, this implied authorization may be expressly withheld by the client or by other provisions of the Rules. In our scenario, the initial disclosure does not violate the Rules since the LAA is obviously in need of help from his supervisor and is seeking it. Once the supervisor recognizes the conflict and realizes that he has already heard information from an adverse party, he should stop the conversation and have the LAA consult with another senior attorney in the office for advice because of the conflict of interest. This underscores the importance of good screening systems for conflicts in the LAO.

c. Rule 5.2 permits subordinate lawyers to rely on the ethical judgment of their superiors concerning the resolution of arguable questions of professional responsibility. The comments, however, advise that if the question is one which reasonably can only be answered one way, the subordinate lawyer must act ethically and cannot rely on a wrong decision by the supervisor. Under the facts of this case, the issue of whether to reveal is a judgment call and, as to the Army, the LAA could rely on your judgment and be protected. This sounds good, but the problem is that the LAA is still subject to state rules as well. Therefore, if she violates her state rules based on her military supervisor's judgment and this is somehow reported to the state, the LAA may still be subjected to discipline.

d. Rule 5.1 hold supervisory lawyers responsible for a subordinate's ethical violations if the supervisor knew of the unethical conduct at a time when its consequences could be avoided or mitigated, but failed to take reasonable remedial action. Additionally, the supervisor may be held responsible if he knew of the conduct and ratified it, or if he did not make reasonable efforts to ensure that the subordinate conformed his conduct to the Rules. Since Army Rule 1.6 makes disclosure MANDATORY when a lawyer reasonably believes the client will commit a crime likely to result in death or substantial bodily harm, nondisclosure violates the Rule. If the supervisor in this case knows that the subordinate is not going to disclose, he must do so in order to comply with the Army rules.

***

FAMILY LAW AND…

The Servicemembers Civil Relief Act

adapted from The Military Divorce Handbook, by Mark Sullivan
[mark.sullivan@ncfamilylaw.com]

SCRA -The Soldier's Shield

50 U.S.C. App. §501 *et seq.* (formerly the Soldiers' & Sailors' Civil Relief Act –SSCRA)

100,000 Reserve/Guard mobilized

Over 150,000 troops deployed in Gulf Region

Overview of the SCRA

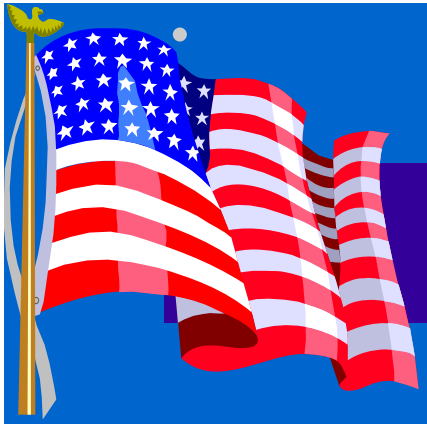
- ***Why was it passed?***
- ***What kinds of obligations does it cover?***

Resources,
Resources,
Resources

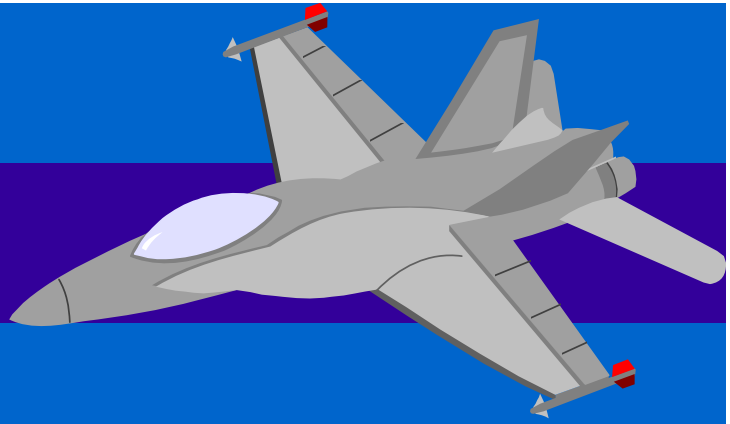
A Judge's Guide to the Servicemembers Civil Relief Act

www.abanet.org/family/military

"Who ya gonna call?"

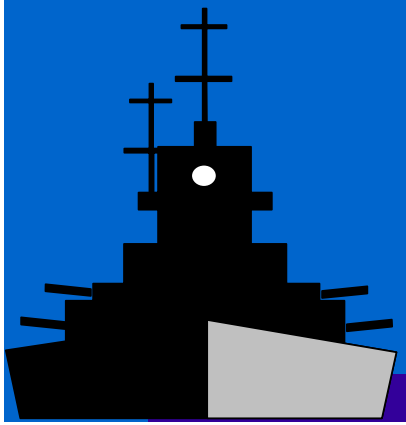


PURPOSE



“Protect those who have been obliged to drop their own affairs to take up the burdens of the nation”

Boone v. Lightner **319 U.S. 561, 575 (1943)**



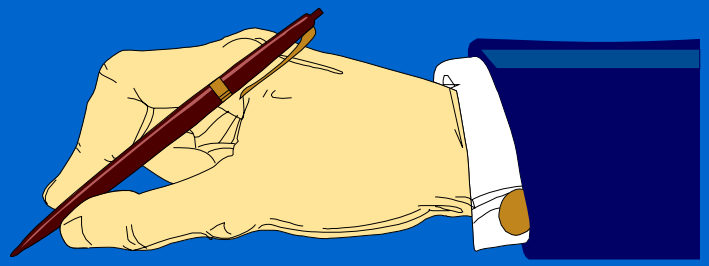
LIBERAL CONSTRUCTION

The Act should be read "with an eye friendly to those who dropped their affairs to answer their country's call."

***Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).**

The New Statute - SCRA

- **The SCRA became law on 12/19/03 - a complete revision of the SSCRA.**



- **It was written to:**
  - **clarify the language of the SSCRA**
  - **to incorporate many years of judicial interpretation of the SSCRA**
  - **to update the SSCRA to reflect developments in American life since 1940.**

"Who's covered by the SCRA?"

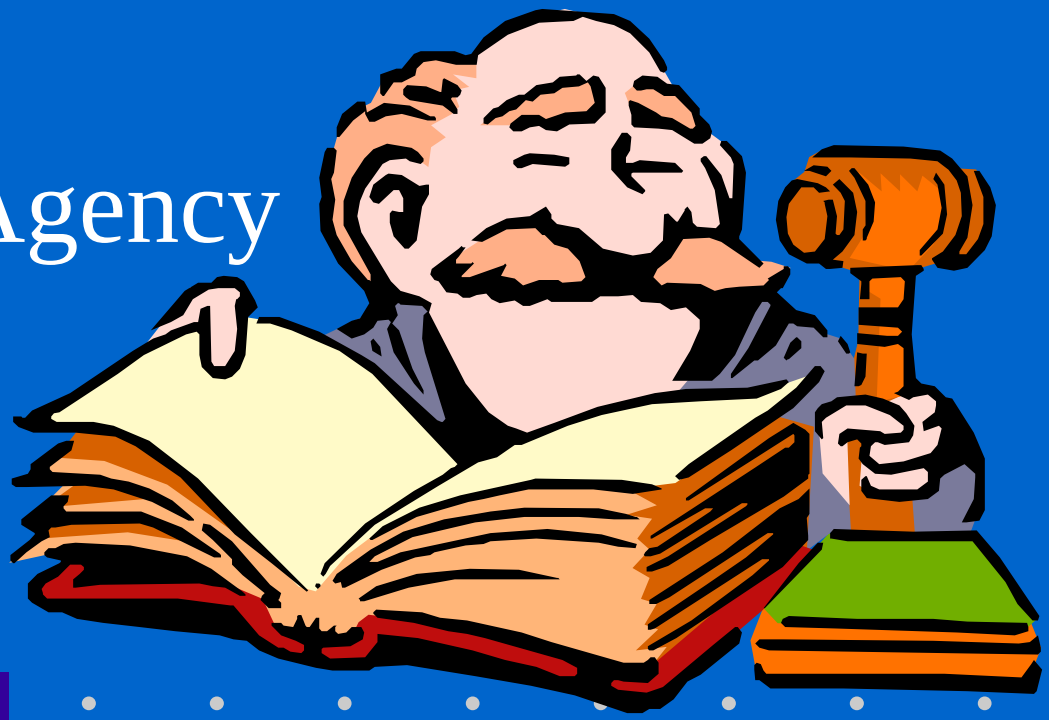
- Active duty servicemember [SM]
- Mobilized Guard/Reserve
- Nat. Guard [Title 32, federal emergency & funds]
- Dependents (sometimes)

DEFINITIONS §101

"**Court**"=

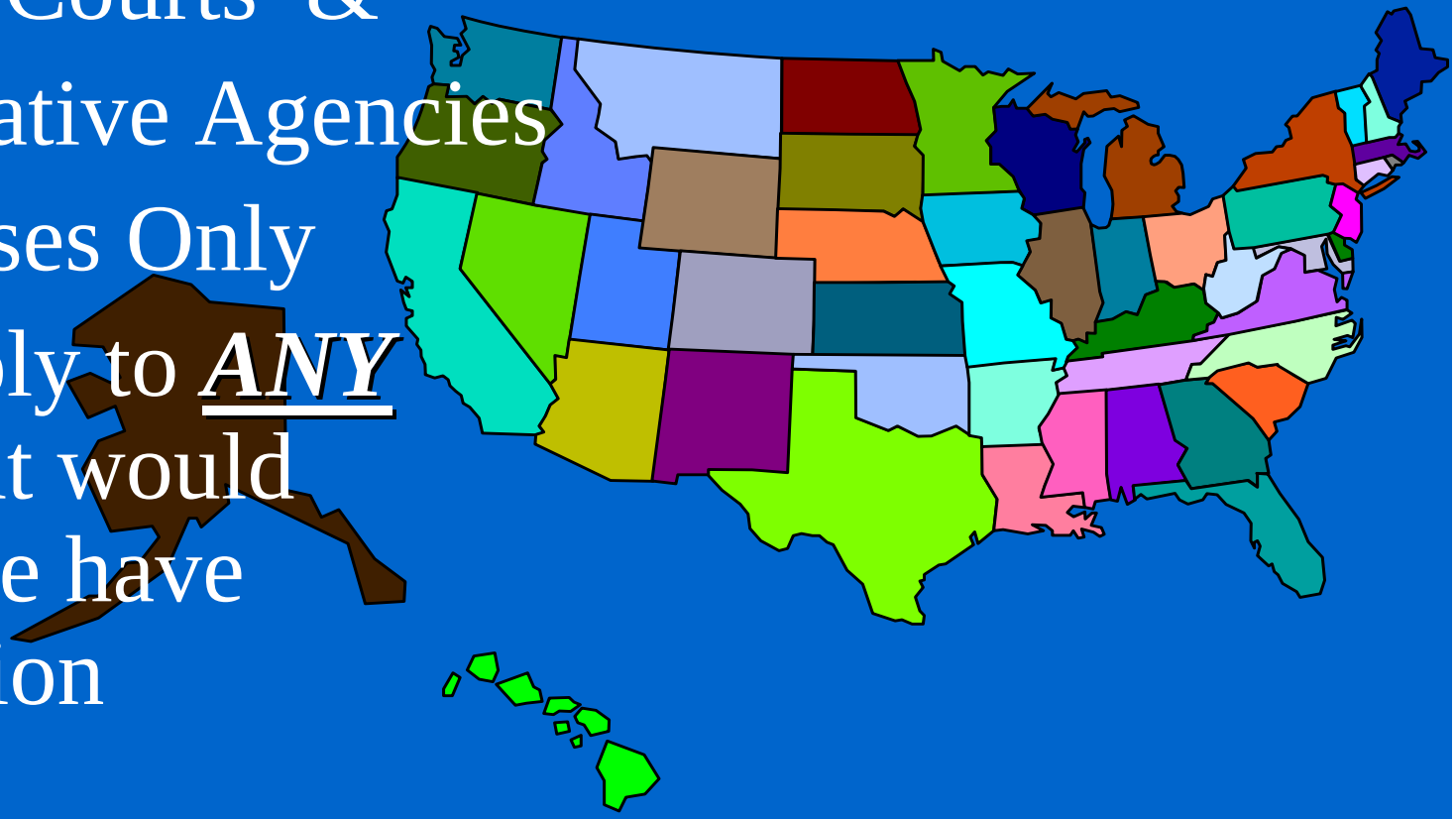
*Court, OR

*Administrative Agency



JURISDICTION §102

- ***All*** U.S. Courts & Administrative Agencies
- ***Civil*** Cases Only
- May apply to ***ANY*** court that would otherwise have jurisdiction



Default judgments – the BIG picture

- What is a default?
  - No answer, counterclaim
  - No motions except:
    - "special appearance" to contest jurisdiction
    - motion for extension of time for answer

PROTECTION AGAINST DEFAULT JUDGMENTS – 50 USC App. §521

- Plaintiff's Affidavit, Certificate, etc.
  - Defendant not in military, and
  - Factual basis; or
  - Unable to determine status - court may require plaintiff to post bond
- Court-Appointed Attorney before entering default
  - Duties? Payment?

PROTECTION AGAINST DEFAULT JUDGMENTS -- 50 USC App. §521

- Court ***SHALL*** Stay Proceedings
  - Minimum 90 Days
  - Application of counsel or court's own motion
- When Court Determines
  - May be a defense that cannot be presented w/o presence of Defendant, OR
  - After due diligence counsel has been unable to contact Defendant or otherwise determine if a meritorious defense exists

PROTECTION AGAINST DEFAULT JUDGMENTS 50 USC App. §521

- Court shall reopen when…
  - SM applies on Active Duty

  or within 90 days after, and shows
  - Material effect, plus
  - Meritorious defense

What is “Material Effect”???

- No single definition
- Impairment of ability to participate in civil suit due to military duties -OR-
- Impairment of ability to pay financial obligations

Stay of Proceedings - 50 USC App 522

- Temporary delay in lawsuit till SM can appear -
  - During period of service + 90 days
  - SM has received notice of proceeding
  - Applies at any stage of proceedings

Motion for Initial STAY

How to apply? What must you show??

Statement re -

- **Military duty materially affects ability of SM to appear +**
- **Date when SM can appear AND…**

Motion for Initial STAY

- How to apply? What must you show?? [cont'd]

CO statement:

  - **duty prevents SM's appearance**
  - **no leave allowed**

Resources,
Resources,
Resources

Sample Motion & Letter for Stay of Proceedings

"Who ya gonna call?"

-- HOT TIP! --

- –How to resist motion for STAY
  - –“We don’t need you”
  - –Demand LES – shows leave available, used
  - –Use of technology

CLIP YOUR WINGS!

-- HOT TIP! --

- How to resist motion for STAY
  - Good faith is implicit; read Judkins, 441 SE2d 139
  - Stay is not “forever,” only so long as material effect lasts
  - See flow chart

STAY PROVISIONS OF SCRA

- Stay request does not constitute –
  - – appearance for jurisdictional purposes
  - – waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).

STAY PROVISIONS OF SCRA
50 USC App §522

- May apply for additional stay if duties materially affect at initial application, or later if SM is unavailable to *prosecute or defend the action.*
- If court denies stay request, it must appoint counsel to represent SM

?? Attorney's duties, who pays fee??

STAY OR VACATION OF JUDGMENTS

If military service materially affects compliance with judgment or order --

- Court ***SHALL*** on application of SM
  - Stay execution; ***and***
  - Vacate or stay attachment or garnishment
- Court may also act on its own motion

DURATION OF STAYS

- May be for the period of service plus 90 days, or any part thereof
- More likely, for so long as the “material effect” lasts

Resources,

Resources,

Resources

- ***www.jagcnet.army.mil/TJAGLCS***
- ***"TJAGLCS Publications"***
- ***"Legal Assistance"***
- ***JA 260,* <u>SCRA Guide</u>**

"Who ya gonna call?"

Marine Corps Rules for Gunfights

1. Be courteous to everyone, friendly to no one.
2. Decide to be aggressive ENOUGH, quickly ENOUGH.
3. Have a plan.
4. Have a back-up plan, because the first one probably won't work.
5. Be polite. Be professional. But... have a plan to kill everyone you meet.

Marine Corps Rules... (cont'd)

6. Do not attend a gunfight with a handgun whose caliber does not start with a "4."

7. Anything worth shooting is worth shooting twice. Ammo is cheap. Life is expensive.

8. Move away from your attacker. Distance is your friend (lateral & diagonal preferred).

9. Use cover or concealment as much as possible.

10. Flank your adversary when possible. Protect yours.

11. Always cheat; always win. The only unfair fight is the one you lose.

12. In ten years, nobody will remember the caliber, stance or tactics. They will remember who lived.

13. If you are not shooting, you should be communicating.

Navy SEALs' Rules For Gunfights

1. Look very cool in sunglasses.

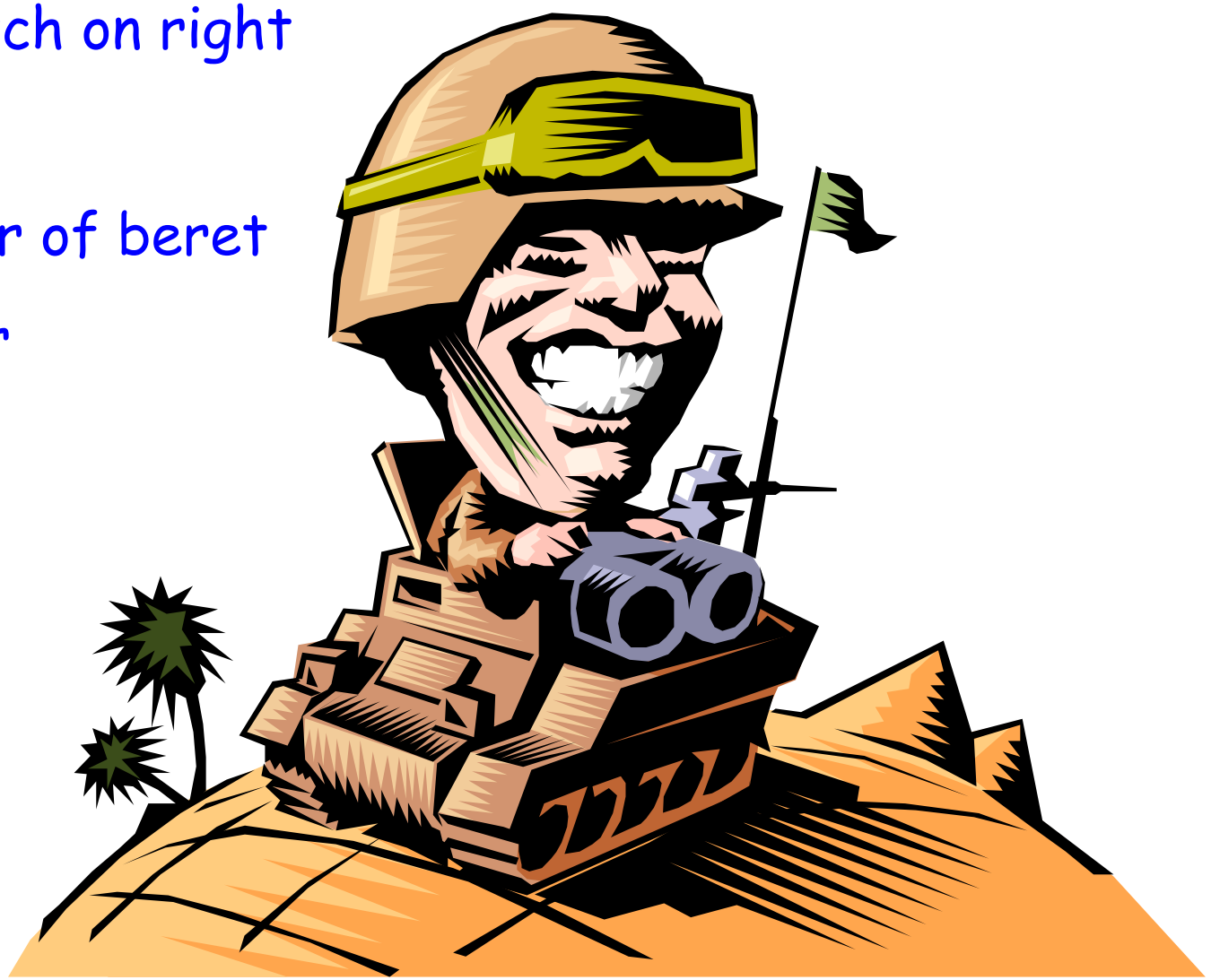
2. Kill every living thing within sight.

3 . Return quickly to look cool in latest beach wear.

4. Check hair in mirror.

Army Rules For Gunfights

1. Select a new beret to wear
2. Sew combat patch on right shoulder
3. Change the color of beret you decide to wear



US Air Force Rules For Gunfights

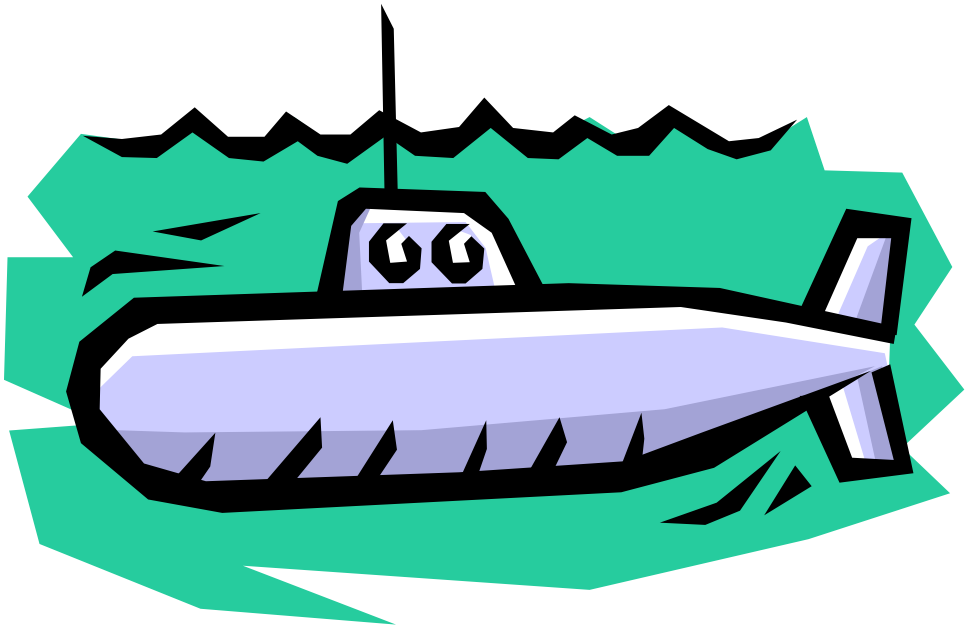
1. Have a cocktail.
2. Adjust temperature on air-conditioner.
3. See what's on HBO.
4. Determine what is "a gunfight."
5. Request more funding from Congress with a "killer" PowerPoint presentation.
6. Wine & dine 'key' Congressmen, invite DOD & defense industry executives.
7. Receive funding, set up new command and assemble assets
8. Declare the assets "strategic" and never deploy them operationally.
9. Tell the Navy to send the Marines.

Army Rangers' Rules For Gunfights

1. Walk in 50 miles wearing 75 pound ruck while starving.
2. Locate individuals requiring killing.
3. Request permission via radio from "Higher" to perform killing.
4. Curse bitterly when mission is aborted.
5. Walk out 50 miles wearing a 75 pound ruck while starving.

US Navy Rules For Gunfights

1. Go to sea
2. Drink coffee
3. Play video games
4. Send in the Marines



-- HOT TIP! --

- Don’t go it alone
- Get competent co-counsel [to assist with the SCRA issue]
- Where? *OPERATION STAND-BY* at **www.abanet.org/family/military**

Target Practice!

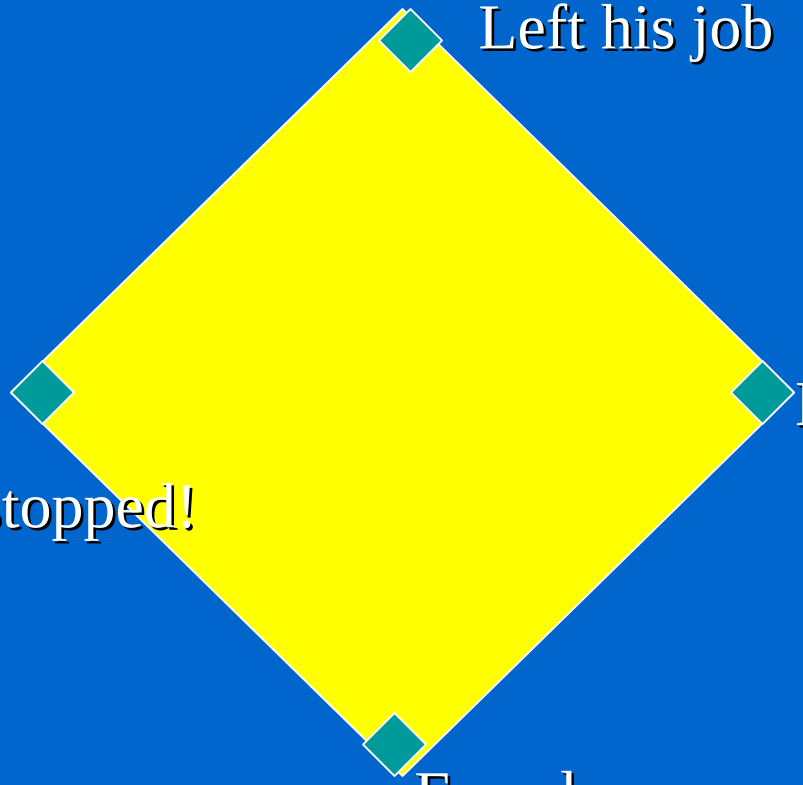
*Setting Your Sights on the **SCRA**...*

When one parent is mobilized…

- Will garnishment continue?
- What about rent (eviction?) or mortgage payments (foreclosure?)
- Let’s see how this works…

HELP! What happened to my child support?

"That's the old ball game!"



Left his job

Dad was mobilized

Foreclosure, eviction? [Use §531!]

Garnishment stopped!

Deployment Child Support Issues

- Problems, questions…
  - Restarting the garnishment
  - Same amount?
  - Where send the notice & motion?
    - Locating, AND
    - Serving the other side!

Deployment Child Support Issues

- Problems, questions… for the SM:
  - *Should I move for a*

    STAY?
  - *I want to request <u>child</u>*

    <u>support reduction</u> --

    How can I participate?

Deployment Custody Issues

- Mom has custody of Johnny
- Gets orders to Kuwait [unaccompanied!]
- ???? Options ????
  - Request discharge?
  - Give Johnny to neighbors? Grandparents?
  - What about to **D-A-D**??
  - What if dad files for custody? Use SCRA?

OTHER SCRA Provisions

- No change of domicile due solely to military service for:
  - Tax purposes (state income tax, personal property tax)
  - Voting purposes
- [i.e., SM retains his original legal residence]
- [Consider for divorce cases…]

Resources,
Resources,
Resources

SILENT PARTNER on SCRA

"Who ya gonna call?"

EVICTIONS 50 USC App. §531

- **Can ***ONLY*** evict upon court order**
  - **Applies to SM or Dependants**
  - **Rent does not exceed $2,400/mo in 2003 dollars**

    [amt adjusted annually - 2006 = $2,615.16], and...

EVICTIONS

- Can ***ONLY*** evict upon order…
  - Ability to pay materially affected by service
  - Court ***SHALL*** stay for minimum 90 days, or
  - Adjust the lease obligations
- Criminal sanctions for violation
- Dependents have right to invoke

RIGHT TO TERMINATE LEASE

- For home, business, or agricultural purposes, and motor vehicles
  - Entered **before** active duty (& for vehicles active duty for at least 180 days) or
  - Leased during active duty +
    - **PCS orders or deploy for 90 days [for real estate]**
    - **PCS out of U.S. or deploy for 180 days [vehicles]**

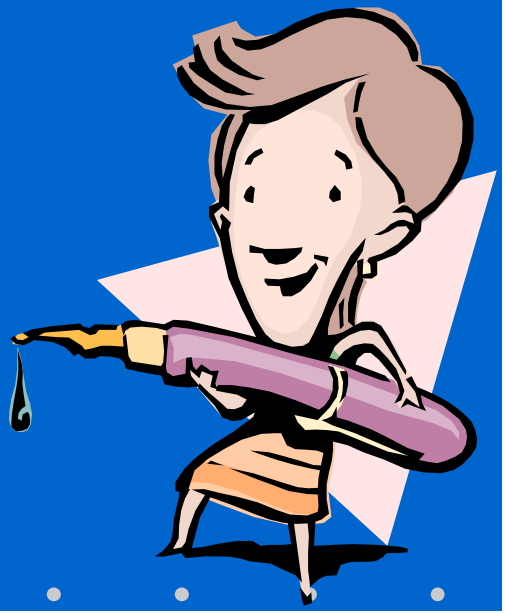
Leases

- Written notice & copy of orders, and return vehicle within 15 days
- No need to show material affect
- SCRA allows refund of security deposits

Installment Contracts

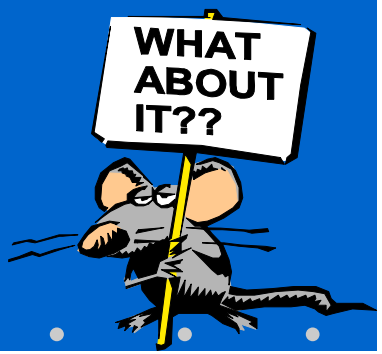
- SCRA applies here also
- Payment or deposit before entry on a/d
- SM unable to make pmts because of military situation
- Can be used to stop repossession

Whoever said "Money can't buy happiness"
DOESN'T KNOW WHERE TO SHOP!



What about the MORTGAGE?

- if mortgage signed before A/D, then
- rate goes to 6% unless--
- bank/creditor can prove “no material effect”
- [protection against mortgage foreclosures also]



Storage liens, personal property

- No execution, foreclosure
- On SM property
- During service period [+3 mo. after]
- Without court order

Resources,
Resources,
Resources

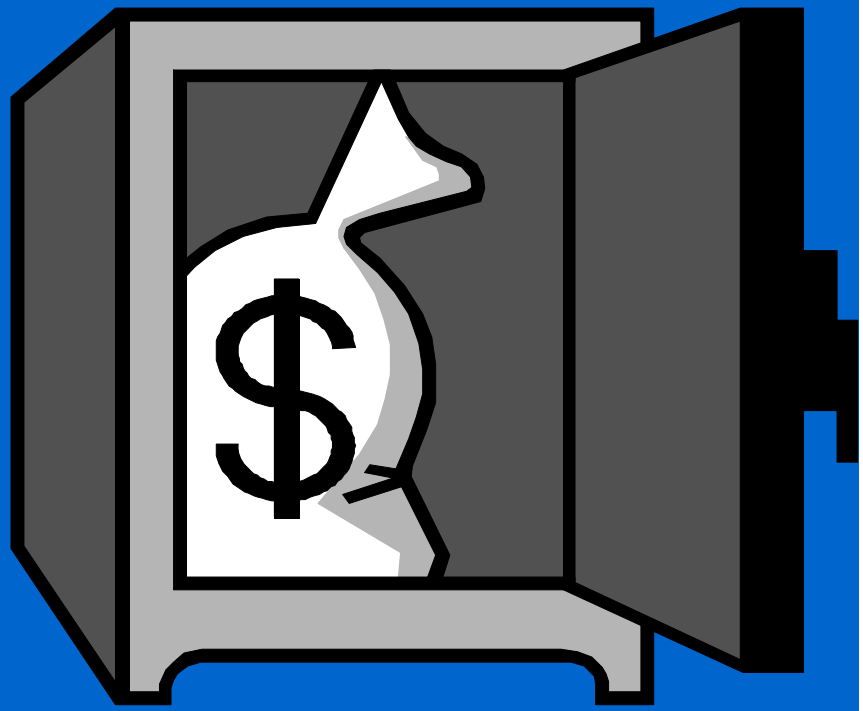
- ABA Family Law Section Military Committee: **www.abanet.org/family/military**
- Army JAG public page: **www.jagcnet.army.mil/legal**

"Who ya gonna call?"

CONCLUSION -- SCRA AND FAMILYLAW

“They say marriage is an institution. Well, I’m not ready for an institution just yet.”

- Mae West



Help is never far away…

Paternity Issues and Legal Assistance

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www.ncfamilylaw.com

Excerpt from Chapter 4, Sullivan, The Military Divorce Handbook (American Bar Association 2006 – www.ababooks.org > Product Code 5130135)

See also Sullivan, AProving Paternity by Presumption and Preclusion,@ 132 Mil. L. Rev. 99 (1991). Go to www.jagcnet.army.mil/tjaglcs > Military Law Review.

§ 4.02 -Paternity Issues

In some child support cases, a preliminary consideration is the determination of paternity for the child. Counseling the SM on paternity matters involves three subjects: estoppel, tissue-testing, and trial procedures. This section applies the law regarding paternity to military personnel and the requirements of service regulations.

Paternity and Estoppel

Litigation as to paternity may be barred by a prior judicial determination establishing a SM as the father of a child. The most common example of this is the adjudication of paternity that is present in most divorce decrees. It is usually an essential element of the complaint or petition for divorce; likewise, it is an essential finding in the judgment of divorce or dissolution in many states. The purpose of this requirement is to bar subsequent litigation of paternity matters that should have been settled in connection with the divorce pleadings. Accordingly, the court ordinarily will deny any attempt by the former husband to reopen the issue of paternity as to the children shown to be his on the face of the divorce judgment.

The SM also may be estopped from litigating paternity if he has signed a paternity affidavit or an acknowledgement of paternity. The same holds true for a verified complaint for dissolution or divorce that alleges that he is the father of a certain child born of the marriage, a verified answer admitting that he is the father of a certain child born of the marriage, or similar documents.

An example of estoppel in lieu of scientific testing for paternity, though it did not involve a SM, is found in a 2001 Massachusetts case, *Paternity of Cheryl*.[5] In *Cheryl*, a child was born out of wedlock and, several months after her birth, the state Department of Revenue (DOR) filed a paternity complaint naming a particular man as Cheryl's father (based on the mother's statement identifying him as the father). The complaint also requested child support.

The revenue department advised the alleged father that he could obtain genetic marker tests to determine or eliminate paternity. He also was informed that he would have to pay for the tests if the results established his paternity. Instead of obtaining the genetic tests, the alleged father executed a document acknowledging paternity and signed a child support agreement. Thereafter, a judge entered a paternity judgment based on these documents. The man subsequently paid child support, visited with the child, and established a relationship with the child as her father.

Some time later the alleged father began to receive information from the mother's friends, and perhaps from the mother herself, indicating that he was not Cheryl's father. He also learned from medical testing that he had a low sperm count and had infertility problems. When DOR,

several years after Cheryl's birth, filed an action to increase the alleged father's child support, the alleged father moved to have genetic testing. The trial court denied his motion.

The alleged father then had the testing done surreptitiously during visitation, without the mother's knowledge. The test results determined that the alleged father was excluded as Cheryl's father. When the alleged father filed a motion to amend or vacate the paternity decree, the judge ordered genetic tests for all three (Cheryl, her mother, and the alleged father). Upon the mother's appeal, the Supreme Judicial Court of Massachusetts vacated the judge's order for testing. The alleged father was barred from challenging paternity because of the prior paternity judgment. In addition, the court noted that he had established a substantial father-child relationship with Cheryl, including emotional and financial support. The opinion stated that children must be protected and that what is in a child's best interest often weighs more heavily than the biological link between parent and child.[6]

The *Cheryl* case is not unusual. Usually, an order for custody or for child support effectively bars the SM from reopening the issue of paternity, especially if that matter could have been litigated in connection with the custody or support issue.[7]

When a mother is faced with a denial of paternity or an attempt to reopen this issue, her best tactic is to challenge immediately the right of the alleged father to raise the issue of paternity at this stage of the proceedings. In civil cases, this is by way of an affirmative defense or a "plea in bar" alleging collateral estoppel or *res judicata*.

From the standpoint of the SM in this situation, the only course of action is to try to attack the validity of the matter asserted as estoppel. Perhaps the SM was not served (personally or by publication) with the complaint for support or the petition for divorce. Perhaps he was not given sufficient time to answer before a judgment was taken by the plaintiff. Perhaps he has a defense under the SCRA, such as entry of default judgment against him without appointment of an attorney on his behalf. In rare cases, the plaintiff could have obtained an order or judgment adjudicating the issue of paternity by fraud, coercion, undue influence, or collusion.

Tissue Tests

When the matter is not barred as above, a party may move for paternity testing and the court may order the mother, child, and alleged father to submit to tissue-typing tests, formerly known as blood tests. The moving party may be required to pay the testing costs in advance. Blood samples used to be collected for this testing, but it is common now to use skin cells from inside the mouth, collected with a cotton swab.[8]

PRACTICE TIP

A change of heart by the SM is seldom a defense. All too often, however, the SM's proffered defense amounts to, "She told me the kid was mine and I believed her. Now that I have to pay child support, I don't believe her." Or, in the actual words of one commander replying to a complaint from the author involving paternity and nonsupport, "We have reason now to question the legality of this child."

There are numerous diagnostic laboratories that perform tissue-test analysis in paternity cases. These tests produce an accuracy factor of about ninety-nine percent (some claim as accurate as 99.9 percent) which, when translated into nonscientific terms, means that ninety-nine out of one hundred falsely accused men will be excluded from paternity. The cost of testing depends on the tests performed and whether the case is one handled though the Child Support Enforcement Office. Once a court order is entered, SMs usually will cooperate in giving tissue samples, which can be taken at military hospitals and shipped to the testing laboratory. Military commanders will not compel a SM to give a sample, however.

Accurate identification is necessary for all individuals taking the tests. The mother and child often are tested at a different place and/or time than the alleged father. Picture ID cards are essential for all involved.

When the test results are returned, the typical situation is that the man either is excluded (zero percent probability of paternity) or he is "strongly included," meaning a probability of paternity in the range of ninety-five to ninety-nine percent. Check your local statutes to see whether there are presumptions of paternity that apply when the probability of paternity is above a certain percentage. With such results available, it is now much easier to counsel the mother or the alleged father as to matters involving paternity, child support, inheritance rights, medical history, and the like.

Trial and Proof

Trial techniques vary from case to case. In addition to tissue-testing results, the alleged father may attempt to prove lack of access or that the mother was living in open and notorious cohabitation with another man in order to show that he is unlikely to be the father of the child.

PRACTICE TIP

It is important to remember, however, that the tissue tests do not "prove" paternity. They merely indicate whether a man is "included" in the group of men with such genetic characteristics that qualify them by tissue type to be the father of the child. Pure proof of paternity, in reality, is in the eyes of God, at least with the tests currently available. It still is possible to contest and "beat the case" in paternity matters with a probability of paternity in excess of ninety-nine percent.

The mother, on the other hand, may try to use the facial features and physical appearance of the child (especially if the child is not an infant) to show his or her resemblance to the alleged father. This data, used in conjunction with tissue-testing results, can be persuasive evidence that helps to establish paternity at trial.

Trial of a paternity and nonsupport case can be lengthy, complex, and expensive. Military personnel and spouses seldom can afford such expenses. Many mothers rely on the child support enforcement agency, rather than private counsel, to handle such a case. The attorney who is privately retained should be sure that the size of the retainer fairly reflects the work ahead of him or her.

When counseling the alleged father, advise him of the importance of acknowledging paternity, paying support, and communicating with the mother and/or child if he wishes to prevent the termination of his parental rights. Those fathers who do not acknowledge their children, refuse to pay support, and do not remain in contact with the child, face significant danger of losing their parental rights, which means that the father's consent will not be necessary for a stepparent, for example, to adopt the child in the future. To stop this, certain actions are required by the father. In addition to acknowledging his paternity, certain states require his providing reasonable and regular child support, consistent with his financial means, either to support the mother during or after pregnancy, to support the child, or both. Another requirement might be that the father regularly visit or communicate (or attempt to visit or communicate) with the mother during or after the term of pregnancy, with the child, or with both.

PRACTICE TIP

If your client does not want an adoption to take place, he will need to be diligent in regard to these actions. It is very important for him to acknowledge, support, and communicate with the child to avoid an adoption.

You also must counsel the alleged father as to service of process and jurisdiction regarding paternity and support. For a valid judgment of paternity, *in personam* jurisdiction over the defendant must be obtained. An *in rem* jurisdiction judgment is not entitled to full faith and credit.[9]

Welfare Reform Act

Many changes in the area of paternity came about when President Clinton signed the Welfare Reform Act in 1996. Below are the main changes to know:

1. -Voluntary acknowledgments are to be offered in all hospital births, to be signed by the child's parents.
2. -After sixty days, such a signed acknowledgment becomes a legal judgment; it may be challenged only for fraud, duress, or material mistake of fact.
3. -The Department of Health and Human Services must prepare minimum requirements for an affidavit of voluntary establishment of paternity.
4. -To establish paternity, a father either must voluntarily acknowledge paternity or go through a legal process to include his name on the birth certificate.
5. -Birth record agencies, as well as hospitals, must offer voluntary paternity establishment services.
6. -A streamlined legal process was established for determining paternity. A person seeking to establish paternity, or one opposing it, must submit an affidavit giving reasonable facts supporting the existence or nonexistence of requisite sexual contact before genetic testing.
7. -In addition, states must pay costs of genetic testing ordered by a state agency with possibility of reimbursement.
8. -States must change evidentiary rules to allow easier admission of genetic tests and voluntary acknowledgments of paternity.
9. -Finally, jury trials are prohibited in paternity cases.

Military Paternity Regulations

The Air Force Instruction on personal financial responsibility governs paternity claims. It states that the Air Force will not determine paternity claims. If a SM acknowledges paternity, then the Air Force will advise the SM of his financial support obligations.[10] The relevant paragraph on paternity in the Air Force Instruction is reproduced below:

3.3. In cases alleging paternity [the unit commander shall]:

3.3.1. Counsel the member concerning the allegations, in all cases.

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.

3.3.3. If a member acknowledges paternity, advise them of their financial support obligations. Refer the member to the MPF [Military Personnel Flight], Customer Service Element, for guidance on eligibility of Identification Card for the child, to the local Defense Accounting Office (DAO) for with-dependent rate financial support information, and to the legal office for advice on the member's legal rights and obligations to the child.

The paternity rules for the Army are contained in Army Regulation (AR) 608-99, which states in part:

1. -Soldier-mothers of children born out of wedlock are expected to provide support in accordance with court orders or the Army's interim support requirements.
2. -Soldier-fathers of children born out of wedlock are not required to pay support unless there is a judicial determination of paternity and an order for support.
3. -A signed voluntary acknowledgment of paternity done under a hospital-based paternity acknowledgment will be treated as a court order after sixty days with no further court action required. In fact, any document that has the legal effect of a court order under state law is deemed to be a court order, which may include consenting to be named the child's father on a birth certificate or acknowledging paternity in an affidavit.[11]

The other services have similar regulations that defer entirely to court orders adjudicating paternity. Paternity must be established by an order of a court, an administrative order (e.g., a county administrative law judge acting in lieu of a civil court judge to determine paternity), or a formal written acknowledgement by the SM involved.

PRACTICE TIP

When the paternity of a SM is acknowledged or determined as set out above, then the applicable branch of military service will assist in providing an ID card, access for the child to military facilities and benefits, and advice on support. The support regulations are covered below. A SM *can* be entitled
to a limited Basic Allowance for Housing, or BAH, which is payment based solely on paternity of a child born out of wedlock (and generally *all* the BAH money received solely as a result of having this child must be used to support the child).